# The National Agricultural Law Center

nationalaglawcenter.org | nataglaw@uark.edu | @nataglaw

## Legal and Business Guide for Specialty Crop Producers

Contributing Authors:

*Ronald L. Rainey, Agricultural Economics and Agribusiness Department*
*Shalanda Lucas*
*Steven E. Seideman, Food Science Department*
*Harrison Pittman, National Agricultural Law Center*
*Shannon Mirus, National Agricultural Law Center*
*Rusty Rumley, National Agricultural Law Center*
*Elizabeth Rumley, National Agricultural Law Center*

Edited in 2022 by:

*Jana Caracciolo, National Agricultural Law Center*

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## Introduction

The Specialty Crops Competitiveness Act of 2004 authorized the United States Department of Agriculture to make grants available to provide assistance for specialty crops, while the 2008, 2014, and 2018 Farm Bills amended the act and authorized the USDA to provide grants to enhance the competitiveness of specialty crops. This book is the result of one of those grants and was awarded by the Arkansas Department of Agriculture to address a wide range of legal and business opportunities and challenges faced by specialty crop producers in the state of Arkansas. It includes chapters on contract laws, food safety, food labeling, agricultural labor, business organizations, and the application of the Perishable Agricultural Commodities Act. In addition, since the industry is also confronted by other unique challenges that directly affect competitiveness, it also includes a chapter addressing the marketing of various types of specialty crops and one discussing the third-party audit system.

Coordinators on this project include the National Agricultural Law Center and the University of Arkansas Division of Agriculture. Other contributors and collaborators on this project include the Cooperative Extension Service, the University of Arkansas Agricultural Economics and Agribusiness Department, and the University of Arkansas Institute of Food Science and Engineering.

This information contained in this book is intended for use solely as an educational tool and research aid. It is not intended to be legal advice, nor is it intended to be a substitute for legal services from a competent professional. To obtain legal advice, please contact and consult with a licensed, practicing attorney.

This book will also be available online in the "Specialty Crops" Reading Room at www.nationalaglawcenter.org.

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# Chapter 1: Marketing

## Introduction

We have witnessed the exploding momentum of advocates and supporters of local food systems over the past decade. Today, there exists a plethora of sources—books, movies, websites, organizations, etc.—that serve the increasing appetite of consumers, retailers, and farmers interested in actively engaging and supporting "local" and direct marketing efforts. These local based food systems promote many economic, social, and nutritional benefits to members of their respective communities. The opportunities offered by local food systems present farmers with many challenges and require a business skill set to successfully navigate the marketing expectations and regulatory environment.

There is an ever-increasing myriad of marketing approaches, which are sometimes confusing, used to promote local food products and benefits of the systems. This chapter provides a brief overview of the development of "local", direct food systems. Also presented are some specific strategies which should aid growers in evaluating the viability of engaging this direct marketing channel.

## Transformation of the Farmer's Market

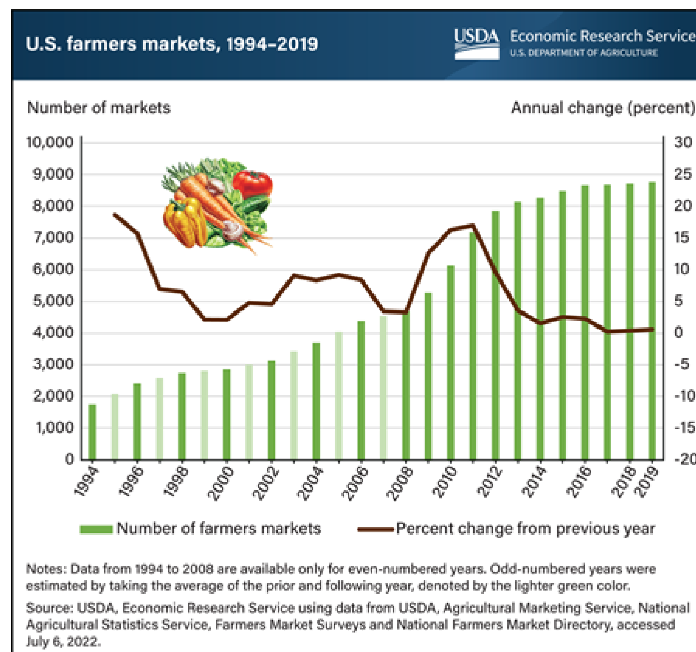
A farmer's market is a form of direct marketing in which producers from a local area gather for the purpose of selling their own produce directly to the consumer. Farmers' markets are just one of many direct marketing outlets which also include u-pick operations, internet sales, buyers' groups, community supported agriculture[1], and farm stands. The demand for local and regional sources of food has been an emerging niche market for a number of years as is evidenced by the popularity and growth of farmers' markets. Farmers markets have continued to grow in popularity over the past couple of decades due largely to the food consumer's sense that the local farmer provides a tastier, healthier, and more trusted source of food.

Since the U. S. Dept. of Agriculture started publishing the number of farmers markets in 1994, the reported numbers have consistently grown (see Figure 1). Data revealed 8,771 markets operating in 2019, which is an increase of almost seven percent per year. However, farmers'

[1] Community supported agriculture (CSA) is a direct marketing program whereby a farmer offers a set number of "shares" for sale to the consuming public. The shares represent a predetermined amount of product (produce, meats, fish, etc.) at periodic intervals throughout the harvest season. This method is a popular way for consumers to purchase local agricultural products.

market growth began to slow and dropped to around a one percent growth between 2016 and 2017. Despite slow growth, the number of farmers' markets has remained steady for the past couple of years, indicating sustained direct marketing opportunities and local food demand.

The 2017 Census of Agriculture, the most up to date Census, reveals dramatic increases in direct sales of farm products from 2012 to 2017. Data released showed that direct agricultural product sales to consumers rose to $2.8 billion for 2017. This estimate represents a seventy percent increase over the $1.3 million estimate reported in 2012. For Arkansas, the 2017 Census reported sales figure was $9.22 million, a ten percent growth from 2012. The growth in these numbers represents higher sales at farmers' markets and other non-traditional outlets. The emergence of the internet and online sales has not evaded farming operations. Farms are not only using the internet to promote and sale their products but also building relationships with customers highlighting their superior products and connecting with consumers.




By selling directly to consumers, producers are able to sell their products at the retail price level. Additionally, the direct-to-consumer social connections that are facilitated by farmers' markets allow producers and consumers to build relationships that are mutually beneficial to both in terms of understanding and satisfying each other's needs. Producers can interact with customers to understand specific customer needs or wants in the marketplace and/or changes in taste and preferences. On the other hand, consumers gain additional satisfaction from purchasing food produced locally and from getting to know not only who

produced their food but also the manner in which their food was produced. The local community and economy are the ultimate winners because of the enhanced multiplier effects as a relatively higher proportion of the dollars spent on local purchases recirculation in the local economy.

To further intensify discussion about the continued emergence of local food demand, there seems to be increased debate between local and organic brands. Research shows that consumers perceive organic foods as more nutritious, natural, and environmentally friendly than conventional foods.[2] This is reflected in the growth of the organic market. According to the 2017 Census on Agriculture, the sales of organic products grew from $3.12 billion in 2012 to $7.28 billion in 2017. Most of the reported 2017 organic sales came from produce, dairy, and poultry productions. Although both local food and organic agriculture are on the rise, some have pinned the two against each other arguing that locally grown food, which is not necessarily certified organic, should be consumers' first criteria.[3]

In recent years, circumstances such as fuel prices, growing consumer demand and the environmental challenges facing key food producing regions have converged to make local and regional procurement systems higher priorities for even the largest companies in the food supply chain. Most food distribution/retail firms have developed or are in the process of developing sustainability strategies that increased use of local food systems.[4] Retailers, in some instances, have identified sustainable strategies highlighting local procurement as a business growth strategy.[5]

Large retailer initial investments into sustainability strategies initially focused on reducing food miles. Food miles is the distance food travels from its initial production location to the retail store. The initial results of these strategies were transportation savings and a reduced carbon footprint. Although these savings alone and the reduced environmental impact may justify these investments, retailers are realizing added gains that support further sustainability efforts. A recent personal communication with a national procurement firm demonstrates the changing paradigm. This firm focused on not only sourcing local produce but also tracking sales impacts in addition to transportation and logistics savings. To enhance their

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[2] *See* Raghava R. Gundala & Anupam Singh, *What motivates consumers to buy organic foods? Results of an empirical study in the United States*, 16 PLoS ONE 9, Sept. 10, (2021) https://doi.org/10.1371/journal.pone.0257288.

[3] *See* The Lexicon of Sustainability, *Local v. Organic*, PBS, https://www.pbs.org/food/features/lexicon-of-sustainability-local-vs-organic/ (last visited Nov. 9, 2022).

[4] *See e.g.*, Charles Redfield, *To Better Showcase Our Quality Produce, We're Refreshing Our Shopping Experience* (Nov. 20, 2019) https://corporate.walmart.com/newsroom/2019/11/20/to-better-showcase-our-quality-produce-were-refreshing-our-shopping-experience.

[5] *See e.g.*, *Local Brands & Makers*, Whole Foods Market, https://www.wholefoodsmarket.com/local (last visited Nov. 9, 2022).

local procurement efforts they worked with growers and retailers to promote products as local throughout the region. The firm's market research revealed an increase in monthly dollar sales of over twenty percent. Not only did units sold increase significantly, but sell-through—a measure of spoilage—showed strong improvement. The retailer driven local strategy also resulted in lower mark-downs to move the product off the shelves because of the increased consumer interest.

## Marketing Strategies

A marketing strategy is a comprehensive plan of how a business will use available resources to achieve the stated goals of the business. Marketing strategies should be narrowed down to include only those which are legal, socially acceptable, and those which offer the best opportunity for success while achieving a stated goal. An example of a marketing strategy is to develop a brochure highlighting the quality of a business' product/service including the business' "guaranteed" program. Another example is to market twenty percent of production volume directly to consumers through the newly developed business website.

As business owners chart the direction of their trade or business, they have many alternatives to consider and evaluate. As industry competition intensifies, a farmer's business analysis skills can be as important as their production skills. Often, marketing plans drive farmer planting decisions on variety selection, planting dates, etc. Marketing success is influenced by many issues including how to gain new customers, how to satisfy loyal existing customers, how to increase market share, and how to expand profit margins. An integral part of developing marketing success is a comprehensive marketing strategy.

Developing a detailed marketing strategy or improving on an existing marketing strategy can assist the owner/manager in determining where the business currently is and/or what direction it will be heading in the future. Basic marketing requires a business to understand and develop a comprehensive plan to coordinate its product(s) and service(s) with pricing and promotion for a given market. A good marketing strategy will help to plot the course of action needed to meet the goals of the business. A good strategy also establishes guidelines the business can use to measure the success of the operation.

Although marketing strategies will vary from company to company, there are five fundamental components that should be considered when developing a strategy. These components include the following:

- **Mission Statement and Goals** - the mission statement is an opportunity to distinguish your company from others within the industry. The mission statement should not only

describe the business but also the products and services that the business offers. This statement should include the business' core beliefs and purpose for serving the market along with goals to drive the business. Your business' goals should consistently reflect the beliefs stated in the mission statement.

- **Situation Analysis –** The situation analysis is a determination of where your business is currently positioned in relation to your customer base, the trends of the marketplace you operate, where you stand in relation to the competition, and in what direction your business or industry is headed. A SWOT analysis can be a useful tool in assessing your situation. The SWOT analysis is used to identify **S**trengths, **W**eaknesses, **O**pportunities, and **T**hreats concerning your business.
- **Marketing Objectives –** The marketing objectives should consist of time-measured sub-goals that will enable the operation to reach its overall goals. Again, the emphasis is on time-specific and measurable goals. Simply stated, these objectives must be realized for the business to reach its final goals. Sample marketing objectives include: increase sales volume by ten percent over the previous year, increase profits by $5000 during the fourth quarter, and expanding the customer base by two hundred clients. Marketing objectives should support the businesses overall mission statement and should drive the day-to-day activities of the operation. Objectives will foster the development of specific goals in order to meet pre-determined "benchmarks". These objectives should be clearly defined providing ownership, management, and employees the necessary guidance.
- **Marketing Strategies –** The marketing strategy should be a comprehensive plan of how available resources will be best used to achieve the stated goals of the business. Money, people, equipment, services, and products are all defined as resources. Marketing strategies can originate from various sources, such as an innovative business owner, outside industry consultants, team brainstorming sessions, or combinations of the aforementioned sources. The strategies should be narrowed down to include only those which are legal, socially acceptable, and those which offer the best opportunity for success while achieving a stated goal. An example of a marketing strategy is to develop a brochure highlighting the quality of your product/service including business' "satisfaction guarantee" program. Another example is to market twenty percent of production volume directly to consumers through the newly developed business website.
- **Marketing Programs -** Marketing programs are the action steps that business will use to implement the decided upon strategies and goals. Simply stated, the marketing programs are the specific business tactic that will assist in the accomplishment of the

business objectives. The marketing programs should outline in detail specific tasks which must be done. These programs will be implemented into various aspects of the business such as, sales, pricing, product development, advertising, market penetration, etc. An example of a marketing program dealing with sales would be to develop a product catalogue with a price guide. Advertising, participation in industry/trade shows, and product branding are also examples of different types of marketing programs.

