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# Adhesion Contracts, Debt, Low Returns and Frustration-Can America's Independent Contract Farmer Outcome the Odds?

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# ARTICLES

## ADHESION CONTRACTS, DEBT, LOW RETURNS AND FRUSTRATION-CAN AMERICA'S INDEPENDENT CONTRACT FARMER OVERCOME THE ODDS?

*Glenn A. Hegar, Jr.*

> "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship, and what is clearly one of independent, entrepreneurial dealing."[1]

## I. INTRODUCTION

In today's agricultural industry, many farmers enter into contracts as independent contractors with vertically integrated companies to raise various crops or animals. Although critics have argued for several decades that contract farmers are merely low wage workers, they are still required to assume one-half of the financial risks.[2] This criticism raises the question of whether growers are truly independent contractors or actually employees. The answer to this question has several legal implications for both contract farmers and the vertically integrated companies. For example, by treating workers as independent contractors, employers can avoid several burdens, which include withholding wage-related taxes, paying minimum wage and overtime, providing employee benefit plans and workers' compensation insurance, being vicariously liable for workers' negligent acts, and having the additional cost of increased record-keeping and other administrative hassles.[3]

Typically, workers want to be classified as employees rather than independent contractors. As an employee, individuals receive more job related benefits and greater legal protections.[4] However, although a contract farmer may have greater legal protections as an employee, the contract farmer would lose several beneficial federal tax provisions that are available only to independent contractors.[5]

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1. National Labor Relations Bd. v. Hearst Publications, Inc., 322 U.S. 111, 121 (1944); *see also* John C. Fox, *A Contractor or Your Employee* 8 (visited November 9, 1997) <http://www.fenwick.com/pub/indepen.html# 1111>.
2. *See infra* Part II.C. (discussing generally contract criticism).
3. *See* John C. Becker & Robert G. Haas, *The Status of Workers as Employees or Independent Contractors*, 1 DRAKE J. AGRIC. L. 51, 52 (1996).
4. *See infra* notes 40-43, 152-53 and accompanying text.

Section II, part B of this article discusses the growth of contract farming in the United States, the typical contract farming relationship, the high costs and low returns of contract farming, and the major issues confronting contract farmers. Section III, part A explains how employees and independent contractors are distinguished at common law. Section IV, part B focuses on the Internal Revenue Service test for classifying workers as either independent contractors or employees.[6] After concluding that contract farmers are truly independent contractors, Section IV focuses on the federal and state laws that protect contract farmers as independent contractors. Section IV, part C provides some recommendations on how the federal and state governments can provide contract farmers with greater legal protections.

## II. BACKGROUND

### *A. Growth Of Vertical Integration In American Agriculture*

Economists are aware that vertically integrated companies typically produce better products at a cheaper cost. [7] The end result is an overall gain for consumers who can spend less for a better product.[8]

Vertical integration is the process whereby a company owns each stage of production.[9] For example, in the United States an integrated poultry company owns the feed mill, breeding, hatching, processing, packaging, and shipping facilities.[10] Today over 90% of broilers are raised under a farming contract.[11] Similarly, the production of swine under contract was a mere 2% in 1980, yet today that figure is already up to 20%, and is expected to reach 50% by the next decade.[12] In the animal production sector, the integrator owns all stages of production, while the grower owns the building and land upon which the animals are raised.[13]

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5. *See infra* notes 52-59 and accompanying text.

6. This article does not discuss the legal protections that contract farmers may receive as employees because the article concludes that contract farmers are not employees. *See infra* Parts III.B.4-5 (discussing and analyzing the Internal Revenue Service's "right to control" test). Additionally, to limit the focus of this paper, traditional state law remedies, such as fraud, misrepresentation, negligence, and breach of contract are not discussed. For a discussion of those remedies, *see* Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies For Contract Poultry Growers*, 25 U. MEM. L. REV. 1207, 1224-28 (1995).

7. *See* Daniel J. Chepaitis, *The National Labor Relations Act, Non-Puralleled Competition, and Market Power*, 85 CAL. L. REV. 769, 778 (1997); David Reiffen & Michael Vita, *Comment, Is There New Thinking on Vertical Mergers?* 63 ANTITRUST 917, 920-21 (1995) (arguing that efficiency is always a potential motivation for, and consequence of, vertical integration, unlike horizontal integration).

8. *See* Chepaitis, *supra* note 7, at 778. *See also* Reiffen & Vita, *supra* note 7, at 920.

9. *See, e.g.*, Continental Grain Co., Inc., v. Beasley, 628 So. 2d 319 (Ala.1993). *See also* Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLINE L. REV. 397, 399 n.12 (1995) (citing Mark Drabenstott, *Industrialization: Steady Current or Tidal Wave?* CHOICES, Fourth Quarter 1994, at 4 (discussing the industrialization of agriculture)). The industrialization of agriculture in the United States, as illustrated with vertical integration and contract farming, has created both a shift from food commodities to food products and a shift from spot auction markets to more direct market channels. *See id.*

10. *See generally* Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. ST. L. REV. 1051, 1051-60 (1995); Kelley, *supra* note 9, at 397-402; Roth, *supra* note 6, at 1207-10.

11. *See* Hamilton, supra note 10, at 1055-56; Roth, *supra* note 6, at 1208 (stating that vertically integrated companies control an estimated 99% of poultry produced in the United States).

12. *See* Hamilton, *supra* note 10, at 1056 (citing Patrick M. O'Brien, *Implications for Public Policy, in* FOOD AND AGRICULTURAL AND MARKETS: THE QUIET REVOLUTION 296, 301 (1994). *See also* NEIL D. HAMILTON, A FARMER'S LEGAL GUIDE TO PRODUCTION CONTRACTS 122-23, 128 (1995).

13. *See, e.g., Continental Grain*, 628 So. 2d at 319. *See also* Kelly, *supra* note 9, at 399 n.12 (citing Mark Drabenstott, *Industrialization: Steady Current or Tidal Wave?* CHOICES, Fourth Quarter 1994, at 4 (discussing industrialization of agriculture).

### B. Typical Farming Contracts

The labor arrangement for raising poultry, turkey, and swine is increasingly based upon a contract that generally is referred to as "contract farming."[14] Contract farming involves two parties: a farmer or grower, and a vertically integrated company.[15] A typical contract arrangement is a written contract that legally binds the grower and integrator; lasts for a fixed term or number of production cycles; is signed or entered into before production begins; requires the grower to care for, feed, and raise the animals on land controlled by the grower; states that the integrator will provide the animals, feed, medicine, and management; requires the delivery of all identified animals back to the integrator; sets forth a payment and deduction schedule in accordance with animal quality and performance such as feed conversion, rate of growth, and animal mortality rate; provides that the grower is responsible for animal waste and disposing of dead animals in accordance with all environmental laws; states that legal title to the animals remains with the integrator and the grower is a bailor of such; and describes the grower as an independent contractor rather than an employee, partner, or other joint venturer with the integrator.[16]

### C. Contract Criticism

Farmers are traditionally "price takers, not price makers,"[17] and contract growers are the ultimate price takers. A vertically integrated company typically dominates an entire region, thus providing contract growers with only one buyer to purchase their animals. Through the contract, an integrated company also dictates the inputs, how the animals are raised, and the price formula. Public debate over such contracts has centered on the economic effects and the fairness of contract farming to growers.[18] Critics argue that vertical integration reduces growers to low-wage employees, but at the same time forces them to assume most of the financial risks.[19] A 1995 survey of poultry contract growers stated that, on average, a grower's gross annual income is about $66,000 and a grower's profit is about $12,000.[20] The contracts are usually adhesion contracts which offer growers very little protection and are terminable with only a few days notice.[21] Many growers

14. *See* Roth, *supra* note 6, at 1209-10.

15. *See id.*

16. *See* Hamilton, *supra* note 10, at 1057-58. *See also* HAMILTON, *supra* note 12, at 128.

17. Donald A. Frederick, *Legal Rights of Producers to Collectively Negotiate*, 19 WM. MITCHELL L. REV. 433, 434 (1993) (quoting RALPH B. BUNJE, COOPERATIVE FARM BARGAINING AND PRICE NEGOTIATIONS, U.S. DEP'T OF AGRIC. COOP. INFO. REPORT NO. 26, 40 (1980)). Farmers rarely have several buyers competing for their product, but rather have one or two buyers bidding. *See id.*

18. *See* Hamilton, *supra* note 10, at 1060 (discussing the history and state regulation of vertical integration). *See also* Kelley, *supra* note 9, at 399 (stating that contract farming is "being closely examined by those who observe or react to changes in agriculture's structure, including legislatures").

19. *See* Hamilton, *supra* note 10, at 1060 (citing Dan Looker, *Hog-Feeding on Contract: Safe Money or Servitude?*, DES MOINES REG., Aug. 15, 1989, at 1A). *See also* Carole Morrison, *Contract Poultry Farming* (visited Apr. 7, 1998) <http://www.web-span.com/pga/contracts/ contfarm.html> (discussing the problems of contract farming in the United States chicken industry). Studies show that integrators enjoy 20% to 30% annual return on their investments, while growers earn only a 1% to 3% annual return, despite investing over 50% of the entire capital in the chicken industry. *See id.* The same studies show that over 80% of growers earn a below poverty level income from raising chickens. *See id.*

feel trapped and intimidated by the companies.[22] To comply with the contract requirements, growers typically mortgage their farms to purchase a single animal house, water facilities, feeders, fans, curtains, tractors, and composters, all of which costs well over $250,000.[23]

Conversely, integrators argue that growers are satisfied with both their contracts and integrators.[24] A few large integrators, however, have taken real steps to improve relations with their growers. For example, Tyson Foods, Inc. conducted a survey of its growers to determine their attitudes about their contracts and Wayne Poultry made several changes in its contracting system.[25] Legal issues brought by growers against their employers include early contract termination before growers pay off their investments; requiring growers to make and pay for improvements which may cost from $5,000 to $30,000 or more;[26] manipulating the quantity, quality, and cost of animals, feed, and medicine;[27] integrators' knowledge that the contracts are unprofitable for growers; mis-weighing animals and feed;[28] failure to promptly pay growers; falsifying ranking system, which the integrators use to pay growers and terminate contracts; retaliating against growers by terminating contracts because growers either complained or formed grower associations;[29] the lack of local competition, resulting in local monopolies for integrators; and using unfair factors to determine growers' pay.[30]

A 1990 report from the Minnesota Agricultural Contracts Taskforce summarized these issues into four major problem areas that detrimentally

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20. *See* A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS, U.S. DEPT. AGRIC., A TIME TO ACT (1998) (citing Testimony of Carol Morrison)[hereinafter A REPORT]. The 1995 survey "conducted by Louisiana Tech. researchers indicated that the average poultry grower is 48 years old, owns 103 acres of land, 3 poultry houses and raises about 240,000 birds under contract annually."*Id.* The grower has been contract-growing birds for 15 years and owes over half of the value of the farm to the bank. *See id.* The contract poultry grower's gross annual income is about $65,000 and the grower's profit, before paying themselves for their labor, is about $12,000. *See id. See also* Marilyn Wentz, *Shaping The Future: The debate over corporate agriculture*; NATIONAL FARMERS UNION NEWS, Dec. 1997, at 3 (noting that swine growers make an investment of $525,000, yet can expect to make a net return of only $20,000 per year, while an analysis by South Dakota retired farmer Dale Murphy found that integrated companies make four to five times the swine growers' net return per year).

