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LEGAL DISCLAIMERS

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

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

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

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

¹ www.farmcommons.org

INTRODUCTION

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

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



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

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

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

I. USING THIS GUIDE

This Guide is divided into two primary sections. Section I outlines rules that apply to all farming operations, regardless of agricultural product and marketing strategy. Section II is organized according to agricultural products. Whether the reader starts with Section I or Section II does not matter, but it is important to consider the information from both sections when constructing a business plan. Also, for whatever chapters a reader may choose to read, the reader is wise to read the entire chapter. Laws may be introduced in one paragraph and exceptions to that law may be discussed in a separate paragraph. The following are a few additional notes about the guide.

Legal-eze: Because this Guide attempts to explain the law, the authors must use terms that have precise meaning to lawyers. Some common English words have a legal meaning that is different or more exact than the common usage, and others are phrases based in Latin. For the reader's convenience, there is a glossary of terms at the back of the guide. For further reference, Law.com's **legal dictionary**² 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.

² www.dictionary.law.com

U.S.C. § ### are federal laws – otherwise collectively known as the U.S. Code. They can easily be accessed at www.gpoaccess.gov (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.

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

R.C. § ####.## references Ohio Revised Code. The first two numbers following the Code direct you to the Title and all four numbers direct you to the Chapter of the statutory code. Any number following the decimal point directs you to the Section. The statutes are available online at <http://codes.ohio.gov/orc>

A.C. ###-#-# references Ohio Administrative Code. The Administrative Code is organized by chapters and sections. The first two sets of digits are the chapter and the last digit(s) are the section. It is available online at <http://codes.ohio.gov/oac>

Finally, extensive resources, including video presentations and database links, on how to find laws and regulations in Ohio can be found through the Cleveland Marshall College of Law **Library website**.³

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 a basic understanding of the state-federal regulatory system and which agencies have authority over what operations is helpful. The Constitution gives the U.S. Congress power to regulate any goods traveling in interstate commerce (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

³ http://guides.law.csuohio.edu/ohio_primary_law

if those activities might take place completely within state lines.⁴ In addition, however, the Constitution allocates to the states the power to regulate everything not exclusively reserved for the federal government or protected by the Constitution. Therefore, states can impose additional regulations on items within their borders that are already subject to federal regulations, as well as regulate items and activities over which the federal government does not have authority. The one limit on this allocation of power is that federal law is supreme over state law, so if the federal law contradicts or is inconsistent with a state law, the federal law controls.

A. Federal Agency Rulemaking

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

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

B. State Rulemaking

Ohio has a comparable Administrative Procedure Act (R.C. § Chapter 119) that establishes the notice and comment rulemaking procedure. As a basic outline, the agency promulgating the rule issues notice in the Register of Ohio and files the proposed rule along with a fiscal analysis and rule summary with three offices. A hearing is held, the Joint Committee on Agency Rule

⁴ 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.

Review reviews the rule, and the agency may then publish the final rule. The General Assembly may invalidate proposed rules before final publishing as well. As noted above, federal laws often overlap with Ohio 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, Ohio regulates all food – including that produced and sold entirely *within* the state – under its own Ohio Pure Food and Drug Law (Pure Food and Drug Law) (R.C. § Chapter 119). Often, the Pure Food and Drug Law incorporates federal standards as Ohio law.

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

III. THE FOOD AND DRUG ADMINISTRATION’S FOOD CODE

Every four years, the FDA publishes the FDA Food Code, which is a model regulation for state and local officials to use in regulating food retail and food service establishments. The Code’s purpose is to provide regulators with a scientifically sound legal basis for regulating the food industry. States are not required to adopt the Food Code, but a significant number of states nonetheless incorporate it nearly verbatim into their regulations. Ohio has in large part adopted the Food Code of 2005 and named it the Ohio Uniform Food Safety Code. This has several important ramifications for producers in Ohio, described below.

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

The second consequence of the Food Code’s near-universal adoption is that producers may find it easier to sell products out-of-state. All of Ohio’s neighbors have adopted some version of the Food Code. Because the Food Code standardizes the rules, complying with Ohio’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 Ohio’s requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

IV. OHIO DEPARTMENT OF AGRICULTURE (ODA)

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

A. Adulterated Food

The Ohio Pure Food and Drug law prohibits the sale of adulterated food. The definition of adulterated is quite extensive and includes any foods with poisonous or deleterious substances, contaminated foods, or foods produced from diseased animals. Foods that were held, processed, prepared or packed under unsanitary conditions (even if it can't be shown that the food itself is unsanitary), are considered adulterated. The container also has a bearing on whether the product is adulterated. Containers that potentially harm human health or that conceal damage render the food adulterated. Anything added to a food that makes it appear of better quality than it is also makes it adulterated. (See R.C. § 3715.59) These regulations give broad powers to local health departments to make decisions about when a food is considered adulterated and thus, cannot be sold.

B. Food Processing Facilities

Ohio law requires that food processing establishments (see the definition of processing in Chapter 8) be licensed through local health departments and that farms selling processed foods direct to consumers be licensed as retail food establishments (R.C. § 3715.021). Further, all food sold at farmers' markets, wholesale and retail food establishments must be from sources that comply with all applicable food safety and labeling laws (A.C. 901:3-6-02 (farmers' markets); A.C. 901:3-1-08 (wholesale/ food processing establishments); A.C. 3717-1-031.1 (retail food establishments)). Processors must also comply with requirements that are specific to the type of food processed. The regulations are necessarily vague because they apply to a variety of production facilities, and inspectors will interpret each regulation based on its applicability to a particular operation.

Specific rules are found in the Ohio Administrative Code, Chapter 901, Section 3. Individuals who are ill should not be in contact with food and all food handlers should be trained and supervised to ensure good manufacturing practices are followed (A.C. 901:3-1-02). The water supply, plumbing, and sewage systems must be safe and adequate. Hand washing facilities and notices must be provided (A.C. 901:3-1-05). Refrigeration facilities must maintain specific temperatures and records must be kept (A.C. 901:3-1-07). Raw food products must be protected from contamination (A.C. 901:3-1-08). Depending on the type of product being manufactured, additional wholesale rules apply. Ohio Revised Code, Chapter 3715: Ohio Pure Food and Drug

Law and Ohio Revised Code, Title 9: Agriculture lists specific laws for bakeries, canneries, soft drink bottlers, cold storage, lockers, and egg facilities.

C. Local Interpretation

ODA bases regulations on the health and safety risks of food production generally; so, local health departments and their individual inspectors make decisions as to how general regulations are applied. ODA 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 interpretation of the applicability of rules to unique facts may differ. In any case, inspectors cannot allow a facility to fall *below* the general standards established in the regulations. In many cases, inspectors may require more stringent practices than other inspectors or ODA.

D. Cottage Foods

A limited range of food products may qualify as cottage foods and when prepared in a home, may be eligible for an exemption from food processing establishment licensing. To qualify for this exemption producers may offer only jams, jellies, candy, or fruit butters produced without any potentially hazardous foods (such as milk or eggs) and without acidified foods. Dry herbs, herb blends, teas, and seasonings also qualify (A.C. 901:3-20 et seq). The products must be made in the person's home (R.C. § 3715.01(19)). In addition, the producer must allow the ODA to take a sample of the product to determine if the product is misbranded or adulterated (R.C. § 3715.59 and .60). Cottage food products may only be sold within the state of Ohio (A.C. 901:3-20-05(F)).

If a direct farm business bakes non-potentially hazardous bakery products, the products are eligible for an exemption from the food processing establishment regulations (R.C. § 3715.021(A)). To qualify for this exemption with respect to grains, producers may offer only bakery products that does NOT have a pH level of greater than 4.6, a water activity value greater than .85, or requires temperature control to prevent the rapid formation of microorganisms (R.C. § 3715.01(18)). Cottage food producers may also sell granola, granola bars, popcorn products, baked donuts, waffle cones, pizzelles, dry cereal and nut mixes, baking mixes in a jar. The products must be made in the person's home (R.C. § 3715.01(19)). In addition, the producer must allow the ODA to take a sample of the product to determine if the product is misbranded or adulterated, both of which are prohibited for all foods and defined at Ohio Revised Code 3715.59 and .60. Cottage food products may only be sold within the state of Ohio (A.C. 901:3-20-05(F)).

Cottage food products must be labeled with 1) the name and address of the cottage food production operation, 2) the name of the food product, 3) the ingredients in the food product, in descending order of predominance by weight, 4) the net weight and volume of the food product, and 5) the following statement in 10-point font, "This product is home produced." In

addition, the product must adhere to federal labeling requirements of 21 C.F.R. Part 101. This federal law governs health claims, nutrition claims, specific additives such as flavorings and colorings, and warning labels. This section of law is extensive and producers should review it to be certain they are not using ingredients or making statements regulated by it.⁵

⁵ The full text can be found at:
www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?CFRPart=101&showFR=1

AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

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

SECTION I: FARMING OPERATIONS



CHAPTER 1: STRUCTURING THE BUSINESS

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



I. PLANNING THE DIRECT FARM BUSINESS

A. *Feasibility Studies*

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

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

initial exploration as well. For example, an entrepreneur’s personal capacity to start a business is an important consideration. The U.S. Small Business Administration has compiled a **Small Business Readiness Assessment** of initial considerations for anyone planning a small business.⁶ If you would like personal assistance with a feasibility study, consider contacting an Ohio Small Business Development Center (SBDC). Ohio SBDC Network is comprised of 42 different centers across Ohio who each offer support, training, and resources to small business start-ups.⁷

B. *Business Plans*

After determining that a business is feasible, the second step in the planning process is to develop a written business plan. A business plan is a concise 5-10 page summary of what the business will provide, who the customer is, how the business will reach customers, and

⁶ https://eweb1.sba.gov/cams/training/business_primer/assessment.htm

⁷ <https://www.ohiosbdc.org/>

projected income and expenses. The main advantage to writing out a business plan is that it helps an entrepreneur think carefully about each aspect of their proposed business. It will also help identify weaknesses in strategy and flag areas in which additional help and expertise may be needed. Many banks and funders will require an entrepreneur to provide a business plan, as well. The Ohio Business Development Center publishes an online resource titled **Starting Your Business in Ohio** that contains a questionnaire to help launch the business planning process.⁸

C. Choosing a Business Name

Deciding on the name for your farm business is an exciting part of starting a business. Brand recognition is important to the long-term success of your operation and the name you choose can influence your impact. The business name carries legal considerations as well, and a new business owner should not order signs or business cards unless the owner has checked that the name is permissible and available. Some words are not allowed for a farm business, such as “bank,” “trust,” or those that appear to connect the operation to a federal or state government entity (R.C. § 1329.02). Each business name must also 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.⁹ If another business is already using a name, the two businesses can agree to have a similar name by filing a **Consent for Use of a Similar Name** on Form 590. Even if a farm business is not yet prepared to organize officially, a desired business name can be reserved for up to 180 days by filing Form 534B **Name Reservation Form** with a fee of \$50. The Secretary of State also publishes a name availability guide that provides more detailed information.¹⁰ This process does not necessarily confer protection of the name from use by others. Please see Chapter 3, Section III: Intellectual Property for more information on protecting a business name. Farmers may also wish to search the federal trademark database to avoid infringing on someone else’s right to use an existing name.¹¹

⁸ <https://www.ohiosbdc.org/DocumentMaster.aspx?doc=2462>

⁹ www.ohiosecretaryofstate.gov

¹⁰ www.sos.state.oh.us/sos/upload/publications/busserv/trademark.pdf

¹¹ <http://www.uspto.gov/trademarks/index.jsp>

Business Planning Resources

1. Business planning assistance is available from the **Small Business Development Centers** (sponsored by Ohio Development Services Agency, the U.S. Small Business Administration and selected Ohio chambers of commerce, colleges and universities, and economic development agencies.)

→ www.ohiosbdc.org

2. Ohio Business Gateway is a first stop for any Ohio business because it contains many resources to help entrepreneurs in any industry understand the basic process for getting started.

→ www.business.ohio.gov

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

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

→ www.oh.marketmaker.uiuc.edu

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

→ www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222

D. Choosing a Business Entity

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

Although this section touches on the tax implications of business form choice, the subject is discussed in more detail in Chapter 4: Taxation. Because the law treats certain forms of businesses differently than others, *the following generalized information should not be considered a substitute for consulting with a qualified attorney and/or accountant prior to choosing a business form.* Consulting with a professional is important because the entity selected affects potential tax and legal liabilities, as well as business succession and estate planning. In addition, each form varies as to setup cost and complexity.

For those interested in learning more detail about entity choices for the farm business, the National Agricultural Law Center at the University of Arkansas published *An Overview of Organizational and Ownership Options Available to Agricultural Enterprises*. The article is divided into two sections. **Part I**¹² covers general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships. **Part II**¹³ covers limited liability companies, corporations, and cooperatives. Although not specifically aimed at direct farm businesses in Ohio, and therefore not a substitute for advice from legal counsel in Ohio, the overview is nonetheless helpful in understanding the legal and tax implications of the various business entities.

The Ohio Business Development Center’s **Starting Your Business in Ohio** manual contains a table comparing factors such as tax, liability, and business concerns across the most popular business entities.¹⁴ The chart is a useful accompaniment to the description of the most popular farm business entities below.

Sole Proprietorships

A **sole proprietorship** is the easiest business to start because it is essentially the same entity as the owner, although this convenience comes with drawbacks.¹⁵ The majority of farms are owned as sole proprietorships. The reason most farms are organized this way may be because

¹² www.nationalaglawcenter.org/assets/articles/goforth_ownership1.pdf

¹³ www.nationalaglawcenter.org/assets/articles/goforth_ownership2.pdf

¹⁴ <https://www.ohiosbdc.org/DocumentMaster.aspx?doc=2462>

¹⁵ As an exception to the “one individual” rule, spouses may co-own a sole proprietorship. This can impact filing and paying taxes, but otherwise makes little difference. An alternative arrangement would be a partnership, discussed below.

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

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

In Ohio, an individual wishing to start a sole proprietorship using their own name as the business name (for example, John Doe's Farm) does not need to file anything to start the business. (However, additional filings are needed at tax time.) If a sole proprietorship operates under a different name (for example, John Doe uses the name "Green Acres" instead of "John Doe's Farm"), the business must do one of two things: 1) register the trade name or 2) report the use of a fictitious name with the Secretary of State's office (R.C. § 1329.01 et seq). Registering a name gives the person registering the name the exclusive right to use the name and may be done by filing Form 534A, Name Registration, which is available online. The fee is \$50. Reporting the use of a fictitious name does not give the registrant an exclusive right to the name, but it does allow a sole proprietorship to legally use a fictitious name. The Trade Name or Fictitious Name Registration Update, Form 542A, requires a filing fee of \$25. Both are available on the Secretary of State's website.¹⁶

Partnerships

A **general partnership** is two or more persons who combine their resources to conduct business for profit. There are no formal requirements for formation of a partnership, much like a sole proprietorship, and one may be formed by default if two people simply carry on a business together. Also as with a sole proprietorship, the individuals in a partnership are personally responsible for the liabilities of the business. In addition, each partner is personally liable for the obligations of the other partner(s). This means that if the partnership lacks the resources to pay its debts, creditors may force the partners to pay the partnership's debts out of their personal assets. If one partner has no personal property, creditors can force the other partners to personally pay the full debts of the partnership.

Another disadvantage is that if one partner leaves the partnership, the partnership might automatically dissolve, depending on the circumstances of the partner's departure. In addition, partnership shares are not freely transferable and create special concerns for both business succession and estate planning. In terms of taxation, tax liability for the business's profits and

¹⁶ www.sos.state.oh.us/sos/upload/business/filingformsfeeschedule.aspx?page=251

losses is handled on the partners' individual tax returns and the entity itself does not file taxes. Despite the liability concerns, general partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status.

The *limited partnership* (LP) is different than a general partnership because it has two types of owners, the general partner and the limited partner. The LP is similar to a general partnership in that the general partners are still personally liable for the business' obligations. However, the limited partner may be shielded from personal liability. This business entity is not a popular choice for new businesses as a Limited Liability Company (discussed below) offers broader liability protection and is more flexible.

Simply doing business together may create a general partnership. However, if the general partnership does business under a name other than the individual owners' names, they must: 1) register the trade name or 2) file a Statement of Partnership Authority. Registering a name gives the person registering the name the exclusive right to use the name and may be done by filing Form 534A, Name Registration, which is available online. The fee is \$50. Registering a statement of partnership authority does not give the registrant an exclusive right to the name, but it does allow the use of a fictitious name. Statement of Partnership Authority, Form 535, requires a filing fee of \$125. A limited partnership is formed by filing a Certificate of Limited Partnership, Form 531A, and requires a filing fee of \$125. All are available on the Secretary of State's website.¹⁷

The Ohio Uniform Partnership Act (R.C. § 1776.01 et seq.) governs general partnerships and Ohio Revised Code 1782.01 et seq. governs limited partnerships.

Limited Liability Companies (LLC)

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

LLCs are an especially popular business entity because they are very flexible. Where corporations (detailed below) have several statutory obligations such as holding meetings and

¹⁷ www.sos.state.oh.us/sos/upload/business/filingformsfeeschedule.aspx?page=251

electing officers, LLCs have fewer statutory rules. The owners of an LLC are called “members” and there are a variety of ways to structure membership within an LLC. A farm business considering working with investors may also have more flexibility in terms of how to structure that relationship by using an LLC. Ohio allows one person to form an LLC, which makes this entity a strong alternative to the sole proprietorship. As with sole proprietorships and partnerships, an LLC is a pass-through entity, which means that the members account for business profits and losses on their personal tax returns.

To create an LLC, a person files Form 533A, **Articles of Organization for a Domestic Limited Liability Company** with a filing fee of \$125 with the Secretary of State. Many LLCs choose to create an operating agreement, an internal document that governs how the LLC is structured, although one is not legally required. Even a single-member LLC may benefit from an operating agreement. The document, when the members follow it, is further evidence of the distinction between personal and business matters, which provides the liability protection. If an operating agreement for the LLC doesn’t legally specify otherwise, Ohio law governs LLCs in Ohio Revised Code, 1705.01 et seq. An attorney can provide farm owners with more information about when and how to use an operating agreement.

Corporations: C and S elections

Farm businesses are often organized as a corporation, especially when multiple family members are involved in the operation. This entity is popular when a business works with investors or with family members who do not work on the farm day-to-day. A corporation’s owners are called shareholders. Shareholders finance the corporation’s existence by purchasing stock in it; each stock share represents an ownership stake in the corporation. Individual shareholders typically have no say in the day-to-day operations of the corporation. Rather, shareholders elect a board of directors, which is responsible for making all decisions related to the corporation’s affairs. On a small farm, shareholders may also be directors. In fact, a single person can create a corporation and serve as its shareholder and hold all the offices of the directors.

The corporation is a separate legal entity from its owners (shareholders) and so shareholders may avoid personal liability for the corporation’s liabilities. On the other hand, incorporation may be time consuming or expensive because additional paperwork is required by the Secretary of State’s office. Further, there are many statutory and administrative formalities that *must* be followed when operating the corporation. Owners who fail to follow these formalities may lose their personal liability protection. Ohio Revised Code 1701.01 et seq govern Ohio corporations. To form an Ohio corporation, file Form 532A Initial Articles of Incorporation with the Secretary of State, accompanied by a \$125 fee.

Similar to the “operating agreement” that sets out rules for how an LLC is managed and distributes profit and loss, a corporation is governed by its bylaws. Shareholder agreements also

lay out rules for how shares may or may not be transferred. An attorney can help farmers understand these documents and how they can help the farm business run smoothly.

The Internal Revenue Service Code classifies corporations as either "Subchapter C corporations" or "Subchapter S corporations." The IRS considers all corporations C corporations unless shareholders elect S corporation status. C corporations are subject to "double taxation" - the government taxes the corporation on its profits and when the corporation passes profits back to shareholders in the form of a dividend because they pay income tax on it as well. A farm business can avoid this by making an S election. Under an S election, the corporation does not pay taxes on its profits as an entity; instead, just as with a sole proprietorship or LLC, the individual pays income taxes on his or her share of the profit.

A corporation elects S corporation status with the IRS by filing **Form 2553**.¹⁸ Only after the IRS accepts the registration may the corporation file its taxes as an S corporation. Although avoiding double taxation is appealing, an S corporation is subject to restrictions. S corporations can have no more than 100 shareholders and all must agree to the S corporation status. All shareholders must be U.S. citizens or resident aliens and only individuals, estates, certain exempt organizations, and certain trusts can be shareholders. The S corporation must be a U.S. company. Finally, an S corporation may have only one class of stock with limitations on the type of income that holders of that stock receive. Despite these limitations, the smaller scale of many direct farm businesses may make S corporations an attractive option.

Cooperatives

A cooperative is a user-owned and controlled business that generates benefits for its users. The cooperative entity is similar to a corporation in some ways; however, a single user has a single vote in the cooperative's activities rather than voting privileges in proportion to their ownership. Its members who receive equity in the retained earnings of the business own a cooperative. Members may also receive a distribution of the cooperative's profits in proportion to their usage of the cooperative. Common reasons for forming agricultural cooperatives include improved marketing or access to markets and increased efficiency in delivering to markets. As cooperatives are organized to provide a service to members, the entity is considered a nonprofit business and unlike a corporation, the entity is not taxed on its profits. Individual members may owe tax on received distributions under specific circumstances.

Ohio requires an agricultural cooperative to be an association of five or more persons engaged in the production of agricultural products as a nonprofit cooperative association. The association may engage in cooperative activity in connection with a broad array of activities, including the "propagation, raising, producing, harvesting, storing, drying, handling,

¹⁸ The form is available online at www.irs.gov/pub/irs-pdf/f2553.pdf. Further instructions are available at www.irs.gov/pub/irs-pdf/i2553.pdf.

processing, or marketing of agricultural products; procuring equipment and supplies or providing services for producers and others; bargaining; and any activity related to the foregoing” (R.C. § 1709.01) Cooperatives must also adopt bylaws to govern the entity with several specific provisions regarding meetings, voting rights, membership classes and qualifications, and the issue or transfer of stock (R.C. § 1709.14).

A cooperative is legally created with the Secretary of State by using Form 600, **Initial Articles of Incorporation**, accompanied by a \$125 filing fee. However, cooperatives can be complex to establish and operate because they require coordinating numerous individuals. Moreover, there are several legal documents necessary to running an effective cooperative, including an organization agreement securing financial commitments and patronage, bylaws governing the management of the cooperative, marketing agreements between the cooperative and its members, and membership applications. The details of operating a cooperative are beyond the scope of this Guide, but several online publications provide good general information on establishing a cooperative, including the legal aspects of the operation:

USDA/Rural Business Cooperative Service, *Cooperative Information Report*,¹⁹ September 1996, contains information on how to start a cooperative.

The Farmer's Legal Guide to Producer Marketing Associations ²⁰ by Doug O'Neil, Neil D. Hamilton, and Robert Luedeman.

USDA, *Cooperative Marketing Agreements: Legal Aspects*,²¹ July 1992.

USDA/Rural Business Cooperative Service, *Cooperative Information Report 40*,²² 1990, provides sample legal documents for cooperatives.

II. LOOKING TO THE FUTURE: ESTATE PLANNING

Estate planning may not seem like an important component of managing a direct farm business, but it is critical for farmers who wish to keep the farm in the family for future generations. The USDA estimates that 80% of farmers do not have estate plans in place. Without an estate plan, the estate will go through probate court, which means that it may take years to settle the distribution of land and assets among heirs and creditors. Meanwhile, younger generations may not be able to make business decisions or plant the crops necessary to continue the operation. The probate court also applies a set of default rules for distribution that may not be beneficial for the business or the family's wishes. For instance, if the farm has been used to secure

¹⁹ Available at www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm

²⁰ Available at www.nationalaglawcenter.org/assets/articles/obrien_producemarketing_book.pdf

²¹ Available at www.rurdev.usda.gov/rbs/pub/rr106.pdf

²² Available at www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2

equipment, land may be sold off to pay debtors instead of passed down to children even though there may be other ways to satisfy the debts. The Ohio State University Extension has published a guide entitled **Estate Planning Considerations for Ohio Families**²³, which is full of useful information on the importance of estate planning and tools available to farm business owners. The University of Minnesota Center for Farm Financial Management offers an interactive tool called **AgTransitions** to help farm families create transition plans.²⁴ 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 ohioline.osu.edu/estate/

²⁴ www.agtransitions.umn.edu

CHAPTER 2: SETTING UP THE DIRECT FARM BUSINESS

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

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

I. SITING

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

A. Zoning

Zoning is a system of land use regulation that controls the use of private property. Under a zoning system, land is divided into different zones where specific activities are allowed or prohibited. Zoning was originally created to segregate land uses with the intent to protect community health and well-being. The state of Ohio has given counties (R.C. § 303.01 et seq.) and townships (R.C. § 519.01 et seq.) the right to zone their communities. Although most have chosen to enact zoning regulations, some Ohio communities do not have zoning regulations. Because zoning is a powerful tool, it is often litigated and detailed case law covers the precise outlines of private land use regulation. This section is intended to orient farm business entrepreneurs to the basic outlines of zoning law.

In incorporated areas, the authority to enact zoning regulations falls to the city or village. In unincorporated areas, the township administers zoning, unless the township has voted to let the county handle zoning. This means that in any particular location, the municipality, township, or county may handle zoning. The regulating body passes the zoning regulations, although state law dictates much of the shape of the final zoning code.

Of relevance to farm operations, counties and townships are not allowed to prohibit the use of any land for agricultural purposes (municipalities are allowed to prohibit agricultural uses).

This requirement should protect farm operations in unincorporated areas, but entrepreneurs should be aware that not all activities on a farm would be considered using the land for agricultural purposes. Of particular importance, if less than 50% of the product sold at a farm stand is not farm produce, the operation may not be an agricultural use. Agri-tourism operations should also note that entertainment and special events must constitute the “marketing of agricultural products,” to qualify as an agricultural use. The Ohio State University Extension publishes **Understanding the Agricultural Exemption from Ohio Zoning Law: A Summary of Relevant Court Cases and Attorney General Opinions** online which as more information.²⁵

A farm business entrepreneur should start by determining who regulates zoning at the site the entrepreneur plans to do business. The regulating office will have online or physical maps available, and the farm business owner should consult the map to determine which zone their location falls under. After finding the applicable zone, the individual should consult the zoning text to determine which uses are or are not allowed in that zone.

Zoning concerns are especially relevant when farmland intersects urban areas--a common situation for many direct farm operations hoping to be near potential consumers. As towns or other urban areas expand, counties or cities may change the land’s zoning classifications. For example, towns may annex farmland previously under county jurisdiction and subject the property to municipal zoning. Other land use changes may result when the county itself rezones land due to development pressures. In either situation, governments could rezone productive farmland from "agricultural" to "residential" or "commercial," etc. The existing farm operation would be grandfathered as a "non-conforming use," which would allow the continuation of the farming operation, but could prohibit or restrict future changes or other farm-related businesses such as farm stands or U-pick operations. In addition to determining the precise zoning classification for the specific property, the farm entrepreneur should consult the comprehensive plan, if one has been written for the area. The comprehensive plan may indicate if the area may be reclassified as a residential or commercial area in the future.

B. Impacts on Neighboring Land

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

Livestock Environmental Permitting Program

²⁵ <http://agmr.osu.edu/sites/d6-agmr.web/files/Ag%20Exemption%20Opinions.pdf>

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

Nuisance Law

A nuisance is when one person uses his or her land in an unreasonable, unwarranted, or unlawful way, and in so doing, affects the rights of another landowner. A nuisance may be a strong smell, loud noise, unsightly object, or some other condition causing substantial discomfort, so long as it is something that is perceptible to the senses. Nuisance is a common law issue which means its exact contours have been determined through lawsuits rather than through legislation.

There are two types of nuisance claims: private and public. Public nuisance generally is a condition affecting a right common to the general public (such as clean air) and the government instead of an individual generally brings claims for public nuisance. *Kramer v. Angel's Path*, L.L.C., 882 N.E.2d 46 (6th Dist. Erie County 2007). Private nuisance usually affects a single party or a definite, small number of individuals in the use or enjoyment of private rights. In Ohio, a private nuisance must be either 1) intentional and unreasonable or 2) unintentional but negligent, reckless, or abnormally dangerous. *Ogle v. Ohio Power Co.*, 903 N.E.2d 1284 (Ohio Ct. App. 4th Dist. Hocking County 2008).

Direct farm businesses must be aware of conditions they create that rise to the level of actionable nuisance, particularly those businesses in close proximity to land used for non-agricultural purposes. Courts have found some large livestock facilities to be a “nuisance” due to the presence of strong odors and flies such that neighbors can no longer use their property. For example, nuisance may be found where neighbors are unable to open windows in summer. Nuisance lawsuits may also provide a remedy for a direct farm business adversely impacted by a neighbor’s farm operation that makes it difficult for the direct farm to use its land, especially if odors and activities deter potential customers.

Ohio farm businesses have strategies available to them to control the likelihood of a successful nuisance claim. Farms within an agricultural district²⁶ are protected from nuisance lawsuits as long as they, in part, are 1) using “generally accepted agricultural practices,” 2) not breaking any federal, state, or local laws relating to agriculture, and 3) the plaintiff is not also in agricultural production. If an individual brings a nuisance claim against the farmer and the farmer can demonstrate the three criteria, the farmer has a defense against the lawsuit (R.C. § 929.04). One or more farmers with 10 or more acres of land generating an average of \$2,500 annually for the three years prior may apply to become an agricultural district. The form is available at the ODA website, and must be renewed every five years²⁷ (R.C. § 929.02).