## Strategically Capturing Local Markets

Direct marketers and farmers should capture local market opportunity by developing relationships with their existing and potential customers—households, procurement specialists, buyers, and retail management. Specific strategies should be identified to communicate and target your segmented audience because today's marketplace is overwhelmed with marketing information. The following paragraphs outline three strategies designed to aid a grower in evaluating the potential marketing resources and designing a roadmap to capturing this emerging market.

1. **Connect with Your Customer**

   It is important to know your typical customer and their motivations for making purchases and to connect with these clients. Innovation and differentiation are the key drivers in today's fast paced marketing arena, but educating your customer is a critical piece to the puzzle. Local food consumers are motivated to shop by different factors. There are opportunities through local branding and promotional strategies to connect consumers to the various value enhancing marketing components that highlight your products or services. Successful marketers weave these promotional pieces into a compelling story that highlights their farm and its history, the product offerings or unique selections, and/or the firm's commitment to quality and integrity. If growers are successful in compiling a marketing program that effectively connects their farm's history and mission with its products and services, then it enhances the ability to strengthen relationship marketing. Relationship marketing refers to the mutually beneficial arrangement wherein both the buyer and seller recognize the importance of interacting beyond the transaction. Growers and direct marketers have a persuasive story to tell that not only highlights the economic benefit of supporting local growers/economies but also provides unique benefits to customers. Promotional efforts should not only discuss the solid business motivations for sourcing locally but also include that educational component that connects your clients to the product. To

connect best with clients and customers, and provide products and services with the best value, businesses should keep certain cultural differences—such as the generation, geography, and socioeconomics of customers—in mind.

2. **Use Existing Marketing Resources**

There are a number of marketing programs operated by universities and state departments of agriculture which can enhance growers marketing message and overall presence. State commodity promotion programs, or branding programs, are typically coordinated by state departments of agriculture and focused on market development and promotion of a state's agricultural commodities and industry. Commodity promotion programs include names such Arkansas Grown, Fresh from Florida, Made in Oklahoma, Make Mine Mississippi, and Pick Tennessee, to name a few. Typically, growers simply need to sign up or register with the state governmental body that administers the program and verify production of products. The programs are usually inexpensive or free and allow growers to use a branded logo that indicates the product was grown or produced in the state. These marketing programs typically run promotional campaigns which include listing businesses in state marketing directories and participating in state and national trade shows and expositions. Additionally, the programs typically offer marketing assistance, training, and workshops to participants.

In addition to the state commodity promotion programs, universities and industry trade associations also have resources to enhance business marketing efforts. Branding and marketing programs have evolved from purely promotional programs of a state's commodities to regional identity branding that is a component of, but also a growing phenomenon distinct from, local food systems. With this transformation, the state commodity promotion programs now signal specific attributes to consumers and in the current marketplace presents a host of opportunities for growers/retailers to use these programs to enhance their "local" message. Commodity promotion programs allow consumers to easily identify state growers and understand that at a minimum the products were developed within the state's borders or a specific region. Local branding provides growers with an instant invitation to start building a relationship with new customers. These programs enhance the ability of a grower to highlight local products by providing a third-party source verification program. This enhanced transparency improves the potential for relationship marketing as both parties focus on value enhancing activities that ultimately result in a more satisfying exchange.

Growers interested in communicating a consistent marketing message can build on the synergies offered by state commodity promotion programs and enhance their products in the marketplace. Three specific benefits that growers can use by participation in a state commodity promotion program: 1) expanded marketing presence through agricultural department activities including online presence, 2) an opportunity to network and build relationships with outside expertise and training, and 3) enhanced marketing avenues to communicate firm value and uniqueness to customers.

3. **Expanding Your Network**

Within each grower's community, there are a collection of networks including fellow growers, consumers, procurement specialists, advocates, stakeholders, etc. These networks offer growers tremendous opportunities to enhance their marketing presence, understand the changing business landscape, and enhance production and marketing expertise. Growers should become actively engaged within their local community and strategically think about ways to use these networks to improve their marketing opportunity. Community organizations and local food producers can network with nonprofit organizations, academic institutions, civic groups, and city/state agencies. Growers can enrich their marketing presence by being active within their local community and other industry organizations.

By building relationships through civic and networking endeavors, growers create opportunities to augment their business reputation, work ethic, standards, etc. These activities create a win-win for growers to expand their customer base and promote products.

# Chapter 2: Contracts and Contracting

Contracts are everywhere—they exist to help people buy and sell goods, obtain and give loans, lease property or agree to perform a service. A contract is a legal document that represents an agreement between two or more parties and involves legally enforceable commitments or promises to do or not do something. It is important to understand that a contract is more than just a promise—it is a legally enforceable promise. This means the court can step in and enforce the agreement. Contracts consist of four parts: the offer, acceptance of the offer, consideration for the contract, and performance of the contract.

## Parts of a Contract

A contract begins with an *offer*. In legal terms, an offer is a "communication by the offeror of an intent to enter a contract with the offeree with the stated terms." In other words, it is not an invitation to bargain or negotiate- it expresses one party's willingness (the *offeror*, the one making the offer) to be bound by the terms that he just set forth. An offer can be revoked before the *offeree* (the one the offer is made to) has accepted, but if the offeree accepts the offer before it is revoked, both parties are bound by the offer.

The next step in the life of a contract is *acceptance*. Acceptance is the "communication of assent or agreement by the offeree to the terms of the offer to the offeror." This acceptance of the offer must be made in the manner required by the offer. For example, if you offer to sell a bushel of corn to your neighbor for $15 as long as they call you this afternoon by 5pm, you have offered to make the sale. If your neighbor then shows up at your door at 4:30 to take you up on your offer, you are not obligated to sell the produce, because the terms of your offer required that he call you in order to accept the offer. Another important point is that the offer can only be accepted by the offeree. To return to the earlier example, assume that you offered to sell the produce to your neighbor, but your coworker overheard you talking. Your coworker cannot accept the offer because she is not the offeree.

An offer must be accepted exactly as it is made, without modifications. If the offer is changed, it is a *counteroffer*. Once a counteroffer is made, the original offer is gone and the counteroffer is in its place. This means that if the counteroffer is rejected, the original offer cannot be accepted. Instead, the process must begin again with a new offer. If your neighbor, in response to your offer to sell him produce, tells you that $15 is too high, but he'll buy it for

$12, he's made a counteroffer. After he does that, you have the choice of accepting or rejecting his counteroffer, but he can no longer accept your original offer to sell for $15.

*Consideration* is the third part of a contract and is defined as "the bargained exchange of something of value." In other words, consideration is the "promise" part of the contract—it is what one party promises to do or exchange in return for the promised action from the other party. Further, consideration can take many forms, such as money, physical objects, services, or promised actions. In our example, the consideration you offer to provide is the bushel of corn. If your neighbor accepts your offer, he promises to provide the consideration of $15 in cash.

The final part of a contract is *performance*. Once the obligations contained in the contract are fulfilled by both parties, then full performance of the contract has occurred, and the contract is complete. However, if full performance has not occurred, then the contract may have been "breached." A breach of contract occurs when the contract terms were not met by at least one party. At this point, courts can step in to provide remedies for the breach.

## Remedies

Money is usually the remedy used by the courts. The court may order one party to pay the other for expectation damages, reliance damages, restitution, or the contract may specify stipulated damages that are due.

- *Expectation damages* are what the party expected to gain from the bargained exchange in the contract. Expectation damages are "forward looking" and put the party in the position they would have been if the contract had been fulfilled.
- *Reliance damages* compensate for the losses incurred in reasonable reliance on the contract that was breached. Reliance damages are "backward looking;" they put the party in the position they would have been in if the contract had never been entered into.
- *Restitution* is meant to prevent "unjust enrichment" by one party. In restitution damages, a court may require one party to return an unfair benefit they received as a result of the contract. This remedy is usually ordered when there has been partial performance of the contractual obligations by one party which results in the other party's benefit.
- *Stipulated damages* are usually a fixed sum of money or a formula for calculating the sum of money due if one of the parties breaches the contract in a certain way. Stipulated damages are actual terms of the contract- the parties to the contract agreed to those specific damages when they signed the contract.

The court may also order *specific performance* of the contract. Specific performance occurs when the court requires one party to complete their contractual obligations. This remedy is available primarily in situations where money damages are considered to be an inadequate remedy.

## Statute of Frauds

The *Statute of Frauds* requires that certain contracts must be in writing and signed by the parties. The idea behind it is that a contract is not enforceable unless there is evidence that a contract existed, and the best evidence of that is a written contract containing the terms that both parties agreed to. Contracts covered by the Statute of Frauds must also identify the parties and the essential terms and obligations of the agreement. Further, changes or additions to the contract should also be in writing and signed as well.

Each state has its own statute of frauds, and the contracts that are required to be in writing vary a bit from state to state. However, there are many similarities. A few of the types of contracts that are often required to be in writing include:

- Contracts that cannot be performed within one year.
- Real estate sales
- Sale of goods over $500
- Agreeing to become a *surety* (becoming responsible for another's obligation or debt)

However, even if the Statute of Frauds does not *require* that a contract be in writing, it is always a good business practice to have all contracts in writing.

## UCC: History and Scope

The *Uniform Commercial Code*, or *UCC*, is a set of standardized state laws that have been adopted, in some form, in all fifty states. It is designed to make doing business across state lines easier and more uniform by providing a common law to govern business transactions across the country. It was originally drafted by the National Conference of State Law Commissioners in the 1940s, was adopted in the 1950s by most states, and has gone through several revisions since that time.

The UCC is divided into eleven sections called *articles*. Each article addresses a different type of business transaction. For example, article 1 contains the general provisions of the code, including its scope, applicability, and general definitions, while article 2 covers the sale of goods. Article 3 applies to negotiable instruments which are a special type of contract for the payment of money—usually checks, promissory notes, and other commercial paper. Article 2 will be the focus of the remainder of this discussion, although any or all the sections of the UCC may apply to your business transactions.

## UCC Definitions

Before setting out requirements for contracts, it is important to determine exactly what contracts are covered by Article 2 of the UCC. Here are some important definitions that do just that:

- *Goods*: UCC Article 2 covers all contracts for the sale of goods. A good includes all things that are moveable at the time of identification to a contract for sale. The definition includes specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to *realty* or land.
- *Merchant*: A person that deals in goods or holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.
- *Between Merchants*: Any transaction where both parties are charged with the knowledge or skill of a merchant
  - Why does it matter if you are a "merchant"? It matters because Article 2 treats contracting between merchants differently than contracts between non-merchants (usually a consumer) and a merchant. This section will address contracts between merchants.

## UCC Article 2: Contract Requirements

The basic requirements to form a contract under Article 2 are the same as any contract. There must be an offer, acceptance, and consideration. When accepting an offer, an offeree can accept by either a return promise or by performance of the contract. For example, when an order or other offer is made to buy goods, the offer can be accepted by either a promise to ship the goods, or actual shipment of the goods. Article 2 was written with transactions that take place multiple times in mind, and it makes it easy to accept an offer either by fulfilling the terms of the offer, or by communicating that you will fulfill the terms.

The statute of frauds in the UCC also requires that all contracts for the sale of goods over $500 must be in writing and signed to be enforceable. They must also contain the quantity of goods that are to be sold. However, the UCC outlines three exceptions to the statute of fraud. One exception is for the sale of specially manufactured goods. If the seller has already taken steps in the production of goods that are not marketable in the ordinary course of business, the court might excuse the absence of a written contract. Another exception is an admission by the offending party that a contract exists. This may happen in a pleading or in court testimony. The third exception occurs when acceptance of payment or of the goods is an objective indication that a contract existed. In this case, the absence of a written contract may be excused when one party accepts payment or the goods, and then denies that a contract was in place.

## UCC Article 2: Terms of Contract

The terms of a contract may be established in a number of ways. First of all, they can be included explicitly within the contract—these are *express terms*. However, often the terms of a contract are not clear, so the court will use the performance during the life of the contract—this is called the *course of performance* of the parties. Another way courts may determine contract terms is if the parties have contracted often and for the same things. In this situation, the parties may develop a customary relationship from which terms of the contract can be implied. These terms are called *course of dealing* terms. Finally, within certain industries there are customs and expectations that are traditionally in place. These implied terms are called *usage of trade* terms. When a court is considering exactly what the parties meant when they signed the contract, it will look first at the express terms, and then at the course of performance between the parties. If those don't establish the meaning, the court will turn to the course of dealing between the parties, and, as a last resort, to the usage of trade.