21. *See* Kelley, *supra* note 9, at 397-98 (noting that farming contracts are not subject to negotiation, but all terms are dictated by integrator).

22. *See id.* at 397.

23. *See* Roth, *supra* note 6, at 1209 n.7.

24. *See* Hamilton, *supra* note 10, at 1064.

25. *See id.* at 1064 (citing *Wayne Farms takes steps to improve grower relations*, POULTRY GROWERS NEWS, Oct. 1993, at 1).

26. *See* Roth, *supra* note 6, at 1211 n.18 (citing Eric Bates et. al., *Ruling the Roost--What's Bigger than Tobacco, More Dangerous Than Mining, and Foul to Eat?*, INDEPENDENTLY WKLY., July 20-26, 1989, at 1 (noting that "Holly Farms required 56 growers to make expensive improvements to their chicken houses just before terminating their contracts.")). *See also* Pavlik v. Cargill, Inc., 9 F.3d 710 (8th Cir. 1993); *Continental Grain*, 628 So. 2d at 319; Ambrose v. ConAgra, Inc., No. 93-714 (W.D. La. 1993).

27. *See* Roth, *supra* note 6, at 1212-13 n.21 (quoting deposition of employer representative). "If . . . had a bad grower, what kind of poultry would you get to that grower? Well, that depends. That can work both ways. If you've got an exceptionally good grower, sometimes you'll give him the bad birds because you can get them through. But if you've got one that you've just had it with and you're done with, you might give him the bad ones just so he'll quit." *Id. See also* Evans v. Herider Farms, Inc., No. 2:91CV83 (E.D. Tex. 1993) (complaining that grower received baby chicks too sick to stand, fatal medicine mixtures and bad feed); Brooks v. Ralston Purina Co., 270 S.E.2d 347 (Ga. Ct. App. 1980) (alleging that the grower received unfit feed).

28. *See, e.g.*, Braswell v. ConAgra, Inc. 936 F.2d 1169 (11th Cir. 1991) (providing multi-million dollar verdict to growers when the employer breached contract by deliberately misweighing birds and thus underpaying growers); *Pavlik*, 9 F.3d at 710; Jackson v. Swift-Eckrich, 836 F. Supp. 1447 (W.D. Ark. 1993); *Ambrose*, at No. 93-714; *Evans*, at No. 2:91CV83.

29. *See, e.g.*, Wiles v. Tyson Foods, Inc., No. 5:94-CV-4-M.U. (W.D.N.C. 1994) (alleging that the employer terminated the contract because growers complained about employer's policy of undercounting birds); Baldree v. Cargill, Inc., 758 F. Supp. 704, 707 (M.D. Fla.1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991) (holding that the employer retaliated against the growers since growers formed an association).

30. *See* HAMILTON, *supra* note 12, at 124-25 (listing ten common claims) (citing Randi Ilyse Roth, *Contract Farming Breeds Big Problems for Growers*, 7 FARMERS LEGAL ACTION REPORT (1992)).

affect growers. The four problem areas include: (1) non-payment, slow payment, bankruptcy, and bonding; (2) producers' unawareness of rights and programs available to them; (3) unequal bargaining power and adhesion contracts; and (4) interpretation of contract rights and responsibilities.[31]

Before discussing which laws protect growers, one must first determined whether growers are independent contractors or employees. The following section addresses this issue.

## III. ARE GROWERS INDEPENDENT CONTRACTORS OR EMPLOYEES?

### *A. The Common Law Distinction Between Independent Contractors and Employees*

Neither a single homogenous definition, nor a "bright-line" test, exists for determining whether a grower is an employee or an independent contractor.[32] Most statutes, regulations, and judicial decisions define an employee and an independent contractor differently.[33] At common law, the "right to control" test is used to classify whether a grower is an employee or an independent contractor.[34]

Essentially, an employer-employee relationship exists if the employer has the right to control the worker's job performance.[35] This test, as reflected in the Restatement (Second) of Agency, is based upon ten factors:

> 1. The extent of control which, by the agreement, the [employer] may exercise over the details of the work;
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> 2. Whether the one employed is engaged in a distinct occupation or business;
>
> 3. The kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> 4. The skill required in the particular occupation;
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> 5. Whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

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31. *See* Kelley, *supra* note 9, at 399-400 n.19 (citing AGRICULTURAL CONTRACTS TASKFORCE, MINN. DEP'T OF AGRIC., FINAL REPORT TO THE 1990 LEGISLATURE 6 (1990)).

32. *See* Fox, *supra* note 1, at 9.

33. *See id.*; *See also infra* Part III.D. (discussing the fact that growers can be classified as employees under other statutes).

34. *See infra* notes 35-42 and accompanying text.

35. *See* RESTATEMENT (SECOND) OF AGENCY § 220(1); Becker & Hass, *supra* note 3, at 52-53; Fox, *supra* note 1, at 10.

6. The length of time for which the person is employed;

7. The method of payment, whether by the time or by the job;

8. Whether the work is a part of the regular business of the employer;

9. Whether the parties believe they are creating the relation of master and servant; and

10. Whether the principal is in business.[36]

The Restatement goes on to say that "the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'"[37] Therefore, a finding of all the factors is not necessary because no single factor is conclusive and all ten factors relate, directly or indirectly, to the most critical requirement of the right to control the manner and means by which the work is accomplished.[38] In essence, "substance prevails over the form."[39]

Instead of using the common law "right to control" test to determine whether a contract grower is an independent contractor or employee, this paper will use the Internal Revenue Service ("IRS") "right to control" test. The IRS "right to control" test is based upon the common law "right to control" test and better illustrates how integrators, growers, and the IRS are significantly affected by having growers classified as either independent contractors or employees. The IRS test illustrates that the independent contractor-employee distinction is an extremely problematic area of the law for companies, workers, the IRS, and even Congress.

### *B. The Internal Revenue Service "Right To Control" Test*

#### *1. Employers Want To Classify Workers As Independent Contractors*

For federal tax purposes, a worker is classified as either an employee who provides personal services or as an independent contractor.[40] By classifying workers as independent contractors, employers can significantly

36. RESTATEMENT (SECOND) OF AGENCY § 220(2).

37. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968) (analyzing the totality of circumstances of each case and weighing all factors). *See also* United States v. Silk, 331 U.S. 704 (1947); Doty v. Elias, 733 F2d 720 (10th Cir. 1984).

38. *See* Darden, 503 U.S. at 323-24 (1992). *See also* Chapman v. Black, 741 P.2d 998, 1002 (Wash. Ct. App. 1987).

39. United Eng'rs and Constructors, Inc. v. Branham, 550 S.W.2d 540 (Ky. 1977). *See also* Harrison v. Humphries, 567 S.W.2d 884 (Tex. Civ. App. 1978).

40. *See* S. REP. NO. 281 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1494, *reprinted in*, SMALL BUSINESS JOB PROTECTION ACT OF 1996 (discussing classifications of workers for employment purposes) [hereinafter SMALL BUSINESS JOB PROTECTION ACT].

reduce their tax, record-keeping and administrative costs, avoid overtime, minimum wage and other worker protection laws, reduce the likelihood of being vicariously liable for the negligent acts of a worker, and avoid paying costly employee benefits.[41] Employers can reduce their labor costs up to 37 % by simply eliminating employee benefits, such as vacation time, health care benefits, pensions, child care, life insurance, and sick, family or emergency leave.[42]

When a worker is classified as an employee, the Internal Revenue Code (IRC) requires an employer to withhold and forward to the federal government the employee's federal income taxes,[43] Social Security taxes under the Federal Insurance Contributions Act (FICA),[44] and unemployment taxes under the Federal Unemployment Tax Act (FUTA).[45] In addition to the administrative cost of withholding these taxes, employers are required to pay several costly excise taxes if the worker is classified as an employee. During each calendar year, an employer must pay an excise tax of 6.2% on the total wages paid to an employee under FUTA,[46] 6.2% on the first $65,400 paid to an employee under FICA, and 1.45% on the total wages paid to the employee under FICA.[47] Employers failing to pay these taxes are liable for both the employee's and the employer's share of the unpaid taxes, as well as an additional penalty equal to 100% of all the unpaid taxes.[48] By contrast, if the worker is treated as an independent contractor, the employer is not required to withhold or pay any of these taxes. Instead, the independent contractor is responsible for withholding and paying his own federal income taxes[49] and Social Security taxes.[50] Accordingly, employers prefer to treat workers as independent contractors due to the lower tax and administrative costs involved.[51]

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41. *See id.* (noting that when the IRS prevails in reclassifying a worker as an employee, employing business becomes liable for substantial employment and income tax assessments). *See also* Becker & Haas, *supra* note 3, at 52; Paul Husband et. al., *Independent Contractors, Employers, the Entertainment Industry and the IRS*, 11 ENT. & SPORTS LAW 3 (1993); David Williams II, *A Warning On Employee Status*, 5 BUS. L. TODAY 48 (1995).

42. *See* CONTRACTOR GAMES: MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS, H.R. REP. NO. 1053 (1992) (stating that employee benefits can increase wages by thirty-seven percent).

43. *See* I.R.C. §§ 3402-03 (West 1989 & Supp. 1998).

44. *See id.* at §§ 3101-02, 3111 (West 1989). The FICA imposes two types of taxes: (1) an Old Age, Survivors, and Disability Insurance tax ("OASDI"); and (2) a Hospital Insurance tax. The OASDI tax requires each employee to pay a 6.2% tax on the first $65,400 earned during the calendar year, and also requires the employee's employer to pay a 6.2% excise tax on the first $65,400 paid during the calendar year. The Hospital Insurance tax requires each employee to pay a 1.45% tax on all wages earned during a calendar year, and also requires the employee's employer to pay a 1.45% tax on all wages paid during a calendar year. The I.R.C. requires that the employee's employer must withhold and send the federal government both the employee and employer's share of the OASDI tax and the Hospital Insurance tax. *See id.*

45. *See id.* at § 3301.

46. *See* I.R.C. § 3301 (West 1989 & Supp. 1998) (stating that the excise tax rate of 6.2% applies for calendar years 1988 to 2007, and a 6.0% rate applies for calendar years 2008 and thereafter).

47. *See id.* at §§ 3101-02, 3111.