Ohio law offers a similar defense from a public nuisance charge. If a farm operation produces excessive odor from feeding animals, the odor is considered a public nuisance. In that case, the operation would inspect the operation to determine if a case should be brought. However, if the farm is operating outside a municipality and it conforms to “generally accepted agricultural practices” and does not have a “substantial adverse effect on the public health,” the operation cannot be found a public nuisance (R.C. § 3767.13).

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

The agricultural defenses to nuisance claims are not absolute. A farm must be considered an agricultural operation, which may not include nursery stock businesses, to use one example.²⁸ Also, in other states such as Iowa, the state Supreme Court found that a similar statute disallowing affected neighbors from bringing lawsuits was unconstitutional.²⁹

C. Fence Law

Fence law determines the rights and responsibilities of neighboring landowners as to the fence placed on the division line between rural properties. The Ohio legislature recently passed an overhaul of the century-old Line Fence or Partition Fence Law. In the past, neighboring landowners were required to share equally in repair or maintenance of a line fence. Today, responsibility for maintaining a fence is determined only after considering six factors including

²⁶ Agricultural districts offer other protections as well, including deferral of special assessments and additional review in the case of eminent domain. More information is available from OSU Extension at <http://ohioline.osu.edu/cd-fact/1268.html>

²⁷ www.agri.ohio.gov/divs/FarmLand/Farm_AGDist.aspx

²⁸ *Winkelmann v. Cekada*, 137 Ohio App.3d 176 (1999).

²⁹ *Gacke v. Pork Xtra L.L.C.*, 684 N.W. 2d 168 (Iowa, 2004).

topography, waterways, vegetation, risk of trespass, the importance of the fence for marking division lines, and the livestock each party may contain with the fence (R.C. § 971.09).

Landowners can file a request with the township trustees or court of common pleas to assess the factors, and these factors only apply to existing fences before 2008.

If an individual landowner wants to build a new line fence where one has not existed in the past, he or she will be responsible for building and maintaining the fence (R.C. § 971.07(A)). This means that a landowner must know if a fence has existed in the past and the law lays out ways by which a party may prove that a fence existed (R.C. § 971.05). Landowners may also agree amongst themselves about how a fence will be maintained and that agreement will be binding on future landowners if the document is filed with the county recorder (R.C. § 971.04). OSU Extension has published and compiled several resources on the new fence law, including detailed legal explanations and model affidavits for fence costs and removed fence lines.³⁰

II. REGISTRATION

A. *Animal Disease Traceability*

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

In December of 2012, USDA announced the finalization of a new animal disease traceability program that addresses many of the concerns with the old NAIS program.³¹ Under the new rules, if an animal is moved across state lines, the livestock must be officially identified and have an accompanying certificate of veterinary inspection or another form of documentation. The official identification number is not a part of a single national system; instead, producers may use a number of different existing systems such as the National Uniform Ear tagging

³⁰ <http://agmr.osu.edu/anr-programs/agricultural-and-resource-law-program/law-library/line-fence-law>

³¹ The new rules are officially published in Number 6, Volume 78 of the Federal Register at page 2040.

System, which is a metal ear tag for cattle. Animals moved across state lines to a custom slaughter facility do not need the certificate or official identification number.

B. FDA Food Facility Registration

The Federal Food, Drug, and Cosmetic Act (FDCA) requires all facilities that hold, pack, manufacture or produce food for animal or human consumption in the U.S. to register with the U.S. Food and Drug Administration (FDA) prior to beginning manufacturing/processing, packing, or holding food (21 U.S.C. § 350d). Facilities that fail to register face civil and/or criminal prosecution. However, many types of direct farm businesses are exempt from registration requirements (21 C.F.R. § 1.226).³² 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 definition of “farm” set forth in FDA regulations (**and a flowchart is provided at the end of this chapter**):

- ***Farm*** (21 C.F.R. § 1.227(b)(3)): A facility in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both. Washing, trimming of outer leaves of, and cooling produce are considered part of harvesting. The term “farm” includes:
 - Facilities that pack or hold food, provided that all food used in such activities is grown, raised, or consumed on that farm or another farm under the same ownership; and,
 - Facilities that manufacture/process food, provided that all food used in such activities *is consumed on that farm* or another farm under the same ownership.
- ***Restaurant*** (21 C.F.R. § 1.227(b)(10)): A facility that prepares and sells food directly to consumers for immediate consumption.
 - “Restaurant” includes entities in which food is provided to humans, such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens.
 - “Restaurant” also includes pet shelters, kennels, and veterinary facilities in which food is provided to animals.

³² FDA has published a helpful 16-page guide on facility registration (“What You Need to Know About Registration of Food Facilities”) that explains who must register (including exemptions) and how to register. It is available online at www.directfarmbusiness.org/storage/fsbtreg.pdf.

- “Restaurant” **does not** include facilities that provide food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers.
- **Retail Food Establishment** (21 C.F.R. § 1.227(b)(11)): A retail food establishment is defined by the statute as “an establishment that sells food products directly to consumers as its primary function. *A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers* (emphasis added). A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term “consumers” does not include businesses. A “retail food establishment” includes grocery stores, convenience stores, and vending machine locations.”

These vague definitions can raise more questions than they answer. In addition, FDA considers some facilities “mixed-type” that require registration. For example, a maple syrup operation that harvests maple sap and then heats the maple sap into syrup for sale *to a distributor or grocery store* is an example of mixed-type facility that requires registration. Even though taking sap from a tree is harvesting, heating sap into syrup is considered processing. Customers and not the farm family eat the syrup, so the farm exception does not apply. The farm also would not qualify for the retail food establishment exception because the final product is not sold directly to consumers. On the other hand, if the farmer sold the sap only at a roadside stand, then it would qualify for the retail food establishment exception because the farmer would be selling directly to consumers.

The FDA has published a **guidance document**³³ 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**³⁴ 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

³³

www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm331959.htm

³⁴

www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm

facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

III. FEDERAL AND STATE ENVIRONMENTAL REGULATIONS

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

As a starting point for Ohio regulations, regulatory agencies and OSU Extension have combined to publish *Guidelines for Livestock Operations*, which discusses several potential environmental regulations.³⁵ This Guide also contains a helpful list of many OSU Extension and Ohio Livestock Environmental Assurance Program (LEAP) documents relating to large animal operations. Although not specific to agricultural operations, the Ohio EPA has a guide that discusses many of their permits, how to apply, and what to expect in the application process titled **Guide to Environmental Permitting in Ohio**.³⁶ Federal regulations, such as the Endangered Species Act and the Safe Drinking Water Act, may also apply to agricultural operations. The EPA has provided brief summaries of its programs on its **website**.³⁷ These resources are useful starting points, but a farm operation with the potential to fall under any of these programs or regulations must do extensive research to be sure they comply.

A. Waste Management

The Clean Water Act (33 U.S.C. § 1541, *et seq.*) (CWA) requires facilities that house exceptionally large numbers of animals to obtain permits under the National Pollutant Discharge Elimination System (NPDES). The Ohio EPA administers the CWA in Ohio under an agreement with the Federal EPA. NPDES permits protect water quality by requiring facilities that release pollution into surface waters (or have a very high likelihood of releasing pollutants) to treat their water discharges. All large concentrated animal feeding operations (CAFOs)³⁸ require a discharge

³⁵ www.ohiolivestock.org/images/1_livestock_guidelines03.pdf

³⁶ www.epa.ohio.gov/portals/41/sb/publications/permitguide.pdf

³⁷ www.epa.gov/agriculture/agmatrix.pdf

³⁸ 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.

permit obtained through Ohio EPA or ODA LEAP. For more information on how to apply for a permit, see the Ohio EPA's **CAFO website**.³⁹

Although the NPDES system was implemented to address pollution that comes from a specific location such as a drainpipe, "nonpoint" or pollution that enters waterways from runoff is also a problem. Agriculture is a source of nonpoint pollution when field runoff carrying dirt or manure enters waterways. The federal EPA directed all states to create plans to address nonpoint pollution and in response, Ohio created the Nonpoint Source Management Plan. The management plan is a set of targeted improvements to Ohio waterways to be achieved by regional coordination. Grants are available to help implement planning projects to achieve the management objectives and more information is available at the Ohio EPA Division of Surface Water website.⁴⁰ In addition, Ohio currently participates in the Environmental Quality Incentives Program through the **USDA Natural Resources Conservation Service**, which provides technical and financial assistance to agricultural producers who implement conservation practices on agricultural land. EQIP grants can help farmers of all sizes and types implement ways to control runoff and improve environmental standards. Information can be found on Ohio NRCS website.⁴¹

In 2009 there was a petition pending before the EPA to also regulate CAFO air emissions under the Clean Air Act. On January 13, 2011, the EPA completed a two-year study of air emissions from poultry, swine and dairy animal feeding operations, which will be used to develop methods for estimating emissions. As of the writing of this guide, emission-estimating methodologies were available for public comment, but no laws have been promulgated. Updates on the status of that petition may be available through the **EPA's website**.⁴²

B. Stormwater runoff

If, while constructing a new poultry or livestock facility, a farmer will be clearing, grading, or excavating one acre or more, the farmer must apply for a NPDES stormwater construction permit. This rule is not exclusive to agriculture, and is intended to control sediment runoff into waterways. This permit may require a farmer to install silt fences and other control devices to ensure that soil is not running into waterways. Information on applying for this permit is available from the Ohio EPA's Division of Surface Water and on their website by clicking on the "Construction Activities" tab.⁴³

³⁹ www.epa.ohio.gov/dsw/cafo/index.aspx

⁴⁰ www.epa.ohio.gov/dsw/nps/index.aspx#

⁴¹ www.oh.nrcs.usda.gov/programs/

⁴² www.epa.gov

⁴³ www.epa.ohio.gov/dsw/storm/index.aspx

C. Wetlands

The federal Clean Water Act also requires landowners to obtain permits from the Army Corps of Engineers (the Corps) to discharge dredge or fill materials into waters of the United States (33 U.S.C. § 1344). Accordingly, a permit may be necessary prior to construction or farming in wetlands. These permits, known as Section 404 permits, are only an issue for new farms – the law has an exception for normal farming, silviculture and ranching activities that are part of an established operation (33 U.S.C. § 1344(f)). However, new farms, or farms resuming operations on land that has been unused for so long that modifications to the hydrological regime are necessary to commence operations, should first determine if a permit is necessary. The Corps defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas” (33 C.F.R. § 328.3). The Ohio EPA’s **Guide to Environmental Permitting in Ohio** discusses this permit in more detail.⁴⁴

D. Pesticide Regulation

The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Chapter 6) (FIFRA) requires EPA to approve *all* pesticides sold or distributed in the United States. Upon approval, the pesticides are subject to labeling requirements, and applicators must comply with the use and application restrictions on the labels. Applicators must meet training and certification standards. The FIFRA is also the law that established the worker protection standards discussed in Chapter 6: Labor and Employment. Additional Ohio regulations are discussed in Chapter 8: Fruits and Vegetables.

E. Environmental Incentive Programs

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

⁴⁴ www.epa.ohio.gov/portals/41/sb/publications/permitguide.pdf

Conservation Service’s webpage.⁴⁵ For more information on Ohio-specific programs, visit **USDA’s Natural Resource Conservation Service’s** page for Ohio.⁴⁶

Direct farm businesses may also wish to participate in the National Organics Program. Under this program, once a farm has been certified as organic, it may place the official USDA Organic label on its products. For more information on Organic certification, see Chapter 12: Organic Certification.

Finally, there are emerging markets that pay farmers in exchange for providing ecosystems services such as preserving the clean air and water that all community members enjoy. These markets, known as ecosystems services markets or environmental markets, quantify activities, such as reducing emissions or setting aside land as nature preserves, and enable the owner to sell the service or benefit to interested parties. Conservation easements and land trusts - in which landowners agree to set aside parcels of land for conservation or wildlife protection - are examples of ecosystem services markets already in operation. Oftentimes, farmers can gain tax benefits from placing conservation easements on their land or transferring land into a land trust. ODA has an Office of Farmland Preservation dedicated to helping farmers preserve the benefits of farmland to the community. The Office’s website discusses several programs to help farmers including the Clean Ohio Local Agricultural Easement Purchase Program, the Ohio Agricultural Easement Donation Partnership Program, and the Ohio Agricultural Easement Donation Program.⁴⁷

Section 2709 of the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill) directed the Secretary of Agriculture to “establish technical guidelines that outline science-based methods to measure the environmental services benefits from conservation and land management activities in order to facilitate the participation of farmers, ranchers, and forest landowners in emerging environmental services markets” (16 U.S.C. § 3845). As a result of this legislation, the Department of Agriculture established the Office of Environmental Markets in order to help facilitate the creation of market-based approaches to agriculture, rangeland, and forest conservation. The Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) took 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**.⁴⁸

⁴⁵ www.nrcs.usda.gov/programs/

⁴⁶ www.oh.nrcs.usda.gov/programs/

⁴⁷ www.agri.ohio.gov/divs/FarmLand/FarmLand.aspx

⁴⁸ www.fs.fed.us/ecosystemservices/OEM/index.shtml/index.shtml

IV. INSURANCE

To best determine the insurance needs of a direct farm business, start with a visit to a qualified insurance agent - preferably one who is familiar with how direct farm businesses operate. Farmers should be prepared to explain their operation in detail, and should request an insurance proposal from the agent that addresses the operation's risks and potential losses. Businesses may also wish to compare policies from multiple agents. This section outlines the various risks farmers may encounter and the policies available to address those risks so that farmers will be better able to understand the products offered by insurance agents.

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

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

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

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

A beginning direct farm entrepreneur should investigate insurance options early in the life of the business as the cost may influence the viability of the business. Moreover, bank financing may require insurance expenses to be incorporated as part of the cost structure and profitability models in the business plan. Further, some potential customers and outlets (for example, restaurants, hospitals and farmers markets) may require proof of adequate insurance before engaging with the direct farm business.

Although the issue is also addressed in Chapter 5: Labor and Employment, it is important to note that a farm liability and a CGL policy provide very limited coverage for injuries suffered by anyone who is working for the farm, whether that individual is paid or unpaid. Compensating volunteers may create an employment relationship and for the purposes of an insurance policy, may disqualify their injuries from coverage. Liability insurance is not a substitute for workers' compensation insurance. Because of the high cost of medical services and the high likelihood of injury from farm labor, farmers should pay special attention that anyone who performs any labor for the farm is covered by insurance.

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

V. CHECKLIST

Have you...

- If you already have a farm, have you looked into your zoning code to determine what type of operation is permitted at your location?
- If you do not yet have a farm site, have you considered which zoning codes will accommodate your desired operation?
- Looked into the **FDA registration and potential environmental permitting requirements?**
- Informed yourself about **insurance options and costs?** Insurance (or lack thereof if something goes wrong) can represent a significant cost for a small-scale farmer. It should be considered as part of your initial overall business plan.

KEY CONTACT INFORMATION

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

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

Ohio EPA, Division of Surface Water

Ph: (614) 644-2001

Ohio Department of Agriculture, Livestock Environmental Permitting

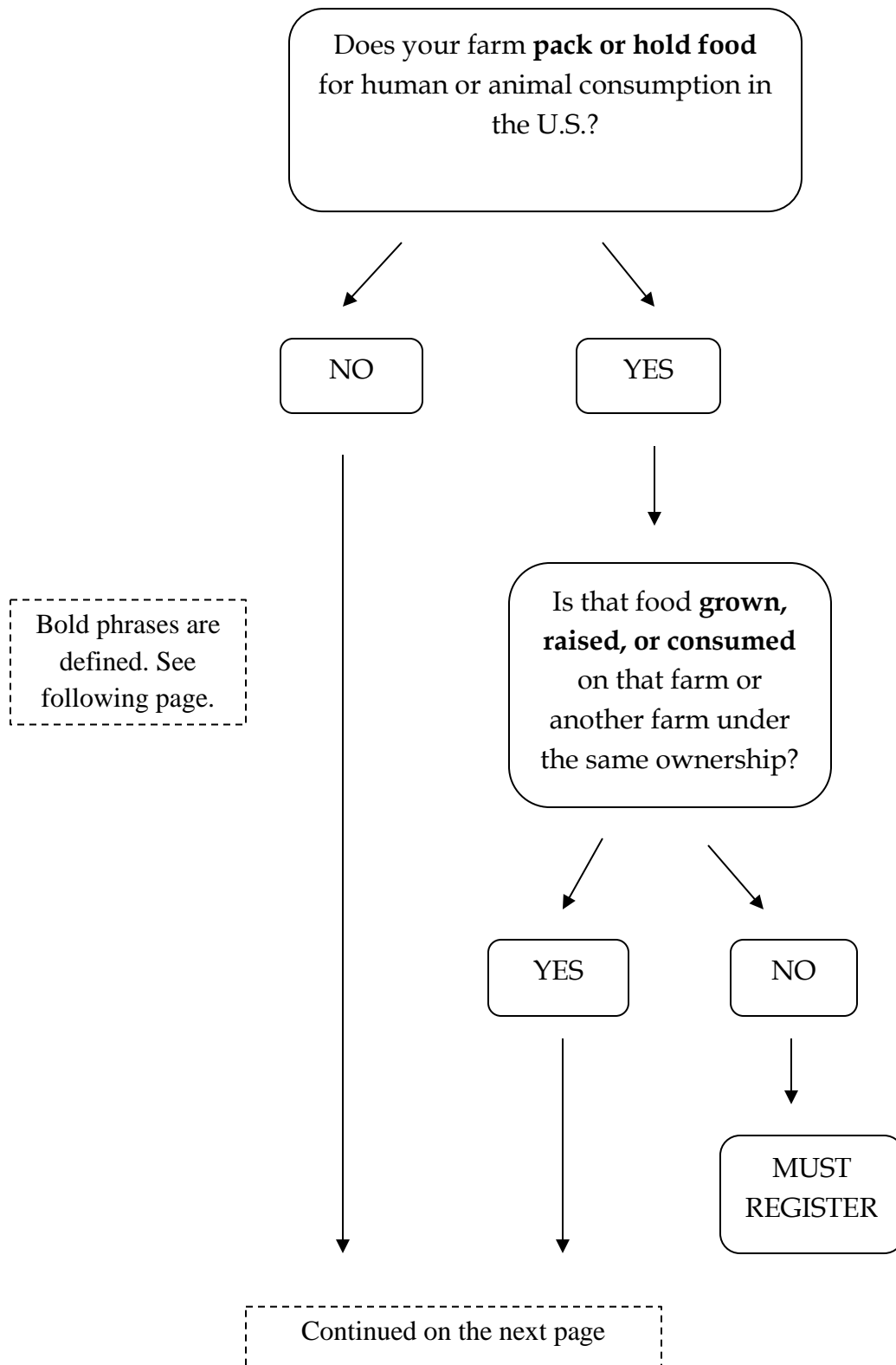
Ph: (614) 387-0470

Email: lepp@agri.ohio.gov

Ohio Department of Agriculture, Farmland Preservation Office

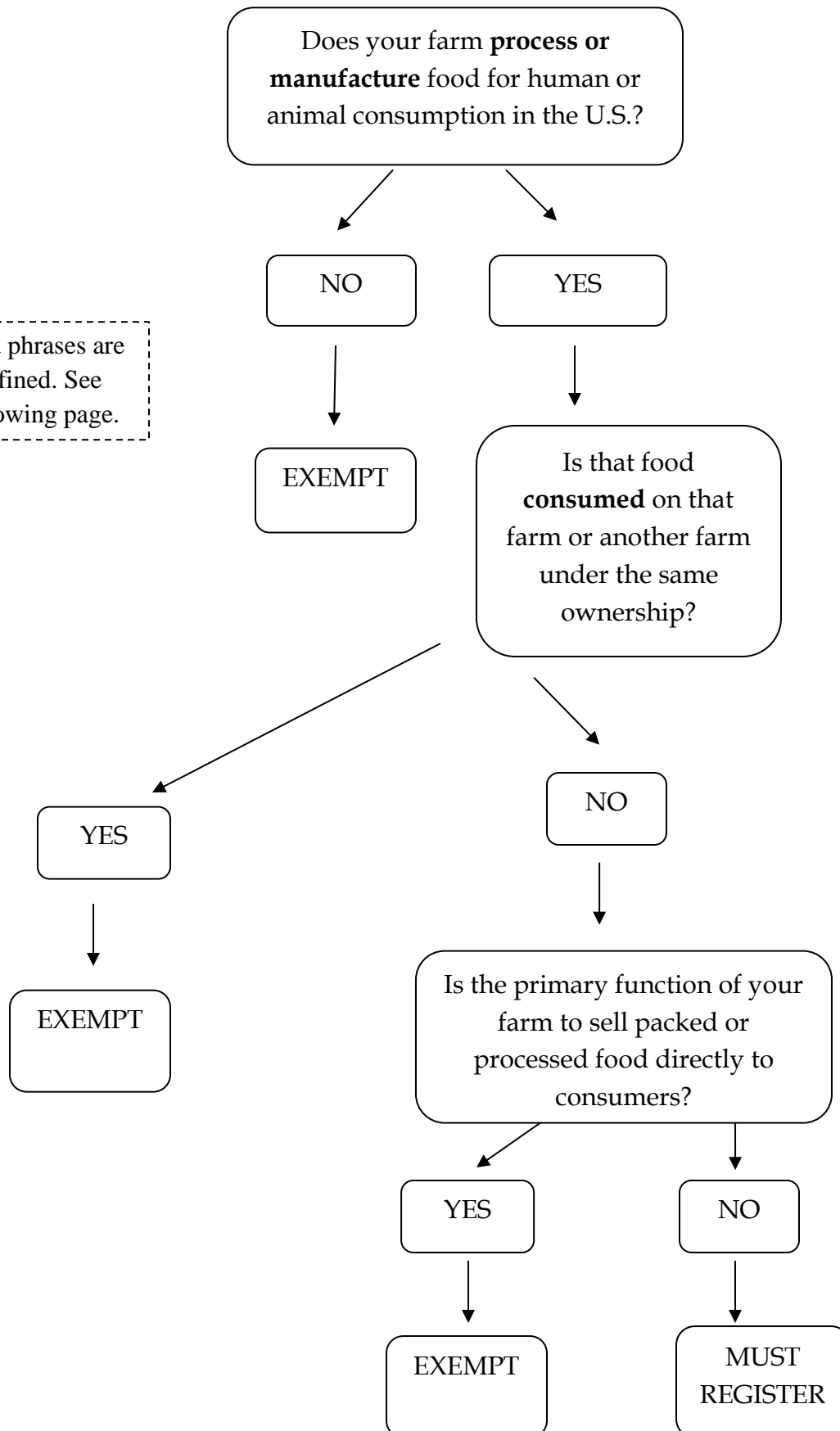
Ph: (614) 728-6210

Email: farmlandpres@agri.ohio.gov

DO I NEED TO REGISTER MY FARM WITH THE FDA?

Continued from the previous page

Bold phrases are defined. See following page.



Definitions used in this flowchart:

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

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

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

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

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

CHAPTER 3: MANAGING AND MARKETING THE DIRECT FARM BUSINESS

There are many components to successfully managing a direct farm business. Taxes and employment encompass such significant portions of law that they merit their own chapters in this Guide. However, there are many other management details that this chapter will address. First and foremost, farmers enter into contracts of many types and should be aware of how the



principles of contract law may protect their business. A direct farm business also needs to have effective marketing in order to reach potential customers and sell products. Internet marketing, procurement contracts, and intellectual property rights, and other issues may control how marketing may be conducted. And when a sale is made, the direct farm business must accurately measure its products in order to comply with state law.

I. CONTRACTING

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

A. General Contract Law

A contract is an agreement between two or more parties to do something in exchange for something of value. There are three basic elements of a valid contract: an offer, acceptance, and consideration. An offer is a proposal that is communicated to someone else. An offer is accepted when a party agrees to the proposal using clear and unequivocal terms. The final requirement, consideration, requires that the contract actually involve the exchange of something of value on both sides. The concept of consideration is meant to distinguish a contract from a gift. If the exchange is a gift, and not a contract, then one party expects nothing of value in return. On the other hand, the parties to a contract both expect something valuable in return. Providing consideration can come in many shapes and sizes. The parties might exchange money, land, crops, or even a promise to provide products in the future.

The Uniform Commercial Code (UCC) is a uniform set of laws adopted in every state in order to facilitate interstate commerce. The American Law Institute develops the UCC and then each state adopts it with minor variations that the state deems necessary for its local needs. The UCC covers a broad array of commerce issues, such as the rights and duties of creditors and debtors, how loans can be transferred between varying parties, and standards for forming and interpreting leases. In Ohio, the UCC is in Title 13 of the Ohio Revised Code. Farmers need to be aware of the UCC because it establishes unique rules for commercial transactions, including the sale of goods (R.C. Title 13). Specifically, the UCC defines when a contract is formed between two business people, sets standards for how contract terms are interpreted, provides default terms to cover contractual omissions, and defines what remedies are available if the contract is breached. Contracting parties are always free to negotiate alternative terms for their contract; these UCC rules are the default law that courts will apply if contracting parties have not agreed otherwise. Relevant provisions of the UCC are covered in more detail in the following discussion.

Oral Contracts, Written Contracts

A contract does not necessarily have to be in writing in order to be binding and enforceable. The sale of an item is essentially a contract because it is the exchange of product for money. In that sense, oral contracts are incredibly common. Small direct farm sales - for example, a farmers' market sale - are oral contracts. When a farmer sets up a stand and communicates the availability of her produce in some way at a certain price, she has made an *offer*. By agreeing to pay the purchase price, the consumer *accepts* the offer, forming an enforceable contract. The *consideration* is the produce the farmer provides and the money the customer pays. The contract is *performed* (and thus complete) when the farmer receives the money and the customer receives the produce. In most cases, oral contracts are binding and enforceable—just like a written contract. If one party feels the contract was breached, they have remedies. There are instances, however, where a contract must be in writing to be enforceable.

As early as the 1600s, people recognized that certain contracts are particularly susceptible to misrepresentation. In response, the English Parliament adopted what is known as the “statute of frauds,” which requires that certain fraud-prone contracts be in writing to be enforceable. Following this English tradition, every state has adopted a version of the statute of frauds. The Ohio Statute of Frauds (R.C. § 1335.01 et seq.) lists a number of circumstances specifically requiring a written contract, but there are two situations most relevant to farmers: 1) Contracts that will take more than one year to perform, and 2) The sale of real property. Additionally, a separate statute of frauds provision applies to the sale of goods; if the amount totals \$500 or more, it must be in writing (R.C. § 1302.24). In summary, three types of contracts must be in writing: 1) Contracts that will take more than one year to perform whether for goods or for a service, 2) The sale of real property, and 3) The sale of goods totaling \$500 or more. (Situation 3 has an important exception for a merchant, discussed below).

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

When it comes to the sale of goods totaling \$500 or more, the statute provides a slightly different rule when two business persons (rather than a business person and a customer) are involved. Ohio law uses the term “merchant” for business person and defines a merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction...” (R.C. § 1302.01(A)(7)). If both parties to a contract are merchants, an oral contract that would otherwise have to be in writing under the statute of frauds is binding if a confirmation of the oral contract is sent in writing within a reasonable time and neither party objects within ten days after the writing is received (R.C. § 1302.04(B)). Across the country, states are split on whether farmers are merchants. In Ohio, when a farmer has sold a product for several years and is familiar with the marketplace for the crop, she is considered a merchant.⁴⁹ However, if farmers sell certain products on a more incidental basis such as processing fruits into jam and selling it to a store, Ohio case law has not clarified whether farmers are merchants.

Farmers should note what constitutes a “writing”. It does not mean a full contract must be executed. An email confirming what will be sold, how many, and at what price may be considered a contract. Likewise, the writing does not have to have a handwritten signature to be “signed.” For email, a typed name at the bottom may be as good as a handwritten signature. Although an Ohio court has not issued the final word, several courts have found that a simple email from one party to the other is a signed writing for the purposes of the statute of frauds.⁵⁰ Farmers should try to get a contract in as secure a form as possible; but where that is not possible a confirming email may be sufficient.

⁴⁹ *Ohio Grain v. Swisshelm*, 318 N.E.2d 428 (2d Dist. Greene County 1973).

⁵⁰ See, John E. Theuman, *Satisfaction of Frauds by E-Mail*, 110 A.L.R.5th 277 (2003).

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**.⁵¹

ADDITIONAL RESOURCES: PACA'S PROVISIONS

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

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

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**.⁵²

⁵¹ www.gipsa.usda.gov

⁵²

www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACACla imorApplyforaLicense&rightNav1=FileaPACACla imorApplyforaLicense&topNav=&leftNav=Commodit yAreas&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 get paid when they file a court action. The trust also puts farmers ahead of other creditors if the buyer goes out of business or declares bankruptcy. Producers who are not subject to the Act can nonetheless get a PACA license in order to benefit from the PACA trust protections.