Additionally, the UCC outlines specific gap fillers for contracts it governs. A *gap filler* is a solution a court places in the contract when the parties did not agree upon or include such a solution as an express term. Typical gap fillers include:

- **Price**: When forming a contract, the parties may agree to set a price at a later time, to have a third party set the price, or simply leave the price out of the contract. If this happens, the contract is still valid as long as there was intent to enter into a contract. A court will insert a gap filler that requires the paying party to pay a reasonable price at the time of delivery. Once that happens, the parties will both be allowed to present evidence as to the market value at the time the delivery is made, and the judge will set a reasonable price.
- **Delivery**: If there is no express agreement as to delivery, Article 2 provides for the manner, place, and time of delivery. Unless agreed otherwise, the seller is required to deliver all the goods involved in the contract in a single delivery and payment is due only when the buyer receives the goods. The place of the delivery, if none is provided in the agreement, is the seller's place of business—meaning the buyer will pick up the goods from the seller. Finally, if no time is mentioned in the contract, delivery must be made in a reasonable time.
- **Payment**: Unless there are other terms in the contract between the parties that specify otherwise, payment is generally due when the buyer receives the goods to allow the buyer an opportunity to inspect the goods. Even when goods are considered "delivered" upon shipment by the seller, the buyer need not pay until the goods are received.

There is no gap filler for the quantity involved in the contract. While the other gap fillers can be determined based on the market or the typical relationship in similar transactions, there is no way to know what the parties were thinking when it comes to the quantity of goods at issue. The quantity must be specified in the contract.

On the other hand, sometimes there are too many terms, or conflicting terms, that are included in a contract. Typically, this happens in transactions between merchants and when businesses have standard forms that they use for contracts. Often when form contracts are used, terms in one party's form contract will differ from the terms in the other party's form contract. These differing terms are typically seen in the terms on warranties, remedies, or disclaimers. In this case, the court must determine which party's terms make up the enforceable contract. The UCC has a specific provision that governs this situation, which is called "the battle of the forms." The provision states that when two merchants are contracting with each other, additional terms will become part of the contract unless 1) the offer forbids alteration; 2) the new terms in the acceptance materially alter the agreement; or 3) one of the merchants objects to the terms added by the other merchant. It's important to note, however, that most contracts are executed without a problem, and these issues only arise when there has been a breach of the terms by one party.

## UCC Article 2: Performance & Breach of Contract

When you agree to a contract, you promise to fulfill your specific part of the contract. Failure to do so is a breach of the contract, and the other parties to the contract can sue for legal remedies. Article 2 contract breaches typically falls into one of three categories:

- If the seller delivers the goods according to the terms, and the buyer rejects them, the buyer has breached.
- If the goods do not meet the terms of the contract and the buyer rejects them, the seller has breached.
- If the goods do not meet the terms of the contract, the buyer can either accept or reject the goods.

The first two categories are pretty straightforward. However, in the last category, it can get a little tricky. There are special rules for both the acceptance and rejection of goods that do not meet the terms of the contract, and it's important to remember that even if the buyer accepts the goods, the seller has breached the contract and the buyer can seek remedies.

Goods that do not meet the terms of the contract are *nonconforming goods*. The buyer has the right to reject nonconforming goods under the *perfect tender rule,* as long as the rejection is in good faith and in a timely manner. For example, if you contracted to sell 100 zucchinis to the neighborhood grocery store, but only delivered 95 zucchinis, they would be nonconforming goods, because they didn't meet the terms of the contract. The grocery store would have the right to reject the 95 zucchinis, as long as they did so in a timely manner. This means that they probably could not keep the vegetables for a week before they were rejected.

However, sellers that deliver nonconforming goods have the right to fix the problem, or *cure the breach*, in some situations. First, the seller may cure the breach if the time for performance has not expired and the seller can substitute conforming goods within the contract time. To return to the example above, assume that you agreed to deliver the zucchini by June 12th. On June 11th, you delivered 95 zucchinis to the grocery store and the store refused them. If you then deliver 5 zucchinis to the store by June 12th, then you have cured your breach.

The other way in which a seller can cure the breach is when the time for performance has expired but the seller had reasonable grounds to believe the goods would have been accepted. In this situation, the seller has a reasonable amount of time to cure the breach. Typically, in this case the circumstances usually show that the seller was unaware of the nonconformity. Again, assume that you delivered 95 zucchinis to the store, but assume that you did so on June 12th, the date specified in the contract. When you delivered them, you thought that you had 100 of them in the crates. Because you had reasonable grounds to believe that the goods would have been accepted (because it was reasonable to mistake 95 zucchinis for 100), you have a reasonable amount of time to bring the other 5 zucchinis that will cure the breach. However, if you only brought 10 zucchinis to the store on the 12th, you probably wouldn't be able to fix the breach, because it would be obvious to anyone that the goods were non-conforming. It's also important to note that the seller must notify the buyer of its intent to cure the situation in a timely manner. As a result, you would have to notify the grocery store that you planned on bringing the remaining product to them and curing the breach.

After the buyer accepts the goods, it is difficult to return them. In fact, a buyer may only *revoke acceptance*, or return the product, if "the nonconformity of the goods substantially impairs the value of the goods." Further, the buyer must meet a couple of other requirements before revoking acceptance. Either the original acceptance must have been based on a reasonable assumption that the nonconformity would be cured, or the buyer must not have known about the defects at the time of acceptance. In other words, either the buyer accepted the goods thinking that the seller would cure the problem, or the buyer did not know the goods were flawed. This is a rare situation. If you are the buyer, the goods should always be inspected before acceptance to avoid the complications of revoking the acceptance.

## UCC Article 2: Anticipatory Repudiation

Very rarely, parties engage in anticipatory repudiation of a contract. *Anticipatory repudiation* occurs when one party notifies the other before the time of performance or delivery that he does not intend to follow through with the contract. To continue with our example from

above, you contract with a grocery store to sell them 100 zucchinis by June 12th. On June 11th, you notify the store that you will not be delivering the produce. Alternatively, on June 11th, the store notifies you that they do not need your zucchinis, and they will not accept it if you deliver it. Either one of these situations would be an anticipatory repudiation of the contract. If you are involved in a contract in which the other party engages in anticipatory repudiation, you should stop your own performance under the contract, limiting your damages. In the situation above, once the store notified you that your produce would not be accepted, you should stop your performance of the contract, and not deliver the produce. The next step is to wait for performance for a "reasonable time," and finally, to resort to remedies for breach of contract. In the example, this would probably involve waiting until the 12th to see if the grocery store notifies you that they will accept the produce. If the grocery store does not notify you, and you do not deliver the zucchinis, then you should contact your attorney and discuss filing a lawsuit to recover your damages.

## Warranties in the UCC

A *warranty* is a legally enforceable promise by one party to another that certain facts or conditions are true or will happen. Once a warranty is made, the other party is permitted to rely on that promise and seek a legal remedy if it is not true or does not take place. The UCC recognizes two types of warranties: express warranties and implied warranties. An *express warranty* arises from the seller's affirmative actions. In other words, an express warranty is based on something the seller did or said to get the buyer to commit. On the other hand, an *implied warranty* is based on protections that are offered through the law and are not based on anything the seller specifically did or said.

Express warranties generally concern characteristics of the item for sale such as its potential uses, its description, and the use of samples or models in negotiating that create expectations of how the final product will look. However, it is important to distinguish warranties from *puffery*, or when the seller makes a general statement that exaggerates the attributes of the product. For example, the statement that "this tomato is the best tasting one you'll ever eat" would probably be considered puffery, while the statement that a specific packet of seeds has a 94% germination rate would be a warranty.

Implied warranties relate to the condition of the goods. For most sellers of specialty crops, the three implied warranties that are the most important are the warranty of merchantability, the warranty of fitness for a particular purpose, and the warranty of title.

The *implied warranty of merchantability* is based on the unstated and reasonable expectations of the buyer about the quality of the goods. It guarantees that goods purchased from a merchant are merchantable goods and meet a certain minimum level of quality. A *merchantable good* is one that falls within the quality range normally associated with the good by those in the trade. This warranty does not apply to goods sold by non-merchants, and it cannot be disclaimed unless expressly disclaimed by name.

The *warranty of fitness* for a particular purpose is implied when a buyer relies on the seller's judgment or skill when buying goods for a particular purpose. It is based on the idea that if a seller has knowledge of the buyer's needs and knowledge that the buyer is relying upon her to furnish suitable goods, that the seller has a responsibility to furnish suitable goods. For this warranty to apply, the seller does not have to be a merchant. However, the buyer must prove that the seller knew of the use for which the goods were purchased and must also prove they actually relied on the seller's assurances.

The warranty of title is an implied promise that the seller has *title* to, or owns, the goods and has the right to sell them and that the title the seller is passing to the buyer is a good title, free from security interests, liens, and encumbrances (except for those the buyer is made aware of).

## Common Sense Contracting

Before agreeing to a contract, it is important to consider who will be the parties to the contract. You should know who you are becoming legally obligated with. Is it an individual or a business? Are they in good financial standing? And do they have a good reputation in the industry? Your answer to these questions might determine whether it is a good idea for you to enter into the contract.

Additionally, some businesses will ask that you meet certain requirements before they will contract with you. You should know what these requirements are and ensure that you and your business will be able to meet them. They might include licensing, bonding, or insurance requirements.

- *Business licenses* may be required at the local or state level depending on the type of business you operate. In some cases, farmers are exempt from the licensing requirements. However, even if you are a producer you should check with the proper offices to be sure you meet the business requirements. If you sell your produce directly to consumers, your state or local government may require you to obtain a permit.
- *Bonding, or surety bonds*, are agreements by a third party to pay or have the work completed if a vendor does not fulfill his or her obligations under a contract. A

bond is not an insurance policy. It does not cover loss due to personal injury or property damage; it only provides assurance that the work contracted for is satisfactorily completed. Banking institutions, surety bond companies, and even the Small Business Administration (SBA) offer bonding services.

- *Liability insurance* may be required if you are selling at a farmer's market. For more information, talk to your insurance agent. Additionally, don't be afraid to talk to other insurance agents as well, and get several different quotes. Different companies have different options and different prices. It's important to know what options are available so that you can make the best choice.

Neil D. Hamilton, Professor Emeritus at Drake University Law School, has written "10 Rules of Contracting" for producers to consider. They are published in his book "A Farmer's Legal Guide to Production Contracts.[6]"

1. *The parties who wrote the contract took care of themselves first.*
   This means there is no reason to assume a contract you are asked to sign is fair or balanced, or that it protects your interests. In fact it is probably safer to assume the opposite. This does not mean the party on the other side is evil, instead it just reflects the fact that most contracts are arms-length business transactions in which both sides try to maximize their advantage.

2. *Read and understand (at least try to) any contract before signing.*
   Signing a contract creates a binding legal obligation. It is in your best interest to understand what you are agreeing to do and what the other party's obligations are as well. Ask questions until you understand and are comfortable with the terms of the contract.

3. *Complying with the terms of a contract will be required before you are considered to have satisfied the agreement.*
   Contracts usually offer an economic incentive. But don't expect to take advantage of it until you have fulfilled your obligations under the contract – including quantity, quality and delivery terms. For example, if a contract to provide a local store with vegetables requires you to meet the quality standards of the buyer, you should not expect to be paid if what you deliver does not meet those standards.

4. *Never assume your failure to meet the terms of the agreement will be excused.*
   Every provision of a contract has some legal effect. Failure to meet any the terms is considered a breach of the contract. While the party on the other side of an agreement may excuse your failure to perform in one situation, such as not delivering the quantity you promised, this may not always be the case. In some situations, like a crop failure due to weather, the law may provide you with an excuse but in other situations where the failure to perform was due to your actions, the other party might choose to enforce the contract. If you believe you will not be able to perform a contract as agreed it is a good

[6] Available on the National Agricultural Law Center's website at https://nalcpro.wpenginepowered.com/wp-content/uploads/assets/articles/hamilton_productioncontracts.pdf.

idea to notify the other side and alert them to your situation. Then you can attempt to negotiate a resolution.

5. *If the contract calls for you to be paid by another party, know their financial situation.*
   Take precautions to limit the risk that you will not be paid. This can be done by learning more about their financial situation: by requesting financial guarantees, and by selling crops or livestock only to businesses which are covered by the public laws designed to insure farmers get paid.

6. *Remember that proposed contracts are always negotiable.*
   Even though many contracts are on printed forms, it does not mean they cannot be changed, if the parties agree to it. A good rule to keep in mind is that you will never have more bargaining power in a contraction relation than just before you sign. The reverse is also true – once you have signed a contract, it will be difficult to alter it.

7. *Make sure any changes to a contract are in writing.*
   Just as the statute of frauds dictates that certain contracts must be in writing, the amendments should also be in writing. Have the other party sign or initial the written changes. Be sure the person you are dealing with has the proper authority to make changes to the contract, especially if they represent a larger business.

8. *Do not rely on oral communications to amend the terms of an agreement.*
   Just because you believe the written contract was amended by your discussions doesn't make it true. In fact most written contracts include provisions that state that only the written terms are binding. It is also important to keep copies of any letters or other documents that might help show what was agreed.