48. *See id.* at § 3403. *See also* IRS Publication 539, Employment Taxes (Rev. Dec. 1988); Fox, *supra* note 1, at 11.

49. *See* I.R.C. §§ 3402-03 (West 1988 & Supp. 1998).

50. *See id.* at § 1401(noting that a self-employed individual, such as an independent contractor, must withhold and pay his own Social Security taxes). The Self Employment Contributions Act ("SECA") requires that each independent contractor pay "OASDI" tax at a rate of 12.4% on the first $65,400 earned during the calendar year, and also requires the independent contractor to pay a Hospital Insurance tax at a rate of 2.9% on all wages earned during a calendar year. *See id.*

51. *See* Husband et. al., *supra* note 41, at 3.

### 2. *Growers Want To Be Classified As Independent Contractors*

Although employees typically have more legal rights and worker benefits than independent contractors, growers still prefer to be classified as independent contractors. As independent contractors, growers have a greater sense of autonomy and can take advantage of several important federal tax provisions. First, both employees and independent contractors are required to withhold and pay their federal wage-related taxes in four quarterly installments.[52] Farmers can choose to make a single lump sum payment of all taxes by March 1 and completely avoid the four quarterly installment requirement.[53] If a grower was classified as an employee, however, the grower would not have the flexibility to defer all wage-related tax payments until March 1. Additionally, numerous other special tax provisions apply to farmers, which growers benefit from if classified as independent growers.[54] Finally, independent contractor growers can deduct business expenses from their gross income.[55] The business deduction is crucial for growers because they incur large expenses in a contract growing operation. However, if growers are classified as employees, they cannot deduct their expenses as a business deduction.[56] As an employee, the question becomes whether or not the integrator reimburses the grower. Reimbursed expenses are deductible from gross income, since reimbursements are includable as gross income.[57] In this situation, the reimbursement deduction merely offsets the reimbursement amount that is counted as income.

An integrator, however, is not likely to reimburse a grower because the integrator would then be paying for, and owning, the growing facilities. Integrators want to avoid this situation because it is more beneficial to them if the growers bear the burden of owning and paying for the cost of the growing facilities. Then what happens if a grower is not reimbursed?

A grower who is classified as an employee and does not get reimbursed for his expenses can take miscellaneous itemized deductions.[58] The miscellaneous itemized deduction is allowed only to the extent that the aggregate of such deduction exceeds 2% of the grower's adjusted gross income.[59] Unlike the business and reimbursed employee deductions, both of which are taken against gross income, the miscellaneous deduction is taken against adjusted gross income. The end result is that a grower will still have the same expenses, whether classified as an independent contractor or an

52. *See* I.R.C. § 6654(c) (West 1989 & Supp. 1998) (requiring four equal tax payments on or before April 15th, June 15th, September 15th, and January 15th).

53. *See id.* at § 6654(l) (discussing the special rules for farmers and fishermen).

54. *See generally* NEIL E. HARL, 4 AGRICULTURAL LAW: AGRICULTURAL ESTATE, TAX, AND BUSINESS PLANNING (1997) (discussing the business deductions available to farmers, such as use of automobile, labor costs, and other necessary business expenses).

55. *See* I.R.C. § 62(a) (1) (West 1988 & Supp. 1998). *See also* H.R. REP. NO. 1053 (1992).

56. *See* I.R.C. § 62(a) (1) (West 1989 & Supp. 1998).

57. *See* I.R.C. § 62(a) (2) (West 1988 & Supp. 1998).

58. *See id.* at § 67.

59. *See id* at §§ 63, 67(providing for a basic standard deduction of $5,000 in the case of a joint return). If the miscellaneous itemized deduction is less than $5,000, then the grower would prefer to take the basic standard deduction. *See id.*

employee, yet as an employee the grower will lose part of his deduction and end up paying more taxes. Clearly growers are disadvantaged economically if classified as employees.

### *3. The Internal Revenue Service Wants To Classify Workers As Employees*

Classifying workers as employees creates a higher rate of compliance with tax regulations, produces additional tax revenues, and accelerates the collection of tax revenue, since tax payments are made under the employer-employee withholding system.[60] Therefore, the IRS prefers to treat workers as employees since employers are forced to withhold their wage-related taxes.[61]

The IRS estimates that mis-classifying employees as independent contractors costs the federal government $1.56 billion a year in lost revenues.[62] A 1990 study illustrated that over two-thirds of the taxable wage reporting errors are due to either misclassification of workers as independent contractors or the failure to report casual/part-time workers.[63] In a single year, the IRS generated tax assessments of $93.8 million by reclassifying some 76,000 workers as employees.[64] The federal government also loses an additional $20 billion annually because self-employed individuals under-report their income.[65] The question then becomes whether a grower is an employee or an independent contractor under the IRS "right to control" test.

### *4. The Internal Revenue Service "Right to Control" Test*

The term employee is not uniformly defined by the IRC;[66] rather, an employee is defined differently for income tax withholding,[67] FICA,[68] and FUTA purposes.[69] In an attempt to determine whether a worker is an employee or independent contractor, the IRS set forth a new twenty-factor "right to control" test.[70] The IRS test, like the common law test, focuses on

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60. *See* Husband et. al., *supra* note 41, at 3; H.R. REP. NO. 1053 (1992).

61. *See* Husband et. al., *supra* note 41, at 3.

62. *See* IMPROVING THE ADMINISTRATION AND ENFORCEMENT OF EMPLOYMENT TAXES, H.R. REP. NO. 1060, (1992). *See also* H.R. REP. NO. 1053 (1992); John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. J. 337, 344 (1991) (citation omitted) (stating that workers being mis-classified as independent contractors rather than employees costs federal government $1.56 billion annually).

63. *See* H.R. REP. NO. 1053 (1992) (citation omitted).

64. *See* Bruntz, *supra* note 62, at 344 (citation omitted); H.R. REP. NO. 1053 (1992) (noting that the misclassification of employees as independent contractors is widespread and increasing).

65. *See* H.R. REP. NO. 1060 (1992); H.R. REP. NO. 1053 (1992).

66. *See generally* Bruntz, *supra* note 62, at 342 (analyzing the historical, common law, and statutory differences between employee and independent contractor).

67. *See* I.R.C. § 3401(c) (1989 & Supp. 1998) (defining an employee as including an officer, employee, or elected official of the United States, State, or political subdivision thereof, or District of Columbia, or agency or instrumentality of one or more of the foregoing, or officer of corporation); United States v. Latham, 754 F.2d 747, 750 (7th Cir. 1985) (stating that the statute uses the word "includes" as a term of enlargement, not a term of limitation, and accordingly, the term "employee" is not intended to exclude privately employed workers).

68. *See* I.R.C. § 3121(d) (2) (1989) (defining an employee as an individual who, under usual common law rules applicable in determining employer-employee relationship, has the status of employee); Treas. Reg. § 31.3121(d)-1(c) (as amended in 1980).

69. *See* I.R.C. § 3306(I) (1989) (defining an employee as having the same meaning assigned to that term by I.R.C. § 3121(d));Treas. Reg. § 31.3306(I)-1 (1960).

whether the employer has sufficient control over the worker so as to establish an employer-employee relationship.[71]

> [N]o single factor generally is dispositive of the issue. Instead, all of the facts of a particular situation must be evaluated and weighed in light of the presence or absence of the various pertinent characteristics. The decision as to the weight to be accorded to any single factor necessarily depends upon both the activity under consideration and the purpose underlying the use of the factor as an element of the classification decision. Because of the particular attributes of a specific occupation, any single factor may be inapplicable. Generally an employer and employee relationship exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so . . . . Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.[72]

### *5. Analysis Of The Internal Revenue Service "Right to Control" Test*

Although farming contracts classify growers as independent contractors,[73] the IRS uses a twenty-factor test to evaluate and weigh all the facts.[74] In analyzing all twenty factors, the degree of importance placed on each factor is scrutinized in light of the worker's occupation.[75] The question then

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70. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (noting that the IRS expanded upon the common law test to establish a new twenty factor test after examining past cases and revenue rulings). *See also* SMALL BUSINESS PROTECTION ACT, *supra* note 40; *Silk*, 331 U.S. at 716; Eastern Inv. Corp. v. United States, 49 F.3d 651, 653 (10th Cir. 1995) (citing Bartels v. Birmingham, 332 U.S. 126, 130 (1947)); Dole v. Snell, 875 F.2d 802, 804-05 (10th Cir. 1989); *Doty*, 733 F.2d at 722-23 (10th Cir. 1984); Marvel v. United States, 719 F.2d 1507, 1514 (10th Cir. 1983); Avis Rent a Car Sys., Inc. v. United States, 503 F.2d 423, 429 (2nd Cir. 1974)); Treas. Reg. § 31.3121(d)-1(c) (as amended in 1980); Treas. Reg. § 31.3401(c)-1 (as amended in 1970); Treas. Reg. § 31.3306(I)-1 (1960); H.R. REP. NO. 1053 (1991) (stating that the common law twenty-factor test was first adopted in the Social Security Act of 1935).

71. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (1992).

72. Rev. Rul. 87-41, 1987-1 C.B. (1992). *See* SMALL BUSINESS PROTECTION ACT, *supra* note 40; S. REP. NO. 494 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1091, *reprinted in* INT. REV. ACTS, TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 403, 653-54 [hereinafter INT. REV. ACTS of 1982](discussing the classifications of workers for employment purposes); 296 S. REP. NO. 1263 (1978), *reprinted in* INT. REV. ACTS, REVENUE ACT OF 1978 649, 860 [hereinafter REVENUE ACT OF 1978](citation omitted). *See also Silk*, 331 U.S. at 719; *Eastern Inv. Corp.*, 49 F.3d at 653 (citing *Bartels*, 332 U.S. at 130; *Dole*, 875 F.2d at 805; *Avis*, 503 F.2d at 430).

73. *See Feeder Pig Risk Sharing Contract*, Farmland Industries, Inc., 3315 North Oak Trafficway, Kansas City, Missouri 64116 (citing provision 21). This is a swine contract, but is similar to those used by the poultry industry as well.

74. *See generally* SMALL BUSINESS ACT, *supra* note 40; INT. REV. ACTS OF 1982, *supra* note 72, at 653, 860 (citation omitted).

becomes whether the integrator has the right to control the details of the grower's services, or, in other words, how the grower performs his services. This is a difficult question to ask because at what point does an integrator actually control the details or how the services are performed? Additionally, what is really controlling "the detail" by which the result is accomplished? The following analysis will attempt to resolve these finite questions.