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

The Act prohibits handlers from (1) coercing a producer to join a cooperative, or refusing to deal with a producer for joining a cooperative; (2) discriminating against a producer in price, quantity, quality or other terms due the producer's membership in a cooperative; (3) coercing or intimidating a producer to enter into, breach, or terminate a membership agreement or

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

ADDITIONAL RESOURCES: Model Producer Protection Act

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

[www.nationalaglawcenter.org
/assets/articles/peck_contract
regulation.pdf](http://www.nationalaglawcenter.org/assets/articles/peck_contract_regulation.pdf)

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 contracts can be very unfair to the farmer in terms of how compensation is determined, supplies are distributed, and market adjustments are made. 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, Ohio has not. Ohio farmers considering signing a production contract should look for red flags such as a confidentiality clause, which may prevent the producer from being able to seek advice from attorneys or other professionals when issues arise; clauses that make payment unfair for the producer; termination clauses that give the processor unilateral termination rights at any time for any reason; and arbitration clauses that require any issues to be resolved in front of a costly and possibly biased arbitrator of the processor's choice.⁵³

Federal law does provide some protections for poultry and swine producers entering into production contracts.⁵⁴ First, the 2008 Farm Bill contains a provision that protects poultry and livestock producers from non-disclosure provisions in their production contracts (7 U.S.C. § 229b). Second, the 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

⁵³ For a more in depth discussion of potential issues to look out for, *see* <http://faircontracts.org/issues/farming>

⁵⁴ Although much of the federal legislation covered in this Guide does not apply to purely intrastate commerce, the Packers and Stockyards Act likely does, due to the provision which states "for the purpose of this Act . . . a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries..." (7 U.S.C. § 183). In *Stafford v. Wallace*, 258 U.S. 495 (1922), the U.S. Supreme Court held that a wholly intrastate transaction at a stockyard was nonetheless part of the "current of commerce" and therefore fell within the purview of the P&SA. More recently, relying on the Supreme Court's decision in *Stafford v. Wallace*, the U.S. Court of Appeals for the D.C. Circuit interpreted a nearly identical provision in the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(b)(4), ruling that fruit shipped and delivered purely intrastate, but handled by a dealer who commonly ships fruit out of state, had entered the current of commerce. *The Produce Place v. U.S. Dept. of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996). In their analogy, the court stated:

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

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

hiring growers to perform production contracts, the P&SA requires the first page of these contracts to conspicuously disclose whether capital investments are necessary to perform the contract (7 U.S.C. § 197a(b)). The P&SA authorizes the Secretary of Agriculture, through GIPSA, to institute investigations and compel dealers and contractors to pay damages to injured parties for violations of the Act; producers may also petition GIPSA for an investigation and reparation (7 U.S.C. § 210). Alternatively, the producer may bring a lawsuit against the dealer or contractor in federal court (7 U.S.C. § 209).

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

Requirements and Output Contracts

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

Entering into a requirements or output contract is not a green light for producers to simply increase production, knowing that a party is contractually bound to purchase everything that the producer can churn out. The UCC puts some restrictions on these types of contracts including a duty of "good faith" on the parties to the contract (R.C. § 1302.19(A)). This means that neither side can demand or produce a quantity that is unreasonably disproportionate to the quantity that was estimated by the parties at the time of contract formation. If the parties failed to make any estimates at the inception of the contract, the UCC restricts quantities to those

“normal” or “comparable” to what would ordinarily be required or produced. However, the UCC does not specifically identify how those terms should be defined.

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

Procurement Contracts

Procurement contracts can be an advantageous way for a direct farm business to make significant sales. The USDA purchases large quantities of commodities through various procurement programs in order to supply food for school lunch programs, prisons, international food aid and other programs. USDA’s programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive bidding process. Information for small businesses is compiled by the USDA and **available online**.⁵⁵ Schools are allowed to specify a geographic preference in their food bids, which can give the direct farm business an advantage while avoiding the impracticality of the USDA procurement system. OSU Extension provides training materials, food safety information, and guidance on how to work within the school procurement system on their **Ohio Farm to School** webpage.⁵⁶

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

⁵⁵ www.dm.usda.gov/procurement/business/procedure.htm

⁵⁶ <http://farmtoschool.osu.edu/content/farmers.htm>

include product labels and other brand collateral, roadside signs, and Internet marketing. This guide addresses legal issues pertaining to labeling and advertising, a few specific issues related to the Internet, and basic intellectual property issues that may arise in the context of developing a brand for a direct farm business.

ADDITIONAL RESOURCES: Food Labeling

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

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

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

www.ftc.gov/bcp/policystmt/ad-food.shtm

A. Labeling and Advertising

Basic Labeling Laws

As for federal law, the FDA under the Food, Drug, and Cosmetic Act regulates labeling (21 U.S.C. Chapter 9), which prohibits selling “adulterated” or “misbranded” food. The Federal Trade Commission (FTC) regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer’s decision-

making process) and is likely to mislead consumers. A statement is unfair if it causes or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers.

Ohio law follows the same pattern as federal law as it also prohibits the selling of adulterated or misbranded food (R.C. § 3715.59 and .60). Adulterated foods are those that contain poisonous or contaminated product, or that have been handled under unsanitary conditions that may have contaminated the product. Animals that died in any way other than slaughter are also considered adulterated. Finally, masked damage or inferiority also renders the product adulterated (R.C. § 3715.59). Misbranded food is defined as anything with a false or misleading label, the wrong name of the food, a misleading container, or an imitation product that is not labeled as such. Of importance to the direct farm business, any package without the name and place of business of the manufacturer or packer and an accurate quantification of the contents (such as weight, measure or count) are misbranded (R.C. § 3715.60).

Ohio law also has specific labeling requirements for certain categories of products. Canned fruit and vegetables must have a label stating the grade or quality and the name and address of the packer (R.C. § 3715.15). Cottage food products must have special labels as well, which are discussed in Chapter 9: Grains, Cereals, and Oilseeds. The Ohio Department of Agriculture

(ODA), Food Safety Division takes jurisdiction over Ohio labeling laws and will require producers to submit a label template and plan before they will conduct an inspection of a food processing facility, more of which is explained in Chapter 8: Fruits and Vegetables. Other products have additional labeling requirements that are discussed in **Section II: Regulation by Product**.

The laws relating to misbranded and adulterated food are designed to give consumers a broad cause of action against producers that use labels to mislead consumers. In addition to labeling laws, Ohio citizens have a cause of action for misleading advertising as well (R.C. § 1345.01 et seq). As with the federal law, Ohio law prohibits deceptive practices in a consumer transaction (R.C. § 1345.02). Deceptive practices include telling a customer that a product is of a certain quality when it is not. Businesses that violate advertising laws may be prosecuted by the attorney general or by the aggrieved party (R.C. § 1345.05 and .09).

Nutrition Labeling

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

For more information on nutrition labeling, and to obtain a small business labeling exemption form, visit the **FDA's website**.⁵⁷ The FDA also publishes a comprehensive **Food Labeling Guide**⁵⁸ that outlines the requirements of the agency's food labeling laws.

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

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

Allergy Labeling Requirements

The Federal Food Allergen Labeling and Consumer Protection Act of 2004 requires foods that contain, or that are derived from, a “major food allergen” to specifically state that information on its label (21 U.S.C. § 343(w)(1)). The Act defines a “major food allergen” as (1) milk, (2) eggs, (3) fish, (4) Crustacean shellfish, (5) tree nuts, (6) wheat, (7) peanuts, or (8) soybeans. The Act states that the allergen information may be conveyed in one of two ways: (1) by printing the word “Contains,” followed by the name of the food source from which the major food allergen is derived, immediately after or adjacent to the list of food ingredients; *or* (2) by placing the common or usual name of the major food allergen in the list of ingredients and following it in parentheses with the name of the food source from which the major food allergen is derived.

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

The FDA has published a **Food Allergen Labeling Guide**⁵⁹ 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

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<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm>

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

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

Structure or Function Claims

Structure or function claims describe the role of a nutrient in affecting normal structure or function in humans (for instance, “calcium helps build strong bones”). FDA pre-approval of such claims is not required, but the statements must be truthful and not misleading. For more information on these types of claims, see the FDA’s **Small Entity Compliance Guide on Structure/Function Claims**.⁶⁰

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. Ohio Domestic Marketing Logos

Ohio Proud



Businesses with products where at least 50% of the item was grown, raised, or processed in Ohio are able to participate in the Ohio Proud program (A.C. 901:4-6). This program gives producers the ability to use the Ohio Proud logo on their labels and in advertising. Ohio Proud also maintains a web directory of participating products and farmers markets. The program carries a licensing fee of \$25, and the application is online at the Ohio Proud website.⁶¹

C. Internet Marketing

Many small businesses consider an Internet presence to be an essential part of their business strategy. The Internet and other forms of electronic communication (email or social networking sites such as Facebook) can help direct farm businesses reach more customers. USDA's Agriculture and Marketing Service has published an informative brochure, **How To Direct-**

⁶⁰ Available at

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

⁶¹ www.ohioproud.org

Market Farm Products on the Internet,⁶² 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 **Ohio MarketMaker**⁶³ or **Ohio Proud**⁶⁴. These directories help farmers disseminate information on their products and reach consumers as well as commercial retailers or businesses such as restaurants. Although the Internet's flexibility as a marketing tool makes it an attractive option for direct farm businesses, farmers should be aware of several important legal issues that may arise in the context of doing business on the Internet.

Shipping Products

If the farm's products can be shipped by mail, a website that allows customers to place orders online can be an important aspect of the direct farm business. Sending perishable goods through the mail, however, can be costly and requires careful packaging. If food needs to be shipped cold, the USDA recommends shipping with dry ice, foam coolers, and polyethylene film to provide additional insulation. The package should contain clear labels that say, "contains dry ice" and "keep refrigerated," and it should be shipped by the fastest means possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. These shipping recommendations are recommendations only, and are not legally required. However, the farm business will have a customer relations problem and perhaps a deceptive advertising problem if the business claimed product would be sold in a specified manner and did not follow through. The USDA provides a helpful **guide of safe handling times**⁶⁵ for a large variety of mail-order foods. Keep in mind that shipping food out of state may subject the business to federal laws with which the operation may not otherwise have to comply. The laws discussed in this guide, for example, that refer to interstate shipment of food will apply to mail-order products sold out of state.

The FTC's Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435) also applies to sales made over the Internet. The Rule regulates shipment promises, unexpected delivery delays and customer refunds. To comply with the Rule, a seller must have a reasonable basis for promising shipment within a certain time frame. If online advertising does not specify the shipment

⁶² Available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3101222

⁶³ <http://oh.marketmaker.uicu.edu/>

⁶⁴ www.ohioproud.org

⁶⁵ 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>

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**⁶⁶ to assist businesses in complying with consumer protection requirements.

Taxation of Internet Sales

Determining the taxes owed on Internet sales can be complex. For the most part, however, Ohio direct farm businesses will need to collect state and local sales taxes if a sale takes place in Ohio or the product is delivered to an Ohio address (assuming the product is taxable- See Chapter 4: Taxation for more details). The local tax rate to be applied depends upon where the order is accepted. A U.S. Supreme Court decision prohibits states from requiring out-of-state retailers to collect and remit the sales tax for the state where the product is delivered if the retailer has no physical presence (such as an office) in the state (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state (in that case, the consumer becomes subject to their own state's use tax law).

D. Email Marketing

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

⁶⁶ <http://business.ftc.gov/privacy-and-security/consumer-privacy>

concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of this Act can result in significant fines.

E. Signage

Farmers who operate farm direct-to-consumer businesses such as U-pick operations and produce stands often depend on signage to direct consumers. For the most part, Ohio law delegates the power to regulate commercial signage to local government authorities, which vary from location to location. 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. Two signage issues are of relevance to all Ohioans: 1) those in view of a federal or state highway, and 2) the state Tourist-Oriented Directional Assistance program (TODS).

State and Federal Highway Signs

A business within view of a state or federal highway is allowed to post signs on the premises, but off-premises signage requires a permit. Permits are available for commercial and industrial zones, which may limit possibilities for a rural direct farm business. As an overview, signs intended for between 0 and 660 feet of an interstate highway, if the property is within a municipal boundary and it is zoned commercial or industrial, new signs may be placed on the property. Signs of the same distance from a state primary highway may only be placed on land zoned commercial or industrial. If the land is unzoned, a sign may be placed only within 850 feet of existing commercial activity (R.C. § 5516.01 et seq). Precise permitting requirements are more complex than can be discussed in this guide, but guidance is available from the Ohio Department of Transportation, Advertising Device Control Section at (877) 811-4090.

Tourist-Oriented Directional Assistance

Because it can otherwise be difficult to put a sign in a non-municipal area, Ohio businesses may participate in the Tourist-Oriented Directional Signing Program (TODS), which is administered by the Ohio Department of Transportation (R.C. § 4511.104). Businesses participating in the TODS program may have a sign made, installed, and maintained at intersections on rural state highways (excluding locations at freeway interchanges) that direct motorists to local, tourist-oriented businesses. To be eligible for the TODS program, a direct farm business must be: 1) within 10 miles of the state highway, 2) open at least five days per week, one of which must be Saturday or Sunday for at least 40 hours per week during the entire business season, 3) ineligible for the logo sign program used on interstate freeways, 4) derive at least 50% of their income from motorists not residing in 10 miles of the business, 5) have at least 2000 customers in any 12 month period, and 6) comply with additional requirements for campground and food-serving facilities (A.C. 5501:2-8-0(5)).

Businesses interested in the TODS program should fill out an information form online at www.ohiotods.interstatelogos.com. The fee for participation is \$360 annually.

III. INTELLECTUAL PROPERTY

Marketing a business often involves developing and protecting intellectual property (IP). Intellectual property are non-tangible items created by a person such as literary and artistic works, symbols, names, images, and designs used in commerce. Intellectual property may be protected with several means including trademarks, patents, copyrights, and trade secrets. Each may be important to the direct farm business because IP protection gives the farm business the right to *prevent others* from doing certain activities without permission. These rights are important because they protect the investment the owner has made in developing the IP. Understanding the basics of IP protection will also help the direct farm business avoid violating others' IP rights.

A. *Trademarks and Trade Names*

Trademarks may be the most useful form of IP for the direct farm business. A trademark is used to distinguish *goods and services* from those manufactured or sold by others – it is the symbol that customers use to identify a product. A trademark can be a name, symbol, sound, or color. It is also possible to register the design, packaging, or other element of appearance so long as the element is both nonfunctional and distinctive. By contrast to trademarks, trade names are used to identify a person's *business or vocation*. While there may be some overlap between trade names and trademarks, if a name is used only as a trade name it may not be registered with the the United States Patent and Trademark Office (USPTO). Courts have held, however, that a trade name may have trademark protection if the business adopts a stylized font and other design features that would set the name apart from regular text.

Registration of Trademarks and Trade Names

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

Trademark registration is available at both the state and federal level. To be valid, the trademark must appear on the goods, their container, or on the displays associated with the goods. Federal registration of a trademark is done through the USPTO. Federal registration can be costly: \$275-\$325 per mark per class of product (for instance, a sheep farmer wishing to trademark both her wool yarn and artisan cheese would have to file two applications because yarns and cheeses are in different classes). The USPTO also recommends hiring an attorney who is familiar with trademark law, because applicants are expected to comply with all procedural and substantive rules. Despite its cost and complexity, federal registration has several benefits. First, it allows the trademark owner to bring suit in federal court (in addition to state court) and to register the trademark with the United States Customs and Border Protection in order to stop the importation of infringing goods into the United States. Second, federal registration protects and ensures the legitimacy of the trademark throughout the country. For more information, including a link to the USPTO's searchable trademark database, visit the **USPTO's trademark website**.⁶⁷

State registration is less expensive and cumbersome than the federal system, but it provides protection only within Ohio. To register an Ohio trademark, fill out Form 555, Trademark/Service Mark Application, and submit it to the Secretary of State's office with the \$125 filing fee. Applicants cannot submit the application before then name or logo is in use, and the application must be notarized. For registration of logos, a letterhead, a business card, or some specimen of the mark must be included with the application.

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

In order to be registered and enforceable, trademarks may not be generic or primarily geographically descriptive, and cannot infringe on an existing trademark. A phrase or slogan that is commonly used to refer to a category of product or that falsely suggests a connection with a person, institution or governmental body may not be registered (R.C. § 1329.55). Federal registration follows similar guidelines. For example, an attempt to register the phrase "the best beer in America" as a trademark for Sam Adams Beer was rejected by the USPTO as too descriptive. Similarly, a court rejected the trademark "Beef Stick" because the term merely described the kind of good and did not distinguish the manufacturer (*Hickory Farms v. Snackmasters*, 509 F. Supp. 2d 716 (N.D. Ill. 2007)). The USPTO will use the "likelihood of

⁶⁷ www.uspto.gov/trademarks/index.jsp

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.

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**.⁶⁸

C. Copyrights

A copyright protects “original works of authorship fixed in any tangible medium of expression.” Although literary works come to mind as examples of copyrighted material, copyright protection in the direct farm business context could extend to categories such as pictures and graphics, sound recordings, movies, and other information related to the direct farm business operation. A copyright does not protect actual ideas or methods, but instead gives the owner

⁶⁸ www.uspto.gov/web/offices/pac/doc/general/index.html#patent

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**.⁶⁹ 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. The legal definition of a trade secret in Ohio is a, "scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers. . ." (R.C. § 1333.61).

Although the agriculture community has traditionally shared innovation, there may be certain trade secrets that provide the direct farm business an important commercial advantage that warrants protection. Typical farm examples could include a list of regular customers built up over time, a special recipe for apple preserves, or a secret fertilizer method for growing the best tomatoes. However, a business cannot protect any recipe or methodology, for instance. Under Ohio law, the practice or item the business wants to protect as a trade secret must, 1) have independent economic value because it is not generally known or ascertainable; and 2) be protected within the business (R.C. § 1333.61(D)).

The first criterion is satisfied if, as explained, the trade secret is actually a new, valuable, and not generally accepted practice. To satisfy the second criterion, the employer should take steps such as not advertising the advantage, not educating others about the secret process or technique, and requiring employees to sign non-disclosure agreements or non-compete agreements. A typical non-disclosure agreement outlines the nature of the trade secret and the obligations of the employee to not disclose the information, and a time period in which former employees

⁶⁹ www.copyright.gov/

must maintain the secret. A non-compete agreement prohibits an employee from using the trade secret to their own advantage, for example, by starting their own business using the trade secret. State law may find overly broad or restrictive non-compete agreements to be invalid. There are exclusions on the scope and duration of non-disclosure or non-compete agreements, so an attorney may be helpful in drafting a proper enforceable agreement.

IV. WEIGHTS AND MEASURES

Because agricultural products are sold by weight or measure, protecting the integrity of a specified weight or measure is important to maintaining the public's trust. Ohio's weights and measures laws are designed to protect that trust and apply to items such as fuel meters, retail store scanners, and livestock scales. Regarding agriculture, Ohio law regulates measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed, by certifying the accuracy of scales, and by requiring weight and measure information on labels (R.C. § 1327.01 et seq.).

Ohio law lays out some very basic rules including that a seller may not misrepresent or misstate a quantity of an item for sale (R.C. § 1327.53 and .54). For the direct farm business, that means if a farmers' market stand has a sign stating that one-pound bags of spinach are for sale at \$5 each, if representative bags of spinach are displayed, they must weigh one pound and the customer must be given one pound in return for \$5. The shape or wrapping of the product may not be misleading in terms of the fill level (R.C. § 1327.57(D)). If the spinach bag actually had a big air pocket in the middle, a person may violate this law.

Prepackaged items for sale to retail customers must have a label stating 1) the nature of the contents (for example, "apples") 2) the quantity of the contents in terms of weight, measure, or count, and 3) the name and place of the business (R.C. § 1327.57, A.C. 901:6-3-03). Weights and measures must be in the metric or inch-pound system (A.C. 901:6-3-06). However, the basic requirements are just the start. The law carefully lays out the size of the font, location of the weight or measure statement, and placement of the label (A.C. 901:6-3-08). Before investing in any label production, a direct farm business should read Ohio Admin. Code Chapter 901:6-3: Weights and Measures,⁷⁰ call the ODA Weights and Measures Division, and contact the local health inspector (who will require any farm processors to submit a label sample before conducting inspections as described in Chapter 8 Fruits and Vegetables.)

Anyone using a scale to determine the final quantity and cost of a transaction must have a weights and measures seal. Farmers should call their county or city auditor's office for more information on local inspections and fees for scale seals.

⁷⁰ <http://codes.ohio.gov/oac/901%3A6-3>

V. CHECKLIST

Have you...

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

VI. 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

Ohio Secretary of State Office (trademarks and trade names)

Ph: (614) 466-2655

Ohio Department of Agriculture, Weights and Measures

Ph: (614) 728-6290

CHAPTER 4: TAXATION

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

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

I. REGISTRATION REQUIREMENTS

A. *Federal*

A direct farm business may need to obtain a federal employer identification number (an EIN) to identify the business entity with the federal Internal Revenue Service (IRS). Banks may also require an EIN to open an account. An EIN is available by phone or at the IRS website, is free of charge, and is provided in about 24 hours.⁷¹ If the answer to any of the following questions is yes,⁷² the operation needs an EIN:

- Does the business have employees?
- Is the business operated as a corporation or a partnership?
- Is the business involved with any of the following types of organizations?
 - Trusts, except certain grantor-owned revocable trusts, IRAs, Exempt Organization Business Income Tax Returns
 - Estates
 - Real estate mortgage investment conduits
 - Non-profit organizations
 - Farmers' cooperatives

⁷¹ www.irs.gov/Businesses/Small-Businesses-&Self-Employed/How-to-Apply-for-an-EIN

⁷² These questions are also on the IRS's website:

www.irs.gov/businesses/small/article/0,,id=97872,00.html

B. Ohio Registration Requirements

Ohio does not have a state equivalent of the FEIN- a number that needs to be received before doing business. Instead, a farm business will need to open tax accounts with the state of Ohio if the business hires individuals or sells taxable products. The state of Ohio has made it quite easy to open the necessary tax accounts through Ohio Business Gateway.⁷³ By opening an account with Ohio Business Gateway, an individual will be able to easily open the necessary accounts and make tax filings as described below.

Ohio's Department of Taxation (DOT) requires that businesses with annual gross receipts of \$150,000 or more pay the Commercial Activities Tax (CAT). Taxpayers register by submitting the CAT 1 registration form. The CAT 1 registration form is available through the DOT's website,⁷⁴ or by registering with Ohio Business Gateway online (those without internet access may call 1-800-282-1782). Electronic registration has a \$15 fee and a paper application carries a \$20 fee, which can be applied towards the first return.

If the farm business plans to make taxable retail sales, the business must carry a vendor's license and remit sales tax. Taxable retail sales are sales of tangible personal property, which means a physical good that is not real estate. However, Ohio exempts the sale of food for human consumption off-premises from sales taxes (R.C. § 5739.02(B); A.C. 5703-9-02(B)(2)). However, if a farm business also sells crafts, soap, or other associated items, the farm will need to collect sales tax. Current sales tax rates at state, county, and municipal levels are searchable for all addresses in Ohio through DOT.⁷⁵ Ohio also requires a vendor's license from businesses engaged in taxable retail sales. Apply to receive a vendor's license through Ohio Business Gateway or by contacting the local county auditor, a list of which is available online through the County Auditors' Association of Ohio.⁷⁶ The license is available for \$25.

Businesses that have employees must register with DOT to create a wage withholding account. The money withheld from employee's paychecks for the purposes of Ohio income tax are then deposited into this account. A wage withholding account can be opened by filing Form IT-1 or through Ohio Business Gateway. Accounts can be opened by telephone at (888) 405-4089; press 2 to speak with an agent.

The different tax permits and obligations are discussed in each section below.

⁷³ www.business.ohio.gov

⁷⁴ www.tax.ohio.gov/commercial_activities.aspx

⁷⁵ <https://thefinder.tax.ohio.gov/StreamlineSalesTaxWeb/Default.aspx>

⁷⁶ www.caao.org/DIRECTORY/

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**.⁷⁷ The guide covers tax issues specific to farming, including records, accounting methods, income and expenses, expenses associated with soil and water conservation, asset basis, depreciation/depletion/amortization, gains and losses, disposition of property, installment sales, casualties/theft/condemnation, self-employment tax, employment tax, excise tax, estimated taxes, filing a return, and where to get help. In addition, the website **www.ruraltax.org** covers a wide range of tax issues relevant to farmers and direct farm businesses, including who is a "farmer" for tax purposes, filing dates and estimated tax payments, self-employment taxes, and others. Finally, the **Tax Guide for Owners and Operators of Small and Medium Sized Farms** by Phillip Harris and Linda Curry is an excellent resource for smaller farm operations.

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**.⁷⁸

Sole Proprietorships

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

⁷⁷ www.irs.gov/pub/irs-pdf/p225.pdf

⁷⁸ www.irs.gov/businesses/small/article/0,,id=154770,00.html

Partnerships

Partnerships file Form 1065 to report earnings, but the partnership itself does not pay income tax. Rather, the tax liability “passes through,” meaning that each partner pays taxes on her share of the partnership’s earnings as part of her personal income taxes. Accordingly, a partner who owns a 70% share in the business would pay taxes on 70% of the partnership’s profit. Each partner must pay taxes on their share of partnership’s earnings, even if no distribution is made. For instance, if the partnership reinvests all of the profit in expanding the business, partners would still pay taxes on their share of the undistributed profit. Similarly, partnership losses pass through to individuals and are deductible by the individual up to the partner's basis⁷⁹ in the partnership.

ADDITIONAL RESOURCES: Federal Taxation

Partnerships

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

www.irs.gov/pub/irs-pdf/p541.pdf

Corporations

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

www.irs.gov/pub/irs-pdf/p542.pdf

Investment Income

Taxation of investment income is covered in IRS Publication 550.

www.irs.gov/pub/irs-pdf/p550.pdf

Limited Liability Companies (LLC)

An LLC is a unique business entity in that, although the entity is registered with the state, an LLC is not a taxable entity itself. Instead, the owners (who are called “members”) must choose whether to be taxed as a sole proprietorship/partnership, or corporation. If the LLC has one owner, the IRS automatically will treat the LLC as a sole proprietorship unless the LLC elects treatment as an S corporation. Similarly, if the LLC has two or more owners, the IRS automatically will treat the LLC as a partnership unless it elects otherwise. The LLC may elect S corporate taxation status using Form 8832. Sole proprietorships or partnerships do not have to file Form 8832 unless they wish to be treated as an S corporation.

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

treatment file a corporate return (1120 or 1120S).

S Corporations

For the purposes of forming a business at the state level, a corporation is one option. However, at tax time, all corporations can choose whether to make an “S election” or a “C election.” For

⁷⁹ Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

convenience, business owners often refer to their operation as an *S* Corporation or a *C* Corporation. However, it is important to note that both are corporations at the state level and the distinction is made only for tax filing purposes. Only corporations meeting certain requirements are allowed to make an *S* election.

S corporations, except in limited circumstances, do not pay taxes at the business level, as is the case with sole proprietorships and partnerships. Instead, earnings and losses pass through to the shareholders, who pay taxes on these earnings based on their individual income level. The earnings are allocated on a per share, per day basis, with shareholders liable for taxes on these earnings even if there is no cash distribution. This is the same situation as with a partnership. For instance, if the business reinvests all of the profit in expanding the business, shareholders would still pay taxes on their share of the undistributed profit. An *S* corporation reports earnings and losses on Form 1120S.

C Corporations

Unlike the pass through entities (partnerships, sole proprietorships, *S* Corporations, and LLCs) the corporate entity must pay taxes as an entity itself before passing the profits back to shareholders. Generally, the corporation must make estimated tax payments throughout the year using form 1120-W. At the end of the year it makes a final calculation and reports its taxes using Form 1120. As noted in the introduction, shareholders must pay taxes on the corporate profits distributed to shareholders.⁸⁰ Corporations may distribute profits in several ways, such as dividend payments, increased stock ownership, changes in types of stock, etc. The IRS considers all of these distributions as taxable income. Of course, if shareholders work for the corporation, a common situation in small corporations, the shareholder also pays individual income taxes on their income.

Cooperatives

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative typically is not taxed as any earnings pass through to individual patrons of the cooperative. The cooperative reports profits on Form 1120-C and patrons report income on form 1099-patr. For a primer on the federal taxation of cooperatives, the USDA Rural Development maintains a **website**⁸¹ that contains many publications related to the taxation of cooperatives, including *Cooperative Information Report 23*, *The Tax Treatment of Cooperatives*, published by the USDA Rural Development program. *IRS Publication 225: Farm Income* also touches on cooperative reporting of taxes.

⁸⁰ Because the corporation also pays taxes on that profit as the business itself, this situation is often referred to as “double taxation.” The profit is taxed once at the corporate level and second at the shareholder level.

⁸¹ www.rurdev.usda.gov/rbs/pub/legal.htm

B. State Taxation of Business Income

Commercial Activities Tax

As discussed above, Ohio businesses with annual gross receipts of \$150,000 or more pay the Commercial Activities Tax (CAT) (R.C. § 5751.01(E)(1)). This tax applies to all types of businesses and most types of receipts--the sales of products, properties, and services-- are included in the \$150,000 threshold calculation (R.C. § 5751.01(F)(1)). However, if the product or service is sold to out-of-state purchasers, those receipts are not subject to the CAT. Those that sell or rent any type of property in Ohio must also pay the CAT. For businesses with less than \$1 million in gross revenue, the minimum of \$150 must be remitted annually (R.C. § 5751.03(B)). Before May 10 of the following year, businesses must submit the CAT Tax Annual Return and Minimum Tax Payment Return. Both may be filed electronically through Ohio Business Gateway.

Pass-Through Entity Investment Reporting

As discussed in the federal taxation of business entities section, pass-through entities are not taxed as a business; instead, the individual who owns the business reports the profit on his or her individual income. The federal government requires that a pass-through entity file an additional form with the individual return. The state of Ohio requires additional forms from out-of-state investors. If a direct farm business has such an investment relationship, they will need to investigate Form IT 1140 and IT 4708 to report that income. More information is available at the DOT website.⁸²

III. INCOME, EMPLOYEE AND SELF EMPLOYMENT TAXES

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

A. Federal Employee-Related Taxes

Overview

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

⁸² www.tax.ohio.gov/pass_through_entities.aspx

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.