9. *Keep good records of your performance under the contract.*
   This includes any records or documentation concerning the quantity you delivered and any payments made. It may also be helpful if you keep notes on any communications you have with the other party. If a dispute should arise about your performance, your records may help provide the answers needed to sort out the situation.

10. *Stay in touch with the other party to the contract.*
   Communication between the parties can be important in resolving uncertainties and in preventing misunderstandings. Do not hesitate to ask questions if you don't understand what is happening, such as why your payment is late. It may be that the other side is unaware of the situation.

# Chapter 3: Perishable Agricultural Commodities Act

The Perishable Agricultural Commodities Act, or "PACA," was enacted in 1930 to regulate the marketing of perishable agricultural commodities in interstate and foreign commerce. The primary purposes of the PACA are to prevent unfair and fraudulent conduct in the marketing and selling of perishable agricultural commodities and to facilitate the orderly flow of perishable agricultural commodities in interstate and foreign commerce. In short, PACA is widely viewed as a statute designed to promote fair trade in the fruit and vegetable industry. It also provides important protections to sellers of "perishable agricultural commodities" that are relevant to many specialty crop producers.

The PACA is administered and regulated by the Agricultural Marketing Service (AMS), an agency within the United States Department of Agriculture. Thus, AMS is the agency that develops the regulations that implement PACA, including enhanced definitions of terms such as "perishable agricultural commodity" and certain other key aspects of PACA. In fact, AMS provides information on PACA on its website, [https://www.ams.usda.gov/rules-regulations/paca](https://www.ams.usda.gov/rules-regulations/paca), and, according to its website, receives "hundreds of telephone calls each week" from stakeholders in the fruit and vegetable industry.

PACA is important for many specialty crop producers because it governs important aspects of transactions between sellers and buyers of fresh and frozen fruits and vegetables. In particular, the unfair conduct and the statutory trust provisions are particularly significant.

## Key Definitions

As noted, PACA applies to certain type of buyers and sellers of "perishable agricultural commodities." Under PACA, a "perishable agricultural commodity" is any fresh fruit or vegetable, including cherries in brine, as defined by the USDA Secretary.[7] The PACA regulations define fresh fruits and vegetables as "all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, . . . [except] those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character."[8]

PACA also applies to "dealers", "commission merchants", and "brokers". In general, a "dealer" is "any person engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agricultural commodity in interstate or foreign commerce" that

[7] 7 U.S.C. § 499a(b)(4).
[8] 7 C.F.R. § 46.2(u).

has an invoice value in any calendar year more than $230,000.00.[9] There are some exceptions to this definition that could become applicable under certain situations, but the general definition provided here is very instructive. A "commission merchant" is "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another."[10] Finally, a "broker" is a "person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the" seller or buyer.[11] However, a person who is "an independent agent negotiating sales for or on behalf of the vendor" is not considered to be a broker if "sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000.00 in any calendar year."[12]

Under the PACA, the term "person" is broadly defined to include individuals, partnerships, corporations, and associations.[13]

## Unfair Conduct

As noted, PACA prohibits certain types of conduct on the part of buyers and sellers, though issues arising in this arena commonly focus on the alleged conduct of commission merchants, dealers, and brokers. For example, it is unlawful for a commission merchant, dealer, or broker "to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce."[14] It is also unlawful for a commission merchant, dealer, or broker to do any of the following:

- "to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity";
- "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction"; and
- "to fail or refuse truly and correctly to account and make full payment promptly" with respect to any transaction. [15]

[9] 7 U.S.C. § 499a(b)(6).
[10] 7 U.S.C. § 499a(b)(5).
[11] 7 U.S.C. § 499a(b)(7).
[12] *Id*.
[13] 7 U.S.C. § 499a(b)(1).
[14] 7 U.S.C. § 499b(1).
[15] 7 U.S.C. § 499b(4).

PACA provides that a commission merchant, dealer, or broker that violates any of the unfair conduct provisions "shall be liable to the person or persons injured thereby for the full amount of damages . . . sustained in consequence of such violation."[16] The injured person or persons may enforce such liability by bringing an action in federal district court or by filing a reparations proceeding with AMS against the commission merchant, dealer, or broker. Reparations proceedings are discussed below.

## Licensing

The PACA requires all commission merchants, dealers, and brokers obtain a valid and effective license from the USDA Secretary.[17] PACA does not require growers who sell perishable agricultural commodities that they have grown to obtain a license, though sellers commonly choose to apply for a PACA license. From the grower's perspective, the license demonstrates that the buyer is a legitimate businessperson or business entity who can be trusted to honor contractual terms and PACA requirements.

The requirement of a PACA license by a commission merchant, dealer, or broker is akin to the requirement of a driver obtaining a driver's license. A commission merchant, dealer, or broker that fails to obtain a valid and effective license shall be subject to monetary penalties, though some leniency may be provided if the failure to obtain the license was not willful. Importantly, if a commission merchant, dealer, or broker has violated any of the unfair conduct provisions, that person's PACA license may be suspended or possibly revoked, which effectively negates their ability to engage in the fruit and vegetable industry. A person who knowingly operates without a PACA license may be fined up to $1,000 for each violation and up to $250 for each day the violation continues.[18]

It should be noted that the PACA license is the only license required under PACA. It is possible that a state or local government could require additional licenses. A grower should at a minimum check with the appropriate state or local government entities in his or her jurisdiction to determine whether an additional license is required. In addition, growers with any questions regarding PACA licenses can contact AMS toll free at 800-495-7222.

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[16] 7 U.S.C. § 499e(a).
[17] *See* 7 U.S.C. § 499c.
[18] 7 U.S.C. § 499c(a).

## Statutory Trust

For specialty crop producers, the statutory trust is a very important aspect of PACA because it is specifically designed to protect sellers of perishable agricultural commodities in the event a buyer becomes insolvent or otherwise refuses to pay for produce. The statutory trust provision under PACA specifically provides the following (emphasis added):

> [p]erishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, **shall be held** by such commission merchant, dealer, or broker **in trust for the benefit of all unpaid suppliers or sellers** of such commodities or agents involved in the transaction, **until full payment of the sums owing in connection with such transactions has been received** by such unpaid suppliers, sellers, or agents.[19]

In other words, the buyer is required to maintain a statutory trust relative to fruits and vegetables received but not yet paid for. If a buyer becomes insolvent or declares bankruptcy, the statutory trust provides priority status to the unpaid seller against all other creditors.

Consequently, the PACA statutory trust is often referred to as a "floating trust." Thus, a PACA trust beneficiary is not obligated to trace the assets to which the beneficiary's trust applies. When a controversy arises as to which assets are part of the PACA trust, the buyer has the burden of establishing which assets, if any, are not subject to the PACA trust. The PACA beneficiary only has the burden of proving the amount of its claim and that a floating pool of assets exists into which the produce-related assets have been commingled.

If a buyer files for bankruptcy, the trust assets do not become "property of the estate" because the buyer-debtor does not have an equitable interest in the trust assets. Rather, the buyer holds those assets for the benefit of the seller. Thus, a beneficiary of the PACA trust has priority over all other creditors with respect to the assets of the PACA trust.

However, the seller must take certain steps to protect his or her rights in the statutory trust. One method of preserving rights to the statutory trust is by simply including the following exact language on the face of the invoice:

> The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.[20]

[19] 7 U.S.C. § 499e(c)(2).
[20] 7 U.S.C. § 499e(c)(4).

It should be noted that this method is available only to those sellers who are licensed under PACA. Hence, many sellers will elect to be licensed so that they can preserve their statutory trust rights in this manner.

Unlicensed sellers (or licensed sellers who choose not to include the foregoing language on their invoices) may preserve their statutory trust rights through a different method. This method requires that the seller provide written notice that specifies it is a "notice of intent to preserve trust benefits".[21] In addition, the written notice must include the name(s) and address(es) of the seller, commission merchant, or agent, and the debtor as well as the date of the transaction.[22] The written notice must also identify the commodity at issue, the invoice price, payment terms, and the amount owed. This written notice must be given within thirty calendar days:

- after expiration of the time by which payment must be made, as set forth in the regulations issued by the Secretary;
- after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering the transaction; or
- after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored.[23]

Additionally, if the payment terms extend beyond thirty days, the seller will lose his or her rights to the statutory trust.

PACA also provides that if the parties to the transaction "expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment must be disclosed" on the documents relating to the transaction.[24] But, as noted, if this agreement extends the time for payment for more than thirty days, however, the seller cannot qualify for coverage under the trust.

## Reparations Proceedings

Any person complaining that a commission merchant, dealer, or broker has violated any of PACA's unfair conduct provisions may commence a reparations proceeding by first filing an informal complaint with the Secretary of Agriculture.[25] Reparations proceedings provide a

[21] 7 U.S.C. § 499e(c)(3).
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] 7 U.S.C. § 499f(a)(1).

remedy in addition to remedies available under applicable state laws or common law and are governed by AMS's regulations on reparation proceedings.[26]

The informal complaint must provide a brief statement of the facts supporting the allegations against the commission merchant, dealer, or broker and must be filed within nine months from the date in which the violation occurred.[27] After receiving all information and supporting evidence provided by the person filing the informal complaint, the Deputy Administrator for AMS will conduct an investigation.[28] If the informal complaint and the investigation seem to warrant such action, subject to certain exceptions, the Secretary "shall give written notice to the person complained against of the facts or conduct concerning which complaint is made, and shall afford such person an opportunity, within a reasonable time . . ., to demonstrate or achieve compliance with the applicable requirements of the Act and regulations promulgated thereunder."[29]

If an amicable or informal settlement is not reached, the complaining party may file a formal complaint.[30] The formal complaint must contain the information required for filing an informal complaint and a statement of the damages claimed.[31] After the parties have properly responded to all claims and counterclaims, if any, the matter is assigned a docket number and scheduled for a hearing.[32]

If a complaint claims less than $30,000.00 in damages, "a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of facts."[33] If a complaint claims damages in excess of $30,000.00, a hearing must be provided, unless waived by the parties.[34] AMS must then determine whether the commission merchant, dealer, or broker has violated any of the PACA's unfair conduct provisions.[35] If AMS determines that a violation has occurred, it must determine the amount of damages owed and enter an order stating the date by which the offender must pay those damages.[36]

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[26] *See* 7 C.F.R. § 47.6-47.25.
[27] 7 U.S.C. § 499f(a)(1).
[28] 7 C.F.R. § 47.3(b)(1).
[29] 7 C.F.R. § 47.3(b)(2).
[30] 7 C.F.R. § 47.6(a)(1).
[31] 7 C.F.R. § 47.6(a)(2).
[32] 7 C.F.R. § 47.10.
[33] 7 U.S.C. § 499f(c)(2).
[34] *Id*.
[35] 7 U.S.C. § 499f(d).
[36] 7 U.S.C. § 499g(a).

Either party may appeal a reparation order to the district court in which the hearing was held within thirty days from the date the order was entered.[37] If, however, the matter was handled without a hearing because the claim for damages was less than $30,000.00 or because the parties agreed to waive the hearing, appeal must be made to the district court in which the commission merchant, dealer, or broker is located.[38]

## Disciplinary Proceedings

A "disciplinary proceeding" is any proceeding, other than a reparations proceeding, arising out of any violation of the PACA.[39] Disciplinary proceedings are governed by the USDA's Uniform Rules of Practice for Disciplinary Proceedings that apply not only to certain PACA violations, but violations under a multitude of other statutes as well. Disciplinary proceedings under the PACA differ from reparations proceedings in that private parties do not bring disciplinary proceedings. Rather, "[a]ny officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested persons (other than an employee of an agency of the Department of Agriculture administering this Act) may file" an informal complaint with the Secretary concerning any alleged violation of the PACA by any commission merchant, dealer, or broker.[40]

Thus, it is possible for a reparations proceeding to be brought by a private party, have a reparations order issued against a commission merchant, dealer, or broker for a violation of any of the unfair conduct provisions as a result of that reparations proceeding, and to then have a disciplinary action filed by "any officer or agency . . . and any other interested person" as a result of the filing of a reparations proceeding.

Disciplinary proceedings are commenced, similar to reparations proceedings, by filing an informal complaint.[41] With respect to disciplinary proceedings, however, the informal complaint may be brought any time within two years after the violation occurred, as long as the complaint does not allege "flagrant or repeated violations."[42]

For more information, please refer to the National Agricultural Law Center's Reading Room on PACA, available at: [https://nationalaglawcenter.org/research-by-topic/paca/](https://nationalaglawcenter.org/research-by-topic/paca/).