Under the first factor of the IRS test, a "worker who is required to comply with [another] persons' instructions about *when, where, and how* he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed has the *right to require compliance with instructions*."[76] In the standard farming contract, the integrator requires the grower to comply with several instructions, including to maintain all equipment and facilities in a satisfactory and sanitary condition, to ask for the integrator's permission to remove any animals, to feed and manage the animals in accordance with the integrator's recommendations, to administer all medications or vaccines only with the integrator's approval, to dispose of all dead animals, to maintain timely records and to provide such records for inspection upon the integrator's request.[77]

If the standard in this first factor is merely the right to require compliance with instructions, the grower would be considered an employee. The revenue rulings issued on this factor, however, focus on the right to require compliance from the worker as to when, where *and* how the services are performed.[78] Farming contracts do not require compliance as to when, where and how the services are performed, much less require the grower to individually perform the services. Instead, a farming contract focuses on what the grower must do in certain situations and to some degree focuses on how the services are performed. A farming contract does not control the details of how the grower will perform daily activities, such as maintaining the facilities, feeding the animals, or disposing of dead animals. Instead the contract controls how the grower performs the less important services, such as maintaining records, administering medications, and providing records for inspections. The integrator does not control how the grower performs the most important aspects of his services. This distinction provides a strong argument that a grower is an independent contractor under the first factor of the IRS test.

The second factor states that

> *[t]raining a worker* by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring

75. *See* Rev. Rul. 87-41, 1987 C.B. 296.

76. Rev. Rul 87-41, 1987 C.B. 298 (emphasis added). *See also*, Rev. Rul. 68-598, 1968-2 C.B. 464; Rev. Rul. 66-381, 1966-2 C.B. 449; Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717 (2d Cir. 1943) (analyzing control exercised by employer and degree to which employer may intervene to impose control).

77. *See Feeder Pig Risk Sharing Contract, supra* note 73 (citation omitted).

78. *See* Rev. Rul. 68-598, 1968-2 C.B. 464; Rev. Rul. 66-381, 1966-2 C.B. 449 (emphasis added).

> the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want[s] the services performed in a particular method or manner.[79]

Neither the integrated company, nor the contract farming agreement require the grower to take part in any type of training before the grower can enter into a farming contract. The absence of this requirement supports the argument that a grower is an independent contractor.

The third factor notes that

> *[i]ntegration* of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.[80]

The grower's activities are both an integral part of the integrator's operation and largely subject to the integrator's control. The integrator has a large investment in owning all the other stages of production, including the feed mill, breeding, hatching, processing, packaging, and shipping facilities.[81] In analyzing this third factor, the issue is whether the integrator's success depends "to an appreciable degree" upon the grower's services. Certainly, an integrator's success depends upon all the growers taken as a whole, but the integrator's success does not depend upon *one* grower "to an appreciable degree." Therefore, an argument can be made that an individual grower may be either an employee or an independent contractor under the third factor.

The fourth factor states that if the "*[s]ervices must be rendered personally*, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results."[82] The typical contract farming agreement requires a grower to perform certain activities and supply all the necessary labor to properly raise the animals.[83] However, the agreement does not require the grower to personally perform the services.[84] The absence of a requirement that the ser-

79. Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added); Rev. Rul. 70-630, 1970-2 C.B. 229.
80. Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (emphasis added).
81. *See generally Continental Grain*, 628 So. 2d at 319; Kelley, *supra* note 9, at 399 n.12 (citation omitted).
82. Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added) (citing Rev. Rul. 55-695, 1955-2 C.B. 410).
83. *See generally Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provisions 2, 3, 5, 7, 9, 11 and 14).
84. *See id.* (citing provision 7). Usually a grower will have family members perform the services, hire workers, or perform the services personally. *See id.*

vices are performed personally indicates that a grower is an independent contractor.

Under the fifth factor,

> [i]f the person or *persons for whom the services are performed hire, supervise, and pay assistants*, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.[85]

The integrated company hires assistants to deliver, inspect, and remove the animals from the farmer's premises.[86] The grower, however, is responsible for supplying all the necessary labor to raise the animals.[87] Thus, the grower is responsible for hiring, supervising, and paying his own assistants, which shows that a grower is an independent contractor under the fifth factor of the IRS test.

The sixth factor notes that "[a] *continuing relationship* between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals."[88] Each farming contract can range from a few weeks to several years.[89] Quite often, the parties will enter into a new agreement and continue the relationship. The time period for which a particular relationship continues will depend upon the farmer's investment in the growing facilities and the number of integrators located within the grower's area. In some situations, a grower will need five or more years simply to pay off the mortgage which the grower took out to construct his facilities. In other situations, only one integrator operates in the grower's area, thus prohibiting the grower from entering into a contract with another integrator. A strong argument can be made that a grower is either an independent contractor or an employee under the sixth factor of the IRS test.

The seventh factor states that "[t]he *establishment of set hours of work* by the person or persons for whom the services are performed is a factor indicating control."[90] Farming contracts do not require the grower to work a particular set of hours. The seventh factor thus supports the argument that a

85. *Compare* Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added) *with* Rev. Rul. 63-115, 1963-1 C.B. 178 *and* Rev. Rul. 55-593 1955-2 C.B. 610.

86. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provision 2).

87. *See id.* (citing provision 7).

88. Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added) (citing *Silk*, 331 U.S. at 704).

89. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provision 17) (stating that a contract shall continue for 60 months).

90. Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added) (citing Rev. Rul. 73-591, 1973-2 C.B. 337).

grower is an independent contractor.

The eighth factor notes that

> [i]f the *worker must devote substantially full time to the business* of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.[91]

Even though the farming contract does not require a grower to work an established set of hours, the grower must be devoted substantially full time to the operation. This prevents a grower from freely working for anyone other than the integrator. For example, the grower must water, feed or inspect the animals, make minor repairs, plus dispose of dead animals and animal waste each day.[92] Thus, this factor indicates that a grower is an employee.

The ninth factor asks whether the "*work is performed on the premises* of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere."[93]

Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvas a territory within a certain time, or to work at specific places as required.[94]

A grower is not required to work on the premises of the integrator. Therefore, this factor would indicate that the grower is an independent contractor.

Under the tenth factor,

> [i]f a worker must *perform services in the order or sequence* set by

91. Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added) (citing Rev. Rul. 56-694, 1956-2 C.B. 694).
92. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provisions 2, 3, 5, 7, 9, 11 and 14).
93. Rev. Rul. 87-41, 1987-1 C.B. 296 (emphasis added) (citing Rev. Rul. 56-660, 1956-2 C.B. 693).
94. Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citation omitted) (emphasis added) (citing Rev. Rul. 56-694, 1956-2 C.B. 694 (emphasis added)).

> the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.[95]

Typically an integrator does not require a grower to perform the daily services in a specific order. Integrators may require a grower to perform certain duties in a specific order, such as notifying the integrator before administering medications to the animals and requiring the grower to maintain timely records.[96] These requirements, however, do not establish a routine or schedule that inhibits a grower's freedom to follow his own daily work patterns. Thus, this factor indicates that a grower is an independent contractor.

The eleventh factor notes that "[a] *requirement that the worker submit regular or written reports* to the person or persons for whom the services are performed indicates a degree of control."[97] A grower is frequently required to submit written production and health records.[98] This factor supports the idea that a grower is an employee.

The twelfth factor is that

> *[p]ayment by the hour, week, or month* generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates that the worker is an independent contractor.[99]

A poultry grower is paid per flock, while a swine grower is paid per month.[100] The per month payment for a swine grower is merely a convenient method of payment, since swine production is not always on a convenient cyclical pattern, as with poultry flocks. Under factor twelve, a grower would be an independent contractor.

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95. Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 56-694, 1956-d C.B. 694) (emphasis added).
96. *See Feeder Pig Risk Sharing Contract, supra* note 73 (citing provisions 11 and 14).
97. Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (emphasis added) (citing Rev. Rul. 70-309, 1970-1 C.B. 199; Rev. Rul. 68-248, 1968-1 C.B. 431).
98. *See Feeder Pig Risk Sharing Contract, supra* note 73 (citing provision 14).
99. Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (emphasis added) (citing Rev. Rul. 74-389, 1974-2 C.B. 330).
100. *See Feeder Pig Risk Sharing Contract, supra* note 73 (citing Appendix A, provision 2).

The thirteenth factor looks at whether "the person or persons for whom the services are performed ordinarily pay the *worker's business and/or traveling expenses*, [if so] the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities."[101] Contract growers never have their business or traveling expenses paid for by the integrator. Instead, growers are responsible for taking an ordinary business deduction, as independent contractors, for all of their business expenses.[102] Therefore, the thirteenth factor suggests that growers are independent contractors.

The fourteenth factor reasons that "[t]he fact that the person or persons for whom the services are performed *furnish significant tools, materials, and other equipment* tends to show the existence of an employer-employee relationship."[103] The integrator provides the grower with the animals, feed, and animal health care products,[104] while the grower is responsible for the animal houses, water facilities, feeders, fans, curtains, tractors, and composters.[105] Consequently, under factor fourteen a grower is an independent contractor.

The fifteenth factor considers whether

> the *worker invests in facilities* that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), [if so] that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer- employee relationship.[106]

A grower may invest about $250,000 for a single animal house, water facilities, feeders, fans, curtains, tractors, and composters.[107] Therefore, this factor supports the idea that a grower is an independent contractor.

The sixteenth factor states that "[a] *worker who can realize a profit or suffer a loss* as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee."[108] A contract grower is paid according to a price formula, which considers the class or grade and weight of each animal, as well as the amount of feed and medications used to pro-

101. Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (emphasis added) (citing Rev. Rul. 55-144, 1955-1 C.B. 483.
102. *See supra* notes 55-59 and accompanying text.
103. Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (emphasis added) (citing Rev. Rul. 71-524, 1971-2 C.B. 346).
104. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provision 10).
105. *See* Roth, *supra* note 6, at 1209-12 n.17.
106. *Id.* (noting that special scrutiny is required with respect to certain types of facilities, such as home offices). *See also* Rev. Rul. 68-598, 1968-2 C.B. 464.
107. *See* Roth, *supra* note 6, at 1209-12 n.17.

duce the animals.[109] The producer is also responsible for disposal of dead animals, purchase of insurance, and maintenance of the property and facilities.[110] A grower's performance of services can affect these expenses, which in turn subjects a grower to potential income variations during each payment period. Thus, under factor sixteen a grower is an independent contractor.

The seventeenth factor is whether "a *worker performs more than de minimis services* for a multiple of unrelated persons or firms at the same time, [if so this] factor generally indicates that the worker is an independent contractor."[111] Typically, a grower will raise animals for an integrator and continue that relationship for several years. This factor alone supports the idea that a grower is an employee.

The eighteenth factor explains that "[t]he fact that a worker makes his or her *services available to the general public* on a regular and consistent basis indicates an independent contractor relationship."[112] A grower is required by the contract to raise animals only for the integrator during the contract period.[113] In part, this requirement is a result of the contract farming business. Growers raise animals for one integrator to help control diseases and other similar health hazards.[114] In the poultry industry, for example, just because birds are vaccinated does not mean they are immune to all diseases. Birds from one hatchery will be immune to the same diseases, but may not be immune to diseases carried by birds from another hatchery. Mixing birds from different hatcheries could expose each flock to a new set of diseases, and result in the entire flock's death. Without looking at the nature of a grower's business, this factor supports the idea that a grower is an employee.