Social Security and Medicare Taxes

Social Security and Medicare taxes pay for employees' benefits upon retirement. These taxes are known collectively as Federal Insurance Contributions Act taxes, or "FICA" taxes. An employer is responsible both to withhold an employee's own FICA contribution from wages and to pay the business' share of FICA for the employee. Agricultural employers have a very narrow exemption from FICA taxes. If the farm pays any individual less than \$150 in wages in a year, then the farm does not need to withhold or contribute for FICA taxes. However, if the farm pays a total of \$2,500 or more to all workers in sum, then the farm must withhold and contribute to FICA for every employee, even those receiving less than \$150 in wages.⁸³

Social Security and Medicare taxes have different rates, and the Social Security Tax has a wage base cap--a maximum limit on the wages subject to the Social Security tax. The employee pays the tax from his/her wages, and the employer makes a matching payment. Form 943 is used to file income taxes and FICA taxes withheld for farm workers. Employers deposit these taxes on a weekly or monthly basis, depending on the total taxes reported for a two-year lookback period (e.g., the lookback period for 2012 extends to 2010).

Unemployment Insurance Taxes

The Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.) governs whether agricultural operations must pay an unemployment insurance tax on cash wages paid to employees and are known as "FUTA" taxes. An agricultural operation is considered an employer subject to the federal unemployment tax if: during any calendar quarter in the calendar year or preceding calendar year the operation (a) paid wages of \$20,000 or more for agricultural labor, or (b) the farmer employs 10 or more individual employees for some portion of a day during each of 20 different calendar weeks (26 U.S.C. § 3306(c)(5)). The federal tax is paid using Form 940, with deposits generally required quarterly. The federal tax is paid using Form 940, with deposits generally required quarterly. FUTA tax rates have been around 6% but change frequently, and a

⁸³ Internal Revenue Services, Publication 51, Agricultural Employer's Tax Guide at Section 4.

credit is often available for paying state unemployment taxes. *Publication 51: Agricultural Employer's Tax Guide* describes federal unemployment taxes.

More information

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

B. Ohio Employee-Related Taxes

Withholding Taxes from Wages

Although Ohio requires employers to withhold Ohio income tax from almost every other employer, agricultural employers (within the definition of 29 U.S.C. 3121, Section g) are not required to withhold taxes from wages for their employees⁸⁴ (R.C. § 5747.06). Local Ohio municipalities may have an income tax, and business owners should contact local municipalities for withholding information. The Ohio Business Gateway will assist business owners in determining if their location is subject to a municipal tax and how to file that tax. The DOT also has more information and a municipal tax database by address at their website.⁸⁵

Unemployment Compensation

Ohio's unemployment compensation law follows the federal law's agricultural exemption (i.e., during any calendar quarter in the calendar year or preceding calendar year the operation (a) paid wages of \$20,000 or more for agricultural labor, or (b) the farmer employs 10 or more individual employees for some portion of a day during each of 20 different calendar weeks (26 U.S.C. § 3306(c)(5)). Farms meeting this requirement need not contribute to Ohio's unemployment compensation fund (R.C. § 4141.01(3)).

However, if an employer paid \$20,000 or more in wages in a calendar quarter OR had at least 10 individuals employed in agricultural labor for some portion of a day in each of 20 different weeks in the current or preceding calendar year, then that employer must contribute to

⁸⁴ The DOT has published a flowchart to help employers understand the exemptions of R.C. § 5747.06 at www.tax.ohio.gov/portals/0/communications/information_releases/it200101_flowchart.pdf.

⁸⁵ www.tax.ohio.gov/municipalities.aspx

unemployment (R.C. § 4141.01(A)(1)(d)). Farm businesses in this category must register for an unemployment compensation tax account number and then submit a quarterly tax return with their contribution. The tax rate varies by year and according to how long the employer has been in business. Current tax rates are listed at the Ohio Department of Job and Family Services website.⁸⁶

More information

More comprehensive information on Ohio employment-related taxes can be found at the Ohio Department of Taxation's webpage on Employer Withholding.⁸⁷

C. Farmers Who Are Self-Employed

Many farmers are self-employed. The self-employment tax is a Social Security and Medicare tax paid by persons who work for themselves. Farmers carrying on the direct farm business as a sole proprietor or member of a partnership, or who are otherwise in business for themselves, are "self-employed" and must pay self-employment tax if their earnings are \$400 or more. Self-employment tax rates change annually, and farmers should consult the latest IRS bulletin on the subject.⁸⁸ 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*⁸⁹ provides additional details regarding the self-employment tax rules.



IV. SALES AND SERVICES TAXES

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

⁸⁶ <http://jfs.ohio.gov/ouc/uctax/rates.stm>

⁸⁷ www.tax.ohio.gov/employer_withholding.aspx

⁸⁸ [http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Self-Employment-Tax-\(Social-Security-and-Medicare-Taxes\)](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Self-Employment-Tax-(Social-Security-and-Medicare-Taxes))

⁸⁹ Available online at www.irs.gov/pub/irs-pdf/p225.pdf

A. Sales Tax on Farm Sales

Each person with a fixed place of business in Ohio who intends to make taxable sales to customers must have a vendor's license (R.C. § 5739.17(A)). Farms may apply to receive a vendor's license through Ohio Business Gateway or by contacting the local county auditor, a list of which is available online through the County Auditors' Association of Ohio.⁹⁰ The license is available for \$25.

However, before applying for the vendor's license, a farm needs to determine if it will make taxable sales. When it comes to the usual direct farm business sales of raw or value-added products to regular customers, the sale may be exempt because food sold for human consumption off the premises is not taxable (R.C. § 5739.02(B)(2), A.C. 5703-9-02(B)(2)). Food includes many items including concentrated, frozen, dried, or dehydrated food products sold for ingestion or chewing, but it does not include alcoholic beverages, dietary supplements, soft drinks or tobacco.⁹¹ Wholesale sales are also not subject to sales tax (R.C. § 5739.17).

For farms that process value-added items or sell food for consumption on their premises, sales tax may apply. In that case, the farm must open a sales tax account and remit those taxes, which is done on form UST-1 and submitted entirely online through Ohio Business Gateway. The current (Spring 2013) state tax rate is 5.5%.⁹² Local governments (counties and regional transit authorities) may charge additional taxes on sales in multiples of .25%, up to 3%, for a combined total sales tax limit of 8.5%. Farm businesses should assess their total sales tax responsibility based on their location. The DOT provides a searchable database for this purpose on their website. Businesses may receive a discount of .75 of 1% if they return form UST-1 on or before the due date, which is the 23rd day of the following month.

B. Sales Tax on Farm Purchases

Many items that a direct farm business may purchase to run the farm may be exempt from sales tax. Under Ohio law, sales to persons engaged in farming or agriculture of tangible personal property for use in farming and agriculture are exempt from sales tax (R.C. § 5739.02(B)(17)). The item must have been purchased for use directly in the production of an agricultural product for sale. In an attempt to clarify this broad exemption to sales tax, the Ohio Department of Taxation notes on their website some of these tax-exempt items include: seeds, fertilizers, insecticides, pesticides, field tiles, tractors, plows, and combines.⁹³ In addition, equipment used in the preparation of eggs for sale or portable grain bins are not taxable (R.C. § 5739.02(B)(24) and (31)). To claim a farm business exemption from sales tax, a farm needs to offer an

⁹⁰ www.caaohio.org/DIRECTORY/

⁹¹ Ohio Department of Taxation, Information Release ST 2004-1: Food Definition. www.tax.ohio.gov/portals/0/sales_and_use/information_releases/st200401.pdf

⁹² www.tax.ohio.gov/sales_and_use/faqs/sales_basics.aspx

⁹³ <http://www.tax.ohio.gov/faq/tabid/6315/Default.aspx?QuestionID=452&AFMID=11354>

exemption certificate to the supplier. This form is available from the DOT by searching for forms relating to the sales use tax at their website.⁹⁴

C. Fuel Use Taxes

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

Federal Fuel Excise Taxes

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

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

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

⁹⁴ www.tax.ohio.gov/forms.aspx

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.

Ohio Fuel Excise Taxes

Ohio law taxes fuel for use in motor vehicles on highways and waterways. If an individual did not use the fuel for that purpose, for example, the fuel was used to operate a tractor on a field, the individual may request a refund of the tax paid (R.C. § 5745.14(A)). Currently (Spring 2013), the Ohio motor fuel tax rate is \$0.28 per gallon.⁹⁵ Taxpayers may request the refund using the Motor Fuel Refund Permit Application available at DOT's website.⁹⁶ A refund may not be requested for less than 100 gallons of fuel used, and the farm business maintain accurate records reflecting the fuel's purchase and usage to claim this refund (R.C. § 5745.14(C)).

V. PROPERTY TAXES

A. Current Agricultural Use Value

Direct farm businesses must pay local property taxes each year on real property owned by the business. Ohio, like other states, assesses property tax based on the fair market value of the property (R.C. § 5713.03). However, farmland has a different assessment formula based on the land's value for agricultural use, which is called the Current Agricultural Use Value (CAUV) program (R.C. § 5713.31). Where homeowners typically pay a tax assessment around 35% of the fair market value, the CAUV typically cuts a farmer's property tax assessment down to 25%, with an even lower percentage when crop values are low.⁹⁷ Computation of the CAUV value is complex and handled in three steps: 1) calculate the land's projected gross income from agricultural production, then 2) subtract projected non-land production costs to calculate the farm's net income, and 3) divide net income by an adjusted capitalization rate.

To determine the farm's projected gross income, the assessor must take into account the farm's soil types, average yields per acre, and average crop prices received. Production costs such as seed, fertilizer, fuel, shipping and other costs are compiled to determine net income. These costs, along with the capitalization rate, are determined by Ohio DOT and are unappealable,

⁹⁵ www.tax.ohio.gov/excise/faqs/motor_fuel.aspx

⁹⁶ www.tax.ohio.gov/portals/0/forms/excise/motor_fuel/MVF_MVF31_FI.pdf

⁹⁷ www.dispatch.com/content/stories/local/2011/09/03/farntaxesto-jump-but-still-heckofadeal.html

unlike a home or business valuation. Ohio DOT publishes the annual CAUV for each soil type and the methodology behind their calculation for the previous three years on their website.⁹⁸

In order to qualify for CAUV, the farm must first meet these three conditions: 1) the land must be devoted exclusively to agricultural use for three years prior 2) the parcel must equal 10 acres or more *or*, produce (or be anticipated to produce) a yearly gross income of at least \$2500 (R.C. § 5713.30(A)). To determine if criterion 1 is met, a person must understand how “agricultural use” is defined. Ohio Revised Code, Section 5713.30 defines agricultural use as, “commercial animal or poultry husbandry, aquaculture, algaculture meaning the farming of algae, apiculture, the production for a commercial purpose of timber, field crops, tobacco, fruits, vegetables, nursery stock, ornamental trees, sod, or flowers, or the growth of timber for a noncommercial purpose, if the land on which the timber is grown is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use.” Also, agricultural land may lay fallow for up to one year (R.C. § 5713.30(A)(4)). If the land is converted to non-agricultural use, the landowner must pay back tax savings received from CAUV for the immediately preceding three years (R.C. § 5713.34).

To take advantage of the CAUV program, a farm owner must apply with the county auditor using Form DTE-109 between the first of January and the first Monday in March. The application carries an initial \$25 filing fee and must be renewed each year (R.C. § 5713.31).

B. Agricultural Security Areas

The Ohio Agricultural Security Area (ASA) program is a framework for interested communities to preserve the agricultural capacity of the area (R.C. § 931.01 et seq.). The ASA program is administered through a cooperative agreement between landowners, county commissioners, and township trustees to prohibit non-agricultural development for 10 years (R.C. § 931.02). Getting an agreement in place between these parties can be a difficult process because public hearings and multiple resolutions must be secured. If the community does succeed in establishing an ASA, then no new roads, sewers, or water lines may be built in the area. Also, landowners may receive up to a 75% exemption on their property taxes for improvements made. The ASA may also decrease property taxes through the CAUV assessment.

To be considered for an ASA, the proposed area must consist of at least 500 contiguous acres of farmland in an unincorporated area, enrolled in an agricultural district and in the CAUV program. No applicants may have violated environmental laws within the prior ten years and all farming must be in accordance with Natural Resource Conservation Service or Soil and

⁹⁸ www.tax.ohio.gov/real_property/cauv.aspx

Water Conservation District best practices (R.C. § 931.02). Application materials and a list of current ASAs are maintained on the Ohio Department of Agriculture website.⁹⁹

⁹⁹ www.agri.ohio.gov/divs/FarmLand/Farm_ASA.aspx

VI. CHECKLIST

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Opened the necessary tax accounts 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?
 - State and local sales taxes?
 - Fuel excise tax reimbursements and credits?
- Looked up your land's assessed value and calculated your current property taxes and how changed land uses could alter the tax value? Considered applying for CAUV or ASA programs?

VII. KEY CONTACT INFORMATION

U.S. Internal Revenue Service (general help)

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

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

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

Ohio Department of Taxation

General Business Questions: (888) 405-4039

General CAT Questions: (888) 722-8829

Email: DirectorOfRevenue@wyo.gov

Ohio Department of Agriculture, Office of Farmland Preservation

Ph: (614) 728-6210

Email: farmlandpres@agri.ohio.gov

CHAPTER 5: LABOR AND EMPLOYMENT

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

Readers should keep in mind that federal and state laws may differ in terms of their minimum wage rates, exceptions for agriculture from employment laws, and rules on child labor. A farm operation must comply with the strictest regulation, whether it is the state or the federal rule. Also, if a farm operation is exempt from one employment regulation, such as minimum wage, that does not mean the farm operation is also exempt from other employment laws. Additionally, what may be classified as “employment” in one context may be volunteerism in another context. Lastly, farmers are cautioned from assuming that any exception available from employment regulations applies to all aspects of the farming business. To the contrary, some employment law exceptions apply only to the type of labor being performed. A single employee may be exempt from employment laws while performing one task and not exempt while performing another.

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

I. MINIMUM WAGE AND OVERTIME

A. Federal: The Fair Labor Standards Act

The federal Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) mandates a minimum wage, establishes maximum hours worked per week (40 hours) over which amount employees must be paid time and a half, prohibits employment discrimination, and regulates child labor (29 U.S.C. §§ 206; 207; 208; 212, respectively).

Minimum wage is one aspect of the FLSA. Currently, the federal minimum wage is \$7.25 per hour, although where Ohio minimum wage is required and is higher than the federal wage, the

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

To be exempt from minimum wage, an employee must perform agricultural labor. Agricultural labor is "farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities. . . the raising of livestock, bees, fur-bearing animals, or poultry, or any practices (including forestry or lumbering operations) performed by a farmer or on a farm *as incident to or in conjunction with* such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" (29 U.S.C. § 203(f), emphasis added). Obviously, this definition is complex and must be broken down for further analysis.

Agricultural labor breaks down into two branches: primary agriculture and secondary agriculture (29 C.F.R. § 780.105). The primary definition includes farming in all its branches and the specific farming operations enumerated in the definition above (*id.*). These activities always qualify for the agricultural exemption, regardless of the employer's purpose in performing the activities (for instance, a factory owner operates a farm for experimental purposes for the factory) (29 C.F.R. § 780.106).

The secondary meaning of "agriculture," encompasses operations that do not fall within the primary meaning of the term, requires that work be " ... performed by a farmer or on a farm as an incident to or in conjunction with such [primary agriculture] farming operations ..." (*id.*). Analysis of whether the work is performed "by a farmer" (29 C.F.R. §§ 780.130-780.133) or "on a farm" (29 C.F.R. §§ 780.134-136) and is "incidental to or in conjunction with" the primary agricultural farming operations (29 C.F.R. §§780.137-780.157) is complex and highly fact specific. If employees are doing work off the farm (including sales at a farmers market stand), performing work on another farmer's products, or doing any processing or value-added operations, the employer should consult an attorney or contact the local U.S. Department of Labor's Wages & Hours division before relying on the agriculture exemption to the FLSA. Contact information is available on the Department of Labor **website**.¹⁰⁰ For more general information, the U.S. Department of Labor maintains an agriculturally oriented **compliance webpage**.¹⁰¹

¹⁰⁰ www.dol.gov/whd/america2.htm#Ohio

¹⁰¹ www.dol.gov/compliance/topics/wages-agricultural.htm

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

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

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

The small farm agricultural labor exemption only applies to federal minimum wage- state minimum wage may still apply, as discussed below. In addition to the exemption for employees performing agricultural labor for a small farm, the following situations are also exempt from the FLSA’s minimum wage requirements (29 U.S.C. § 213(a)):

- The employee is an immediate family member;
- The employee is a hand laborer paid on a piece-rate basis who commutes from his/her home each day and was not employed in agriculture more than 13 weeks in the preceding year;
- The employee is a family member under the age of 16 working on the same farm as the parent or surrogate parent who is paid on a piece-rate basis and is paid at the same rate as those over 16; or

- The employee is principally engaged in the production of range livestock.

II. OHIO: MINIMUM WAGE AND OVERTIME

All Ohio employers of agricultural labor must pay Ohio minimum wage, but they are not required to pay overtime. The details behind this summary are somewhat complex. According to the Ohio Constitution, Ohio's minimum wage must be adjusted annually for inflation (Ohio Constitution, Section 34a). As of 2013, Ohio minimum wage is set at \$7.85 per hour,¹⁰² which is higher than the federal rate of \$7.25 per hour. Generally, if an employer is required to pay both the federal and state minimum wages, the higher rate applies. Ohio does not exempt small farms with agricultural laborers from minimum wage (unlike the federal FLSA)¹⁰³ and so agricultural employers must pay \$7.85 per hour in 2013.

Ohio's overtime law is the same as federal law: agricultural employees are not owed overtime. Farm employers must make sure that employee tasks fit the definition of agricultural labor, described above if they wish to avoid paying overtime. For both Ohio minimum wage and overtime rules, if non-agricultural labor is performed, all hours in that workweek are no longer eligible for the exception (R.C. § 4111.14(B)(1) (regarding minimum wage); R.C. § 411.03 (regarding overtime)). Further, the employer cannot make an agreement with him or her to pay less than the minimum wage (R.C. § 4111.13(C)).

Ohio employers are required to keep the following records for three years, and farm employers are not excluded (R.C. § 4111.08).

- The name, address, and occupation of each employee
- The rate of pay and amount paid each pay period to employees
- The hours worked each day and each work week by each employee

¹⁰² Ohio Department of Commerce News Release, "Ohio Minimum Wage Set To Increase on January 1, 2013."

¹⁰³ The exact nature of this exclusion is somewhat complicated. Ohio's Fair Minimum Wage Law covers employees broadly and does not exclude agricultural operations. In 2006, Ohio voters passed an amendment to the Ohio Constitution, Article 2, Section 34a that raised the minimum wage and tied annual adjustments of the minimum wage rate to inflation. However, in implementing the amendment, the Ohio legislature passed a bill that created a different definition of "employee" in Section 4111.14 of the Ohio Revised Code than the Fair Minimum Wage Law had previously provided. This definition adopted exclusions and exceptions under federal law, specifically Section 203(e) and 213 of the FLSA, which remove small farms from federal minimum wage regulations. By appearances, the implementation of the constitutional amendment conflicted with the constitutional amendment because the Constitution explicitly states that only the exemptions stated therein apply. Where the Revised Code and Constitution conflict, the Ohio Constitution controls and thus, the exclusions to the federal FLSA are not also adopted into Ohio's minimum wage law. The Bureau Chief of the Ohio Department of Commerce, Wage and Hour Division has confirmed this interpretation as of Spring 2013.

The Ohio Department of Commerce (ODC) is responsible for enforcing Ohio's minimum wage law, and ODC may enter any place of employment to inspect records that relate in any way to wages paid or hours worked, and to question employees (R.C. § 4111.04(B)). If an employee makes a complaint that he or she has not been paid wages owed to the employee, the employer may not fire or discriminate against that employee for that reason (R.C. § 4111.13(B)).

III. CHILD LABOR LAWS

A. Federal

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

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

B. Ohio Child Labor Regulations

Ohio's child labor laws do not apply to minors in agricultural employment in connection with farms operated by their parents or grandparents (R.C. § 4109.06(10)). However, for direct farm businesses employing children not their own, these laws are important. Also, the regulations below apply to non-agricultural employment, which may include off-farm activities such as selling at a farmers' market, or doing value added processing on the farm. Minors as young as 14 are allowed to work. However, the employer must receive a work permit from the minor's school to employ the minor during the school year (R.C. § 4109.02). Although an employment agreement is not required for adults, it is for minors and it



must specify the agreed remuneration (R.C. § 4109.10). Minors working longer than 5 hours must receive a 30-minute meal break as well. Detailed restrictions apply to start and end times of day for minors and the rules vary depending on whether the minor is under 16 or between 16 and 17 years old (R.C. § 4109.07). Further information is available on the DOC's website.¹⁰⁴

Ohio has its own list of hazardous occupations in agriculture that children under the age of 16 may not be employed at, except when in connection with farms operated by the child's parents or grandparents (A.C. 4101:9-2-03). The categories are similar to the federal restrictions and farmers are encouraged to consult both lists before assigning youths under the age of 16 to farm tasks. Parents with a farm business that includes nonagricultural operations such as value-added processing or off-farm sales should be cautious of the hazardous occupation rules applying to minors. For example, minors under 16 years of age are not allowed to work at poultry processing, operating power-driven machinery, cooking, operating cooling equipment, preparing meats for sale, loading or unloading goods or in warehouses (R.C. § 4101:9-2-02) regardless of whether the operation is owned by the minor's parent (R.C. § 4109.06(5)).

IV. WORKER HEALTH AND SAFETY

A. Occupational Safety and Health Act

The federal Occupational Safety and Health Act (the "Act") (29 U.S.C. Chapter 15) and implementing regulations (29 C.F.R. Parts 1900-2009) establish safety and health standards for employees of private businesses.¹⁰⁵ The Act does not cover self-employed persons or farms that employ only the farmer's immediate relatives. The funding appropriations bill for 2012 (as well as appropriations bills for the past 33 years) prohibits the Occupational Safety and Health Administration (OSHA) from spending any funds on enforcement against farms that have fewer than ten employees and have not had a *temporary labor camp* in the previous 12 months (OSHA Directive CPL 02-00-051). Any housing provided for seasonal farm employees is considered to be a temporary labor camp, which means that a farm providing housing to an intern or a single seasonal employee does not meet this exception. Although the Act technically applies to small farms, there is nothing OSHA can do if a small farmer without employee housing fails to comply with the rules.

29 C.F.R. Part 1928 lists most of the OSHA regulations for farms. The regulations require rollover protective structures for tractors, protective frames and enclosures for wheel-type agricultural tractors, safety mechanisms for farming equipment and provision of bathrooms and hand washing facilities for field sanitation (29 C.F.R. §§ 1928.51, 1928.52-.53,

¹⁰⁴ www.com.ohio.gov/laws/QuickRefGuideEmpMinors.aspx

¹⁰⁵ Ohio has passed a state law similar to the Act at Ohio Administrative Code, Chapter 4167 which is designed to cover public employees and does not affect agricultural operations.

1928.57, and 1928.110, respectively). Part 1928 incorporates some regulations from Part 1910, including requiring that employers communicate information to employees on hazardous chemicals, retain DOT markings, placards and labels, store and handle anhydrous ammonia safely, adhere to safety standards in logging operations, attach a “slow moving vehicle” sign on any equipment that travels at less than 25 miles per hour on public roads, and institute monitoring of and controls for employee’s exposure to cadmium (29 C.F.R. §§ 1910.1200, 1910.1201, 1910.111(a)&(b), 1910.266, 1910.145, and 1910.1027, respectively) This section also establishes minimum plumbing, sewage, laundry, trash, and first aid standards for any housing provided to seasonal farm workers. 29 C.F.R. § 1910.142. *Agricultural operations are exempt from all the other provisions of Part 1910, which establish general operational safety standards* (29 C.F.R. § 1928.21(b)).

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

B. Toxic Substances Disclosure to Employees

Federal OSHA regulations on hazardous communication impose disclosure requirements on employers (29 C.F.R. § 1910.1200). Employers must maintain information on how to handle and detect dangerous chemicals in the workplace, as well as provide training and information to employees.

C. Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. Chapter 6) requires the U.S. Environmental Protection Agency to regulate the production and use of farm chemicals. Pursuant to FIFRA, the EPA has promulgated a Worker Protection Standard (WPS)

for agricultural pesticides. In Ohio, the Department of Agriculture administers and enforces the federal FIFRA law. The standard requires employers to provide safety training and access to information on pesticides used on the farm. Employers must protect workers from exposure during pesticide mixing and application, as well as notify workers and restrict entry to sites after application. Finally, employers must provide adequate soap and water for clean up, and emergency assistance if a worker is injured by a pesticide. The EPA has provided a **WPS compliance manual**¹⁰⁶ for employers on its website.

V. MIGRANT AND SEASONAL WORKERS

A. *The Migrant and Seasonal Agricultural Worker Protection Act*

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (29 U.S.C. Chapter 20) and its regulations (29 C.F.R. Part 500) establish standards for the employment of migrant and seasonal agricultural workers. It also requires employers to make certain disclosures and maintain employment records. Under the MSPA, a “seasonal agricultural worker” is one who is employed in agricultural employment of a seasonal nature and who performs fieldwork such as harvesting or planting (as opposed to processing or packing) on a farm or ranch. Despite the title of the MSPA, **this law applies to most agricultural workers and not just workers who migrate.**

Hiring

Some direct farm businesses use a Farm Labor Contractor (an “FLC”) to obtain migrant or seasonal workers. FLCs recruit, pay, and transport workers to the needed locations. In return, the direct farm business pays the FLC a fee. FLCs must register and obtain a certificate with the United States Department of Labor pursuant to the MSPA (29 C.F.R. §§ 500.1, 500.40). An employee of a registered FLC must obtain a Farm Labor Contractor Employee Certificate of Registration (29 C.F.R. § 500.40). The direct farm business should ensure that it deals only with a registered FLC. The United States Department of Labor maintains a **list of MSPA Ineligible Contractors**¹⁰⁷ that should be checked before doing business with any FLCs.

If the owners or employees of a direct farm business recruit their own workers instead of contracting with an FLC, the business need not register as a farm labor contractor if it qualifies as a family or small business (29 C.F.R. § 500.30). Entities qualify for the family business exception if the owner of the farm or immediate family member does the labor contracting (29 C.F.R. § 500.20(a)). If the operation used less than 500 man days of seasonal or migrant labor during every quarter of the preceding year, it qualifies for the small business exception (29

¹⁰⁶ www.epa.gov/oecaagct/htc.html

¹⁰⁷ www.dol.gov/whd/regs/statutes/mspa_debar.htm#.UJPOjVE2f3A

C.F.R. § 500.30(b)). The regulation defines a “man day” as any day in which an employee performs agricultural labor for at least one hour.

Wages

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

Disclosures

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

Information must be provided to the worker in English and in the worker's native language, with translation expenses being born by the employer (29 U.S.C. § 1821(g); 29 C.F.R. § 500.78).

Providing Housing or Transportation

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

Recordkeeping

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

Prohibitions

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

VI. H-2A VISAS

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

The Department of Labor maintains a **website**¹⁰⁸ that provides step-by-step instructions on how the H-2A program works, including links to forms.

VII. UNPAID EMPLOYEES: INTERN AND STUDENT WORKER PROGRAMS

For many small farms, hiring unpaid interns is a common practice. The farm benefits by receiving much needed labor, and the intern benefits by receiving valuable mentoring and experience. However, if the intern is doing work on the farm that contributes to the farm's profitability, the intern is likely an employee and employment law applies. The federal Department of Labor provides a fact sheet that lists 6 criteria to determine if an internship program is exempt from the federal FLSA because the intern is not an employee. These criteria are as follows:

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

¹⁰⁸ www.foreignlaborcert.doleta.gov/h-2a.cfm

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Most farms will not meet the DOL's six criteria and as such, the farm business must take care to comply with the FLSA. Ohio does not exempt agricultural workers and the DOL's six criteria will be persuasive to an Ohio court. Internship issues are addressed in extensive detail in a publication by Farmers' Legal Action Group called **Farmers' Guide to Internships**. The resource is available for purchase or download.¹⁰⁹

Even if the farm has an exception from minimum wage, farms are still required to keep the records required including hours worked, jobs performed, and more as listed under Section VII(B) of this chapter. This information is also important if a disgruntled intern complains to the Department of Labor. If the farm becomes the subject of an investigation, it is important to have a paper trail documenting the farm's compliance with the laws. Even if an internship is exempt from the minimum wage requirements, the farm is not exempt from complying with the other employment laws: for instance, OSHA, FIFRA, and MSPA may still apply. Workers' compensation is also required if even one intern works on the farm, whether paid or unpaid. Farms employing paid and unpaid employees must count the unpaid employees' man-days in calculating the next year's 500 man-day minimum wage exemption.

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. In addition, this exception is irrelevant for Ohio farms that must pay state minimum wage regardless.

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* –

¹⁰⁹ <http://www.flaginc.org/publication/farmers-guide-to-farm-internships/>

Practical Approaches to Teaching on the Farm, for \$35, provides more detailed guidance. The publications are available through **NESFI's website**.¹¹⁰

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 an audit or inspection.