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[37] 7 U.S.C. § 499g(c).
[38] *Id.*
[39] 7 C.F.R. § 47.2(m).
[40] 7 U.S.C. § 499f(b).
[41] 7 C.F.R. § 47.3(a)(1).
[42] *Id.*

# Chapter 4: Business Organizations

Various forms of business organizations have existed for years, but it is only recently that agricultural operations have begun to structure their business into more formal arrangements. From the simplest sole proprietorship to the most complex multinational corporation, the various business structures have evolved to meet farmers' needs. The many types of business structures offer the flexibility required to fit the different requirements of agricultural operations today. Every farming operation falls into at least one business structure whether or not the operator realizes profit. Informal arrangements are often considered sole proprietorships and general partnerships. More formal arrangements registered at the state level and include operations such as limited liability companies and corporations. These business organizations provide stability and protection to investors and officers while establishing guidelines within the organization and under the state(s) laws where they do business. Within the United States over the past century state legislatures have made numerous changes to state laws creating new business structures and modifying old ones to induce businesses to locate within their borders. States such as Delaware have written their statutes in such a way as to create an almost ideal environment for businesses, to attract both old and new entities into the state. Competition between the states has arisen to attract business organizations, which in turn has resulted in rapid changes in laws affecting taxes, liability, and even the composition of the business itself.

Laws surrounding business organizations concern almost every aspect of business, including those tied directly to agriculture. Because of this, it is important to know the benefits and consequences of creating any business entity. These benefits and consequences can include liability issues, tax implications, payment limitation issues, corporate farming statutes and bankruptcy, among others. The benefits and consequences are primarily determined by the type of business organization that is selected –usually a sole proprietorship, general partnership, limited liability partnership, limited liability company, or a corporation (whether C or S).

## Important Issues

### *Liability Issues*

One of the most fundamental reasons to create a business entity is to protect owners and investors from the legal liability of actions performed on behalf of the business. As a result of this need, legislators created business entity statutes to provide a "veil" of protection for certain types of business structures.

On the end of the spectrum with the least protection, sole proprietorships and general partnerships provide no liability protection to the owners. General partnerships often expose all partners to joint and several liability as a result of the actions of a single partner. In the middle of the spectrum lies the limited liability partnership, or "LLP," which provides partial protection to the partners. Typically, these ventures have at least one general partner who is personally liable for the actions and debts of the partnership and one or more limited partner that is protected by the limited partnership so long as they remain passive in the running of the business. On the most protective end of the spectrum are limited liability companies ("LLCs") and corporations that provide the most protection to the shareholders and officers of the businesses by shielding all parties from the actions and debts of the business so long as certain business boundaries are respected.

Asset protection is a very important aspect for many farming and agribusiness operations. Growers of specialty crops always face the risk of serious legal consequences because of foodborne illnesses, Perishable Agricultural Commodities Act (PACA) violations, negligence lawsuits, and a host of other potential issues. As a result, arranging the ownership of assets through business entities has become a frequent method used to help limit exposure to events such as civil liability from lawsuits and financial liability from unpaid or delinquent loans.

***Tax Implications***

Changes in business organization statutes in all fifty states have had direct consequences on income taxes and indirect consequences on estate taxes. Early in the twentieth century, before the advent of many of the limited liability organizations, businesses were taxed according to what structure they operated under. Sole proprietorships and general partnerships were not (and still are not) taxed directly. Instead, the income is imputed directly to the owner/partners with no mention of a business entity (therefore under the law, many farms are considered businesses even if the farmers do not consider them businesses).

Corporations are subject to the so called "double taxation" rule. Under this rule, the corporation is held liable for taxes on its earned income while the corporation owners are also taxed on the dividends paid out to the shareholders. For a time, the Internal Revenue Service ("IRS") tried to determine whether new business entities classified as a corporation, however the IRS abandoned this approach because it was overly complex and states and new businesses were purposefully creating convoluted business structures to avoid the IRS classifying businesses as corporations. Instead, since 1997, the IRS uses the "check the box" rule under

which a business may elect for the “flow-through status” of a partnership even though the business may more closely resemble a corporation.

## Business Structures

### *Sole Proprietorship*

One of the simplest forms of business, the sole proprietorship is effective without filing any paperwork with a governmental body. Many businesses throughout the country function under this structure even if they are completely unaware that their operation does in fact have a business structure. Any individual who starts their own business or farming operation without further organization and filing is legally considered a sole proprietor. One of the most important characteristics of the sole proprietorship is that the owner is personally liable for the actions, taxes and debts of the business. For example:

> A tomato grower operates his farm as a sole proprietorship and also works in town to supplement his income. The farm experiences a bad year, and the grower is unable to pay the bank with the proceeds from the crops. In this case the bank can garnish the grower’s wages from his job in town, foreclose on his farm if the bank has a mortgage, or reach almost any other asset that the farmer owns. The farmer is responsible for the debts of the farm and this responsibility even extends to non-farm assets.

This virtually limitless potential exposure to liability often leads to the sole proprietor either shutting down the business or shifting to another form of business organization. It is also not the most stable form of business because, like with its creation, the termination can occur without the sole proprietor ever being aware that it has happened. The death of the owner, the selling of assets, bringing in partners to help run the farm, or creating a more formal business structure can all result in the termination of a sole proprietorship.

The sole proprietorship is essentially a fictitious entity. The profits, assets, debts, responsibilities, and liabilities of the business rest solely on the individual owner. Unlike other business structures, such as corporations or LLCs, there is no legal entity that is created to bear the responsibility and risk of operating the farming operation. The ultimate responsibility rests entirely on the owner alone. There is nothing in place to shield the owner from the financial and legal consequences of operating the farm, nor to protect the assets of the business if the individual owner suffers from financial or legal problems. The survival of both the farm and the individual are tied together so closely that neither is likely to survive if one suffers a serious setback.

*General Partnership*

The general partnership is similar to the sole proprietorship in that this form of business structure does not require any legal documents to be filed in order to create it. The basic definition of a general partnership is that it occurs when two or more individuals come together with each person contributing money, labor, property, or skill and each expecting to share in both the profits and losses of the business. Evidence of two or more individuals involved in a common enterprise and sharing the profits is often enough for courts to find that a partnership exists even without the agreement being formalized either verbally or in writing. The liability that a partner in a general partnership is exposed to is very similar to the personal liability that a sole proprietor suffers (being held personally responsible for the businesses' actions and debts). However, it also includes an added element of risk. In a general partnership, the actions of one partner are imputable to the other partners through joint and several liability. Each general partner is treated like an agent of the rest of the partners. Essentially, this means that the actions and mistakes of one of the partners may become the responsibility of the rest of the partners. Depending upon the number and experience of the partners involved in the farming operation, the risk increases substantially with each additional partner. For example:

> Suppose that an older farmer wishes to bring his children in on the family orchard. The children will help with labor, marketing, and management and intend to split the profits with the farmer at the end of the year (if there are any). While taking fruit to the farmers' market, one of the children is involved in a serious car accident injuring another driver. It is entirely possible that the farmer's assets, including the farm, could be reached by the other driver because of the general partnership that exists between the farmer and his children.

Another critical problem of the general partnership is the ease at which it can be terminated. This business structure, unless there is a written agreement to the contrary, is terminated by the creation of another business structure or by the addition or loss of any partner. The inability to add or remove partners without terminating the business can create serious problems, especially as the number of partners in the business increases. A binding partnership agreement can successfully modify most of the problems that occur when entering a general partnership, however many partnerships are created and operated by verbal agreements or even accidentally through the actions of the partners. The almost limitless potential liability coupled with the ease in which the business can be dissolved make the general partnership a risky business structure for a specialty crop farming operation to use without some form of modification or formalization in place to mitigate these inherent weaknesses.

*Limited Partnership*

The limited partnership structure is created by two or more people or businesses that file the proper paperwork with the state in which they wish to form. Unlike the sole proprietorship and the general partnership, this business form cannot be formed accidently or automatically. There must be at least one general partner that is personally liable for the actions of the partnership and will typically run the farming operation. There will also be one or more limited partners that is only liable up to the amount that they have invested in the partnership. These members typically have little or no control over the farming operation and remain as passive investors. The two partnership statuses differentiate this partnership business structure from the general partnership since personal liability rests almost solely on the general partner(s). It is important to note, however, that the more involved a limited partner becomes with the business, the more likely it is that a court will find them to be a general partner, and subject them to general liability. This ability to protect some, but not all, of the partners is a unique trait of the limited partnership and is the primary reason why this form of business structure is not as popular as the LLC or corporation, both of which potentially offer protection to all of their owners. Regardless of the problems that face the partners of a limited partnership, there are some benefits that the structure provides which is why this model remains to this day.

*Corporations*

The corporate business structure is one of the oldest options for organizing a business or farming operation. It was established to provide liability protection; however, along with that liability protection came a disadvantageous tax situation known as "double taxation." In this situation, the income generated by the corporation is taxed first at the corporate level and then again when the profits are distributed to shareholders in the form of a dividend.

Traditional corporations with these parameters are now known as "C" corporations, and while originally all business organizations were organized in this manner, it is now usually only the largest—and typically public-traded—businesses who choose to organize in this way. "C" corporations must have a board of directors, corporate bylaws, and stock certificates for the initial owners of the corporations. They must also file formal paperwork, or "articles of incorporation," in the state where they incorporate. Once incorporated, "C" corporations must exercise nominal formalities, such as periodic meetings of the board of directors and record retention, to maintain the protection provided by the corporate status if legal trouble arises in the future. Because of the complexity of the "C" corporation, many smaller farming operations are typically bettered served by organizing under a different business structure.

In the twentieth century, a new form of corporate structure was recognized even though it is practically identical to a traditional corporation. Known as an "S" corporation, this business form provides the limited liability of a "C" corporation, but it allows the corporation's shareholders to elect against double taxation. Instead, the "S" corporation may choose to use "flow-through" taxation, where the profits are only taxed at the individual level. The "S" corporation has the same initial formation requirements as a "C" corporation, but it requires some additional steps. For a business to incorporate as a "S" corporation, it must be a domestic corporation or LLC with only one class of stock, it may not have more than 100 shareholders, all of whom must be U.S. citizens or residents, and profits and losses must be allocated to shareholders proportionately to each one's interest in the business. If these requirements are met, the corporation may file the proper paperwork with the IRS to avoid the issue of "double taxation" entirely.

The last hurdle that many smaller business operations face with the corporate business structure is exercising the required corporate formalities throughout the year and keeping accurate records to show that they are keeping the corporate business separate from their personal finances. Over time, small corporations may not be as diligent in keeping their personal finances from intermingling with the corporate business which may result in the corporate business structure being ignored and subjecting the owners to personal liability just as with a sole proprietorship or a general partnership. For this reason, many new businesses use the LLC structure because it provides the protection of the corporation without the hassle of maintaining rigid corporate formalities.

***Limited Liability Company***

The LLC is one of the most popular business structures for farms and other businesses. An LLC is a hybrid structure that basically offers the limited liability of a corporation with the flow-through taxation of a partnership. It is similar to the S Corp but without many of the corporate formality requirements.

In an LLC, the owners are referred to as "members," and LLCs can be either member-managed or manager-managed. A member-managed LLC may be governed by a single class of members (similar to a partnership) or multiple classes of members (similar to a Limited Partnership). The LLC's operating agreement sets out the management structure of the business.

To form an LLC, members must choose a business name that conforms to their state's LLC rules and file formal paperwork (usually called articles of organization) with the state, along with the payment of a filing fee. Many states also require that the name must end with an LLC

designator, such as "Limited Liability Company" or "Limited Company," or an abbreviation of one of these phrases (such as "LLC," "L.L.C.," or "Ltd. Liability Co."). The benefits—including flow-through taxation, limited liability and relaxed corporate formalities—that come with forming an LLC are significant and make this one of the most popular choices for organizing a business.

## Conclusion

Business organizations are creations of state governments. Just as all governments are different, so are the organizations that are created by them. From country to country and from state to state there exist many forms of business organizations that differ subtly. Each form of organization offers benefits and drawbacks, so it is up to the people who are organizing the business entity to choose the structure that best meets their needs. As agriculture has become more commercialized, the importance of business organizations has risen dramatically. Taxes, estate planning, and limiting liability are some of the reasons that are currently driving agricultural operations of all forms throughout the world into creating a formal business structure and this trend will undoubtedly continue on into the foreseeable future.

For more information on the topic, please refer to the National Agricultural Law Center's Reading Room on Business Organizations, located at: https://nationalaglawcenter.org/research-by-topic/business-organizations/.

# Chapter 5: Agricultural Labor

Farming is a labor-intensive operation, particularly for those specialty-crop producers who harvest their crops manually. As a result, another important area of law for specialty crop growers concerns employment and labor law. There are many state and federal laws in place regulating many varied aspects of employment including wages, working conditions, immigration, and employment opportunities.

Application of these laws is often complicated because special exemptions and exceptions are provided to agricultural employers. As a result of these complications, agricultural employers must employ special vigilance to maintain compliance with the myriad of requirements. The laws specifically discussed in this chapter include the Migrant and Seasonal Agricultural Worker Protection Act; the Fair Labor Standards Act; the Occupational Health and Safety Act; the Federal Insecticide, the Fungicide, and Rodenticide Act; the Immigration Reform and Control Act, and the National Labor Relations Act. However, there are also others that affect specialty crop employers that this chapter discusses more generally.