The nineteenth factor states that

> the *right to discharge a worker* [indicates] that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.[115]

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108. Rev. Rul. 70-309, 1970-2 (commenting that the risk of economic loss indicates that the worker is an independent contractor). For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. *See id.* The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees, and, thus does not constitute a sufficient economic risk to support treatment as an independent contractor. *See id.*

109. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing Appendix A, provisions 2 and 3).

110. *See id.* (citing provisions 2, 3 and 19).

111. Rev. Rul. 70-572, 1970-2 C.B. 221 (noting that a worker who performs services for more than one person may be an employee for each person, especially where such a person is a part of the same service arrangement).

112. Rev. Rul. 56-660, 1956.

113. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provisions 8 and 13).

114. *See id.* (citing provision 13).

115. Rev. Rul. 75-41, 1975-1 C.B. 323; Cope v. House of Maret, 729 S.W.2d 641, 643 (Mo. App. E.D. 1987) (citing Pratt v. Reed & Brown Hauling Co., 361 S.W.2d 57, 63-64 (Mo. App. W.D. 1962)).

An integrator cannot terminate a grower at will. Instead, a contract provides that an integrator may terminate the contract if the grower fails to use reasonable skill in caring for the animals, when certain minimum standards of production are not achieved, or when the grower does not comply with the terms of the contract.[116] As long as a grower meets the conditions of the contract, the grower cannot be discharged. This factor supports the idea that a grower is an independent contractor.

The twentieth factor states that "[i]f the *worker has the right to end his or her relationship* with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship."[117] A grower can terminate the contract if the integrator fails to remove the animals or fails to pay the grower, but cannot terminate a contract at will without incurring liability.[118] Under this factor a grower is an independent contractor.

In conclusion, strong arguments can be made that one particular factor indicates that growers are independent contractors, but other factors indicate that they are employees. This particular analysis of the IRS "right to control" test concludes that four factors indicate that growers are employees,[119] yet sixteen factors indicate that growers are independent contractors.[120] The most important indicator of an independent contractor relationship is that growers assume heavy financial risks in a farming contract and the integrator does not control how the growers perform their daily services.

### *C. Integrators Are Not Liable For Unpaid Taxes Due To Public Law Section 530*

In Public Law section 530 of the Revenue Act of 1978, Congress prohibited the IRS from issuing new regulations classifying whether a worker is an employee or independent contractor.[121] Section 530 prohibits the IRS from changing its position on interpreting the common law rules for distinguishing between employees and independent contractors for federal income tax withholdings, FICA taxes and FUTA taxes.[122] In the mid-1970s, many taxpayers complained that the IRS wanted to classify workers as employees despite previous private letter rulings and technical advice memoranda or prior audits that classified the same workers as independent contractors.[123] Accordingly, Congress enacted section 530 to provide relief for taxpayers confronted with large unpaid tax assessments, "until Congress has adequate

116. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provision 18).
117. Rev. Rul. 70-309 1970-1.
118. *See Feeder Pig Risk Sharing Contract*, *supra* note 73 (citing provision 18).
119. *See id.* (citing factors 8, 11, 17 and 18).
120. *See id.* (citing factors 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 19 and 20).
121. *See* I.R.C. § 3401 (West 1989 & Supp. 1998). *See also* REVENUE ACT OF 1978, *supra* note 72, at 861. *See generally* SMALL BUSINESS PROTECTION ACT, *supra* note 40 (modifying section 530).
122. *See* I.R.C. § 3401 (West 1989 & Supp. 1998). *See also* REVENUE ACT OF 1978, *supra* note 72, at 861; SMALL BUSINESS PROTECTION ACT, *supra* note 40 (modifying section 530).
123. *See* REVENUE ACT OF 1978, *supra* note 72, at 861.

time to resolve the many complex issues involved in this area."[124] Since the Revenue Act of 1978, Congress has continually reenacted section 530.[125] Supposedly Congress reenacts section 530 to assist small businesses without adequate resources to challenge the IRS position on worker classification and to reduce unnecessary and costly litigation.[126] In reality, however, Congress does not have the desire to resolve the problems associated with classifying whether a worker is an employee or independent contractor.

Currently, section 530 protects an employer from liability for any employee wage-related taxes, interest, or penalties for the years the employee was improperly classified as an independent contractor. Section 530 also protects an employer who consistently treated the worker as an independent contractor, had a reasonable basis for treating the worker as an independent contractor, and did not treat a worker in a substantially similar position as an employee.[127] Congress defines a reasonable basis as the reasonable reliance on either judicial precedent, published rulings, technical advice or letter of ruling to the taxpayer, past IRS audit of the taxpayer, or a long-standing recognized practice within a significant segment of the industry in which such worker was engaged.[128] For decades growers have been classified as independent contractors without any attempts by the IRS to reclassify growers as employees. Thus, integrators are protected by these safe harbors from any attempts by the IRS to reclassify growers and to hold integrators liable for any unpaid taxes. However, section 530 does not prevent the IRS from reclassifying an independent contractor as an employee and requiring an integrator to withhold wage-related taxes in subsequent years. Therefore, although section 530 protects integrators from liability for a grower's unpaid taxes, the IRS could still attempt to reclassify growers as employees, even though such an attempt, as illustrated above, would be in vain.

### *D. Growers Could Be Classified As Employees Under Other Statutes*

Although the IRS "right to control" test indicates that growers are independent contractors, growers could be classified as employees under other federal or state laws.[129] To determine whether the "right to control" test should apply to a particular statute, courts examine the language and congressional purpose of each statute.[130] The courts have ruled that the "right to

124. *Id.* at 860-61.

125. *See* SMALL BUSINESS PROTECTION ACT, *supra* note 40. *See also* H. R. REP. NO. 1060 (1992) (stating that the IRS and Congress need to simplify the definition of an independent contractor in order to assist employers in determining whether or not they are subject to penalties if the IRS later reclassifies a worker as an employee); H. R. REP. NO. 1053, *supra* note 62.

126. *See* SMALL BUSINESS PROTECTION ACT, *supra* note 40. *See also* H. R. REP. NO. 1060 (1992); H.R. REP. NO 1053 (1992).

127. *See* I.R.C. § 3401 (1989 & Supp. 1998). *See also* SMALL BUSINESS PROTECTION ACT, *supra* note 40 (modifying section 530).

128. *See* I.R.C. § 3401 (1989 & Supp. 1998) (noting that a long-standing industry practice does not require a showing that the practice began before 1978, continued for more than ten years, or that more than twenty-five percent of an industry follows such practice).

129. This section does not analyze how growers would be classified under these laws, but rather illustrates that growers could be classified as independent contractors under one statute and employees under another.

control" test applies to cases involving the Federal Insurance Contributions Act,[131] the Employee Retirement Income Security Act,[132] the Immigration Reform and Control Act,[133] the Federal Torts Claim Act,[134] the Lanham Trade-Mark Act,[135] the Federal Employer's Liability Act,[136] the National Labor Relations Act,[137] Labor-Management Relations Act,[138] the Jones Act,[139] and the Copyright Act.[140] Generally, the states apply the "right to control" test to state workers' compensation laws as well.[141]

Congress, on the other hand, intended for "the economic realities" test to apply in cases concerning the Fair Labor Standards Act,[142] the Migrant and Seasonal Agricultural Workers Protection Act,[143] and the Federal Mine Safety and Health Act.[144] Unlike the "right to control" test, the "economic realities" test focuses on whether the worker is economically dependent on the business to which the services are provided.[145] In using the "economic realities" test, the courts analyze the totality of the circumstances and weigh five factors, none of which are controlling.[146] The factors include: first, the degree of control exerted by the alleged employer over the worker; second, the worker's opportunity for profit or loss; third, the worker's investment in the business; fourth, the permanence of the working relationship; and fifth,

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130. *See, e.g., Darden*, 503 U.S. at 323 (stating that a term should be given its common law meaning unless the statute otherwise dictates, or such construction would thwart congressional design or lead to absurd results); Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) (discussing congressional intent). The *Reid* Court stated that:

> [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional [employer-employee] relationship as understood by common-law agency doctrine.

*Id. See also* Kelley v. Southern Pac. Co., 419 U.S. 318, 322-23 (1974).

131. *See, e.g.*, United States v. W.M. Webb, Inc., 397 U.S. 179, 182-83 (1970).

132. *See, e.g., Darden*, 503 U.S. at 318 (holding that the common-law test should be applied to determine who qualifies as an employee under ERISA).

133. *See* 52 C.F.R. § 16219 (1987) (stating that the Immigration and Naturalization Service will use the Internal Revenue Service twenty-factor employee/independent contractor test). *See also* Maka v. United States Immigration Naturalization Serv., 932 F.2d 1352 (9th Cir. 1991).

134. *See, e.g.*, Loque v. United States, 412 U.S. 521, 527-28 (1973); Leone v. United States, 910 F.2d 46, 49-50 (2nd Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

135. *See, e.g.*, Manufacturers Technologies, Inc. v. Cams, Inc., 706 F. Supp. 984, 1005 (D. Conn. 1989) (noting that the Lanham Act deals with copyrightable subject matter). *See also* Morita v. Omni Publications Int'l., Ltd., 741 F. Supp. 1107, 1112, (S.D.N.Y. 1990), *order vacated*, 760 F. Supp. 45 (S.D.N.Y. 1991).

136. *See, e.g.*, Williamson v. Consolidated Rail Corp., 735 F. Supp. 648, 649 (M.D. Pa. 1990), *order reversed*, 936 F.2d 1344 (3d Cir. 1991), *appeal after remand*, 947 F.2d 936 (3d Cir.1991); Bueeieri v. Illinois Cent. Gulf R.R., 601 N.E.2d 840 (Ill. App. 1996).

137. *See, e.g.*, NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968); NLRB v. H & H Pretzel, 831 F.2d 650, 654 (6th Cir. 1987).

138. *See, e.g.*, Labor Relations Div. of Constr. Indus. of Mass., Inc. v. International Bhd. Local 379, 29 F.3d 742, 749 (1st Cir. 1994); McBryar v. U.A.W., 160 F.R.D. 691, 696 (S.D. Ind. 1993).

139. *See, e.g.*, Evans v. United Arab Shipping Co., 4 F.3d 207, 215 (3d Cir. 1993) (citing Matute v. Lloyd Bermuda Lines Ltd., 931 F. 2d 231, 235-36 (3d Cir. 1991)) (stating that the Jones Act provides seamen with a possible suit for damages against employers for injuries incurred while at sea, providing that an employment relationship is established).

140. *See, e.g.*, Autoskill v. National Educ. Support Sys., 994 F.2d 1476, 1489 (10th Cir. 1993), *cert. denied*, 510 U.S. 916 (1993); Respect Inc. v. Committee on Status of Women, 815 F. Supp. 1112, 1117 (N.D. Ill. 1993).