VIII. INJURIES AND WORKERS' COMPENSATION

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

If an employee of a direct farm business is injured, the injured employee can seek compensation in two potential ways — make a claim under Ohio's workers' compensation program or sue the employer for negligently causing the injury. However, if the injured employee has workers' compensation available to him or her, the worker cannot choose to sue the employer (R.C. § 4123.931(I)(3)).

The Ohio Workers' Compensation Act (Revised Code Chapter 4123) requires almost all employers to obtain workers' compensation insurance. Workers' compensation insurance covers medical treatment and lost pay owed to employees injured on the job, regardless of who was at fault in causing the injury. Ohio's workers' compensation statutes follow a fee schedule for payment of medical treatment and daily disability pay. If workers' compensation insurance is available, an employee may not choose the second option to sue the employer under tort law. This ban protects employers from negligence claims and the unpredictability of compensation awards.

Ohio's workers' compensation law requires all businesses with one or more employees to provide workers' compensation (R.C. § 4123.35(A)). An employee is defined as "every person in the service of" a business (R.C. § 4123.01(A)(1)(b)). This broad definition includes full- and part-time employees as well as interns and compensated volunteers regardless of whether the business and employee have a formal agreement for employment. The only agricultural

¹¹⁰ www.smallfarm.org/main/bookstore/publications/

exclusion from the law is that officers of a family farm corporation do not have to count themselves as employees (R.C. § 4123.01(A)(2)(b)). Businesses should file Form U-3 with the Ohio Bureau of Workers Compensation (BWC) to receive coverage.

If a farm business fails to get workers' compensation or fails to pay the premium on time and an employee is injured, the individual has two options. The individual could choose to sue the employer and argue in court to receive the full value of their damages and expenses if the court finds the farm business negligently caused the injury. The farm's liability or commercial insurance coverage is highly likely to deny such a claim, and the liability for a medical injury can be incredibly expensive. In the alternative, an injured individual could file a claim with the BWC and receive workers' compensation benefits regardless of whether the farm business was at fault (A.C. 4123-14-01 et seq.). In the latter case, the employer then has to pay the entire sum back to BWC. BWC can also receive a lien against the business's property for non-payment of premiums and claims costs (R.C. § 4123.37).

IX. EMPLOYER LIABILITY WHEN EXEMPT FROM WORKERS' COMPENSATION REQUIREMENTS

In rare cases where employers are exempt from mandatory workers' compensation insurance coverage or fail to provide the coverage, Ohio common law tort principles will determine a farm business's liability for injuries. A tort is an injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit. Torts are part of the *common law*, which is the body of laws and rules that courts (rather than legislatures or other lawmaking bodies) create as they issue decisions.¹¹¹

A. Employer's Negligence

Although there are many legally recognized causes of action (harms), the most common claim is for negligence. Whether a person was negligent and caused an injury is a highly fact-specific issue that courts must decide on a case-by-case basis. To avoid being negligent, an employer must 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. Unsafe or defective

¹¹¹ 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.

tools are automatically evidence that the employer should have known about the hazard, regardless of whether she actually knew the tools were unsafe (R.C. § 4113.04).

B. Contributory Negligence of the Employee

If the employee's own negligent actions contributed to his or her injury, the employee's monetary award for damages is reduced proportionally according to the amount by which the employee's negligence contributed to his or her injury. However, if the employer violated any law intended to keep the employee safe, such as any OSHA regulation, and that violation contributed to the injury in any way, then the employee's negligence will not reduce his or her award (R.C. § 4113.07). In some cases, where an employee is required to report unsafe conditions and fails to do so, and the employer does not already know that conditions are unsafe, the employee may be said to have assumed the risk of the injury which may reduce his or her total award (R.C. § 4113.06 and .07). For example, if the damages are \$1000 and the employee was 70% negligent and the employer was 30% negligent, the employee may only recover \$30.

C. Employer Responsibility for Employee's Injury to Others

This section discusses the employer's potential liability when an employee injures a third party (whether on or off-farm) or a fellow employee. Please note that where workers' compensation is provided, an employee injured by another employee would be limited to workers' compensation and could not sue the employer (R.C. § 4123.931(I)(3)). Under that circumstance, this section addresses situations where workers' compensation is not provided.

Employees Injuring Third Parties

It is very possible that farm employees could injure customers, visitors, or business guests, so farms should know when they might be liable for those injuries. Two primary factors affect whether the farm business will be responsible for an employee's injury of a third party: 1) whether the employee was in fact an employee, 2) whether the act causing the injury was committed in the course of the employment. If these two conditions are satisfied, and the employee was negligent in causing the third party's injury, then the farm business may be responsible for the injury caused by the employee. Under Ohio case law, the employee is primarily responsible and the employer is secondarily responsible. However, the full judgment may be requested from either the employer or negligent employee (*Orebaugh v. Wal-Mart Stores, Inc.*, 2007 WL 2758599 (Ohio 2007)).

Regarding the first factor, for the employer to be liable there must have been an employer-employee relationship, rather than that of an independent contractor. The question of whether an employer/employee relationship exists is based on the facts of each individual case. The actual practice between the employer and the employee will determine the relationship. A

ADDITIONAL RESOURCES: Labor and Employment Law

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

www.ers.usda.gov/Publications/AH719/

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

www.dol.gov/compliance/guide/

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

www.dol.gov/compliance/laws/main.htm

The Ohio Department of Commerce maintains a website with information on wage, hour, overtime, and child labor restrictions.

www.com.ohio.gov/laws/

number of evidentiary factors may be taken into account, including the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required for the work to be done, and who provides the tools, materials, or equipment. The distinction between employee and independent contractor is an important one for many reasons, including taxes, and the IRS has a helpful explanation in Publication 15: Employer's Tax Guide, under Who is an Employee?

Regarding the second factor, the injury must have been caused within the employee's scope of employment (*Bauman v. Bob Evans Farms, Inc.*, 2007 WL 96969 (10th Dist. Ct. App. 2007)). Although being on duty and at work is one indication that an action is within an employee's scope of work, it must go beyond that. In the words of one court, "an employee is not responsible for the independent self-serving acts of his employees which in no way facilitate or promote his business." (*Id.*) If the employee's act is intended to further his or her work for the business, then it is within the scope of employment. One obvious example of work in the scope of employment is where an employee causes a traffic accident while delivering produce to the market. On the other hand, if an employee causes a traffic accident in her own car while driving home after work, she is probably not acting within the scope of her employment.

An employer can always raise the defense of contributory negligence if an employee injures a third party. If the third party knew of and assumed the risk of the injury that occurred, then the third party's award will be reduced by the proportion of his or her negligence. For example, if the third party involved in the traffic accident with the employee delivering the produce ran a stop sign, the third party's own negligence would reduce or preclude any recovery.

Employers may also be liable for an employee's 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 liable for having hired the person in spite of that knowledge.

Employees Injuring Other Employees

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

Conclusion

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

X. CHECKLIST

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

XI. KEY CONTACT INFORMATION**U.S. Department of Labor, Wage and Hour Division (compliance assistance)**

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

Cincinnati Area Office: (513) 684-2908

Cleveland Area Office: (216) 357-5400

Columbus District Office: (614) 469-5678

U.S. Department of Labor, OSHA Offices

Cincinnati: (513) 841-4132

Cleveland: (216) 615-4266

Columbus: (614) 469-5582

Toledo: (419) 259-7542

Ohio Department of Commerce, Bureau of Wage and Hour Administration

Ph: (614) 644-2239

Ohio Bureau of Workers' Compensation

Ph: (800) OHIOBWC (800 644-6292)

Ohio Department of Commerce, Bureau of Labor and Worker Safety, OSHA

Ph: (800) 282-1425

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 Ohio Department of Agriculture, Dairy Division to discuss plans *before starting*.

I. FEDERAL REGULATION

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

By federal law, all milk shipped across state lines must be pasteurized. The source of this regulation is a bit complex. The Food and Drug Administration (FDA) administers the federal Food, Drug, and Cosmetic Act, which prohibits adulterated or misbranded food from entering interstate commerce (21 U.S.C. §331). Understanding the nuances of the legal definitions of “adulterated” and “misbranded” is tricky, but it should be sufficient to know that FDA considers a food adulterated if it contains any “poisonous or deleterious substance” or if it is “filthy, putrid, decomposed” or otherwise unfit for food (21 U.S.C. § 342), and misbranded if it does not comply with FDA labeling standards (21 U.S.C. § 343). Labeling standards include the FDA standards of identity, which require pasteurization unless the product is a cheese that is exempt (21 C.F.R. § 1240.61; parts 131; 133).¹¹²

Further, all milk and milk products must also adhere to the Grade A Pasteurized Milk Ordinance (PMO), which is available on the **FDA’s website**.¹¹³ The PMO is a 405-page model regulation published by the FDA. Many states, including Ohio, use the PMO as their standard for sanitation of all milk products (A.C. 901:11-1-02), whether the products ship in state or out of

¹¹² 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).

¹¹³ www.fda.gov/downloads/Food/FoodSafety/Product-SpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSMModelDocuments/UCM291757.pdf

state. Farmers who are interested in starting a dairy direct farm business, including processing or production of milk products (cheese, ice cream, etc.), should read the PMO carefully. The PMO prohibits the misbranding and adulteration of milk and milk products, requires permits and inspection of milk production and processing (including transportation), and prescribes labeling rules. The PMO also sets forth specific standards for production and processing. If a dairy wants to be on the Interstate Milk Shippers list, the National Conference of Interstate Milk Shippers requires the State Milk Sanitation Rating Authorities to certify that the dairy attains the milk sanitation compliance and enforcement ratings in the PMO. More information about inclusion on the list is available on the **FDA's website**.¹¹⁴

B. USDA: Grading and Milk Marketing Orders

The USDA administers a variety of programs that regulate or grade dairy products. A full listing of USDA dairy programs can be found online on the Agricultural Marketing Service (AMS) website.¹¹⁵ This section addresses only grading and standards, milk marketing orders, and mandatory reporting.

Grading and Standards

The USDA provides grading and standards services to certify that products are of a certain quality (7 C.F.R. Part 58). To qualify for the grading and standards service, the USDA must first inspect a dairy plant and approve it as being in compliance with USDA's sanitary standards. A producer can then request grading services. Use of the program is voluntary, but it may be important for producers who want to market to schools and other institutions that require foods to meet certain standards. For more information on the benefits of the grading and standards program, as well as information on how to apply for inspection and certification, visit the **USDA's website**.¹¹⁶

Federal Milk Marketing Orders

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

¹¹⁴ www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/FederalStatePrograms/InterstateMilkShippersList/default.htm#rules

¹¹⁵

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

¹¹⁶

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

marketing orders using formal rulemaking procedures, and the regulations are in 7 C.F.R. Parts 1000-1170. The orders apply to “handlers” (7 C.F.R. §§ 1030.30, 1032.30), which are anyone operating pool or non-pool plants, anyone receiving milk for processing and redistribution, or anyone brokering milk for processing (7 C.F.R. § 1000.9). AMS also considers cooperatives to be handlers, although they have a slightly different structure for determining payment amounts to their producers (*id.*).

Most direct-to-consumer dairies are producer-handlers, which are producers who also process and distribute their own milk (7 C.F.R. §§ 1030.10; 1032.10). In order to be a producer-handler, a producer must be able to (1) demonstrate ownership of the animals and control over their care, (2) demonstrate ownership of the production and processing equipment, and (3) show that the operation is entirely at the owner’s risk (7 C.F.R. §§ 1030.10(e); 1032.10(e)). Prior to June 1, 2010, producer-handlers were not subject to the minimum price orders. However, on April 23, 2010, the USDA issued a final rule that subjects producer-handlers who distribute over 3 million pounds a month to the marketing orders (75 Fed. Reg. 21157). The effect of this new rule is that exceptionally large direct-to-consumer dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.¹¹⁷

Direct farm businesses subject to the Milk Marketing Order will need to know that Ohio falls within the Mideast Order. Each Order provides the minimum price a fluid milk handler must pay producers in the respective region. The intended use of the milk determines the “class,” which in turn determines the price. (7 C.F.R. § 1000.40). Class I, which covers milk intended for consumption as milk, is the most valuable. Class II includes, but is not limited to, milk that will be cottage cheese, frozen desserts, sour cream, custards, pancake mixes, and buttermilk biscuits. Class III is milk for products such as cream cheese and cheeses that may be grated, shredded or crumbled. Class IV, the least valuable, is milk for butter, sweetened condensed milk, and dried milk. Each month, the Milk Market Administrator will issue price orders that then adjust based on the value of the components of the milk (butterfat, protein and other solids) and the price differential for the county where the product is delivered. The calculations are somewhat confusing, although the AMS attempts to explain the method on **its website**.¹¹⁸ 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.

Mandatory Price and Storage Reporting

¹¹⁷

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

¹¹⁸

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

Even if a producer-handler is not subject to the Milk Marketing Order, he or she is likely still subject to some reporting requirements. Mandatory price and storage reporting requirements are authorized by amendments to the Agricultural Marketing Act (7 U.S.C. § 1637b). Mandatory reporting provides reliable information to calculate the pricing factors used in the Milk Marketing Order formulas.

Price reporting requires manufacturers of cheddar cheese, butter, nonfat dry milk, and dry whey to submit weekly reports including the price, quantity, and moisture content, where applicable (7 C.F.R. §§ 1170.7, 1170.8). Manufacturers that process and market less than 1 million pounds of dairy products (cheese, butter and other items that are not fluid milk) per year are exempt (7 C.F.R. § 1170.9). Dairy products with a higher value than the basic commodity (for instance, kosher butter produced with a rabbi on site or organic milk) are also exempt from price reporting requirements (7 C.F.R. § 1170.8). It is the obligation of the producer to track annual production and report if they exceed the 1 million pound exemption. Reports must include the “name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content where applicable.” (7 U.S.C. § 1170.4(a)). A weekly price report must be submitted to the National Agricultural Statistics Service (NASS) by noon every Wednesday using the appropriate form. The forms are available on the **NASS website**.¹¹⁹

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

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

¹¹⁹ www.nass.usda.gov/Data_and_Statistics/Dairy_Products_Mandatory_Program/index.asp

must report all stocks on hand (7 C.F.R. § 1170.10(b)). NASS mails the monthly reporting forms to producers (73 Fed. Reg. 34175, 34176 (June 17, 2008)).

II. STATE REGULATION

Any one considering starting a dairy operation in Ohio should contact the Ohio Department of Agriculture (ODA), Dairy Division as soon as possible in the planning stages. Milk production, storage, handling, processing, and distribution are heavily regulated; licenses are required at all stages of milk processing.

Although the rules are exacting and complex, this section describes the overall framework for state regulation of dairy. By way of reference, milk production is handled under the Ohio Revised Code, Chapter 917: Dairy Products, which authorize the Department of Agriculture to establish licensing procedures. Ohio

Administrative Code, Chapter 901, Section 11 lays out the precise requirements for receiving a license.



The ODA, Dairy Division, administers different licenses at each stage of milk production. Milk dealers; haulers; processors; weighers, samplers, or testers, and manufacturers must each be licensed. Of relevance to producers, any person in Ohio who sells milk obtained from a cow, goat, or sheep that the person owns or controls, must obtain a milk producer license. The milk producer license is straightforward and the fee is \$15.¹²⁰ Before a producer license will be issued, any milk producer who proposes to construct or extensively alter a milk production facility must submit their plans and receive approval before construction begins. The plan submission includes detailed locations and layout of the plant as well as specifications for equipment, cleaning and storage.¹²¹ Also, a facility inspection and water test must occur before any processing begins.

A producer wishing to sell fluid milk for consumption must meet Ohio Grade A Milk Rules (A.C. 901:11-1), and those selling milk for further processing into milk products for human consumption must meet Ohio Manufacture Milk Rules (A.C. 901:11-2). Milk production is regulated according to the end use of the milk. Milk intended for consumption without further processing is regulated as Grade A milk while that for manufacturing purposes is called

¹²⁰ www.agri.ohio.gov/Public_Docs/Forms/dairy/Dairy_3500-004.pdf

¹²¹ www.agri.ohio.gov/Public_Docs/Forms/dairy/Dairy_3500-005.pdf

manufacture milk. Ohio Grade A Milk Rules follows the federal PMO with some minor variations.¹²² Manufacture Milk Rules do not adopt the PMO but instead list out detailed rules and regulations for the product.¹²³ Generally, the milk must be tested regularly and must not exceed certain test levels for drug residues, somatic cell counts, and adulterants. The rules regulate herd management, milking facilities, milking procedures, cooling, and storage extensively. Because milk is potentially hazardous, cleaning procedures are described in great detail both on the farm and in transport. Additional rules regulate the production of specific milk products and pasteurization procedures. Regarding the labeling of the state of Ohio does set identity standards that all milk products must meet to be in conformance with marketing regulations.¹²⁴

Ohio dairy farmers should also be aware of regulations concerning livestock, such as animal health laws, administered by ODA. Chapter 11: Livestock and Poultry provides further information on various livestock welfare and health laws.

III. ORGANIC MILK

Farmers interested in producing and marketing certified organic milk must follow USDA's organic standards (7 CFR Part 205). The regulations generally require the dairy to manage the animals according to certain standards and obtain certification from an accredited certifying entity. For more information on organic management and certification, see Chapter 12: Organic Certification.

IV. RAW MILK

Currently, it is illegal to sell raw milk in Ohio to the final consumer. Raw milk is milk that has not been pasteurized. Some consumers believe raw milk strengthens the immune system, and pasteurization eliminates valuable bacteria and proteins. However, raw milk can be a source of dangerous pathogens such as *Salmonella*, *E. coli*, and *Listeria*. Although the FDA requires pasteurization of milk sold in interstate commerce, (21 C.F.R. §1240.61) states are able to regulate the sale of raw milk within the state. In Ohio, the PMO prohibits the sale of raw milk to consumers and is strictly followed by Ohio inspectors.

Some Ohio farmers and consumers may be familiar with the "herd share" method of selling raw milk. Herd share arrangements are understood by some farmers to be a legal means of selling raw milk by selling the animal instead and then charging a fee for the milking service. Under a herd share, the animals are sold by the fraction to other owners although the animal itself

¹²² A.C. 901:11-1-02

¹²³ A.C. 901: 11-2

¹²⁴ A.C. 901:11-5

remains on the farm and under the care of the farmer. Because the cow is merely being boarded at the farm, the “owner” pays a flat fee for care of the animal plus a weekly “boarding fee” in exchange for a gallon of milk.¹²⁵ Generally, herd share owners travel to the farm to collect their own milk.

Herd share arrangements are present in other states as well, and different states take a different regulatory stance towards such programs. In 2006, ODA brought an enforcement action against an Ohio herd share operation and suspended the individual’s license to produce Grade A Milk. The judge on the case halted the regulatory action, although the judge did not say that the herd share arrangement was a permissible approach to the consumption of raw milk.¹²⁶ Although ODA initially appealed the case, the Governor asked that the appeal be dropped. With the appeal dropped, the farmer’s ability to distribute milk via the herd share arrangement was reinstated by ODA.¹²⁷

Any producer looking to start a herd share arrangement should be cautious. Such arrangements are not sanctioned by ODA, although ODA may not choose to bring an enforcement action against a herd share operation. Any herd share operation requires very careful consideration, and in all cases a milk producer must maintain their milk producer license and Grade A Dairy producer license.

V. RBGH FREE LABELING

Recombinant Bovine Growth Hormone (rBGH) is a genetically engineered hormone designed to increase milk production in dairy cattle. Although the FDA has approved the use of the hormone and takes the position that there is no difference between milk from cows treated with rBGH and those not treated with it, many consumers (and therefore retailers) have a strong preference for milk that comes from untreated cattle. To address this consumer demand, some milk producers wish to label their milk as “rBGH free.” The reason these labels are controversial is that Grade A milk produced under the PMO is already determined by the federal government to be safe and the label “rBGH free” could cause consumers to be misled to think that the milk is of higher quality, which is currently unknown. On the other hand, some consumers have a strong desire to know (whether for environmental, animal welfare, or health reasons) if their milk products are derived from animals treated with rBGH.

Ohio used to regulate the use of “hormone free” language on milk labels by prohibiting statements such as “rBGH free,” or “no artificial hormones.” However, the law was rescinded

¹²⁵ *Schmitmeyer v. Ohio Dep’t of Agriculture*, Case No. 06-CV-63277, (Ohio Common Pleas Ct. Dec 29, 2009)

¹²⁶ *Id.*

¹²⁷ www.farmanddairy.com/news/farmer-can-supply-raw-milk/428.html

effective February 2012, in response to a First Amendment lawsuit.¹²⁸ At this point, milk may be labeled as hormone free and the label does not also need to state that the FDA has not confirmed a difference between cows treated with rGBH and those that have not, as may still be required in other states. However, this rule is inconsistent with FDA's national labeling standards and producers may wish to follow the FDA's standards regardless.

¹²⁸ International Dairy Foods Association v. Boggs, full text available at: <http://www.ca6.uscourts.gov/opinions.pdf/10a0322p-06.pdf>

VII. CHECKLIST

Have you...?

- Contacted the Ohio Department of Agriculture to discuss the process necessary for developing a dairy product well before you wish to begin production?
- Followed all steps in the Grade A Pasteurized Milk Ordinance dairy farm and dairy handler permitting and inspection process if you wish to produce Grade A Milk?
- Developed labeling and marketing strategies?

VIII. KEY CONTACT INFORMATION

Ohio Department of Agriculture, Dairy Division

Ph: (614) 466-5550

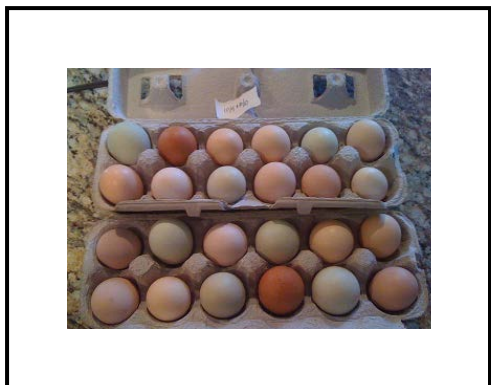
Email: dairy@agri.ohio.gov

CHAPTER 7: EGGS

Several laws and agencies regulate egg sales. Federal regulations, with the exception of safe handling instructions, will not apply to small to medium-sized Ohio direct farm businesses that sell within Ohio. State regulations, however, will affect farm businesses that sell off-site, with the specific requirements varying by location.

I. FEDERAL OVERSIGHT OF EGGS

Two agencies regulate eggs at the federal level, the United States Department of Agriculture



(USDA) and the Food and Drug Administration (FDA). The Egg Products Inspection Act (EPIA) (21 U.S.C. Chapter 15) authorizes the USDA to inspect eggs and egg products and establish standards for uniformity of eggs. The EPIA applies to eggs shipped in interstate and intrastate commerce, but has exemptions for small producers. The Food and Drug Administration (FDA), under the authority of the federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C. § 341), issues and enforces standards of identity for egg products and requires shell egg producers to implement measures to prevent *Salmonella enteritidis*. For

purposes of federal regulation, egg products are defined as dried, frozen, or liquid eggs, with or without added ingredients. Shell eggs (whole eggs) are treated separately. The FDCA applies only to eggs shipped in interstate commerce. Many direct farm businesses selling their eggs will not be subject to the federal rules, but determining application of the federal law to a specific operation can be difficult. A brief discussion follows.

A. USDA's Oversight of Eggs

Within USDA, the Agricultural Marketing Service (AMS) and Food Safety and Inspection Service (FSIS) administer programs under the EPIA. AMS prohibits buying, selling, transporting, or offering to buy, sell, or transport restricted eggs, unless exemptions apply (7 C.F.R. § 57.700). Exemptions are discussed in the next section. Restricted eggs are eggs that are checks, dirties, incubator rejects, inedible, leakers or loss (unfit for human food) (7 C.F.R. § 57.1). A “check” means an egg that has a broken shell or crack in the shell but has its membranes intact and whose contents are not leaking. *Dirty egg* means an egg that has a shell that is unbroken, but has adhering dirt or foreign material, or prominent stains on the shell surface, or moderate stains covering more than $\frac{1}{4}$ of the shell surface. *Inedible eggs* are any eggs of the following description: black rot, yellow rot, white rot, mixed rot (addled egg), sour egg, egg with green

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

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

AMS also provides voluntary grading services for class, quality, quantity, or condition and any combination thereof (7 C.F.R. Part 56). Inspection by federal or authorized state graders must be requested, and will cost a fee. More information on requesting egg grading services, as well as the form to do so, is available through AMS’s grading **website**.¹²⁹ AMS’s official standards, grades and weight classes are available **here**.¹³⁰

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

The EPIA requires USDA to continuously inspect plants processing eggs into egg products (21 U.S.C. § 1034). The Act defines egg products as “any dried, frozen or liquid eggs, with or without added ingredients” (21 U.S.C. § 1052(f)). All egg products must undergo pasteurization (21 U.S.C. § 1036). FSIS oversees the inspection of egg processing plants (9 C.F.R. § 590.24). The procedures and standards for inspections are in 9 C.F.R. Part 590. Producers who process their own eggs and sell directly to consumers are exempt from continuous inspection under the FSIS regulations (9 C.F.R. § 590.100(e)). However, they must apply for an exemption and their facility

¹²⁹ www.ams.usda.gov/AMSV1.0/Grading

¹³⁰ www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376

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).

B. FDA's Oversight of Eggs

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

Furthermore, some shell egg producers must adhere to FDA's *Salmonella enteritidis* (SE) testing, handling and treatment standards. Producers with 3,000 or more laying hens at a particular farm that produce shell eggs for the table market, and that do not sell all of their eggs directly to consumers, are subject to the additional SE prevention standards (21 C.F.R. Part 118).¹³¹ The regulations require these producers to (1) develop a written SE prevention plan that involves procuring pullets that are SE monitored, (2) use a bio-security program limiting visitors and controlling cross contamination between houses, (3) control rodents, flies and pests, and (4) clean poultry houses between flocks if there was a positive SE test (21 C.F.R. § 118.4). Producers must perform environmental testing for SE when laying hens are 40 to 45 weeks old and 4 to 6 weeks after molt; if an environmental test is positive for SE the producer must conduct shell egg testing (21 C.F.R. §§ 118.5 and 118.6). Producers must maintain a written SE prevention plan as well as records to verify compliance, which they must make available within 24 hours of receipt of an official agency request (21 C.F.R. § 118.10). Shell eggs being held or transported must be refrigerated at or below 45 degrees Fahrenheit ambient temperature beginning 36 hours after laying (21 C.F.R. § 118.4). This refrigeration requirement applies to shell egg producers as well as individuals transporting or holding shell eggs (21 C.F.R. § 118.1). For more information on the Egg Safety Final rule, please check the **FDA** website.¹³²

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

INSTRUCTIONS: To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly." The statement must appear on the label prominently, conspicuously, and in a type size no smaller than one-sixteenth of one inch.

¹³¹ 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.

¹³²

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

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

C. The Food Safety Modernization Act

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

II. OHIO REGULATION OF EGGS

Broadly speaking, Ohio regulation of egg production varies depending first on the location where the eggs are sold. If eggs are only sold on the farm where they were produced, and the farm manages fewer than 500 birds, then the farm must comply with the labeling and advertising regulations. If the eggs are sold off the farm (or eggs are sold on-farm only but the producer keeps more than 500 birds), the farm must comply with on-farm food processing establishment requirements as well. Eggs must also be kept under refrigeration at farmers' market or off-site sales locations.

A. On-Farm Regulations

Farms with off-site sales (including farmers' market sales) or more than 500 birds, must apply for a food processing establishment permit. (R.C. § 3714.041(2); R.C. § 3714.021) The permit will be issued if the operation complies with the requirements of Ohio Administrative Code 901:3-1.¹³³ The food processing code cited applies to any establishment and is not specific to eggs. Conversations with Ohio Department of Agriculture (ODA) inspection staff indicate that the inspector of an egg facility will verify that the producer will maintain shell eggs in refrigeration at 45 degrees or lower (R.C. § 925.03). The inspector will want the producer to use a hanging thermometer even if a thermometer is built into the unit so that it can be replaced or calibrated as necessary. If the farm uses well water, inspection staff will also need to see a test showing a negative for coliform bacteria (A.C. 901:3-05). Before an inspector will visit the farm, the individual must receive a draft of the planned label to see that it fulfills the regulations.

¹³³ <http://codes.ohio.gov/oac/901%3A3-1>

B. Labeling and Advertising

All egg producers must comply with labeling requirements. The label must contain the following items: 1) the name and address of the packer, 2) a count number, 3) the processing date, and 4) if the eggs are ungraded, a statement saying such *or* a statement of the egg standard, grade, or weight as available through the AMS voluntary grading process described above. (R.C. § 925.021 and .04; 7 CFR Part 56) ODA's Food Safety Division personnel have said that farmers are permitted to re-use existing egg cartons if all other markings are obscured except the count number and safe handling instructions. If eggs are sold from a bulk container, a sign with letters at least one half inch in size must state the grade or "ungraded" if the eggs are ungraded (R.C. § 925.022).

Egg advertisements must also be in accordance with regulations. Advertisements must state the grade or that the eggs are "ungraded" in a conspicuous manner. If advertising materials use words such as "fresh eggs," or "direct from farm," then those eggs must meet the minimum requirements for United States consumer grade A eggs. The standards for grade A eggs are located at the AMS website.¹³⁴ Also, egg packaging and advertising may not imply that eggs have been graded by a United States agency if they have not (R.C. § 925.025).