## Migrant and Seasonal Agricultural Worker Protection Act

Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act of 1983 ("MSPA"), 29 U.S.C. §§ 1801-1872, to protect migrant and seasonal workers and is the primary agricultural labor statute. The MSPA establishes, in part, wage and working condition requirements and requires farm labor contractors to register with the U.S. Department of Labor. Farm labor contractors are defined by the statute as any person other than agricultural employers, their employees, or agricultural associations that recruit, solicit, hire, employ, furnish, or transport any migrant or seasonal agricultural worker for money or other valuable consideration. The only workers covered by MSPA are persons engaged in seasonal or temporary agricultural employment. The Act also distinguishes between workers that are away from home overnight and those that live near the work site.

Farm labor contractors are required to register with the Department of Labor before they perform any labor contracting activities. If the labor contractor provides transportation for the workers, they are required to have proof of vehicle safety and adequate insurance. The contractor must also verify that the workers' housing meets safety and health standards for occupation. Employers who use the services of a farm labor contractor must take reasonable steps to determine that the contractor has a valid certificate of registration. Farmers can verify

if a farm labor contractor is registered here: https://www.dol.gov/agencies/whd/agriculture/mspa/farm-labor-contractors.

Farm labor contractors or employers must provide workers with written information about wages, hours, workers' compensation, working conditions, and housing at the time the workers are recruited. The contractor and employer must keep payroll records and must give a written earnings statement to each employee.

The statute and regulations also allow the creation of "joint employment." Joint employment makes employers liable for violations of MSPA even when the employees are hired through an independent farm labor contractor. Joint employment exists when there is evidence of control determined by a set of criteria that evaluate the relationship between the employer and the workers. The more control that an employer exerts over the farm labor contractor's workers the more likely a judge will determine that a joint employment situation exists. Factors include such things as the employer's power to hire or fire, the employer's power to determine wages, permanency of the work, the skill required to perform work, and the location of the work.

The MSPA is enforced by the Department of Labor and includes both criminal and civil sanctions. However, it also creates a private right of action. The private action allows an aggrieved party to file suit in any federal district court with jurisdiction over the parties, regardless of the amount in controversy, citizenship of the parties, or whether the parties have exhausted their administrative remedies.

## Fair Labor Standards Act

The Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219, is a sweeping federal statute that sets minimum wages, requires overtime wages, restricts child labor, and mandates recordkeeping. The FLSA covers employees of employers engaged in interstate commerce directly or engaged in the production of goods and services for interstate commerce.

Agricultural employers are exempt from certain requirements of the FLSA. Under FLSA, agriculture is defined as farming and all its branches, raising livestock or poultry, and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. Regulations and case law further define agricultural employees as persons employed in farming, by a farmer, or on a farm. The exemptions for agricultural employers are different for each broad coverage area of the FLSA.

***Minimum Wage***

Minimum wage requirements do not apply to employers that did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year. A

man-day is any day during which an employee performs at least one hour of agricultural labor. Immediate family members of the agricultural employer, certain hand harvesters that are paid on a piece rate, and employees primarily engaged in range production of livestock are not covered by the minimum wage requirements.

***Overtime Wage***

Generally, all employees employed in agriculture are exempt from the overtime wage requirements. Packers and processors of produce that work with multiple farms' crops are not covered by this exemption.

***Recordkeeping***

For those employers who are subject to the minimum wage or overtime pay provisions, the following information must be recorded:

- Personal information, including employee's name, home address, occupation, sex, and birthday if under 19 years of age
- The hour and day at which the workweek begins
- Total hours worked each workday and each workweek
- Total daily or weekly straight-time earnings
- Regular hourly pay for any week when overtime is worked
- Total overtime pay for the workweek
- Deductions from or additions to wages
- Total wages paid each pay period
- Date of payment and pay period covered

***Child Labor***

Agricultural employers are allowed to hire children for agricultural labor below the general legal minimum age applicable to other industries. Outside of school hours, agricultural employers may hire children fourteen and older, children twelve and thirteen-year old with parental permission, and children under twelve if they are their own children or with parental permission on a farm that falls below the 500 man-day employment requirement.

The FLSA provides the minimum standards that apply to employers. However, the statute requires compliance with other laws, which allows for enforcement of state and local laws that may provide greater protections for agricultural workers than are contained in the FLSA.

**Occupational Safety and Health Act**

The Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, created the Occupational Safety and Health Administration ("OSHA"), and assures safe and healthy working conditions. The Act enforces workplace standards, provides for research and

information in the field of occupational safety and health, and aids to state programs that assure safe and healthful working conditions. Generally, employers must furnish employees with employment and workplaces free from recognized hazards that could cause death or serious injury and follow legal standards of occupational safety and health. Employees must also follow all rules and regulations that apply to that employee's conduct.

Agriculture is covered under the Act in areas of temporary labor camps, tractor roll-over protection, guarding of farm field equipment, storage of anhydrous ammonia, field sanitation, hazard communication, cadmium usage, and logging operations. However, two exemptions for agricultural employers remove most agricultural employers from coverage under the Act. First, immediate family members of the farm employer are not considered employees and thus are not covered. Second, Congress has repeatedly, through appropriations bills, excluded agricultural operations that have had ten or fewer non-family employees within the last twelve months. However, if such a farm maintained a temporary labor camp during the same time period, then the exclusion does not apply. As a result, OSHA regulations apply to less than 10% of farm employers and about half of the hired farmworkers.

Temporary labor camps, for example, must meet OSHA standards for the site; shelters; water supply; toilet facilities; lighting; insect and rodent control; refuse disposal; first aid; the reporting of communicable disease violations; and the construction and operation of kitchens, dining hall and feeding facilities.

To ensure compliance of covered workplaces, OSHA is authorized to conduct workplace inspections. These inspections are given without advance notice but must take place at a "reasonable time." Penalties are proposed based on the severity of conditions, the good-faith effort of the employer to remedy problems, the employer's size, and the firm's history of OSHA violations.

**Federal Insecticide, Fungicide, and Rodenticide Act**

The Federal Insecticide, Fungicide, and Rodenticide Act of 1947 ("FIFRA"), 7 U.S.C. §§ 136-136y, is a broad statute regulating the use of pesticides through a risk-benefit analysis. It mandates that pesticides be registered and labeled before use. When used according to its label instructions, the pesticide must perform its intended function while not causing unreasonable risk to human health or the environment. The Environmental Protection Agency ("EPA") regulates the registration and labeling of the pesticides.

As part of its regulation, the EPA has issued a Worker Protection Standard ("WPS") and a Certification of Pesticide Applicators Standard ("CAS") to protect the safety of workers

potentially exposed to pesticides. The WPS has a broad application and covers most agricultural employers including owners or managers of operations that produce agricultural plants, operators who hire workers for operations that produce agricultural plants, businesses that apply pesticides for operations that produce agricultural plants, and crop advisor businesses. The WPS includes the following worker requirements:

- Only appropriately trained and equipped workers are allowed in the area during pesticide application.
- Workers may enter a treated area before the restricted entry interval has expired only if the worker will have no contact with pesticide residue, will not be performing hand labor, or is entering for a short term, emergency, or specifically exempted task.
- Workers must be provided with protective equipment in proper working order.
- Workers must be notified of pesticide applications, treated areas must be posted, and/or oral warnings must be given to workers as directed by labeling.
- Workers must have received safety training during the past 5 years before being allowed to enter a treated area during a restricted entry interval.
- Pesticide safety poster must be on display in a central location.
- Decontamination site must be provided and maintained if workers are required to enter treated area during restricted entry area and following 30 days.
- Emergency assistance must be provided to any worker when there is reason to believe the worker was poisoned or injured by pesticides.

Further, it contains several pesticide handler requirements as well:

- Handler must provide information to handler employer prior to applying any pesticide.
- Only appropriately trained and equipped handlers are allowed in area being treated.
- Handler employee must have knowledge of label, safe use of equipment, and posted information before starting handling activity.
- Handler fumigating in a greenhouse must be in continuous voice or visual contact with another handler.
- Handlers must use protective equipment specified on the label for use with the product.
- Handlers must be provided with a decontamination site.
- Emergency assistance must be provided to any worker when there is reason to believe the worker was poisoned or injured by pesticides.

Employers are also prohibited from retaliating against workers who attempt to comply with the safety requirements.

The WPS covers all pesticide use unless a specific exception or exemption exists. These include exceptions for certain government pest control, application on livestock or in livestock areas, application on noncommercial plants, and exemptions for farm owners and their family of some entry restrictions, certain notice and information requirements, and emergency assistance provisions.

The CAS requires workers to seek certification from state agencies before they may apply or supervise the application of restricted use pesticides. Restricted use pesticides are identified by the EPA. The certification programs carried out by state agencies must meet EPA approval.

The states generally enforce the safety requirements and licensing programs if they have met EPA approval. State laws may also provide more stringent protections for workers.

**Immigration Reform and Control Act**

The Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending various sections of 8 U.S.C.), limits unauthorized immigration into the United States. The statute creates employer sanctions for the employment of unauthorized aliens. All employers are required to verify the employment eligibility status of employees. Employers must examine approved documents to determine if the potential employee is properly identified and authorized to work in the United States. Once verified as eligible, employers may not discriminate against employees based on citizenship or national origin.

The Immigration and Nationality Act as amended by IRCA also creates the current H-2A program. This program allows agricultural employers that have a shortage of qualified domestic workers to import nonimmigrant aliens into the United States. These workers are permitted to remain only temporarily for the purpose of seasonal agricultural work.

**National Labor Relations Act**

The National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. §§ 151-169, protects the rights of workers to participate or not participate in organizations that attempt to collectively bargain for the mutual aid and protection of workers. The impact of this statute on agricultural labor is through a broad exclusion: agricultural laborers are specifically excluded from the definition of covered employees. There is no federal protection for agricultural laborers that wish to form organizations to promote their interests. However, state laws may confer such a right to farm workers.

**Other State and Federal Statutes**

Many other state and federal labor statutes apply generally to all employers, most of which provide agricultural employers no special exemptions and therefore affect agricultural employers in a manner similar to other employers.

Workers' compensation laws are designed to provide employees with immediate benefits in the case of an accident or work-related illness and to limit employer liability from negligence

lawsuits. These laws are unique to each state, and each state's coverage of agricultural workers may be voluntary or mandatory and may or may not have some exemptions for certain employers.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires states to compile directories of new hires to facilitate the collection of delinquent child support.

The Family and Medical Leave Act of 1993 allows employees to take a certain amount of unpaid leave from work for covered family or medical reasons. Generally, employers must continue health insurance coverage during the leave, and upon return the employee must be given the original or an equivalent job. The law only applies to employers with fifty or more employees during twenty or more weeks in the current or previous year.

Both state and federal equal employment opportunity statutes prohibit discrimination by employers against employees for such things as gender, race, color, religion, national origin, age, or disability. The federal statutes generally apply only to larger employers.

The major federal employment tax laws, Federal Insurance Contributions Act, Federal Unemployment Tax Act, and Federal Income Tax Codes, generally apply to all employers. These tax laws require employers to withhold wages from employees, match certain funds withheld from employee wages, and forward these withheld and matching funds to the United States Treasury. Certain information collection and notification are also required of employers. Agricultural employers may have special rules regarding their duties under these laws based on the type of agricultural work performed, the amount of wages paid, or the number of employees.

For more information on federal labor laws and regulations, visit the National Agricultural Law Center's Reading Room on Labor Law, at https://nationalaglawcenter.org/research-by-topic/labor/.

# Chapter 6: Food Safety and Specialty Crops

## Introduction

Recent outbreaks of food-borne illnesses associated with fresh produce have led consumers to question the safety of the food products—fruits, vegetables, meats, processed foods, etc.—that they consume. Despite our food safety laws and regulations, foodborne illness outbreaks can still affect numerous people and businesses. A recent outbreak of salmonella in onions caused at least 1,040 illnesses and 260 hospitalizations, and led to multiple companies initiating recalls between July 1, 2021, and August 31, 2021.[43] People involved in food safety know that a 100% totally safe food supply is impossible, but nevertheless strive to reduce the probability to as low as realistically possible.

## Historical Perspective

Up into the 1980s, most people believed that almost all food-borne illnesses were the result of eating meat and meat related products. This was mainly because most analyses methods were not as good as they are today, and pathogens were looked for primarily in meat products. Another issue that has changed over time is the relatively low level of consumer awareness and concern for food-borne illnesses and the reporting of such instances. Most food-borne illnesses are not reported since most people think they have the flu or some other type of illness. They are even more convinced of the flu when the whole family suffers the contagious nature of the perceived flu when in fact the whole family is suffering from food poisoning after eating the same contaminated food.

## Hazards in Foods

Growers and handlers of fresh produce must carefully control the factors that can affect the safety of their produce. There are basically three types of hazards that can affect produce—biological, chemical, and physical. A **biological hazard** results from bacteria, viruses, and molds (fungi) that produce toxins or when ingested multiply and cause food-borne illness. These microorganisms can contaminate produce or proliferate any time from when it is in the field up to the time it is eaten. **Chemical hazards** are those that arise when food in contaminated with harmful chemicals to include fertilizers, pesticides, herbicides, and chemicals contained in

[43] Salmonella Outbreak Linked to Onions, Centers for Disease Control and Prevention (Feb. 2, 2022), https://www.cdc.gov/salmonella/oranienburg-09-21/index.html.

runoff water. **Physical hazards** are those materials which are not supposed to be in the product to include stones, sticks, or other foreign material like glass, metal objects, etc.