141. *See, e.g.*, Becker & Hass, *supra* note 3, at 68-71(focusing on the Pennsylvania workers' compensation laws' use of common law employer-employee test).

142. *See* 29 U.S.C. §§ 201-06 (1995 & Supp. 1998). *See also id.* at §§ 207-19 (West 1995 & Supp. 1998). *See, e.g.*, Darden, 503 U.S. at 318; Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

143. *See* Antenor v. D & S Farms, 88 F.3d 925, 929 (11th Cir. 1996).

144. *See* Joy Technologies, Inc. v. Seeretary of Labor, 99 F.3d 991, 996 (10th Cir. 1996) (concluding that strict adherence to the common law employer-employee test is inconsistent with the broader statutory language of the Federal Mine Safety and Health Act).

145. *See, e.g.*, Silk, 331 U.S. at 704.

146. *See id.* at 719.

the degree of skill required to perform the work.[147] The "economic realities" test is similar to the "right to control" test, but more expansive. In a few situations the courts apply a hybrid of the "right to control" test and the "economic realities" test to some statutes,[148] including Title VII of the Civil Rights Act of 1964[149] and the Age Discrimination in Employment Act.[150]

This section merely points to the possibility that the economic realities test and the hybrid test could classify a grower as an employee, even though the traditional right to control test would classify the grower as an independent contractor.[151] At this point, the focus of this paper shifts from the issue of whether growers are independent contractors or employees to the question of which remedies are available for growers as independent contractors to improve their bargaining position with the integrators and exercise their contractual rights.

## IV. GROWERS' LEGAL RIGHTS

### *A. The Rights of Growers Under Federal Law*

#### *1. The National Labor Relations Act*

##### *a. The Right to Bargain Collectively as Employees*

The National Labor Relations Act (NLRA) gives employees the right to form labor organizations as well as the right to bargain collectively with their employers.[152] The NLRA encourages the creation of labor unions in the attempt to counteract the "inequality of bargaining power" between employees and employers.[153] In creating the NLRA, Congress found that this inequality of bargaining power burdens commerce, depresses wages, and prevents the stabilization of competitive wages and working conditions.[154]

147. *See id.* at 704; Doty, 733 F.2d at 723 (citing Trustees of Sabine Area Carpenters' Health & Welfare Fund v. Don Lightfoot Home Builder, Inc., 704 F.2d 822, 825 (5th Cir.1983)).

148. *See, e.g.*, Oestman the National Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992) (noting that Title VII and ADEA do not have the Fair Labor Standard Act's expansive definition of the term "employ," thus mere application of the expansive "economic realities" test is unwarranted); Mares v. Marsh, 777 F.2d 1066, 1067-68 & n. 2 (5th Cir. 1985); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981-82 (4th Cir. 1983); EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37-38 (3d Cir. 1983); Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41 (11th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982) (noting that under the hybrid test, the term "employee" is construed in light of general common-law concepts, taking into account the economic realities of the situation); Unger v. Consolidated Foods Corp., 657 F.2d 909, 915 n. 8 (7th Cir. 1981), *cert. denied*, 460 U.S. 1102 (1983), *and cert. denied*, 464 U.S. 1017 (1983); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 & n. 5 (9th Cir. 1980); Frankel v. Bally, Inc., 987 F.2d 86, 89 (2d Cir. 1993), *on remand*, 1994 WL 409461 (S.D.N.Y. 1994); Fox, *supra* note 1, at 11.

*But see*, Speen v. Crown Clothing Corp., 102 F.3d 625, 630-31 (1st Cir. 1996) (adopting the common law "right to control" test for determining who qualifies as an "employee" under the ADEA). The courts have used three different tests to determine whether a claimant is a covered employee, rather than an unprotected independent contractor, under anti-discrimination acts such as the ADEA. *See* Becker & Haas, *supra* note 3, at 68-71. The first test is the traditional common law right to control test, which focuses on the employer's right of control analysis. *See id.* The second test--typically more expansive--is the "economic realities" test, which holds that employees are those who depend on the business they are serving for their economic livelihood. *See id.* The third test is a "hybrid" test, which considers the economic realities of the employment relationship but retains a focus on the employer's right to control. *See id.*

149. *See* 42 U.S.C. § 2000(e) (1995 & Supp. 1998).

150. *See* 29 U.S.C. §§ 621-34 (1985 & Supp. 1998).

151. *See, e.g., Darden*, 503 U.S. at 321; *Silk*, 331 U.S. at 704.

152. *See* 29 U.S.C. § 157 (1995 & Supp. 1998).

153. *Id.*

154. *See id.* (discussing the facts and declaration of policy that underlie the NLRA). *See also* Chepaitis, *supra* note 9, at 773-74.

Once the right to form a labor organization is exercised, the employer is required to meet with the employees' representatives at a reasonable time and to bargain in good faith with respect to wages, hours, and other terms and conditions of employment.[155] An employer could be sanctioned for committing various unfair practices, such as coercing employees not to join a labor organization, interfering with a labor organization, discriminating against pro-union employees with regard to hiring or other conditions of employment, and failure to bargain with employees' collective bargaining representatives.[156]

*b. The National Labor Relations Act Does Not Protect Growers*

The NLRA protections do not apply to contract growers for two reasons. First, the NLRA does not protect independent contractors.[157] To determine whether growers are independent contractors or employees, the NLRA uses the common law "right to control" test.[158] Section II concluded that contract growers are independent contractors under the right to control test.[159] Accordingly, the NLRA does not protect growers, because they are classified as independent contractors.

Secondly, even if growers are classified as employees, they are not protected by the NLRA since the NLRA does not apply to agricultural workers.[160] In determining who falls within the agricultural worker exemption, the courts must analyze the term agricultural workers as used in the Fair Labor Standards Act ("FLSA").[161] Since the NLRA is designed to protect workers, the courts must liberally construe the analysis in the light most favorable to the workers.[162] The FLSA definition of agricultural work encompasses all branches of farming, including any practice performed by a farmer or on a farm, incidentally to or in conjunction with a farming operation.[163]

If a grower is an employee of the integrator, the question is whether the grower's activities are incidental to, or in conjunction with, a farming operation. In *Holly Farms Corp. v. United States*[164] certain workers of a poultry

155. *See* 29 U.S.C. § 158(d) (1995 & Supp. 1998).

156. *See id.* at § 158(a).

157. *See id.* at § 152(3) (West 1973) (stating that the term "employee" does not include independent contractor).

158. *See, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968); NLRB v. H & H Pretzel, 831 F.2d 650, 654; Brown v. NLRB, 462 F.2d 699 (9th Cir. 1972), *cert. denied*, 409 U.S. 1008 (1972); NLRB v. Nu-Car Carriers, 189 F.2d 756 (3rd Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

159. For a discussion of why contract growers are classified as independent contractors, *see supra* notes 66-120 and accompanying text.

160. *See* 29 U.S.C. § 152(3) (1995 & Supp. 1998) (stating that the term "employee" does not include agricultural laborers).

161. *See* 29 U.S.C. § 203(f) (1995 & Supp. 1998). *See. e.g.*, NLRB v. Cal-Maine Farms, Inc., 998 F.2d 1336 (5th Cir. 1993); NLRB v. C & D Foods, Inc., 626 F.2d 578 (7th Cir. 1980) (discussing the boundaries of the agricultural exemption); NLRB v. Tepper, 297 F.2d 280 (10th Cir. 1961).

162. *See, e.g., Cal- Maine Farms*, 998 F.2d at 1336 (mandating courts to construe the agricultural workers provision narrowly and liberally in favor of workers); NLRB v. C & D Foods, Inc., 626 F.2d 578 (7th Cir. 1980) (discussing the boundaries of the agricultural exemption); *Tepper*, 297 F.2d at 280.

163. *See* Holly Farms Corp. v. NLRB, 48 F.3d 1360 (4th Cir. 1995), *cert. granted in part*, 516 U.S. 963 (1995), *aff'd*, 517 U.S. 392 (1996).

164. 517 U.S. 392 (1996).

integrator were classified as employees and not agricultural workers.[165] These workers included chicken catchers, forklift operators, truck drivers and other similar workers.[166] Although each worker performed certain duties on the grower's farm, the United States Supreme Court held that such work was neither incidental to the grower's operation nor to the performance of the grower's contract obligations.[167] Instead, these workers continued to serve the integrator's slaughtering and processing operation.[168] By drawing a distinction between the work incidental to the processing facilities and the grower's operation, the Court assumes that growers are agricultural workers.[169] This assumption is based upon prior cases which concluded that growers are agricultural workers, just as workers who engage in an integrator's feed mill, egg laying, chicken growing, and egg processing operations are both agricultural workers and exempt under the NLRA.[170] Therefore, even if growers are re-classified as employees, they are not protected by the NLRA, due to the agricultural workers exemption.[171]

### *c. Should Congress Extend The National Labor Relations Act To Growers?*

Even if it is assumed that growers are employees, the question then becomes whether Congress should amend the NLRA to protect growers by eliminating the agricultural worker exemption. If this is not the case, should growers look for other means to attain greater bargaining power and rights?

The NLRA is criticized for its failure to adequately strengthen the bargaining position of employees.[172] First, employees are prohibited from engaging in work stoppages, secondary boycotts, or other forms of economic pressure against their employers.[173] Second, employee rights are vaguely worded, limited in scope and impact, and weakly enforced.[174] Third, employers are able to commit unfair labor practices and to aggressively test the NLRA's legal limits, especially considering the low cost of violating the NLRA.[175] Together these weaknesses contribute to the NLRA's overall ineffectiveness to provide employees with some form of bargaining power equal

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165. *See id.*
166. *See id.*
167. *See id.*
168. *See Holly Farms Corp.*, 517 U.S. at 392.
169. *See id.*
170. *See, e.g.*, Dairy Fresh Products Co., v. A Div. of Cal-Maine & Foods, Inc., 251 NLRB 1232 (1980).
171. *See id.*
172. *See* Richard N. Block, *Rethinking The National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP. & LAB. L. 30, 37 (1997); Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS U. L.J. 575, 578 (1997).
173. *See* Getman, *supra* note 172 at 580(stating that the federal law prohibits unions from countering management's advantages through work stoppages, seeondary boycotts or other types of economic pressures). *See also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (declaring that employees may not use forms of economic pressure); Chepaitis, *supra* note 7, at 809-10.
174. *See* Getman, *supra* note 172, at 578.
175. *See* Block, *supra* note 172, at 37. *See also* Richard N. Block et al., *Some Are More Equal Than Others: The Relative Status of Employers, Unions, and Employees in the Law of Union Organizing*, 10 INDUS. REL. L.J. 220, 234 (1988); Richard N. Block & Benjamin W. Wolkinson, *Delay in the Union Election Campaign Revisited: A Theoretical and Empirical Analysis, in* 3 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 43 (David Lewin & David B. Lipsky, eds., 1986); Getman, *supra* note 172, at 580 (stating that employers realize that employee organizations can be defeated by breaking the law on a regular basis); Morris M. Kleiner, *Unionism and Employer Discrimination: Analysis of 8(a) (3) Violations*, 23 INDUS. REL. 234, 236 (1984).

to their employers.[176] Therefore, although union and non-union employees can successfully exercise some rights under the NLRA, a system by which employers and employees cooperate is much more effective for both interested parties.[177] Therefore, if Congress removed the agricultural workers exemption and growers were classified as employees, they would not adequately benefit from the NLRA. The question then becomes, what other remedies are available for growers as independent contractors to improve their bargaining position with integrators and exercise their contract rights?