C. Off-site Handling Regulations

Regulations apply to the sale of eggs at a farmers' market or other off-site location because these sales locations classify the operator as a retail food facility. The authority to regulate off-site inspections is handled by local departments of health according to Ohio Administrative Code Chapter 3717-1, which is written broadly for all types of retail facilities. An egg producer may seek inspection either from the local governing body where the farm is located or where the sales take place. Based on conversations with personnel at ODA's Food Safety Division, eggs must be kept cool while awaiting sale, but different departments of health may interpret the precise regulations differently. In some local jurisdictions, inspectors will require farmers to keep eggs under mechanical refrigeration while selling eggs at a farmers' market. Other inspectors will accept coolers and ice packs as refrigeration. At the same farmers' market, different producers may have different requirements because some producers may choose to be licensed according to their farm location.

Retail food establishment licenses are valid for one year and the application must be filed at least 10 days before the license is needed. License fees vary according to the size and times of business of the establishment. Direct farm businesses should contact their local departments of public health for more information.

¹³⁴ www.ams.usda.gov/AMSV1.0/Grading

D. Additional Regulations

If a farmer wishes to sell to restaurants, retail outlets and other food establishments, they may only accept clean and sound eggs that meet the U.S. Consumer Grade B standards (R.C. § 3717-1-03.1(4)(J)). The same applies to eggs sold at a farmers market (R.C. § 901:3-6-02(C)).

Ohio has adopted the federal Regulations Governing the Voluntary Grading of Shell Eggs (7 C.F.R. §56) at R.C. § 925.02. The grading program establishes a basis for quality and price relationship to enable more orderly marketing. The Regulations require a licensed and authorized grader to perform the grading services. After grading, a USDA grade mark may be placed on the egg depending on which grade it falls into (7 C.F.R. §56.36). Once a shell egg is grade marked, the producer needs a grader or authorized personnel to continue to check the grade (7 C.F.R. §56.40). The fees for the grading service are paid by the applicant for the grading and will be based on the time required to perform the services (7 C.F.R. §56.45-46). A copy of the **Regulations Governing the Voluntary Grading of Shell Eggs** is available online for more information about the requirements¹³⁵.

¹³⁵ www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004690

III. CHECKLIST

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

- How many chickens do you have? 500 or fewer?
- Where will your sales take place? On or off the premises?
- Who are your customers (end user, institutions, and processor)?
- If you plan to sell off the farm:
 - Are you choosing to grade your eggs and if so, do you have the capacity?
 - Have you figured out how to package and transport the eggs?
- Have you obtained the appropriate licenses from the division of Consumer Health Services?

IV. KEY CONTACT INFORMATION

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

Ph: (202) 720-3271

Ohio Department of Agriculture, Food Safety Division

Ph: (614) 728-6250

Email: foodsafety@agri.ohio.gov

CHAPTER 8: FRUITS AND VEGETABLES

Throughout recent history, legislation relating to the production or sale of fresh fruits and vegetables has been scant, although the Food Safety Modernization Act (FSMA) will change that in the near future. By contrast, if a direct farm business wants to sell value-added products, such as canned goods and juices, the regulatory landscape is quite different. Because these items have a long and sordid history of harboring dangerous bacteria, the public has concerns about safety in production. Consequently, all processed products must be produced under a wholesale license. If the farm business also sells processed products direct to the end user, a retail license is also required.



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

on processed fruits and vegetables.

I. UNPROCESSED FRUITS AND VEGETABLES

The most common way for a direct farm business to sell fruits and vegetables is as raw, unprocessed product. For these products, federal regulations will soon affect food safety requirements while state regulations also set packaging and labeling requirements, among others.

A. Federal Requirements

The federal Food and Drug Administration (FDA) is charged with ensuring the safety of food commodities sold in the United States. Until recently, the FDA imposed no formal rules on unprocessed fruits and vegetables at the farm level simply because it did not have the statutory authority to do so. Instead, the FDA was limited to publishing non-binding guidance

documents on best practices for the growing, harvesting, and processing of fresh fruits and vegetables.

This has changed with the passage in early 2011 of the FSMA, the most significant food safety legislation since the 1938 passage of the federal Food, Drug, and Cosmetic Act. The FSMA authorizes the *FDA to mandate food safety measures at the farm level for fruit and vegetable production*. Previously, agricultural production was the exclusive purview of the USDA, with very limited exceptions such as shell egg production. But Section 105 of the FSMA directs the FDA, 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 (Spring 2013), these rules have been proposed but are still a long ways from becoming law. The FSMA states that FDA’s rules should be (1) sufficiently flexible so as to apply to fruit and vegetable producers of all sizes, including those that sell directly to consumers; (2) include, with respect to growing, harvesting, sorting, packing, and storage operations, “science-based minimum standards related to soil amendments, hygiene, packaging, temperature controls, animals in the growing area, and water,” (3) not conflict with or duplicate requirements of the National Organic Program.

The FSMA rules will likely rely heavily on rules the FDA already has established in the voluntary **Good Agricultural Practices (GAP)**¹³⁶ program for fruit and vegetable production. Fruit and vegetable producers who wish to get an idea of what FDA’s rules might eventually look like – or who wish to reduce the risk of bacterial contamination in their produce – may find the Guide to be a helpful resource.

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

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www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf

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

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

The final major take-home message of the FSMA is that the FDA authority to impose on-farm safety measures is limited to fresh fruit and vegetable production, not grains or oilseeds. The HACCP requirements apply to food processing facilities. The definition of a food processing facility specifically exempts farms, unless the farm engages in some type of processing, such as pitting cherries.¹³⁷ However, farms processing harvested goods for use on the same farm (e.g., processing cherries into jam) are exempted from the definition of a “facility.” Therefore, unless the farm is creating a value added product (e.g., engaging in some form of processing) and delivering this product off the premises, the farm is not a facility, and thus not subject to the HACCP rules. Food processing facilities, on the other hand, should carefully monitor the development of implementing regulations as several elements of the FSMA may apply and require operational changing and documentation of food safety procedures.

B. State Marketing and Labeling Requirements

Ohio law also does not impose any on-farm regulations relating to the production of fruits and vegetables specifically. (Environmental or waste regulations may apply to a fruit and vegetable operation but they do not control production itself.) However, Ohio law does regulate marketing and labeling of fruits and vegetables.

¹³⁷ 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).

Any fresh, unprocessed fruit or vegetable that is packed for sale must be marked with the packer's name and address; the contents by weight, count or measure; the grade if the package holds peaches, apples, potatoes, or dry onions; and the variety and minimum size if peaches or apples. Minimum letter sizing applies to the label in accordance with its total weight; lettering five-eighths inch tall will accommodate all weights (R.C. § 925.22). Containers may be reused or repurposed if any inaccurate markings are blacked out (R.C. § 925.24) and may not misrepresent the contents (R.C. § 925.25). These regulations do not apply if the customer receives the product at the farm where it was grown (R.C. § 925.27(C)). If the packaged products are offered for retail sale, the retailer's name and address must also be added to the container (R.C. § 925.52).

State Pesticide Requirements

Under Section 346a of the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 346a), the federal Environmental Protection Agency (EPA) sets tolerance levels for pesticides on and in foods. If these rules are violated, the product is considered to be adulterated. The EPA establishes the tolerance level for each pesticide based on the potential risks to human health posed by that pesticide. EPA lists tolerance levels for more than 1,000 pesticides, so it is impossible for this Guide to cover all the standards. However, there are several ways farmers can determine the tolerance levels for pesticides they are using. One method is to look up the pesticide in the Code of Federal Regulations (CFR) (40 C.F.R. Part 180). EPA maintains a **website**¹³⁸ that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**¹³⁹ 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.

Ohio's Pure Food and Drug Act closely mirrors federal regulation by stating that a food product may not have any "poisonous or deleterious substance added to any food, except where such substance is required in the production thereof. . ." (R.C. § 3715.62). Where the deleterious substance is a pesticide considered necessary for the production of food, the Ohio Department of Agriculture (ODA) may fix limits for pesticide residues, and if products exceed those limits they are considered to be adulterated (R.C. § 3715.62).

State Produce Sampling Requirements

According to personnel at ODA's Food Safety Division, producers may offer free samples of agricultural products at a farmers' market stand. This would not be considered the handling of a processed product thereby triggering a licensing requirement. The product must be cut at the stand rather than prepared in advance. Donations in return for the sample would be

¹³⁸ www.epa.gov/opp00001/food/viewtols.htm

¹³⁹ www.epa.gov/opp00001/regulating/part-180.html

problematic. Interpretation of food safety regulations is open to interpretation and different regulatory personnel may disagree on this point, however.

II. PROCESSED FRUITS AND VEGETABLES

A. Who processes food and what does processing mean?

From a legal perspective, the question of what is a processed product is very important because an establishment that processes food must be registered with the ODA (R.C. § 3715.041(2)). A food processing establishment is one that 1) processes food, 2) packages food, 3) manufactures food, or 4) otherwise holds or handles food for distribution to another site for wholesale. Warehouses, distributors and bakeries are specifically identified as food processing establishments. Maple syrup, honey, and sorghum processors as well as cottage food operations are specifically excluded from the definition (R.C. § 3715.021). For the direct farm business, the first criterion is perhaps the most important. Unfortunately, Ohio law does not explicitly define what it means to process food (R.C. § 3715.01). The definition is open to some interpretation.

Personnel at ODA's Food Safety Division consider "processing" to occur whenever a cut is made to a fruit or vegetable that is beyond the cut made to harvest the product. For example, a harvest cut is made to sever a cabbage head from the plant. ODA personnel have specifically said that this is not processing, and does not become processing if the vegetable is washed. However, if a second cut is then made to remove the core from the cabbage head, the cabbage undergoes processing. The situation is a bit more complex when it comes to salad mixes. Although several baby salad greens may be severed from their roots in a harvest cut and not processed any further beyond washing, several greens may be combined and packaged as a special salad mix. ODA personnel consider this to be processing because the product is also packaged in conspicuous manner.

Farmers may have difficulty navigating distinctions between a harvest cut and a processing cut, as well as the distinction between washing and packaging as preparation for market. Staff at ODA's Food Safety Division are willing to help producers make these distinctions. Where a product is processed, the farm must be registered as a food processing establishment. The good news is that the requirements beyond that are not particularly onerous and reflect a reasonable concern for the food safety risks inherent in washing and cutting fresh produce.

B. State Processing Regulations for Retail and Wholesale

Broadly speaking, a direct farm business will deal with processed food regulations on two levels. First, cutting and processing are handled as a wholesale food. Second, the packaging and holding for sale of that produce are addressed as a retail food. For example, if a direct farm business cuts salad mix and washes it in a packing shed, that process is regulated as a wholesale

process, unless the facility qualifies for an exemption. If the farm then takes it to the farmers market for direct sale to customers, retail food regulations apply, if the operation does not receive an exemption.¹⁴⁰ The same facility would need to be licensed for wholesale and retail. A direct farm business that does not process vegetables but does hold the product for “distribution to another site at wholesale” may still need a retail food establishment license unless the farm qualifies for an exemption.

Wholesale Licensing

Wholesale regulations are quite general in nature and the precise interpretation of the rules is open to some interpretation by the inspector. Overall, the facility must have a three-basin stainless steel sink, a sanitization plan, and a clean operation. Specific rules are found in the Ohio Administrative Code, Chapter 901, Section 3. Individuals who are ill should not be in contact with food and all food handlers should be trained and supervised to ensure good manufacturing practices are followed (A.C. 901:3-1-02). The water supply, plumbing, and sewage systems must be safe and adequate. Hand washing facilities and notices must be provided (A.C. 901:3-1-05). Refrigeration facilities must maintain specific temperatures and records must be kept. A.C. 901:3-1-07. Raw food products must be protected from contamination (A.C. 901:3-1-08). Depending on the type of product being manufactured, additional wholesale rules apply. Ohio Revised Code, Chapter 3715: Ohio Pure Food and Drug Law and Ohio Revised Code, Title 9: Agriculture lists specific laws for bakeries, canneries, soft drink bottlers, cold storage, lockers, and egg facilities. Cottage food operations are specifically exempt as food processing establishments and are discussed below. However, cutting fresh fruits and vegetables does not qualify for an exemption from the wholesale rules. Local departments of public health manage the application process, fees, and renewals.

Retail Licensing

In the case of retail food regulations, the exemptions may be relevant to most direct farm businesses. A direct farm business selling only fresh, unprocessed fruits and vegetables at a farmers market that is registered with ODA; a roadside farm stand with unprocessed fruits and vegetables; and a cottage food operation at a farmers market that is registered with ODA or at the site of production are included in the list of exempt operations (R.C. § 3717.22). Notably, a farmer offering a packaged specialty salad mix may not be exempt from retail requirements because the product is not an unprocessed vegetable. In qualifying for this exemption, the registration of the host farmers’ market is important. Ohio regulations offer farmers’ markets two options: 1) a farm may register with ODA and be regulated by Chapter 901:3-6 of the

¹⁴⁰ This distinction is made on ODA’s Food Safety Division website and is made to assist producers in finding more information on the laws specific to individual operations. At the food safety division website, www.agri.ohio.gov/divs/FoodSafety, click on “Regulations” at the bottom left. Wholesale Food and Retail Food links appear. Text of the laws relevant to each are found by following the links.

Administrative Code, or 2) be regulated as a retail food establishment under Chapter 3717 of the Revised Code (A.C. 901:3-6-01(A)). For farmers' markets choosing option 1, the farmers' market itself must provide hand washing facilities, toilet facilities and, if meats are sold, a multi-compartment sink set-up with sanitation capabilities (A.C. 901:3-6-01 et seq.). Mechanical refrigeration is also required for products requiring such treatment, although eggs may be held on ice gel packs and meat on dry ice in order to meet this requirement (A.C. 901:3-6-03). (Local departments of health inspectors may require mechanical egg refrigeration as described in the egg regulations of Chapter 7.)

For direct farm businesses that must comply with the retail food regulations (for example, because they offer a processed vegetable), ODA personnel explain that the regulations would be applied to mean that a processed product would need to be held at 45 degrees or below and records kept as the temperature is monitored throughout the farmers' market event. Much like the wholesale regulations, they are broadly written and discretion goes to the inspector in applying them to individual operations. As written, the retail food regulations address management and personnel issues, food sources and contamination, food equipment, water sources, and physical facilities (A.C. 3717-1 et seq.).

Retail food establishment licenses are valid for one year and the application must be filed at least 10 days before the license is needed. License fees vary according to the size and times of business of the establishment. Local departments of public health handle applications and inspections.

C. Value-Added Processing: Cottage Foods and Food Processing Establishments

If a direct farm business wishes to turn fruits or vegetables into jams, jellies, or fruit butters, the products are eligible for an exemption from the food processing establishment regulations (R.C. § 3715.021(A)). To qualify for this exemption with respect to fruits and vegetables, producers may offer only jams, jellies, candy, or fruit butters produced without any potentially hazardous foods (such as milk or eggs) and without acidified foods. Dry herbs, herb blends, teas, and seasonings also qualify (A.C. 901:3-20 et seq.). The products must be made in the person's home (R.C. § 3715.01(19)). In addition, the producer must allow the ODA to take a sample of the product to determine if the product is misbranded or adulterated, both of which are prohibited for all foods and defined at Ohio Revised Code 3715.59 and .60. Cottage food products may only be sold within the state of Ohio (A.C. 901:3-20-05(F)).

Cottage food products must be labeled with 1) the name and address of the cottage food production operation, 2) the name of the food product, 3) the ingredients in the food product, in descending order of predominance by weight, 4) the net weight and volume of the food product, and 5) the following statement in 10-point font, "This product is home produced." In addition, the product must adhere to federal labeling requirements of 21 C.F.R. Part 101. This

federal law governs health claims, nutrition claims, specific additives such as flavorings and colorings, and warning labels. Although an overview of Part 101 is provided in Chapter 3 under Marketing, this section of law is extensive and producers should review it to be certain they are not using prohibited ingredients or making prohibited statements.¹⁴¹

D. Juice

Ohio regulates the production of juice, and the only exception is for an establishment where the juice produced is only sold from that premises. Producers who sell their juice only on site must comply with all the regulations affecting food processing establishments, but not the additional regulations applying to juice processors. Even if a juice processor is exempt from state regulation because juice sales occur only on site, apple cider regulations require that all apples go through a mechanical washing and automatic scrubbing device before the fruit is crushed. In addition, the fruit must be washed with chlorinated water. Lastly, the cider package must be labeled (R.C. § 3715.27).

Under state and federal regulations, juice processors (not otherwise exempt as explained below) must have a HACCP plan in place. (A.C. 901:3-23-03, 21 C.F.R. Part 120).¹⁴² The HACCP rules require producers to develop a written analysis that identifies points in the production process where microbial, toxic, chemical, physical or other hazards may contaminate the juice, as well as a written plan for preventing hazards reasonably likely to occur (21 C.F.R. §§ 120.7 and 120.8). The developer of the written analysis and plan must have specialized HACCP training (21 C.F.R. § 120.13). For more information on the juice HACCP, the FDA has issued *Guidance for Industry: Juice HACCP; Small Industry Compliance Guide*, which is available **online**.¹⁴³

Processors who sell their own produce directly to consumers as juice are also exempt from the federal and state HACCP rule, so long as they store, prepare, package, serve, and vend their product exclusively and directly to consumers (A.C. 901:3-23-03; 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).

¹⁴¹ The full text can be found at:

www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?CFRPart=101&showFR=1

¹⁴² 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)).

¹⁴³

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

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.”

E. Wine, Beer and Spirits

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

At the federal level, TTB requires producers to obtain several permits prior to commencing operations and submit annual forms and taxes. Forms are available through TTB’s **website**¹⁴⁴ or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**¹⁴⁵ tailored to particular manufacturers.

The Ohio Department of Commerce, Division of Liquor Control regulates the manufacturing, wholesale distribution, and retail sale of alcoholic beverages. Ohio Revised Code Chapters 4301 and 4303 cover the range of alcohol regulation. Anyone wishing to manufacture an beer beverage for sale to anyone, including end users, must have an A-1 permit while wine manufacturers need an A-2 Permit. (R.C. § 4303.02; R.C. § 4303.03.)

III. OTHER CONSIDERATIONS FOR FRUITS AND VEGETABLES

Other sections of this Guide cover several additional issues that might arise when a direct farm business chooses to grow and sell fruits and vegetables. First, producers may wish to make certain health or nutrient claims when marketing their goods. These statements are regulated by the FDA and are discussed further in Chapter 3. Second, organic production and marketing must follow additional rules, which are outlined in Chapter 12. Finally, the “Weights & Measures” section of Chapter 3 chapter covers additional marketing rules applicable to direct farm businesses.

¹⁴⁴ www.ttb.gov/forms/index.shtml

¹⁴⁵ www.ttb.gov/applications/index.shtml#Manufacturers

IV. CHECKLIST

- Does your packaging and labeling strategy comply with Ohio law?
- If you are offering cut vegetables or packaged salad mix, have you checked with your local inspector about a license?
- 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 you need to get from federal, state and local agencies, be aware of the order in which they must be completed, and investigate how much they will cost (some can run into the thousands). Also be aware of whether you can sell directly or will need to contract with a distributor.

V. KEY CONTACT INFORMATION

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

Ph: (800) 858-7378

U.S. Food and Drug Administration

Guidance on fruits, vegetables, and juices:
www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/default.htm

Ohio Department of Agriculture, Food Safety Division

Ph: (614) 728-6250

Email: foodsafety@agri.ohio.gov

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

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

Ohio Department of Commerce, Liquor Control Division

Ph: (614) 644-2360

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**,¹⁴⁶ which allows producers to list their businesses in a searchable database as well as search for processors and potential institutional customers.



Although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.¹⁴⁷ Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's *Grain Processing: Adding Value to Farm Products*.¹⁴⁸ The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. For those turning grains into value added products such as bakery products, granola, or popcorn, Ohio's Cottage Food Law opens up a direct marketing avenue, which is discussed in Section IV of this chapter.

I. GRAIN INSPECTION STANDARDS

The federal Grain Standards Act (7 U.S.C. § 71 et seq.) authorizes the United States Department of Agriculture (USDA) to establish standards and procedures for the inspection of grain shipped in interstate commerce and out of the country (7 U.S.C. §§ 76, 77). USDA's Grain Inspection,

¹⁴⁶ <http://oh.marketmaker.uiuc.edu/>

¹⁴⁷ www.tritrainingcenter.org/course/

¹⁴⁸ www.attra.org/attra-pub/summaries/grainpro.html

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

II. LICENSING OF WAREHOUSES

A. *The United States Warehouse Act*

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

B. *Ohio Statutes: Buying, Warehousing and Handling of Grain*

Ohio law regulates the marketing and storage of grain to protect producers from problems caused by handlers. Anyone who 1) purchases more than 30 thousand bushels of grain from producers annually (excluding purchases for sale as seed), 2) operates a warehouse, bin, or enclosed structure as a bailee (which means that the owner maintains title to the product) for

Additional Resources: Grain Inspection

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

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

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

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

receiving, storing, or shipping grain, or 3) providing marketing functions, such as deferred payments or delayed marketing, that exert control over another producer's proceeds from agricultural commodities must hold a handler's license from the Ohio Department of Agriculture (ODA) (R.C. § Chapter 926 et seq.). Because the latter two qualifications for a license do not have volume thresholds, even a small producer who stores or ships grain from his or her neighbors, (without actually purchasing the grain outright and leaving the risk of price fluxuation or quality change) as a direct marketing strategy may qualify as a handler. The only exemption is available to individuals licensed under the USWA discussed above (R.C. § 926.04(C)).

Handlers are subject to multiple regulations.

Individuals directly associated with a previous handling business that went into receivership and caused losses to creditors or who have a felony conviction are not eligible for a license for five years (R.C. § 925.05). A new applicant for a handler's license must have a total net worth of at least \$50,000. If he or she does not have such a net worth, the individual may make up the difference with an indemnity agreement and by pledging personal assets, securing a bond, or providing an irrevocable letter of credit (R.C. § 926.06). Ohio law also establishes special lien on warehouse to protect producers in the event of the failure of a licensed dealer or warehouse operator (R.C. § 926.021). When applying for a license, handlers must also prove that they have insurance for the full market value of the grain against loss by fire, explosion, lightening, and windstorm (R.C. § 926.07). Additional record keeping requirements are imposed; the handler must record all receipts, withdrawals, and tickets issued for the warehoused grain. The failure to keep these records, maintain insurance, or a violation of the law's other requirements may result in the ODA revoking the handler's license (R.C. § 926.10).

If a licensed handler wants to run a quality test on a commodity in order to offer a premium, discount, or conditioning charge to a customer, the individual must have passed a commodity tester examination. The resulting certificate issued to a successful examiner is good for three years, at which time the examination must be passed again (R.C. § 926.30). If a grain handler discontinues the business, he or she must give notice to the ODA and to anyone storing grain at his or her warehouse at least thirty days prior to going out of business (R.C. § 926.27). Revised Code Chapter 925 contains many other regulations and any producer considering grain marketing will need to study the code and accompanying regulations carefully.

III. SELLING GRAINS

Unprocessed grains, nuts and seeds sold in the same condition as harvested are considered raw agriculture products and do not need to come from an inspected and licensed facility. However, as is more thoroughly discussed in the processed fruits and vegetables section, bagging, packaging, or grinding require a wholesale food processor license and a retail food processor license to sell the grain directly to consumers. Processing also includes blending, roasting, sprouting, grinding, or any other process that changes the condition of the grain. Sprouting in particular will require an additional variance from the standard retail food establishment license (A.C. 3717-1-03.4(J)(10)). Licensing and inspection is regulated by ODA, Food Safety Division but local departments of health conduct the inspection and issue the license.

Also important are the federal standards of identity for grains and grain products (21 CFR Part 137), which will apply if the finished product is sold in interstate commerce. FDA Defect Action Levels, which are maximum allowable levels of natural or unavoidable defects in foods for human use that present no health hazard (21 C.F.R. § 110.110), are another important area the

producer must monitor. Common defects with specific action levels include molds, insect parts, and excrements. More guidance on the action levels is available on the FDA's **website**.¹⁴⁹

IV. VALUE ADDED AND COTTAGE FOOD REGULATIONS

If a direct farm business bakes non-potentially hazardous bakery products, the products are eligible for an exemption from the food processing establishment regulations (R.C. § 3715.021(A)). To qualify for this exemption with respect to grains, producers may offer only bakery products that do not have a pH level of greater than 4.6, a water activity value greater than .85, or requires temperature control to prevent the rapid formation of microorganisms (R.C. § 3715.01(18)). Cottage food producers may also sell granola, granola bars, popcorn products, baked donuts, waffle cones, pizzelles, dry cereal and nut mixes, baking mixes in a jar. The products must be made in the person's home (R.C. § 3715.01(19)). In addition, the producer must allow the ODA to take a sample of the product to determine if the product is misbranded or adulterated, both of which are prohibited for all foods and defined at Ohio Revised Code 3715.59 and .60. Cottage food products may only be sold within the state of Ohio (A.C. 901:3-20-05(F)).

Cottage food products must be labeled with 1) the name and address of the cottage food production operation, 2) the name of the food product, 3) the ingredients in the food product, in descending order of predominance by weight, 4) the net weight and volume of the food product, and 5) the following statement in 10-point font, "This product is home produced." In addition, the product must adhere to federal labeling requirements of 21 C.F.R. Part 101. This federal law governs health claims, nutrition claims, specific additives such as flavorings and colorings, and warning labels. This section of law is extensive and producers should review it to be certain they are not using ingredients or making statements regulated by it.¹⁵⁰ See Chapter 3, Section II of this Guide for more information.

¹⁴⁹

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

¹⁵⁰ The full text can be found at:

www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?CFRPart=101&showFR=1

V. CHECKLIST

Have you:

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

VI. KEY CONTACT INFORMATION

U.S. Grain Inspection, Packers & Stockyards Administration

Ph: (202) 720-0219 (main)

For a list of official GIPSA service providers, visit

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

Ohio Department of Agriculture, Plant Health Division

Ph: (614) 728-6400

Email: plant@agri.ohio.gov

CHAPTER 10: HONEY, MAPLE SYRUP, AND SORGHUM

Honey, maple syrup, and sorghum production and marketing is regulated by the state of Ohio. The discussion of honey addresses both the aspects of bee keeping and honey processing. Maple syrup and sorghum are handled very similarly, with a minimum of regulatory obligations to protect the quality of the product and consumer safety.

I. HONEY

A. Bee Keeping

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

Domesticated honeybees play an integral role in agricultural sectors needing pollinators, so diseases and pests affecting honeybees can cause significant economic damage. To protect Ohio's bee colonies from disease, Ohio's apiary section of the agriculture code (R.C. § Chapter 909) establishes registration and inspection requirements.

All new beekeepers must register with the Ohio Department of Agriculture (ODA) before June 1st of each year or within 10 days for colonies acquired after June 1st (R.C. § 909.02). The registration application, available on ODA's website, requires disclosure of the precise location of apiaries and the number of colonies in each apiary¹⁵¹ (R.C. § 909.02). The owner must display the registration number on any apiaries located off the owner's residence (R.C. § 909.02). Also, if bee colony ownership is transferred in any way (including gift, barter, or sale), a permit must accompany the transfer (R.C. § 909.09). The permit process is designed to screen for disease and Africanized honeybees. Transfers of bee colonies from out of state must be accompanied by an inspection certificate that verifies the health of the bee colony (R.C. § 909.10).

ODA has the authority to inspect any apiary, whether publicly or privately held, and control or eradicate diseases or Africanized honey bees (R.C. § 909.05). If a serious bee disease is known to exist, the bees, honeycombs, honey, or equipment may be removed by the director of agriculture under a special permit (R.C. § 909.11). To facilitate inspection, bee hives must be accessible and frames must be removable. Cross-comb hives are considered a public nuisance and disallowed (R.C. § 909.12).

¹⁵¹ www.agri.ohio.gov/apps/odaforms/odaforms.aspx?div=Plant%20Health&sec=Apiary

B. Processing

Many bee keepers choose to process their own honey, and Ohio law makes this an attractive option in terms of regulations. Beekeepers who jar honey where at least 75% of the honey came from the beekeeper's own hives have a special exemption from processing requirements. If the honey meets this threshold percentage, the beekeeper does not need to meet the standards required of a food processing establishment in the Food Safety Code (R.C. § 3715.021) and the honey is considered to be from an approved source (R.C. § 3717-1-01(4)(b)). If the beekeeper jars honey with less than 75% from the beekeeper's own hives, then the facility must be registered and inspected as a food processing establishment under the Food Safety Code (R.C. § 3715.041). More detail on food processing establishment licensing is in Chapter 8 under Processed Fruits and Vegetables.

If a producer who is otherwise exempt as described above would like to voluntarily label his or her honey as passing the inspection of the Department of Agriculture, the beekeeper may request a voluntary inspection (R.C. § 3715.024). This request is made by registering with ODA. To pass the inspection, a producer needs to use only collection equipment that is made of food grade materials and used for holding the food product. All collection equipment must be washed and sanitized before use (R.C. § 901:3-46-05). The packaging used to hold the honey must be clean, air tight, at least 90% full, and washed before filling (R.C. § 901:3-46-06). As for the production area, the walls and room must keep out vermin, the floors must not be made of dirt, and light bulbs need to be shatter-resistant (R.C. § 901:3-46-08). The rules regulate overall cleanliness by requiring soap, water, and disposable paper towels, clean and safe food-contact surfaces, and no storage of hazardous materials in the same area where the honey is processed (R.C. § 901:3-46-08). If the facility uses non-municipal water, it needs to be tested annually (R.C. § 901:3-46-09).