These hazards are present in both the production and processing phase for most food products. Careful evaluation of the critical points in the food products development phases is critical to understand the potential for the presence of these hazards. By inserting some simple reporting and tracking processes, growers can make huge strides in not only understanding the potential presence of hazards but also implementing strategies to reduce and/or eliminate the hazard.

## Potential Sources of On-Farm Contamination

There are many possible ways for produce to become contaminated by harmful microorganisms during production, harvest, and handling. While contamination can occur anywhere in the flow of food from farm to fork, our focus begins on the farm. Of particular concern are manure management, water use, and farm worker health and hygiene. Sources of potential on-farm contamination include:

- Soil
- Irrigation water
- Animal manure
- Inadequately composted manure
- Wild and domestic animals
- Inadequate field worker hygiene
- Harvesting equipment
- Transport containers (field to packing facility)
- Wash and rinse water
- Unsanitary handling during sorting and packaging, in packing facilities, in wholesale or retail operations, and at home
- Equipment used to soak, pack, or cut produce
- Ice
- Cooling units (hydrocoolers)
- Transport vehicles
- Improper storage conditions (temperature)
- Improper packaging
- Cross contamination in storage, display, and preparation

These are the critical areas for growers/processors to consider as they evaluate their food safety program. A few simple steps to monitor or evaluate each of the above areas can greatly reduce the likelihood of product contamination.

## The Necessity of Food Safety Regulation

The United States is generally regarded as having one of the safest food supplies in the world because safety improvements such as pasteurization, sterilization, and proper canning have curtailed many problems inherent in the food supply of previous generations. However, foodborne illness is still a serious public health problem. Advances in technology allow us to detect different pathogens at much smaller levels than ever before, and when coupled with ever evolving diseases, the Centers for Disease Control and Prevention (CDC) estimates that there are more than 250 different foodborne diseases caused by a variety of bacteria, viruses, and parasites.[44] The CDC also estimates that around 1 in 6 Americans, or 48 million people get sick, 128,000 are hospitalized, and 3,000 die each year from foodborne diseases.[45] These diseases also translate into a monetary cost to the United States, according to USDA estimates, of over $17.6 billion a year.[46]

Foodborne illness outbreaks are becoming increasingly difficult to track because the food system is increasingly becoming more globalized. Years ago, an outbreak of foodborne illness was typically confined to a small community because food was grown, stored, prepared, and consumed within that area. As the food industry has become more consolidated, the impact of a single contamination event can ripple across the country—or even the world—as food is shipped out. It is also possible that the rise in reported foodborne illness is due to better detection as the result of medical and technological advances that have been made within the last couple of decades. Prior to these advances illness caused by contaminated food may have been written off as a stomachache and nothing more.

Specialty crops are uniquely susceptible to the presence of foodborne diseases for several reasons. Many specialty crops are eaten uncooked, or with minimal processing. Further, it is often difficult to remove pathogens once they attach to surfaces, since infiltration and internalization of pathogens is well documented for a variety of produce. Finally, because

[44] *Foodborne Germs and Illnesses*, Centers for Disease Control and Prevention (March 18, 2020), https://www.cdc.gov/foodsafety/foodborne-germs.html.
[45] Burden of Foodborne Illness: Findings, Centers for Disease Control and Prevention (Nov. 5, 2018), https://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html.
[46] Cost Estimates of Foodborne Illnesses, Economic Research Service (March 4, 2022), https://www.ers.usda.gov/data-products/cost-estimates-of-foodborne-illnesses.aspx.

specialty crops are often highly perishable, when they are the source of an outbreak it is harder to investigate because the contaminated food has rotted. Specialty crop producers should know the laws that have the potential to affect their operation, so that the risk of consequences resulting from foodborne illnesses are minimized.

## The Federal Agencies that Regulate Food Safety

Food safety laws and regulations have traditionally been implemented in an unorganized manner, typically in response to food-related emergencies. As a result, the federal food safety structure consists of numerous federal agencies with authority to enforce some, but not all, of the many different food regulations. Although there are over ten different federal agencies that maintain regulatory control over different aspects of food safety within the United States, two of them stand out as the most important. The Food and Drug Administration ("FDA") and the Food Safety and Inspection Service ("FSIS") within the United States Department of Agriculture ("USDA") enforce the vast majority of food safety statutes and regulations. The general rule of thumb is that the FSIS regulates meat and poultry products while the FDA handles the remaining food groups. However, there is a significant "gray area" where multiple agencies are responsible for food safety at some point in the food production process or several agencies may have joint jurisdiction over the food. For example, FDA has regulatory control over the vegetables in a can of soup as well as the factory where it was canned. However, if the soup contains meat, FSIS is involved in the inspection of the meat. Finally, if the animal that provided the meat was given antibiotics or growth hormones before it was slaughtered, FDA has regulatory authority over those drugs and their usage.

While FDA and FSIS both regulate food safety issues, how they regulate differs significantly. Meat products, which fall under FSIS's jurisdiction, are inspected prior to the food being sold for consumption. FSIS requires USDA meat inspectors to be on duty both before and after slaughter at most slaughter facilities in the U.S. FDA, on the other hand, is only required to inspect food processing facilities under its jurisdiction once every three to five years, depending on the type of food facility.

## The Food Safety Modernization Act

For the purposes of specialty crops, the most relevant actors are FDA and the state government organizations that FDA works with. In 2010, the United State Congress passed the Food Safety Modernization Act ("FSMA") which overhauled FDA's food safety authority. Prior

to FSMA, the federal Food, Drug, and Cosmetic Act and the Public Health Service Act granted the FDA broad power to "provide for such inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings[.]"[47] Despite this language, FDA did not conduct on farm inspections. However, outbreaks of foodborne diseases such as a salmonella outbreak in peppers that infected more than 1,300 people in forty-three states caused Congress to look more closely at food safety standards for farms. This, in turn, led Congress to pass FSMA and grant FDA explicit food safety inspection authority.

FSMA was the most transformative food safety legislation in the United States since Congress passed the Federal Food, Drug, and Cosmetic Act ("FFDCA") in 1938. As FDA explains "FSMA aims to ensure the U.S. food supply is safe by shifting the focus to preventing contamination of the food supply, rather than responding to it."[48] Through FSMA, Congress directed the FDA to publish and enforce regulations that improve food safety. Two main regulations that affect specialty crop producers are the Produce Safety Rule and the Food Traceability Rule.

***The Produce Safety Rule***

Section 105 of FSMA amends the FFDCA and directs FDA to "establish science-based 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 [FDA] has determined that such standards minimize the risk of serious adverse health consequences or death."[49] With this Congressional direction, FDA finalized the Produce Safety Rule ("PSR") which went into effect on January 26, 2016. The PSR applies to specialty crop produces who fall under the PSR's definition of a "covered farm". Covered farms are those that grow, harvest, pack, or hold covered produce and annually have on average of the previous three years more than $25k in sales of all produce. However, small or very small farms qualify for certain exemptions and modifications. Ultimately, the PSR requires those farms that produce fruits and vegetables commonly consumed raw to keep certain records and allows FDA to inspect the records on-farm at any time. The PSR consists of multiple parts, some of which FDA is currently amending and therefore is not yet enforcing. The PSR consists of seven substantive subparts. These subparts require produce farmers to keep records on:

- personnel qualifications and training

[47] 42 U.S.C. § 264(a).
[48] Food Safety Modernization Act and Animal Food, U.S. Food & Drug Admin (Oct. 20, 2022), https://www.fda.gov/animal-veterinary/animal-food-feeds/food-safety-modernization-act-and-animal-food.
[49] 21 U.S.C. § 350h(a)(1)(A).

- health and hygiene
- agricultural water
- biological soil amendments of animal origin and human waste
- domesticated and wild animals
- growing, harvesting, packing, and holding activities
- equipment, tools, buildings, and sanitation

Of these seven, FDA is still finalizing the regulations on agricultural water. On December 6, 2021, FDA published a proposed rule which, if finalized and among other things, would require farmers to "identify conditions that are reasonably likely to introduce known or reasonably foreseeable hazards into or onto covered produce (other than sprouts)."[50] To learn more about the PSR, read the National Agricultural Law Center's PSR factsheet at https://nalcpro.wpenginepowered.com/wp-content/uploads//assets/articles/Produce-Safety-Rule-Fact-Sheet.pdf.

***The Food Traceability Rule***

Section 204 of FSMA directs FDA to publish regulations on food traceability. FDA finalized the Food Traceability Rule on November 21, 2022. The Food Traceability Rule requires food manufacturers, processors, packers, and holders to keep certain records and include certain codes on foods. FDA claims the regulations will help FDA "rapidly and effectively identify recipients of foods to prevent or mitigate foodborne illness outbreaks and address credible threats of serious adverse health consequences or death resulting from food being adulterated or misbranded."[51] The Food Traceability Rule requires specialty crop producers (who do not also serve as packers) to provide packers with certain food safety information. The rule also requires certain specialty crop producers to maintain a farm map that shows, with coordinates, where certain high-risk crops are grown. To learn more about the food traceability rule, read the National Agricultural Law Center's article on this topic at https://nationalaglawcenter.org/focus-on-food-fda-publishes-food-traceability-final-rule/.

## Good Agricultural Practices (GAP) and Third-Party Audits

Although specialty crop growers are legally required to keep certain records, they can also voluntarily request USDA or a private auditing firm to perform food safety audits of their farms. Almost every major food company requires that their suppliers be inspected or audited on a regular basis. The audits can be in different forms—survey or physical—and may vary in

[50] 86 Fed. Reg. 69120.
[51] 87 Fed. Reg. 70910.

required re-certification, although most audits are conducted on an annual basis. A survey audit is used by a company to gain some information from the supplying company without physically visiting the supplier. Physical audits are when the purchasing company physically visits the premises of the supplier. Most audits are a blend of both survey and physical audits. The auditing firm will probably want to see records and documents related to the seller's pest control program if required, list of training of employees, a Hazard Analysis and Critical Control Points plan, and any type of record-keeping control program the buyer or auditor thinks is important to the safety of the product. Some food buying organizations will require those they buy from to be certified by a particular auditing firm or by the USDA. Specialty crop producers should research their current or intended buyers to ensure they are purchasing the audit services required by their buyers.

USDA conducts what it calls GAP audits. GAP is short for "Good Agricultural Practices" and are recommended procedures that producers can use to minimize the risk of produce contamination. The procedures are a scientifically based protocol developed by FDA in collaboration with USDA to establish standard operating guidelines for businesses to follow.[52] These wide-ranging standards include testing for the presence of certain bacteria that are of serious health concern and other environmental hazards such as hazardous chemicals and physical hazards like stones and glass fragments. The extended off shoot of GAP is GMPs or GHPs which are "Good Manufacturing/ Handling Practices". These are recommended procedures to follow after harvesting that reduce the probability of produce becoming a potential hazard. In many cases the term GAP applies to both GAP and GMPs/GHPs.

As mentioned above, USDA's GAP audits are market access tools, meaning that a farm that is USDA GAP certified will likely have easier access to buyers such as supermarket chains, school systems, restaurants, and other markets.[53] Although USDA's GAP audits are useful tools, USDA, like all auditing firms, charges a fee for this service. The fee depends on the type of audit requested and the extent of the audit. In light of the COVID-19 pandemic, however, USDA initiated the Food Safety Certification for Specialty Crops Program ("FSCSC"). According to USDA, the FSCSC program "provides financial assistance for specialty crop operations that incur eligible on-farm food safety program expenses related to obtaining or renewing a food safety

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[52] *See Guidance for Industry: Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables*, U.S. Food & Drug Admin. (Sept. 20, 2018), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-guide-minimize-microbial-food-safety-hazards-fresh-fruits-and-vegetables.

[53] *See GAP Certification Programs*, NASDA Foundation, https://www.nasda.org/gap-overview/ (last visited Nov. 28, 2022).

certification in calendar years 2022 and 2023."[54] For more information on USDA's GAP audits, visit https://www.ams.usda.gov/services/auditing/gap-ghp.

## Current Liability Issues Facing Specialty Crop Growers

Specialty crop growers are under the same general civil liabilities that everyone within the United States faces. People that consume the farmer's products and are made ill because of them may have the ability to recover damages from the farmer through a civil lawsuit even if the farmer follows all food safety laws and regulations. The three major theories that expose a farmer to civil liability are negligence, strict product liability, and warranty theory.

A person who suffers a foodborne illness may bring a negligence action against a farmer if they can prove the produce that got them sick came from that farm. Ultimately, the person bringing the case will have to prove (1) that the farmer owed them a duty of care, (2) the farmer breached that duty of care, (3) the farmer's actions caused the person's illness, and (4) the person suffered some sort of tangible damage such as lost wages or medical bill expenses. The theory is applied broadly and many, if not most, civil suits across the country are brought under a negligence theory.