### *2. Attempts to Protect Growers From Unfair Practices*

#### *a. The Packers And Stockyards Act's Statutory Livestock and Poultry Trusts*

If an integrator fails to pay a poultry grower, that grower has a remedy under the Packers and Stockyards Act ("PSA").[178] The PSA requires an integrator to hold all poultry purchased from a grower, inventories of, or proceeds from, such poultry products in trust for the benefit of the unpaid grower until full payment is received by the grower.[179] The PSA poultry trust applies whether or not the grower raises the birds under contract for the integrator. An integrator with annual sales of $100,000 or less is exempt from this requirement.[180] To preserve the trust, a grower must provide written notice to the Secretary of Agriculture within 30 days of the final date on which payment was due, or within 15 business days after the grower receives notice that the payment instrument has been dishonored.[181] If the trust is preserved, the Secretary will invoke the statutory trust by requiring the integrator to hold all poultry purchased from the grower, inventories of, or proceeds from such poultry products to assure the grower receives full and prompt payment.[182]

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176. *See* Getman, *supra* note 172, at 578; Block, *supra* note 126, at 37-39. *But see,* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 70-73, 84-85 (1988) (arguing that the domination of the labor market by very few employers does not affect the wage-scale of most firms); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION 28-58, 79-87 (alleging that employees' ability to enter and exit a job adequately prevents employers from exploiting them); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 322 (1992) (conceding that employer monopsony power may have been common in the nineteenth century, but dismissing its contemporary relevance because it is probably not a serious problem in this country today); George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach, in* PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR 109, 114 n.8 (Bruno Stein, ed., 1990) (asserting that little evidence supports the idea of monopsony in today's labor market and no claim can be made to the contrary in light of the great increases in worker and firm mobility); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 428 n.32, 455-56 (1992) (arguing that employees have bargaining power since employers are not in the monopsony position of hiring workers); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1353 (1988) (arguing that today's mobility of workers and competition among firms for these workers is a classic economic example of the allocated efficiency created by supply and demand).

The arguments that a worker's ability to switch jobs easily in today's market will adequately protect them from an employer's exploitation is inapplicable to growers. Contract growers do not have the mobility or ability to switch jobs for several reasons. First, growers assume large financial obligations and risks that last for five to eight years before a grower can even consider switching jobs. Second, generally a grower only has one integrator to contract with in his region. This means that the grower cannot switch integrators even if he so desires.

177. *See* Block, *supra* note 172, at 41-43.

178. *See* 7 U.S.C. § 197 (1980 & Supp. 1998).

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id. See also* Roth, *supra* note 8, at 1218.

A similar statutory trust is established under PSA for livestock growers.[183] Section 182 defines livestock to include swine, cattle, sheep, goats, mules and horses.[184] The same requirements of filing a written notice to the Secretary are applicable.[185] The only difference is that an integrator with annual sales of $500,000 or less is exempt from this requirement.[186]

*b. Protecting Growers From An Integrator's Unlawful Practices*

The issue of collective bargaining is not addressed by the PSA, yet the PSA prevents an integrator from engaging in a list of unlawful practices.[187] Few cases involving growers and integrators have been brought under the PSA. Therefore, the ability of this provision to protect growers is uncertain. The PSA provides that an integrator shall not engage in any unfair, unjustly discriminatory, or deceptive practices.[188] One case involving an unfair practice ruled that an integrator shall not terminate a grower's contract and then discourage the grower from presenting grievances to the appropriate governmental authorities.[189]

Second, the PSA prohibits an integrator from giving an unreasonable preference or advantage to any particular person.[190] The word "unreasonable" is without a fixed context, thus the courts must evaluate all cognizable factors to determine the scope and nature of the preference. According to the court in *Swift & Co. v. Wallace,*[191] a preference is reasonable if it is required by the exigencies of the business, justified by the standards of the business, and is not obnoxious to any requirements of law.[192] For example, an integrator does not exhibit an unreasonable preference by offering a specific type of contract to growers with their own feed mills, while refusing the same contracts to growers without their own feed mills.[193]

Third, the United States Department of Agriculture (USDA) has implemented regulations on the issues of: prompt payment procedures, information that must be listed on a scale ticket, ensuring accuracy of animal weighing scales, prohibitions against circulating misleading reports about market conditions, proper weighing procedures of animals, and information that must be disclosed on contracts and settlement sheets.[194] These regula-

183. *See* 7 U.S.C. § 196 (1980 & Supp. 1998).
184. *See id.* at § 182.
185. *See id.* at § 196 (1980).
186. *See id.*
187. *See* 7 U.S.C. §§ 181-229 (1980 & Supp. 1998).
188. *See id.*at § 192(a) (listing unlawful practices). Two other PSA provisions commonly referred to include the prohibition against: (1) engaging in any course of business or any act that in effect manipulates prices, creates a monopoly or restrains commerce; and (2) conspiring with any other person to apportion territory, purchases or sales of any article, or manipulating or controlling prices. *See id.* at § 192(d)-(g). These sections becomes applicable only if two or more integrators enter into an agreement to fix prices or otherwise restrain commerce. *See also* Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968). Typically growers are not affected by this issue. *See* Hamilton, *supra* note 10, at 1095-97; Roth, *supra* note 6, at 1218-19.
189. *See Baldree,* 758 F. Supp at 704.
190. *See* 7 U.S.C. § 192 (b) (1980 & Supp. 1998).
191. 105 F.2d 848 (7th Cir. 1939).
192. *See id.*
193. *See* Jackson v. Swift-Eckrich, Inc., 53 F.3d 1452 (8th Cir. 1995); Jackson v. Swift-Eckrich, Inc., 836 F. Supp. 1447 (W.D. Ark. 1993).

tions were implemented in response to several cases in which integrators intentionally mis-weighed animals and manipulated both the quality and quantity of animals, feed and medicine.[195] Despite these regulations, growers still express concerns that integrators are mis-weighing animals and feed. The USDA has proposed regulations in response to these concerns.

*c. Proposed Regulations*

In an attempt to remedy these concerns in the poultry industry, the USDA issued proposed regulations on February 10, 1997.[196] The first proposal concerns contract payment provisions tied to the performance of other growers.[197] This proposal was in response to concerns repeatedly expressed by growers that comparison of their production costs against production costs of other growers in determining their payment is unfair.[198] The USDA is considering regulations prohibiting such comparisons.[199] The second proposal deals with integrator feed deliveries to contract growers.[200] This set of regulations would require periodic accuracy testing of feed scales used to weigh feed deliveries to growers.[201] It would also mandate computer printing of the feed ticket with specific information that must be shown on the feed scale ticket.[202] The third proposed regulation concerns practices and procedures related to weighing of live birds delivered to processors.[203] The weighing of live birds is a significant determinant of a grower's payment.[204] In the past, growers have expressed concerns that integrators under-weigh birds, thus unfairly under-paying growers.[205] The USDA is considering these regulations as a means for assuring that growers receive equitable payments for their services, despite their unequal bargaining position with the integrators.[206]

*d. Weaknesses Of The Packers and Stockyards Act*

When an integrator violates the PSA, an injured grower has the choice

194. *See* 9 C.F.R. §§ 201.43(b) (4), 201.49, 201.53, 201.72-76, 201.82, 201.100 (1997). *See also* Roth, *supra* note 6, at 1218-19; Hamilton, *supra* note 10, at 1096.

195. *See, e.g.*, Pavlik v. Cargill, Inc. 9 F.3d 710 (8th Cir. 1993); *Jackson*, 836 F. Supp. at 1447; Ambrose v. ConAgra, Inc., No. 93-714 (W.D. Ark. 1993); Evans v. Herider Farms, Inc., No. 2:91CV83 (E.D. Tex. Filed July 10, 1993) (complaining that the grower received baby chicks that were too sick to stand, fatal medicine mixtures and bad feed); Braswell v. ConAgra, Inc., 936 F.2d 1169 (11th Cir. 1991) (providing a multi-million dollar verdict to growers when the employer breached the contract by deliberately misweighing birds and thus underpaying growers); Brooks v. Ralston Purina Co., 270 S.E.2d 347 (Ga. Ct. App. 1980) (alleging that the grower received unfit feed).

196. *See* Issued under the Packers and Stockyards Act: Poultry Grower Contracts, Scales, Weighing, 62 Fed Reg. 27, 5935-37 (1997) (to be codified at 9 C.F.R. § 201).

197. *See id.* at 5936.

198. *See id.*

199. *See id.*

200. *See* 62 Fed. Reg 27 at 5936.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See* 62 Fed. Reg. 27 at 5936.

205. *See id. See also Pavlik*, 9 F.3d at 710; *Jackson*, 836 F. Supp. at 1447; Ambrose v. ConAgra, Inc., No. 93-714 (W.D. La. filed Apr. 26, 1993); *Braswell*, 936 F.2d at 1169; *Evans*, at No. 2:91CV83.

206. *See* 62 Fed. Reg. 27 at 5936. *See also Braswell*, 936 F.2d at 1169; *Pavlik*, 9 F.3d at 710; *Jackson*, 836 F. Supp. at 1447; *Ambrose*, No. 93-714; *Evans*, No. 2:91CV83.

of either filing a complaint with the USDA or filing a civil action in any district court of the United States.[207] If a complaint is filed with the USDA, the Secretary will investigate the violation, serve a written complaint upon the violator, and conduct a hearing.[208]

Growers, however, cannot adequately utilize the PSA, due to the amount of time and resources consumed between filing a private civil action or a complaint with the USDA and receiving a result. Unfortunately, both an investigation and a private civil action takes several years to complete. For example, the USDA is currently investigating two complaints filed against integrators, yet no clear answers will be available for at least six months, and probably more like one to two years.[209]

Another major weakness of the PSA is the Secretary's lack of authority to issue penalties for unfair practice violations.[210] Any person who violates the PSA is liable only for the injured party's full amount of damages.[211] This provides integrators with few incentives to follow the PSA laws that do protect growers. Collectively, these weaknesses prevent the PSA from benefiting growers. Accordingly, Congress must, at a minimum, provide the Secretary with the authority to penalize those who violate the PSA.