C. Marketing

To protect consumers from misleading practices, Ohio law regulates what can and cannot be placed on a label. It is illegal to sell anything that resembles honey and is labeled or represented with words or symbols to be honey (R.C. § 3715.38(A)). If honey is blended with other ingredients and is labeled with the word "honey," then the indication of other ingredients, such as the word "blend," must be more prominent than words or drawings that represent honey (R.C. § 3715.38(C)). Misbranding honey is a minor misdemeanor (R.C. § 3715.99).

The label must include several items: the name and address of the business operation of the beekeeper, the name of the product, ingredients in descending order of predominance by weight, and the net weight and volume of the honey (R.C. § 3715.023). With the appropriate label affixed, such honey is acceptable for sale or use in a retail food establishment or operation (R.C. § 3715.023(B)).

Pasteurizing honey makes the product free flowing, destroys osmophilic yeast (i.e., prevents molding) and delays crystallization. Usually, pasteurization of honey is not required because its high sugar content makes honey naturally anti-microbial. In the absence of regulation, a beekeeper probably can legally produce and sell unpasteurized “raw honey.” Some consumers seek out local unpasteurized, raw honey because they believe it helps alleviate allergies. However, producers should not include this claim on their labels or in their advertising. FDA must specifically approve all health claims prior to use (21 C.F.R. § 101.14),¹⁵² and it has never approved the claim linking honey and allergies (21 C.F.R. §§ 101.70-.83).¹⁵³

D. Organic Honey

To market honey as organic, the bees and processing plant must be certified organic according to USDA’s National Organic Program. Although the regulatory definition of livestock specifically excludes bees (7 C.F.R. § 205.2), the USDA has directed certifiers to use the livestock standards for certification of bees and the National Organic Program has recommended adoption of apiary-specific standards.¹⁵⁴ 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. Chapter 12: Organic Certification covers the livestock regulations in more detail, as well as information on the certification process, record keeping requirements, labeling rules, and processing of organic foods. Given the special nature of bees, it may be best to contact an accredited organic certifying agent that certifies bees to discuss specific requirements. Refer to Chapter 12: Organic Certification for more general information on the organic certification process.

II. MAPLE SYRUP

Much like honey, maple sap is a naturally occurring product extracted by producers. However, to make it into a saleable commodity, syrup makers must boil the sap down into syrup. If the maple syrup processor is boiling sap where a minimum of 75% of the sap used to produce the syrup is collected from trees by that processor, then the operation is not considered a food processing establishment and does not have to comply with registration and inspection

¹⁵² 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.

¹⁵³ For an interesting case regarding FDA’s enforcement of allergy claims related to honey see *United States v. 250 Jars ‘Cal Tuepelo Blossom U.S. Fancy Pure Honey*, 344 F.2d 288 (6th Cir. 1965).

¹⁵⁴ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5087792>

requirements (R.C. § 3715.021). If the syrup is processed with less than 75% from the sap from the processor's collection, then the facility must be registered and inspected as a food processing establishment under the Food Safety Code (R.C. § 3715.041).

Even if the facility does not need to be inspected, maple syrup still must not be adulterated, which includes containing any contaminated substance, being held in unsanitary conditions, or packaged into a container that renders the contents harmful to health, among other common sense requirements (R.C. § 3715.59). Uninspected producers also need to use airtight containers filled to at least 90% of their capacity that are washed and sanitized before filling (A.C. 901:3-45-04).

If a producer who is otherwise exempt as described above would like to voluntarily label his or her maple syrup as passing the inspection of the department of agriculture, the owner may request a voluntary inspection (R.C. § 3715.024). This request is made by registering with ODA. To pass the inspection, a producer needs to use only collection equipment that is made of food grade materials and used for holding the food product. All collection equipment must be washed and sanitized before use (R.C. § 901:3-46-05). As for the production area, the walls and room must keep out vermin, the floors must not be made of dirt, and light bulbs need to be shatter-resistant (R.C. § 901:3-46-08). The rules regulate overall cleanliness by requiring soap, water, and disposable paper towels, clean and safe food-contact surfaces, and no storage of hazardous materials in the same area where the maple syrup is processed (R.C. § 901:3-46-08). If the facility uses non-municipal water, it needs to be tested annually (R.C. § 901:3-46-09).

Like honey, the marketing of maple products must not mislead the customer. Specifically, the word "maple" or maple symbols may not be used on a maple product that is not maple syrup, maple sugar, maple cream or otherwise entirely derived from maple syrup and without any other sweetener (R.C. § 3715.24, R.C. § 3715.25). Mislabeling of maple syrup is a misdemeanor of the fourth degree (R.C. § 3715.99). Generally, a label may not be misleading, must contain the name and business address of the processor, and may not contain artificial colorings or flavorings without indicating the same on the label, among other requirements (R.C. § 3715.60).

Maple syrup producers may choose to grade their products and list the grade on the label, but if the producer so chooses, the label must comply with ODA's standards. Grades are determined using a spectrophotometer, and the color values correspond to the grade. A table of the appropriate values and grades may be ordered by calling 614 387-2078 or by emailing erfhelpdesk@lsc.state.oh.us. Processors are permitted to add salt, chemical preservatives, or defoaming agents to syrup; but, those ingredients must be listed on the label (R.C. § 901:3-45-03).

III. SORGHUM

To avoid being classified as a food processing establishment and thus complying with registration and inspection requirements, the processor of sorghum must extract at least 75% of the sorghum juice directly from the plant (R.C. § 3715.021). If the sorghum processor would like to voluntarily label his or her product as passing the inspection of the department of agriculture, the processor may request a voluntary inspection (R.C. § 3715.024) and use the label if the producer satisfies the same requirements listed for honey and maple syrup above.

IV. CHECKLIST

Have you...?

- Registered your bee colony with the Ohio Department of Agriculture and obtained any necessary permits to transfer ownership? Checked with local authorities for other restrictions?
- If you intend to jar honey, boil sap, or process sorghum juice from another's source, do you have an inspected processing facility?
- If you intend to market your honey as organic, contacted an accredited certifying agent that has experience certifying honey?
- If you are exempt from inspection, but wish to use ODA's voluntary inspection label, have you satisfied the production requirements?

V. KEY CONTACT INFORMATION**Ohio Department of Agriculture, Food Safety Division**

Ph: (604) 728-6250

Ohio Department of Agriculture, State Apiarist

Ph: (614) 728-6373

CHAPTER 11: LIVESTOCK AND POULTRY

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

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

I. RAISING AND CARING FOR ANIMALS

A. Livestock Care Standards

In 2009, a majority of Ohio citizens voted for a statewide ballot initiative that created a 13-member Ohio Livestock Care Standards board charged with establishing rules for the care of alpaca, beef and dairy cows, goats, horses, llamas, pigs, poultry, sheep and veal. The Livestock Care Standards Board subsequently developed rules regarding care, handling, housing, health, and euthanasia of Ohio animals that became effective on September 29, 2011. These rules are still relatively new and the Ohio Department of Agriculture (ODA) has produced several videos to help producers understand their obligations under the law.¹⁵⁵

General Standards

Livestock owners and caretakers must ensure that livestock and poultry have access to feed and water on a regular basis and in enough quantity to maintain their normal growth. When animals are sorted, the process must be humane, and the use of electric prods is specifically regulated according to the weight of the animal and location for usage. Livestock may not be recklessly thrown, dragged, or dropped (R.C. § 901:12-3-03).

¹⁵⁵ www.agri.ohio.gov/LivestockCareStandards/

Livestock owners and caretakers must comply with label instructions for administering medication, and take care that all health and medical treatments are done humanely. Sick animals also need to be separated from healthy animals (R.C. § 901:12-3-05). Livestock that are disabled must have access to water, protected from elements and predators, moved in a humane manner, and monitored or euthanized in a humane manner. Records must be kept of treatments, medications, and withdrawal times for disabled animals as well (A.C. 901:12-4). Livestock and poultry must be monitored regularly for disease, injury and parasites. When caretakers or owners find evidence of these conditions, they must take corrective measures (R.C. § 901:12-3-05). Livestock and poultry facilities and equipment must be designed so that they minimize bruising and injury. If animals must be restrained, it must be minimal in degree and duration, and in a manner that minimizes potential for injury (R.C. § 901:12-3-03).

Species Specific Standards

Cows

Veal calves must be provided with specific housing requirements including opportunities for socialization, the ability to lie down, and enough light to observe other calves. Tethering of veal calves may not restrict their ability to lie down comfortably or groom themselves. Beginning in 2018, veal calves must be allowed to turn around in their cages and housed in group pens by 10 weeks of age (R.C. § 901:12-15). It is against the law for a slaughterhouse or processor to have a calf of less than four weeks old in its possession for sale as human food (R.C. § 3715.22).

Regarding dairy cows, all must be fed colostrum or replacement within the first 24 hours of life. Although tail docking is allowed under certain conditions currently, after 2018 the procedure will only be allowed if it is medically necessary (A.C. 901:12-06-02(A)). Cow and heifer indoor housing must allow dairy cattle of all ages to lie down at the same time and have access to feed and water without excessive competition. Further, free stalls must allow the animal to lie down without her rear quarter contacting the alleyway or gutter, be cleaned regularly, and all areas must be cleaned of standing water and excess manure regularly (A.C. 901:12-06-02(D)). Outdoor housing for dairy cows must promote drainage away from resting and feeding areas (A.C. 901:12-06-02(E)). Beef cows must also have outdoor housing systems with proper drainage away from resting and feeding areas. The outdoor housing must minimize prolonged exposure to unsafe or health-compromising conditions (A.C. 901:12-07).

Pigs

Swine housing systems must allow sows and boars in pens to lie down fully on its side without the head and rear quarters coming into contact with feeders and the back of the pen at the same time. Outdoor housing must provide a method of thermo regulation while sows farrowing outdoors must also have shade in hot weather, shelter from winds, and a supply of bedding in cold weather. Piglet housing must be clean, dry, well-heated, and draft-free with food and water

available under all weather conditions. Indoor housing for breeding, gestating sows and gilts may use gestation stalls until 2026. After 2025, they may only be used for a period of time that maximizes embryonic welfare and confirmation of pregnancy. However, effective in 2012, any new housing, including on an existing facility, for breeding/ gestating sows may not use gestation stalls beyond that which maximizes embryonic welfare and confirmation of pregnancy (A.C. 901:12-08).

Poultry

Laying hens, broilers, and turkeys may have their water withheld if a licensed veterinarian orders it or in preparation for vaccination, transportation, or specific management practices. (A.C. 901:12-09 to -11). Practices such as debeaking and induced molting may be performed if they minimize injury. Stocking densities for layers and broilers must be low enough that all individual animals can access feed and water sufficient to maintain normal body conditions. (A.C. 901:12-09; 901:12-10). If layer, broiler or turkey housing requires mechanized ventilation, a backup system must be in working condition. Battery cages are allowed but manure from upper birds may not drop directly on birds in lower cages. (A.C. 901:12-09). Battery and enriched cage systems installed after 2012 must provide a minimum of 67 square inches per layer. Cage free layer systems must allow at least 144 square inches per layer (A.C. 901:12-09).

Sheep and Goats

All breeds of sheep and goats that do not naturally shed their wool must be shorn regularly. In general, housing must be clean and safe, protect sheep from adverse weather, and offer enough space that ewes and kidding goats may separate themselves. Sheep and goats housed indoors must be ventilated and offer enough space to lie down, stand up, and eat without excessive competition. Outdoor housing must minimize exposure to adverse conditions and promote good drainage away from feeding and resting areas (A.C. 901:12-12; 901:12-13).

Camelids: Llamas and Alpacas

All comingled adult male camelids must have their fighting teeth conditioned and their toe nails maintained in functional condition. During hot weather, cooling methods such as shearing or mechanical ventilation must be used to minimize heat stress. Housing must be safe and allow animals to lie down and feed without excessive competition. If camelids are housed indoors and confined to an enclosure, the owner or caretaker must provide access for regular exercise unless it is medically prohibited (A.C. 901:12-14).

Equine: Horses, Ponies, Mules and Donkeys

Equine animals may be castrated but it must be performed in a humane manner including chemical restraint and effective analgesia. Equine animals must be monitored regularly for “functional condition and maintenance of body condition” with corrective measures taken if

evidence otherwise is found. Housing must be clean and safe with a density at least allowing all animals to sit down at the same time and access food without excessive competition. If indoor stalls are used, they must be cleaned and supplied with bedding regularly. Outdoor housing must be adequately drained away from resting and feeding conditions. All tack and harnesses must fit properly and be maintained to minimize potential for injury. If equine animals are transported, stallions and jacks must be separated, no two-tiered trailers are allowed, and they must be able to stand upright without their heads touching the top of the trailer (A.C. 901:12-15).

Euthanasia

If the animal has a poor likelihood of recovery and the condition cannot be effectively managed, then the animal must be euthanized. The livestock care standards list specific acceptable methods for each type of animal under the standards. If the action does not result in a humane death, then the same or another acceptable method must be performed immediately (R.C. § 901:12-3-04, A.C. 901:12-1).

Enforcement

If a credible livestock standards complaint is made to ODA, the staff will investigate that complaint. ODA will notify persons found violating the livestock care standards, which may be either the person who owns or who has custody of the animal (A.C. 901:12-2(D)). If correctable, ODA staff will include a corrective prescription in the violation, along with a schedule for compliance (A.C. 901:12-2(D)(4)). Neglect or unintentional failures to meet the standards are considered minor violations, punishable at up to a \$500 fine (A.C. 901:12-2(F)). Reckless or intentional acts that result in an unjustified infliction of pain are major violations. These include causing an animal to be disfigured or impairing a limb or bodily organ, as well as putting the animal's life in peril. Major violations come with a fine of between \$1000 and \$5000, with larger fines for each subsequent violation (A.C. 901:12-2(G)).

B. The Federal Humane Slaughter Act

The Federal Humane Slaughter Act (7 USC § 1901) requires that animals be slaughtered humanely. Approved humane methods either render the animal unconscious quickly or comply with Kosher or other religious methods that quickly cause unconsciousness due to anemia from a cut to the carotid artery (7 USC § 1902). Following the Ohio Livestock Standards for euthanasia discussed above satisfies this requirement.

C. Garbage-Fed Swine

Ohio's Garbage-Fed Swine law requires farmers to secure a permit before feeding garbage to swine (R.C. § 942.02). The permit needs to be renewed annually before the end of the year and

costs \$100. The Act does not apply to a person who feeds his or her own swine the garbage obtained only from his or her household; or to a person feeding only bakery waste, candy waste, eggs, vegetables, or dairy products to swine (R.C. § 942.13(A)). Other practices, particularly feeding meat scraps and dead animals to swine, can lead to the spread of difficult-to-control diseases such as hoof-and-mouth disease or Bovine Spongiform Encephalitis (BSE). Therefore, ODA requires that all garbage be thoroughly heated to the boiling point for at least 30 minutes (R.C. § 942.04(B)). If treated garbage is transported in the same container as nontreated garbage, it must be cleaned and disinfected first with one of the products specified in the law (R.C. § 942.06(A)). Leftover garbage not fed to swine must be properly disposed and records of the disposal kept for one year (R.C. § 942.06 to 07).

D. Baby Animals

The Pure Food and Drug Law prohibits the sale or giving away of any rabbit or baby poultry that has been dyed or colored. In addition, baby poultry can only be distributed in lots of six or more. (R.C. § 925.62).

E. Brands

If a livestock producer wishes to brand his or her animals for the purpose of identification, but not for in-herd identification or disease control purposes, the brand must be recorded with ODA. The producer must choose a brand that will not cause confusion as to the ownership of the livestock and comply with several specific requirements. Registration comes with a \$35 fee (A.C. 901:1-25).

II. DISEASED ANIMALS AND DEAD ANIMAL DISPOSAL

A. Animal Disease Control

Because animal diseases can have a very negative impact on agriculture as a whole and the economic development it supports, animal disease incidents and residues are handled seriously. Any person that suspects an animal to have a dangerously contagious disease is required to report the fact to ODA or to a veterinarian, who is then obligated to report the incident to ODA. Further, a person is prohibited from selling any animal that the person knows or should know, harbors an infectious disease (R.C. § 941.06). When ODA receives a report of the possibility of a dangerously contagious disease, the director is required to order an investigation. The investigation may involve inspection of the animal owner's property or quarantine of the animal. Even if a report is not made, but ODA reasonably suspects a premise or animal to have a dangerously infectious disease present, ODA may inspect the premises (R.C. § 941.04). If a person refuses to permit ODA's inspection, the immediate slaughter of the animal may be ordered, with the cost borne by the owner (R.C. § 941.043).

Ohio law also describes additional procedures that must be taken regarding specific livestock and poultry diseases. Producers should be familiar with the signs of brucellosis, hog cholera, pseudorabies, Johne's Disease, scrapie, and equine infectious anemia so they can comply with obligations to report signs of these diseases in a timely manner (A.C. 901, Section 1).

B. Disposal of Dead Animals

If an animal dies or is destroyed because of a contagious disease, it should be disposed of within 24 hours by law. Ohio law allows for the burning, burying beneath four feet of ground, dissolution by alkaline hydrolysis or removal to a rendering plant as acceptable disposal methods. The owner of the dead animal and the owner of the premises holding the dead animal are both responsible under this law. ODA does have the authority to send written notice to the owner of a dead animal requiring the owner to dispose of a dead animal in a specified manner or prohibiting the owner from transporting the carcass on roadways (R.C. § 941.14). Additional state or local regulations may govern disposal, including for example, a prohibition against placing a dead animal carcass in a waterway or public field, meadow or ground (R.C. § 3767.16).

Choosing a disposal method can be difficult but resources are available. The federal Animal, Plant and Health Inspection Service publishes detailed guidelines on selecting a disposal method for diseased animal carcasses. Although it is intended to guide emergency response personnel in selecting an appropriate method, it is useful for any producer dealing with animal disposal.¹⁵⁶ Disposal in a commercial landfill may be the easiest option, and Ohio Environmental Protection Agency (Ohio EPA) compiles a list of landfills that accept animal carcasses.¹⁵⁷ However, landfilling may not be the most efficient use of resources and Ohio EPA has materials to assist farmers in composting animal carcasses.¹⁵⁸ An agricultural producer wishing to compost animals must take a course offered by Ohio Extension and use only appropriate methods allowed by law (R.C. § 1511.022). The Ohio Department of Natural Resources (Ohio DNR) regulates appropriate composting methods by referring to the Ohio DNR's "Field Office Technical Guide" (A.C. 1501:15-5-18). The resulting compost product may be subject to compost standards regulated by Ohio EPA if it is used off the farm (R.C. § 3734.029).

ODA's animal health staff are willing to assist in helping a producer manage animal disposal and can be reached at (614) 728-6220.

¹⁵⁶ www.aphis.usda.gov/emergency_response/tools/on-site/htdocs/images/nahems_disposal.pdf

¹⁵⁷ www.agri.ohio.gov/divs/ai/docs/iw_landfills_animal_carcasses.pdf

¹⁵⁸ www.epa.state.oh.us/portals/34/document/guidance/gd_673.pdf;
www.epa.ohio.gov/portals/34/document/guidance/gd_533.pdf

III. SLAUGHTERING AND PROCESSING

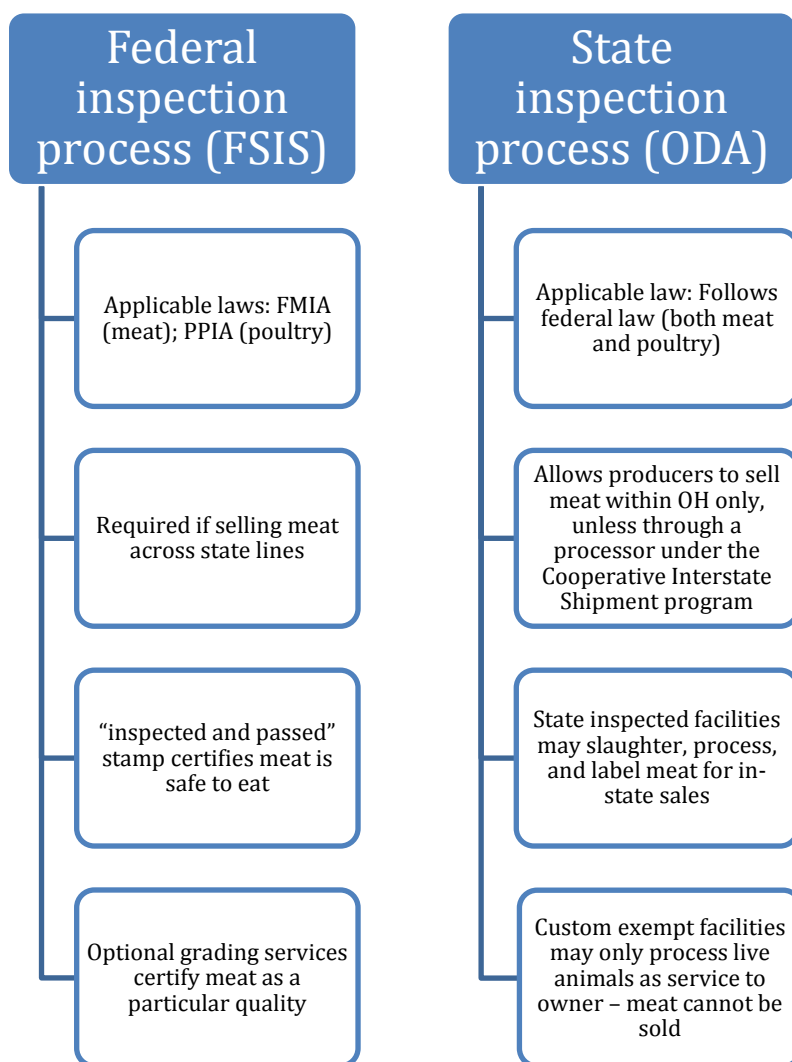
A. Slaughtering and Processing Overview

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 ODA enforces Ohio laws and regulations applicable to Ohio 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 either the USDA or ODA. For instance, in sausage production, the facility that slaughters the animal must have a permit and the facility that processes the sausage, if it is a separate facility, also must have a permit. In rare circumstances, a producer can slaughter and process the operation's own poultry. Although most slaughtering and processing is done at slaughterhouses, mobile processing units, which are designed for small producers, may be available in certain areas.¹⁵⁹

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

¹⁵⁹ 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



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 Ohio, have reacted by banning the processing of horse meat for human consumption.

B. Meat: Federal

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). There is an exemption in the state of Ohio for plants meeting ODA's cooperative interstate shipment program that is described at the end of this section. 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 Ohio (i.e., not in

interstate commerce), the meat may come from a facility inspected according to the Ohio Department of Agriculture statutes, rules and regulations, which follow the federal rules with minor modifications (A.C. 901:2-1-01).

As an overview, the slaughter and processing inspection process controls sanitation practices, product branding, humane handling and slaughtering, and product testing for food safety. An inspected facility must have a HACCP system in place and a Sanitation Standards Operating Procedures (SSOP) plan implemented to be licensed. Businesses that process meat, even if they do not also slaughter, are also regulated. However, there is a retailer exemption to this rule. If the processor sells at least 75% of the dollar value of total sales are to household customers, the

total dollar value of sales is below \$67,300 for red meat and 51,700 for poultry (as of 2013)¹⁶⁰ and the processor simply cuts, trims grinds or rewraps products, a HACCP plan need not be developed.

ADDITIONAL INFORMATION: Animal Processing Licenses

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

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

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

Contact:

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

infosource@fsis.usda.gov

The 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**.¹⁶¹ 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**.¹⁶²

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 and the Poultry Products Inspection Act. The FSIS rule lists requirements for meat and poultry processors

¹⁶⁰ Federal Register Volume 77, Number 79, April 24, 2012, Pages 24456-24457

¹⁶¹ http://www.fsis.usda.gov/wps/wcm/connect/5d43763f-a9aa-459b-94e0-cdf9e3543923/Inspection_and_Grading_What_Are_the_Differences.pdf?MOD=AJPERES

¹⁶² <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling>

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.

Ohio has the distinction of being the very first state to participate in this new Cooperative Interstate Shipment Program. Ohio went through the detailed process of federal evaluation to be sure the state program reflects federal standards. State inspectors have the same equipment and tools to test meat products and satisfy all federal requirements. At this point, if an Ohio livestock producer wishes to sell meat across state lines, he or she may do so if the product was processed at a state facility that has also applied to ODA's Meat Inspection Division as well. Contact the Meat Inspection Division for a current list of state-inspected processors eligible to process meat that may be shipped across state lines.

C. Meat: State

If a producer wishes to slaughter meat for sale to others or to provide a slaughtering service to others, ODA's Meat Inspection Division must inspect the plant. The only exemption is where an individual is slaughtering meat for his or her own consumption; such a process is not regulated. For all others, the facility must be inspected by the state, in accordance with federal standards (A.C. 901:2-1-01). Ohio inspectors inspect Ohio meat plants whenever the slaughter and processing of animals occurs. The implication of this rule is that an inspector must be on site for any day the plant slaughters animals. The inspector reviews the slaughter process of all animals starting from the time they are received at the plant until the carcass is placed in the cooler. Meat produced in a state inspected facility can be sold anywhere within the state.

If a facility only provides slaughter and basic processing services to animal owners themselves and does not handle meat intended for resale, then the facility may be considered a custom exempt processor. Custom exempt processors are not required to meet the full inspection required of a regular slaughter facility. The main difference is that a custom exempt processor is not required to prepare a HACCP plan, although the plant must still have a sanitation plan in place. Custom exempt facilities are also not inspected at all times that slaughter occurs. Instead, the plant is subject to occasional, random inspections approximately 3-4 times per month.¹⁶³ Meat processed in a custom exempt plant cannot be sold to others or retail businesses and must be stamped with the words, "Not For Sale."

¹⁶³ www.agri.ohio.gov/apps/faqs/faqs.aspx?div=Meat+Inspection#tog

ODA Meat Inspection Division publishes additional details regarding the licensing of slaughter and processing facilities and a new plant application packet with information for both fully inspected and custom exempt processors on their website.¹⁶⁴

D. Poultry: Federal

As a general rule, poultry products that are sold across state lines are subject to the federal Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R. Part 381) that require inspection of poultry slaughter and/or processing of poultry products. (ODA's Meat Inspection Division regulates poultry slaughtered and processed only for in-state retail sale.) However, federal law does exempt some businesses from the mandatory inspection requirements (21 U.S.C. § 464; 9 C.F.R. § 381.10). On a basic level, slaughtering is exempt when it is done by:



- The producer for personal use;
- A slaughterer who provides a service to an owner of live chickens and *is not* selling poultry to any consumers;
- A producer-grower who slaughters and sells the poultry they themselves have raised (1,000 bird limit, or 20,000 limit as long as only distributed

intrastate);

- Producer-growers that sell direct to consumers;
- Slaughterers who purchased live poultry specifically to sell direct to consumers;
- Small enterprises that process fewer than 20,000 birds annually *and* the processing only goes as far as cutting up the birds; and
- A retail business that is merely cutting up birds for the store.

The intricacies of whether a producer or slaughterer qualifies for the exemption, and which sales are exempt, are more complex and nuanced than the above list. Producers should contact an FSIS district office for an individualized analysis before proceeding without obtaining an inspection and license. FSIS has published *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry Products Inspection*

¹⁶⁴ www.agri.ohio.gov/meatinspection/#tog

Act, which is available **online**.¹⁶⁵ The guidance document contains a helpful decision flowchart (page 5) and a table (page 21) to help determine whether the operation is exempt from the PPIA.

Regardless of the exemption, processors are never exempt from the PPIA's prohibitions against misbranding and adulteration (injurious to health, or held, packed or produced under unsanitary conditions). Attachment 2 to the *Guidance for Determining Whether...Exempt* (linked above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416), and the *FSIS Sanitation Performance Standards Compliance Guide*, which is available on the **FSIS website**.¹⁶⁶ In general, even exempt facilities must slaughter healthy chickens and ensure that they handle the birds properly. (21 U.S.C. § 464; 9 C.F.R. § 381.10).

E. Poultry: State

ODA's Meat Inspection Division must inspect facilities that process poultry products for sale only within the state of Ohio. Ohio has adopted the federal PPIA as state law so inspectors follow the same rules, with some minor modifications (A.C. 901:2-3). In addition, Ohio has adopted the same exemption opportunities as provided by federal law, listed above. However, there is one important difference: Ohio does not exempt small enterprises that cut up poultry carcasses only. Any facility intending to process under an exemption must make a request with ODA using the Exemption Request Form.¹⁶⁷ Producers must also keep adequate records to establish that they did not slaughter or process more than the number of exempted poultry in the calendar year.

In addition, the regulations incorporate the federal prohibition against misbranding and adulteration described below, regardless of the inspection exemption. All products must be properly labeled and can only be sold within Ohio.