> For example, a farmer fertilizes his vegetables with animal manure that contains E. Coli. A consumer becomes ill as a result of eating the vegetables. Would a farmer exercising reasonable care have applied animal manure to the vegetables? Would a reasonable farmer have taken steps to wash or sterilize the vegetables before distributing them? Did the farmer take reasonable steps to prevent the spread of foodborne diseases?

A court will evaluate these questions, and many more, to determine whether the farmer was negligent. There are steps that farmers can take to reduce the likelihood of civil liability. Using "good agricultural practices" and keeping accurate records are relatively easy steps that many farmers can take. However, the issue of liability in negligence cases often hinges on what the court finds that a person exercising reasonable care would do in a like situation.

Another legal theory that specialty crop producers may be subject to is strict liability. Typically, this cause of action is used when an individual introduces an unreasonably dangerous product into the stream of commerce. Under strict liability there is no "reasonable care" standard because the action or product is recognized as being hazardous or inherently dangerous. If an injury is caused while performing an inherently dangerous activity or selling a hazardous product, then a court will assess civil penalties. For example, a court may consider

[54] Food Safety Certification for Specialty Crops Program, U.S. Dep't of Agric., https://www.farmers.gov/pandemic-assistance/food-safety (last visited Nov. 28, 2022).

applying pesticide onto a field of vegetables an inherently dangerous activity, especially if the applicator does not follow the instructions for application. Although some who become ill from contaminated produce successfully bring strict liability claims, it is more likely that those who become ill will bring negligence claims.

A third legal theory that may expose specialty crop growers and sellers to civil liability is warranty theory. There is an "implied warranty of merchantability" which most states include in their commercial code which deals with the buying and selling of goods. This theory states that if a merchant (someone who is in the business of selling a particular product) sells a good then they guarantee the good is fit for the ordinary purpose for which it is sold. In other words, a farmer who grows and sells specialty crops guarantees that the fruit and vegetables that they grow and sell are generally fit for human consumption. The reason this theory is mentioned last is that it applies to "merchants" and traditionally courts have been reluctant to find farmers are merchants; however, it is worth mentioning because the traditional views that courts and the general public ascribe to farmers has changed in recent years and will undoubtedly continue to change.

The rise in detected foodborne illnesses across the country has increased the pressure on the federal and state governments to take actions to ensure the safety of our food supply. Many past outbreaks were attributed to contaminated meats, however nationwide outbreaks traced back to spinach, tomatoes, and peppers have shown that specialty crops are also a potential safety risk. The producer's ability to mitigate this risk through the exercise of proper food safety practices is a necessary skill if the producer wants to maintain or expand their business.

For more information on the topic, please see the National Agricultural Law Center's Reading Room on Food Safety at https://nationalaglawcenter.org/research-by-topic/food-safety/.

# Chapter 7: Food Labeling

The requirements and restrictions on food labels are an important part of the food safety and regulation system in the United States. However, the topic of "food labeling" is very broad and encompasses several specific areas of the law that may affect specialty crop producers. These areas include nutritional labeling, country of origin or "COOL" labeling, descriptive claims, organic labeling, and irradiation labeling.

In the United States, these areas are generally regulated by the USDA and the FDA. Regulation based on food labeling began in 1938, when Congress passed the Food, Drug, and Cosmetic Act (FDCA). The FDCA focuses on the issues of food misbranding and adulteration and serves as the basic framework for food regulation by the FDA, the agency that has primary jurisdiction over specialty crops. However, Congress, through legislation not related to the FDCA, has directed USDA to administer a few programs that impact specialty crops. The FDCA initiated food standards, authorized inspections of factories, and provided for court injunctions as remedy for violations, in addition to the already existing seizure and prosecution remedies. Since 1938, the FDCA has been amended several times and related laws have been enacted.

## Nutrition Labeling

In 1990, Congress passed the Nutrition Labeling and Education Act (NLEA), which amended the FDCA and required uniform nutrition labeling. When enacting NLEA, Congress's focus was on the relationship between food contents and healthy diets. The purpose of NELA is to provide adequate information to consumers regarding the content of food, including a disclosure of the food's nutritional properties and added nutrients. As a result of NLEA, food labeling addresses nutritional information and is required for most prepared foods, such as breads, cereals, snacks, desserts, and drinks. Food items, including specialty crops, that have been canned or frozen are also required to contain nutrition information. However, nutrition labeling for raw fruits, vegetables, and fish remains voluntary.

Nutrition labeling, as a result of NLEA, has become widely standardized and defined. For foods that must be labeled (and those that are voluntarily labeled), the label must feature a prominent "product identity statement," ensuring that consumers are able to identify the product and obtain important information about the type and form of food contained in the package. Other labeling requirements ensure that the "net quantity of contents," or package amount, is listed on the package, as well as a list of all ingredients, listed in descending order of

predominance and in specifically defined wording. Other regulations require specific wording, type size, and placement of the labeling information.

To ensure consistency, both FDA and USDA regulations are very explicit about the layout of the Nutrition Facts panel, detailing the type of information that may be included as well as the format and order. Nutrition labels are required to provide information on fourteen nutrients, which must appear in a specific order on the label. However, in addition to information on the nutrient by measure of weight (gram or milligram), food companies must also declare the "Percent Daily Value" for most nutrients. This serves to standardize food labeling, so that people who are unfamiliar with the recommended daily value to measure and evaluate foods based on their nutrient contents.

Finally, food labels must also outline the serving size, which is the amount of food upon which the nutrient content is based. To ensure consistent serving sizes between similar products, NLEA defines serving size as the amount of food customarily eaten at one time. While the serving size included on the Nutrition Facts panel may vary slightly between similar products, it is based on the Reference Amounts Customarily Consumed Per Eating Occasion (RACC), as established by the FDA. The serving size is the household measure (e.g., cups, tablespoon, piece, slice, fraction, or container) closest to the RACC.

While raw fruits, vegetables, and fish producers are not required to label their products with nutrition information, to encourage food companies to voluntary label these products, the FDA has created downloadable posters for printing. The posters show nutrition information for the 20 most frequently consumed raw fruits, vegetables, and fish in the United States. The FDA encourages stores to download the posters, print, display or distribute them to consumers in close proximity to the relevant foods in the stores.[55]

For more information on food labeling, please refer to the National Agricultural Law Center's Food Labeling Reading Room, available at: https://nationalaglawcenter.org/research-by-topic/food-labeling/.

## COOL Labeling

In the 2002 and 2008 Farm Bills and the 2016 Consolidated Appropriations Act, Congress included language to require "Country of Origin Labeling," or "COOL," which mandated that retailers notify their customers of the country of origin of muscle cuts and ground beef

[55] These posters are available at: https://www.fda.gov/food/food-labeling-nutrition/nutrition-information-raw-fruits-vegetables-and-fish.

(including veal), lamb, pork, chicken, goat; wild and farm-raised fish and shellfish; perishable agricultural commodities; peanuts; pecans; ginseng; and macadamia nuts. Specialty crop producers should be aware of this labeling concern because the definition of "perishable agricultural commodities" includes "fresh and frozen fruits and fresh vegetables".[56] However, it is important to note that retailers who sell less than $230,000.00 of fresh fruits and vegetables in any calendar year are not required to furnish COOL labeling on their products.

It is the retailer, rather than the producer, who has the primary burden of providing labeling to consumers under the COOL regulations.[57] COOL information must be provided on a clear and visible sign on the commodity itself, the package, the display, or the holding bin at the final point of sale to consumers. Retailers are also required to maintain records sufficient to enable USDA to determine compliance with the regulations, while suppliers to the final retailers are required to provide necessary country of origin information to the retailer to ensure compliance with the regulation.[58]

Because country of origin labeling is only required for larger retail facilities, and because the responsibility to ensure compliance rests with the retailer rather than with the producer, COOL is something that should be considered, but it is not necessarily an integral part of every specialty crop operation.

For more information, please refer to the National Agricultural Law Center's Reading Room on COOL, available at: https://nationalaglawcenter.org/research-by-topic/cool/.

## Descriptive Labeling

Another labeling issue that affects specialty crop producers occurs when engaging in descriptive labeling of their product for the purpose of marketing their crop. Commonly used words such as "fresh" or "natural" have specific meanings.

The word "fresh" has a precise regulatory meaning, specifically that "the food is in its raw state and has not been frozen or subjected to any form of thermal processing or any other form of preservation."[59] However, the term "fresh frozen" or "frozen fresh" can be used, as long as the food was quickly frozen while still fresh, and those terms can still be used if food is

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[56] *See Country of Origin Labeling (COOL) Frequently Asked Questions,* U.S. Dep't of Agric., https://www.ams.usda.gov/rules-regulations/cool/questions-answers-consumers (last visited Nov. 28, 2022).
[57] *See* 7 C.F.R. Part 65.
[58] *See* 7 C.F.R. § 65.500.
[59] 21 C.F.R. § 101.95(a).

simply blanched before being frozen.[60] Food that is refrigerated, treated with approved waxes or coatings, treated post-harvest with approved pesticides or cleaned with a mild chlorine wash or mild acid wash may also use the word "fresh" in labeling the product.[61]

The phrase "natural" on the other hand, is not so clearly defined. Instead, both FDA and USDA have policies regarding natural food labeling. They both provide that "natural" means that no artificial or synthetic ingredients have been added. However, both agencies' policies allow the term on products that have been minimally processed, which includes smoking, roasting, freezing, drying, and fermenting or physical processes which do not fundamentally alter the product.[62]

For more information, please refer to the National Agricultural Law Center's Reading Room on food labeling, available at: https://nationalaglawcenter.org/research-by-topic/food-labeling/.

## Organic Labeling

When and if to label a product "organic" is another potential concern for specialty crop producers. Food labeled as "organic" must be produced and processed according to the National Organic Program standards. The farm where organic food is grown, as well as the companies that handle or process the organic food, must meet the USDA organic standards.

There are four approved organic labeling claims based on four distinctions of organic content. Products labeled as "100 percent organic" must comprise of wholly organic ingredients and must not have any nonorganic ingredients or additives. Products labeled as "organic" must contain at least 95 percent organically produced ingredients. Products with a "made with organic ingredients" label must contain 70 percent organic ingredients. Products with less than 70 percent organic ingredients can only specify the organic ingredient(s) in the ingredients statement. Food manufacturers can only place the USDA organic seal on foods that qualify as "100 percent organic" and "organic." However, operations with a gross annual income from sales of organic products totaling $5,000 or less are not required to obtain NOP certification.

The NOP outlines production and handling standards for those operations that exceed the $5,000 threshold and must obtain NOP certification to sell their products as "organic". These standards set forth requirements for land management; soil fertility and crop nutrient

[60] 21 C.F.R. § 101.95(b).
[61] 21 C.F.R. § 101.95(c).
[62] *See* 80 Fed. Reg. 69905.

management practices; seeds and planting stock use; crop rotation; crop pest, weed, and disease management; and the harvesting of "wild crops."

Potential organic producers must set forth an "organic system plan," which is "[a] plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes a written plan concerning all aspects of agricultural production or handling . . .".[63] It must describe the practices and procedures that the producer or handler will implement and maintain in its operation and explain how often these practices and procedures will be performed. Further, it must describe the recordkeeping system that a producer or handler will use in the operation to ensure compliance with the recordkeeping requirements for certified operations.

Organic producers must submit the organic system plan to a certifying agent. After review and approval of the plan and an on-site investigation, the agent decides whether the operation has met the requirements and qualifies for organic certification. The certification is then subject to periodic review and reevaluation.

For more information, please refer to the National Agricultural Law Center's Reading Room on the organic program, at: https://nationalaglawcenter.org/research-by-topic/national-organic-program/.

## Irradiation Labeling

In response to the 2006 *E.Coli* outbreak, on August 22, 2008 the FDA published a final rule allowing the use of irradiation of fresh iceberg lettuce and fresh spinach in order to control harmful bacteria and other microorganisms and keep longer without spoiling. The products that may be irradiated include loose, fresh iceberg lettuce and fresh spinach as well as bagged iceberg lettuce and spinach. However, the FDA requires that foods which have been irradiated bear the "radura" logo along with the statement "treated with radiation" or "treated by irradiation." Additionally, leafy greens that have been treated with irradiation are not prohibited from using the word "fresh" as part of their labeling and marketing scheme.

## Conclusion

The topic of food labeling encompasses several specific areas of law. However, specialty crop producers are familiar with these food labeling requirements. The requirements and restrictions on food labels are an important part of the food safety and regulation system in the

[63] 7 U.S.C. § 6502(13).

United States. The topic of "food labeling," however, is very broad, encompassing several specific areas of the law that may affect specialty crop producers. Not following these requirements may open a specialty crop producer up to a governmental enforcement action or a consumer lawsuit.

For more information, please refer to the National Agricultural Law Center's Reading Room on food labeling, available at: https://nationalaglawcenter.org/research-by-topic/food-labeling/.