IV. MARKETING MEAT AND POULTRY PRODUCTS

A. Federal: Labeling and Storing of Meat and Poultry Products

FSIS regulates meat and poultry product labeling under the FMIA and the PPIA. These laws explicitly preempt any state law that adds to or is different than these federal laws (21 U.S.C. § 678; 21 U.S.C. § 467(e)). The FDA also establishes labeling requirements for "food products" under the federal Food, Drug, and Cosmetic Act. Depending on the product, the agencies' jurisdictions may overlap or become very unclear. To resolve this potential for jurisdictional overlap, USDA exempts foods containing less than certain specified quantities of poultry or poultry products from the PPIA (although products exempted under this section are still subject

¹⁶⁵ www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf

¹⁶⁶ http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/San_Guide.pdf

¹⁶⁷ www.agri.ohio.gov/meatinspection/#tog

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.¹⁶⁸

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

Labels must appear directly on the immediate packaging (9 C.F.R. §§ 317.1, 381.116), unless the packaging meets special circumstances. For instance, poultry packages destined for institutional customers can have the label on the outside package (rather than each immediate package) as long as the label states “for institutional use” and as long as the customer is not offering the unlabeled product in the container for retail sale (9 C.F.R. §§ 381.115). FSIS also requires the principal display label to contain the name of the product, net quantity of contents, the official inspection legend, number of the official establishment, and, if necessary, a handling statement (9 C.F.R. §§ 317.2(d), 381.116(b)). Information panels (generally defined as the first surface to the right of the principal display panel) may contain an ingredients statement, the name and address of the manufacturer or distributor, and nutrition labeling, if required (9 C.F.R. §§ 317.2(m), 381.116(c)). Safe handling instructions may be placed anywhere on the label (*id.*). Further regulations dictate product names, the prominence of the statement of identity, country of origin labeling, net quantity, and many other provisions. USDA’s *Guide to Federal Food*

¹⁶⁸ 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).

*Labeling Requirements for Meat and Poultry Products*¹⁶⁹ provides more detailed information on these labeling requirements.

B. Federal: Nutrition Content Labeling

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

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

Third, ground or chopped meat or poultry products produced by small businesses do not have to comply with the new nutritional labeling requirements. The USDA defines a “small business” for purposes of this exception as a facility that employs 500 or fewer people and produces no more than 100,000 pounds of meat per year. This exception holds even if small producers use “percent fat” and “percent lean” labels on their ground meat and poultry products, so long as they include no other nutritional claims or nutritional information on their labels. However, unlike for ground products, the nutritional labeling rules for major whole cuts of meat or poultry do NOT exempt small producers. This means that direct farm businesses that sell cuts of meat or poultry to consumers – either on-premises or at a farmers’ market – *must* provide nutritional content information, either on a packaging label or on a placard at the point of sale. However, this requirement should not be overly burdensome, because USDA point-of-purchase labeling materials will be available over the Internet, free of charge.. For more information, the FSIS has produced a **Questions and Answers document**.¹⁷⁰ FSIS does have

¹⁶⁹ Available online at www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf

¹⁷⁰ www.fsis.usda.gov/PDF/Nutrition_labeling_Q&A_041312.pdf

Nutritional Information Charts¹⁷¹ available online for chickens, turkeys, pork, lamb, beef and veal that provide information in the interim.

Those producers that do not qualify for the small business exemption for ground meat or poultry will need to label their products with nutrition information. The USDA has resources available to aid producers in calculating nutrition information for these products. Specifically, the agency has a **national nutrient database**¹⁷² 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**¹⁷³ for ground beef that determines the precise nutrient content information for a specified level of fat or lean in a particular ground beef product.

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

Normally, the packer is considered the producer because the packer produces the final product. For ground or chopped product, the producer of the final packaged product is required to provide nutrition labels on the product, unless an exemption applies. The producer of the final packaged product may be a federal establishment or retail facility. Retailers are required to provide point-of-purchase materials or nutrition labels for major cuts, unless an exemption applies.¹⁷⁴

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 Ohio), 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

¹⁷¹ <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-policies/nutrition-labeling-policies/nutrition-labeling>

¹⁷² www.ars.usda.gov/main/site_main.htm?modecode=12-35-45-00

¹⁷³ www.ars.usda.gov/Services/docs.htm?docid=13933

¹⁷⁴ www.fsis.usda.gov/PDF/Nutrition_labeling_Q&A_0211.pdf

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**.¹⁷⁵

Specific Terms Used in Meat and Poultry Labeling

USDA regulates many terms that direct producers may wish to use on their products. Their **website**¹⁷⁶ explains what USDA requires of specialty product labels. As noted above, many of these labels require pre-approval and many involve inspections and certification fees. Separate agency regulations outline the specific requirements for each claim. Some, but not all, of the terms are

- “Natural”: A product containing no artificial ingredient or added color and is only minimally processed.
- “Organic”: The product was raised and processed in compliance with USDA's National Organics Program standards.
- “Antibiotic free”: allowed on red meat and poultry if supported by sufficient documentation.
- “No Hormones Added”: The claim “no hormones added” may be approved for labeling beef products if the producer provides sufficient documentation to the USDA showing that no hormones have been used in raising the cattle. The claim “no hormones added” cannot be used on pork or poultry products unless it is followed by a statement that says “Federal regulations prohibit the use of hormones.” “Hormone Free” claims are not allowed on animal products, because animal products contain naturally occurring hormones.
- “Grass fed”: Grass and forage must be the feed for the lifetime of the animal, with the exception of milk consumed prior to weaning. The diet must be derived solely from forage consisting of grass (annual and perennial), forbs (e.g., legumes, *Brassica*), browse, or cereal grain crops in the vegetative (pre-grain) state. Animals cannot be fed grain or

¹⁷⁵ <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-policies/nutrition-labeling-policies/nutrition-labeling>

¹⁷⁶ http://www.fsis.usda.gov/wps/wcm/connect/e2853601-3edb-45d3-90dc-1bef17b7f277/Meat_and_Poultry_Labeling_Terms.pdf?MOD=AJPERES

grain byproducts and must have continuous access to pasture during the growing season.

- “Free range”: allowed if producer can demonstrate to USDA that the poultry has had continuous access to the outdoors.
- “Fresh”: Poultry may be labeled as “fresh” if its internal temperature has never been below 26° Fahrenheit.
- “Mechanically Tenderized Beef”: USDA proposed a rule that beef products that have been needle or blade tenderized be referred to as “mechanically tenderized” on the label. If the business plans to use this process, producers should look up the status of this proposed rule.

Grading

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

C. State: Labeling, Marketing and Food Safety Regulations

Ohio regulations set many requirements for what must and may not appear on the labels of meat and poultry packages. These regulations cover all establishments that offer meat for retail sale direct to the consumer. Meats packaged for use in the household need not comply with these rules.

Overall, labels must not be misleading or convey any false impression (A.C. 901:3-31-03). Any label on a meat cut must have an identifying title and the names used must be identical to names adopted by the National Livestock and Meat Board (A.C. 901:3-31-02). Phrases such as “spring lamb” and “Cornish game hen,” along with many other poultry titles are specifically regulated (A.C. 901:3-31-15).

Ohio law also requires that special dietary uses must be accompanied by the product’s corresponding vitamin content or other dietary property as required by federal law, discussed above. Added smoke flavoring, artificial coloring (even if it results from a since-removed casing), and antioxidants must be prominently labeled. Packaged meat and meat products must be labeled with either “Keep Refrigerated” or “Keep Frozen.” (A.C. 901:3-31-02). If the product is labeled with “farm,” as in “farm ham,” then the ham must actually be prepared on the farm (A.C. 901:3-31-03(2)). Packaging products should not be red tinted in a way that gives a false impression of color or leanness, and neither can spices such as paprika (A.C. 901:3-31-07).

“Fresh” cannot be used to label products that have been salted for preservation or that contain sodium nitrate or nitrite or potassium nitrate or nitrite (A.C. 901:3-31-03(7)).

Several regulations apply to processed products. Animal casings must be cleaned and rinsed and the use of several organ meats and blood is prohibited from use in food products. Poultry products, egg products, and dry milk must be from a USDA or state inspected facility (R.C. § 901:3-31-06). Pork and poultry grinding cannot be done on the same equipment without a complete cleanup between species (A.C. 901:3-31-09). The regulations also contain specific definitions for products such as “fresh pork sausage” and “breakfast sausage” that must contain specific quantities of fat, meat, water, and other ingredients to be labeled as such.

D. Specialty Products and Marketing

Organic Meat

The USDA Agricultural Marketing Service administers organic production and labeling standards through the National Organic Program (NOP) (7 C.F.R. Part 205). Generally, NOP requires that animals receive all organic feed and minimum access to the outdoors and prohibits use of hormones to promote growth or antibiotics for any reason. To label the meat or poultry as organic, an accredited organization must certify the production and processing practices, in which case the product can bear the USDA Organic logo. For more information on organic standards, see Chapter 12: Organic Certification.

Kosher

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

FSIS’s policy book¹⁷⁷ requires rabbinical supervision of meat processing before meat can be sold as kosher. FSIS does not certify as to the kosher preparation of products, but instead accepts the statements and markings of the rabbinical authority. Producers must provide the identity of the rabbinical authority upon request from the agency. The FSIS does not maintain a listing or any guidance on whom or what constitutes acceptable rabbinical supervision. Certification requires meticulous standards of health for the animals when presented for slaughter and entails ritual cleaning of all equipment, ritual slaughter by a sochet in a humane fashion, removal of all blood, and restrictions on which parts can be sold as kosher.

¹⁷⁷ http://askfsis.custhelp.com/app/answers/detail/a_id/375/~if-a-label-bears-a-halal-or-kosher-statement,-does-fsis-have-to-monitor-the

Other marketing issues related to kosher foods are important to consider. First, according to one kosher certification agency, the kosher poultry market is largely saturated. Second, although some cattle cooperatives have successfully established kosher slaughterhouses in order to market directly to consumers, doing so requires consistently processing enough cattle to justify the cost of certification and operation.

Halal

“Halal” is the term in Islam for something that is lawful or acceptable, although it most commonly refers to acceptable foods. Halal meat can only come from certain animals (pork is banned), must be raised according to certain humane and feed quality standards, and must be slaughtered according to the ritual Zibaha characterized by a humane, swift cut to the throat of a healthy animal by a Muslim as he delivers a prayer over the animal, which must be facing Mecca.

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

Federal policy on halal labeling is identical to the policy for kosher labeling. The same policy book used for kosher foods requires handling according to Islamic law and oversight by an appropriate authority. FSIS does not certify as to halal preparation of products, but rather accepts the statements and markings of the Islamic authority. The producer must provide the identity of the Islamic authority upon request from agency official. FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision.

General Resource

A good source for guidance on marketing meat is *How to Direct Market Your Beef*.¹⁷⁸ 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.

¹⁷⁸ www.sare.org/publications/beef/beef.pdf

V. CHECKLIST

Have you...?

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

VI. KEY CONTACT INFORMATION

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

Chicago regional office (serves the state of Ohio): (630) 620-7474

Ohio Department of Agriculture, Animal Health Division

Ph: (614) 728-6220

Email: animal@agri.ohio.gov

Ohio Department of Agriculture, Food Safety Division

Ph: (614) 728-6250

Email: foodsafety@agri.ohio.gov

Ohio Department of Agriculture, Meat Inspection Division

Ph: (614) 728-6262

Email: meat@agri.ohio.gov

CHAPTER 12: ORGANIC CERTIFICATION

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

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

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

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

I. ORGANIC LABELING AND MARKETING

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

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



II. ORGANIC CERTIFICATION PROCESS

Before seeking organic certification, a producer should become as knowledgeable as possible about the benefits and costs of organic production. The Ohio Ecological Food and Farm Association provides a wealth of information and support for producers looking to transition to organic and connect with other organic growers.¹⁷⁹ Another excellent resource is the Organic Trade Associations website **HowToGoOrganic.com**,¹⁸⁰ which has an extensive database of materials dedicated to informing producers of how (and why) to transition to organic, including a page dedicated to **Ohio**.¹⁸¹

¹⁷⁹ www.oeffa.org

¹⁸⁰ www.howtogoorganic.com

¹⁸¹ www.howtogoorganic.com/index.php?page=ohio

The first step in the certification process is selecting and contacting a certifying agent. AMS' **website**¹⁸² 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 substances¹⁸³ for 36 months prior to certification. Eliminating certain conventional inputs often requires implementing new, unfamiliar practices, which is why education before starting the transition is critical. The Midwest Organic & Sustainable Education Service provides **online fact sheets**¹⁸⁴ that cover various aspects of the organic farming process, including pest management, weed control, and soil fertility.

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

According to estimates by the Midwest Organic and Sustainable Education Service, certification will likely cost between \$400 and \$1000 per year for non-livestock operations. Livestock operations may cost more. In the past, federal assistance has been available to help defray the costs of obtaining certification. Whether assistance will be available in the future depends upon renewed federal farm bill funding. The Ohio Ecological Food and Farm Association has assisted producers in applying for and receiving these funds in the past, and producers should contact them about any ongoing opportunities.¹⁸⁵

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

¹⁸² www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5100383

¹⁸³ The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 601 & 602.

¹⁸⁴ http://mosesorganic.org/productioninfo_factsheets.html

¹⁸⁵ www.oeffa.org/documents/OEFFACost-ShareApplicationJuly2011fillable.pdf

the program, see Harrison Pittman's *Legal Guide to the National Organic Program*, which is available **online**.¹⁸⁶

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

A. Crops

Organic crop production has several components. The first pertains to how land is managed. The farmer may not apply prohibited substances to the land, and must stop applying these substances three years prior to certification (7 C.F.R. § 205.202). The land must have buffer zones and boundaries to prevent runoff and contamination from neighboring, non-organically managed fields (*id.*). The land must also be managed according to soil fertility and crop nutrient management practice standards, which require producers to “select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of the soil and minimize soil erosion” (7 C.F.R. § 205.203). Management methods include crop rotations, use of cover crops, and application of plant and animal materials. Requirements for the use of plant and animal materials include, but are not limited to, composting of raw animal manure (unless it meets exceptions), use of materials that have a carbon to nitrogen ratio of 25:1 to 40:1, and a prohibition on compost from plants that had prohibited substances applied to them or ash that was produced using burning as a method of disposal for crop residues (*id.*). Many of these practices contribute to another requirement, which is maintaining management practices that control crop pests, weeds, and disease (7 C.F.R. § 205.206). These practices are generally natural, such as mulching to control weeds or developing habitat to support natural enemies of pests. Producers may also use non-synthetic substances, but must ensure they are not on the list of prohibited non-synthetic substances (7 C.F.R. § 205.602). If these do not work, producers may use synthetic substances on the list of allowed synthetic substances. The OSP must detail when and how synthetic substances may be used (7 C.F.R. §205.206).

The regulations generally require all seeds and planting stock to be organically grown. However, there are five exceptions to this rule (7 C.F.R. § 205.204):

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

¹⁸⁶ www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf

- When organically produced equivalents and untreated, non-organically produced equivalents are not commercially available, a producer may use a non-organically produced crop that has been treated with a synthetic substance included in the list of permitted substances.
- A producer may use non-organic annual seedlings if USDA grants a temporary variance.
- A producer can use non-organic planting stock to produce an organic crop after maintaining the planting stock under a system of organic management for at least one year.
- When federal or state phytosanitary regulations require application of a prohibited substance, a producer may use treated seeds, annual seedlings, and planting stock.

The NOP defines “commercially available” as “the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling *as determined by the certifying agent* in the course of reviewing the organic plan” (7 C.F.R. § 205.2). Moreover, 7 C.F.R. § 606 lists some specific products that the agency has determined to be commercially unavailable. Producers who believe a seed or planting stock is commercially unavailable should consult their certifying agent to determine what documentation the agent will require for the producer to prove they diligently sought an organic source and it is truly commercially unavailable.

B. Livestock and Poultry

The NOP rule defines “livestock” as “[a]ny cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products” (7 C.F.R. § 205.2).

To market livestock products as organic, they must be under “continuous organic management from the last third of gestation or hatching” through slaughter (7 C.F.R. § 205.236). Farmers may raise poultry as organic from the second day of life. Farmers must organically manage dairy cattle for at least a year prior to marketing milk as organic. They can market the meat from the cows’ calves as organic if they managed the cows organically for the last third of gestation. For future calves to be organic, the cow must remain under continuous organic management. This prevents producers from gaming the system by managing cows as organic only during the last third of gestation, and otherwise caring for them conventionally.

“Organically managed” means feeding animals 100% organic feed for their entire lives (and the last third of their gestation); avoiding prohibited substances such as growth promoters, plastic feed pellets, formulas containing urea or manure, and mammalian or poultry slaughter by-products; and providing living conditions that accommodate health and natural behaviors, such as allowing access to fresh air, outdoors, exercise, clean and dry bedding and access to pasture for ruminants (7 C.F.R. § 205.239). The rule also requires producers to provide year-round access for all animals to the outdoors, recognize pasture as a crop, establish a functioning management plan for pasture, incorporate the pasture management plan into their organic system plan (OSP), provide ruminants with pasture throughout the grazing season for their geographical location, and ensure ruminants derive not less than an average of 30 percent of their dry matter intake requirement from pasture grazed over the course of the grazing season (7 C.F.R. §§ 205.102, 205.237, 205.239 and 205.240). If need be, synthetic and non-synthetic substances that are listed on the national list of permitted substances may be used as supplements or additives (7 C.F.R. § 205.237; the list of permitted substances is in 7 C.F.R. § 205.603). It is important to note that the USDA does not issue variances or exemptions when there is an organic feed shortage.

Preventing illness and caring for a sick animal is a point of concern for organic producers (and consumers). Many modern medicines are synthetic, which is contrary to the principles of organics, but allowing animals to suffer in the name of avoiding synthetic chemicals is also contrary to ethical concerns. As much as possible, producers must care for animals in a manner that prevents disease by doing things such as selecting animals appropriate for the environment and the site, providing feed that satisfies nutritional needs, and establishing housing, pasture conditions, and sanitation practices that minimize the spread of disease and reduce stress. However, livestock can be given vaccines to prevent disease and other “veterinary biologics” (products of biological origin) when needed. When these are insufficient, farmers may use synthetic medications that are listed on the national list of allowed substances (7 C.F.R. 205.238). The NOP prohibits all antibiotics, but it also prohibits denying an animal medical treatment with the intention of preserving the animal’s organic status. This is a careful balancing act, as farmers cannot market meat as organic if the animal received any antibiotics. Dairy products, however, can be organic if the farmer manages the cow organically for a year after she received antibiotics.

IV. HANDLING AND PROCESSING

In addition to certification of the production process, the NOP requires processing and handling facilities to obtain organic certification (7 C.F.R. § 205.100). Handling means to “sell, process, or package agricultural products” (7 C.F.R. § 205.2). If a facility handles organic and non-organic agricultural products, only the portion that handles the organic product needs organic certification (7 C.F.R. § 205.100). However, the facility must implement practices to prevent the

comingling of organic and non-organic agricultural products (7 C.F.R. § 205.272), including not using storage containers that have been treated with prohibited substances or have held products that were treated with prohibited substances. For a handling facility to receive certification, it must have an organic handling plan (7 C.F.R. § 205.201), only use allowed substances and avoid prohibited substances as listed in sections 205.602 through 205.606 (7 C.F.R. §§ 205.105 and 205.270), and maintain appropriate records (7 C.F.R. § 205.103). As far as actual process methods are concerned, the NOP generally allows any mechanical or biological process, including cooking, curing or fermenting, packaging, canning and jarring (7 C.F.R. § 205.270).

For direct farm businesses seeking to both grow and process organic products, it is critical to work carefully with the certifying agent to design a compliant processing method to maintain the “organic” status of the final product.

Retail food establishments who receive and sell products labeled as organic are usually exempt from certification, but they must nonetheless maintain proper records and comply with the requirements for the prevention of comingling (7 C.F.R. § 205.101).

Further Resources – Organic Marketing

National Organic Program (NOP)

1. For more information on the USDA's organics program, including a list of banned and allowed substances, visit their **website**:

www.ams.usda.gov/AMSv1.0/nop

2. The National Sustainable Agriculture Research and Education program (SARE, which is a branch of the USDA) has published a guide, **Transitioning to Organic Production**, which addresses some of the difficulties a farmer can encounter and lists resources for assistance.

www.sare.org/publications/organic/organic.pdf

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

www.attra.ncat.org/attra-pub/summaries/organic_certification.html

State-Level Resources

1. The Ohio Ecological Food and Farm Association has many resources online and sponsors an annual organic farming conference.

www.oeffa.org

V. CHECKLIST

If you want become certified as organic, you will need to:

- Research, study, and learn as much as you can about organic practices. Switching to organic takes time and requires considerable labor investments – you do not want to make a mistake that costs you money, or worse yet, prevents certification.
- Talk to other producers in your area to learn about your local market and what grows well in your area.
- Attend conferences, workshops, and training sessions on growing and marketing organic products.
- Develop an Organic System Plan, a record keeping system, and a business and marketing plan. Make sure your plans are consistent with each other.
- Research and choose an organic certifying entity. Make sure the certifier has experience certifying your type of production, and then obtain their information on what you need to do.
- Start transitioning crops and animals to organic production practices. Keep good records!
- Contact your chosen certifying agent, obtain certification, and start marketing.

GLOSSARY OF TERMS

Adulterated: The full legal concept of adulteration is complex, but essentially, a food is “adulterated” if it contains any poisonous or added deleterious substance which may render it injurious to health or if it consists of or has been exposed to a diseased, contaminated, filthy, putrid, or decomposed substance during production, preparation, or packaging, or if held under unsanitary conditions.

Agency (agent): A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

Agricultural Enterprise: Agriculturally related activities performed by any person(s) for a common business purpose. This includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units. This could include a leasing of a department of another establishment.

Agronomic Rate: A specific rate of application that provides the precise amount of water and nutrient loading, which selected grasses/crops require without having any excess water or nutrient percolate beyond the root zone.

Amortization: The paying off of debt in regular installments over time; the deduction of capital expenses over a specific period of time.

Annex: To incorporate territory into the domain of a city, county, or state.

Articles of Incorporation: A document that dictates the management of the affairs of a corporation, including the purpose and duration of the corporation and the number and classes of shares to be issued by the corporation.

Assumed Name: (also known as "doing business as" or "d/b/a"): The name under which a business operates or by which it is commonly known.

Assumption of the Risk: A legal concept in negligence (tort) law wherein an individual knows of or is otherwise aware of a risk posed by a particular activity and nonetheless engages in the activity. The doctrine thus limits that individual's right to hold others liable for injuries incurred as a result of engaging in the activity. Assumption of the risk most commonly arises in the context of employer-employee relationships and agri-tourism.

Business Plan: The business plan helps guide the business owner through the goals, objectives, and marketing and financial strategies of a proposed business. It also may serve as an introduction to potential investors if outside financing is required.

Candling (egg): The use of a bright light source behind the egg to show details of the embryo through the shell.

Case Study: An intensive analysis of an individual unit (such as a person, business, or community) that stresses developmental factors in relation to environment.

Checkoff: A mandatory fee for all producers of a particular commodity that is used to fund commodity-specific research or marketing.

Commercially Available: Under the National Organic Program, the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

Commodity: A tangible item that may be bought or sold; something produced for commerce.

Commodity Agriculture: The agricultural production of commodities with the primary objective of farming being to produce as much food/fiber as possible for the least cost. It is driven by the twin goals of productivity and efficiency.

Common Law: The body of laws and rules that courts create as they issue decisions.

Consideration: A vital element in contract law, consideration is something (i.e., an act, forbearance, or return promise) bargained for and received by a promisor from a promisee. It is typically the underlying purpose for entering into a contract.

Contract: A legally enforceable agreement between two or more persons involving an offer, acceptance, and consideration. It may be oral or written.

Cooperative: A user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage.

Copyright: (1) The right to copy a work, specifically an original work of authorship (including a literary, dramatic or other work) fixed in any tangible meaning of expression, giving the holder exclusive right to reproduce, distribute, perform, or otherwise control the work. (2) The body of law related to such works.

Corporation: a separate legal entity in which the owners (shareholders) are not personally responsible for the liability of business.

S corporations elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation.

C corporations are separate taxpaying entities that conduct business, realize net income or loss, pay taxes, and distribute profits to shareholders.

Cow-Share Program: A program in which consumers sign a contract to purchase a “share” in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives the milk from “their” cow without technically “purchasing” the milk.

De Minimis: something so small that it would be inconvenient and unreasonable to keep an account of; the impact is insubstantial.

Depreciation: A decline in an asset's value due to use, wear, obsolescence, or age.

Double Taxation: The government taxes the corporation on its profits and the owners/shareholders also pay individual income tax on profits distributed as dividends from the same corporation.

Estate Plan: The preparation of a plan to carry out an individual's wishes as to the administration and disposition of his/her property before or after death.

Excise Tax: A tax levied on the purchase of a specific good as opposed to a tax that generally applies to the sale of all goods.

Farm Labor Contractor (FLC): Any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other consideration, performs recruiting, soliciting, hiring, employing, furnishing, or transporting of any migrant or seasonal agricultural worker.

Feasibility Study: a process used to analyze an existing business opportunity or new venture. The questions on a feasibility checklist concentrate on areas one must seriously consider to determine if an idea represents a real business opportunity.

Good Faith: Acting honestly, fairly, and with a lawful purpose without malice or any intent to defraud or take unfair advantage. Whether a party has acted in good faith is often an issue that the court or the jury has to decide in a lawsuit.

Grading: USDA certification that a product is of a particular quality.

Grandfather Clause: A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

Gross receipts: All considerations received by the seller, except trades in personal property.

Halal: an Islamic term that refers to something lawful or acceptable.

Hazardous Positions: In the employment context, hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous chemicals.

Health Claim: A health claim describes a relationship between the food (or component of it) and the reduction of the risk of a disease or health-related condition.

Hold Harmless: A provision in an agreement under which one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability.

Injunction (prohibitory): An order of a court commanding a person, corporation, or government entity to stop doing something and/or refrain from doing such actions in the future.

Intellectual Property: Creations of the mind; inventions, literary and artistic works, and symbols, names, images, and designs used in commerce, as well as the body of law (trademark, patent, copyright, trade secret) used to protect such works.

Interstate Commerce: The buying and selling of products and services between people and entities located in different states or territories.

Intrastate Commerce: The buying and selling of products and services within a single state.

Joint and Several Liability: A legal obligation under which a party may be liable for the payment of the total judgment and costs that are associated with that judgment, even if that party is only partially responsible for losses inflicted.

Karst Area: Area(s) where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater

Kosher: The term for foods that comply with Jewish dietary laws.

Livestock Management Facility: Any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area.

Man-day: Any day where an employee performs agricultural labor for at least one hour.

Material Representation: A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion.

Migrant Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

Misbranding: The label, brand, tag or notice under which a product is sold is false or misleading in any particular as to the kind, grade or quality or composition.

Negligence: a tort law concept; the failure to exercise the standard of care that an ordinary, prudent and reasonable person would exercise under the circumstances.

Notice-and-Comment Rulemaking: A rulemaking process by which government agencies provide the public with an opportunity to participate in the interpretation of laws by giving feedback on draft regulations.

Nuisance: A substantial interference, either by act or omission, with a person's right to use and enjoy their property.

Public Nuisance: An interference or invasion that affects a substantial number of people, or an entire neighborhood or community

Private Nuisance: An interference or invasion that affects a single party, or a definite, small number of individuals in the use or enjoyment of private rights.

Nutrient Content Claims: These claims characterize the level of a nutrient in a food; FDA must approve them.

Organic: A system of food production that is managed in accordance with the Organic Foods Production Act of 1990 to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that promote biodiversity and ecological balance. The Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture manages organic certification.

Output Contract: A written agreement in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output.

Partnership: A partnership (also known as general partnership) is an association of two or more persons who combine their labor, skill, and/or property to carry on as co-owners of a business for profit.

Patent: a patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years.

Piecework: Work completed and paid for by the piece.

Prima-facie: Latin for "at first sight." In law, an evidentiary standard that presumes particular evidence proves a particular fact; however, providing contradictory evidence may disprove the fact.

Processing: The manufacturing, compounding, intermixing, or preparing food products for sale or for customer service.

Procurement Contract: A term that refers to contracts used by governments and institutions to acquire products.

Properly Implemented: An administrative law concept that requires agencies to issue rules according to state or federal administrative procedure.

Qualified Health Claim: A health claim where emerging scientific evidence suggests the claim may be valid, but the evidence is not strong enough to meet the standard necessary to be a health claim; must be pre-approved by FDA.

Raw Agricultural Commodity: Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form before marketing.

Real Property: Land and anything growing on, attached to, or erected upon it, excluding anything that may be severed without injury to the land.

Requirements Contract: A contract in which a buyer promises to buy and a seller promises to supply all the goods or services that a buyer needs during a specified period. The quantity term is measured by the buyer's requirements.

Respondeat Superior: In tort law, the doctrine holding an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

Retailers' Occupation Tax: A tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption.

Sales Tax: A combination of occupation taxes (imposed on a business' receipts from the sale of goods used or consumed) and use taxes (imposed on consumers that purchase items for personal use or consumption from a business).

Seasonal Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence-

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

When employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

Setback: The distance a facility must be from property lines or neighboring residences.

Sole Proprietorship: A business owned and operated by one individual.

Statute: a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." Regulations, rulings, opinions, executive orders and proclamations are not statutes.

Tangible Personal Property: A term describing personal property that can be physically relocated. The opposite of real property, in a sense, as real property is immovable.

Technical Bulletins: Non-binding guidance documents published by agencies that facilitate consistent interpretation and application of the regulations issued by the agency.

Three-Tier Distribution System: In the alcohol supply chain, a system that requires manufacturers to sell with distributors, who sell with retailers, who then may sell the product to the end consumer.

Tort: An injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit.

Trade Dress: A design, packaging, or other element of appearance that is both nonfunctional and distinctive.

Trademark: An identification used to distinguish goods and services from those manufactured or sold by others - it is the symbol that customers use to identify a product and equate with goodwill.

Trade Name: A name used to identify a person's business or vocation (see also ASSUMED NAME).

Trade Secret: Information companies make an effort to keep secret in order to give them an economic advantage over their competitors

Use Tax: A privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer.

Veterinary Biologics: Products of biological origin that are used to diagnose and treat animal diseases.