### *3. The Agricultural Fair Practices Act*

#### *a. Prohibited Practices*

The Agricultural Fair Practices Act of 1967 ("AFPA") prevents integrators from engaging in certain activities.[212] The AFPA was enacted after integrators resisted efforts by Ohio tomato growers, Arkansas broiler growers, and California fruit and vegetable growers to negotiate on a collective basis with the integrators.[213]

In 1964, legislation was initially introduced in Congress to enact the AFPA.[214] After several years of debate, the final bill prohibits an integrator from knowingly engaging or permitting an agent

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207. *See* 7 U.S.C. § 193 (1984). *See also* Gerace v. Itoca Vea, Co., 580 F. Supp. 1465, 1469 (N.D.N.Y. 1984) (ruling that 7 U.S.C. § 209 provides a private right of action for recovery of damages).

208. *See* 7 U.S.C. § 193 (1994). *See also* Hamilton, *supra* note 10, at 1096. In 1994, the Secretary found a poultry contract allowing either party to terminate the contract without cause and requiring disputes to be addressed in state court as violations of the PSA. *See id.*

209. Interview with James Baker, Administrator of Grain Inspection, Packers and Stockyards Administration ("GIPSA") and Howard Davis, the Deputy Administrator of Packers and Stockyards Programs within GIPSA, at the University of Arkansas School of Law (Mar. 5, 1998) (pointing out that GIPSA must obtain enough facts to make clear determinations of any PSA violations, all of which takes a few years).

210. *See* Hamilton, *supra* note 10, at 1097 (citing 7 U.S.C. § 193). *See also* Roth, *supra* note 6, at 1218-19.

211. *See* 7 U.S.C. § 209 (1994) (stating that the PSA does not abridge or alter remedies existing at common law or by statute).

212. *See* 7 U.S.C. § 2302 (1994).

> The term handler means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

*Id.* "The term producer means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower." *Id.*

> (a) To coerce any producer in the exercise of his right to join or refrain from joining or belonging to an association of producers; or to refuse to deal with any producer because of the exercise of his rights to join and belong to such an association; or (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or; (d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or (e) To make false reports about the finances, management, or activities of associations of producers or handlers; or (f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.[215]

Prior to Congressional enactment of the AFPA, the integrators lobbied for and received three major modifications in the AFPA, including provisions that deleted the treble damage and criminal penalty,[216] applied the unfair practices prohibition to both integrator and grower associations,[217] and allowed an integrator to select growers for any reason other than membership in a growers' association.[218] Arguably, the integrators could have killed the AFPA altogether, yet instead they secured a few revisions that

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213. *See* RANDALL E. TORGERSON, PRODUCER POWER AT THE BARGAINING TABLE, A CASE STUDY OF THE LEGISLATIVE LIFE OF S. 109, 3-18 (1990). For example, Arkansas poultry growers had their contracts terminated after joining the Northwest Poultry Growers Association. The Arkansas poultry growers filed a complaint with the Packers and Stockyard Administration in 1962, which found, in 1968, that the integrators had conducted illegal activities. *See id. See also* Donald A. Frederiek, *Agricultural Bargaining Law: Policy in Flux*, 43 ARK. L. REV. 679, 681 (1990). The six year delay between the filing of this complaint and the Administration's report severely crippled these growers and further illustrated their lack of bargaining power. *See id.*

214. *See* H.R. 11146, 88th Cong (1964).

215. 7 U.S.C. § 2303 (1994). *See id.* at § 2301, stating that:

> [b]ecause agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce. It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products.

*Id. See also* Michigan Canners and Freezers Ass'n, Inc., v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 464 (1984) (citation omitted) (stating that Congress responded to the growing concentration of power in the hands of fewer and larger buyers of agricultural products by enacting the AFPA to rectify perceived imbalance in bargaining position between growers and integrators); Butz v. Lawson Milk, 386 F. Supp. 227, 235 (N.D. Ohio 1974) (commenting that the "overriding purpose of Congress in enacting [the AFPA] was to protect the individual producer . . . in his right to band together with other producers . . .").

216. *See* STAFF OF SENATE COMM. ON AGRICULTURE, 90TH Cong., 1ST SESS., 109 (Comm. Print 1967); S. REP. NO. 474, (1967), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1967. *See also* Frederick, *supra* note 216, at 682.

217. *See* STAFF OF SENATE COMM. ON AGRICULTURE, 90TH Cong., 1ST SESS., 109, (Comm. Print 1967), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1867. *See also* Frederick, *supra* note 213, at 682; *Michigan Canners*, 467 U.S. at 464-65 (noting that 7 U.S.C. § 2303 applies to both integrator and growers' associations).

218. *See* 7 U.S.C. § 2304 (1994). *See also* Fredrick, *supra* note 213, at 682; *Butz*, 386 F. Supp. at 238 (concluding that the original purpose of Congress in enacting the AFPA was considerably weakened by the inclusion of 7 U.S.C. § 2304).

severely weakened growers' rights.[219]

*b. Weaknesses Of The Agricultural Fair Practices Act*

Critics argue that these weaknesses prevent growers from generating "market power and translat[ing] group action into higher farm incomes."[220] The relative weakness of the AFPA in assisting growers is illustrated by the fact that between the AFPA's enactment in 1968 and 1990, only twenty-five complaints were filed with the United States Department of Agriculture.[221] Of these complaints, nineteen were dismissed,[222] three involved alleged violations of the Packers and Stockyards Act,[223] and only one complaint resulted in a violation of the AFPA.[224] Likewise, only a handful of private cases have resulted in orders favorable to the growers since 1968.[225] Arguably, the AFPA does not provide growers with the power to negotiate effectively with integrators. Why is the AFPA too weak to adequately protect growers?

First, section 2305 gives both growers and the Secretary of Agriculture the right to bring an action against any integrator that has engaged in, or is about to engage in, a practice prohibited by the AFPA.[226] Unfortunately, section 2305 gives integrators little incentive to obey the law; since the Secretary lacks the power to assess administrative penalties, growers have difficulty proving violations, and violators are only required to pay actual damages and attorney fees.[227] This weakness shows why the Secretary needs the authority to administer penalties to those who violate the AFPA.

Second, section 2305 provides that an integrator may select their growers for "any reason other than" membership in a growers' association.[228] Essentially, an integrator can retaliate or discriminate against a grower for any reason, except for membership in a growers association. Even if growers could successfully persuade Congress to eliminate this provision, a grower would have great difficulty proving that his discharge was retaliatory or discriminatory. Thus, growers need to use an alternative means of protecting themselves from an integrator's retaliatory or discriminatory dis-

219. *See* Fredrick, *supra* note 213, at 690-92.

220. *Id.* at 683. *See also* Frederick, *supra* note 17, at 453-54.

221. *See* Frederick, *supra* note 213, at 687-89. *See also* J. Samuels, Administration of the Agricultural Fair Practices Act of 1967, by the Farmer Cooperative Service, USDA, August 27, 1968 to September 1970, PROCEEDINGS OF THE FIFTEENTH NATIONAL CONFERENCE OF BARGAINING COOPERATIVES, U.S. DEP'T OF AGRIC. 21 (1971) (discussing the first fourteen complaints filed with USDA from August 1968 until September 1970).

222. *See* Frederick, *supra* note 213, at 687-89.

223. *See Lane Broiler Farms*, at No. FS-71-C-78; *Maplewood Poultry*, at No. 1922; *Showell Poultry*, at No. DCA-74-106.

224. *See Lawson Milk*, 386 F. Supp. at 227.

225. *See, e.g., Ripplemeyer*, 807 F. Supp. at 1439 (stating that the plaintiffs presented sufficient evidence to create the issue of whether the defendants violated the AFPA); *Baldree*, 758 F. Supp. at 704 (ordering a preliminary injunction to reinstate a suspended grower association president and to cease the discriminatory conduct toward association members); *Eastern Milk Producers*, 484 F. Supp. at 471 (granting a preliminary injunction for growers), *aff'd*, 582 F.2d 1273 (3d Cir. 1978). *But see, Southern Milk Sales*, 924 F.2d at 98 (upholding the denial of the preliminary injunction against the defendants).

226. *See* 7 U.S.C. § 2305 (a) & (b) (1994).

227. *See* Frederick, *supra* note 213, at 683, 691. *See also*, A REPORT, *supra* note 20, at recommendation 3.6 (arguing that providing the USDA with administrative enforcement and civil penalty authority will enable growers to organize and bargain collectively without fear of discrimination or reprisal).

228. 7 U.S.C. §2305(d) (1994).

charge.

Third, section 2305 does not require an integrator to deal with a growers' association.[229] This means that a grower has the right to join a growers' association, yet the integrator can retaliate against the grower by refusing to deal with the association.[230] To overcome this weakness, growers' associations must become powerful enough to force integrators to deal with the association, or Congress must require integrators to negotiate with a growers' association.

Lastly, the AFPA does not require integrators to negotiate in good faith with growers.[231] This issue and the other weakness of the AFPA will be discussed below in more depth.

*c. Attempts to Amend The Agricultural Fair Practices Act*

Congressional representatives have tried unsuccessfully to modify the AFPA since 1969.[232] Generally, these amendments attempted to strengthen the bargaining position of growers by requiring integrators to bargain in good faith with the growers.[233] For example, in 1979, legislation was introduced to replace the AFPA with a law that required good faith bargaining, authorized the Secretary of Agriculture to establish a mediation and arbitration program, required integrators to deduct grower association fees from a grower's payments and pay such to the association at the grower's request, and adopted civil and criminal penalties for violations of the AFPA.[234] Each initiative failed as a result of integrator opposition, a lack of support from the agricultural community, and a lack of public support and sympathy.[235]

In 1997, Congressional Representative Kaptur of Ohio proposed the Family Farmer Cooperative Marketing Amendments Act ("FFCMA") as an amendment to the AFPA.[236] The FFCMA's findings include the fact that growers "do not enjoy the full freedom of association or real liberty to contract and thus continue to suffer from an inequality of bargaining power with the semi-monopolistic [integrators] that contract for their services . . ."; growers invest more than half the total capital and have access to few integrators; integrators have thwarted growers' efforts to advance their interests

229. *See id.*

230. *See id.* at §2304; *Butz*, 386 F. Supp. at 237 (commenting that an integrator is not required to deal with a grower's association, although growers have the right to form such associations and are protected in the exercise of such right). The court further noted that an integrator could lawfully state in the grower's agreement that, should the grower exercise his right to join an association, the integrator will exercise its right not to deal with that association. *See id.* at 240.

231. *See* Fredcrick, *supra* note 213, at 683.

232. *See, e.g.*, S. 812, 91st Cong., 115 CONG. REC. 2340 (1969); S. 2225, 91st Cong., 115 CONG. REC. 13631 (1969); H.R. 18706, 91st Cong., (1970); H.R. 14987, 92d Cong. (1972); H.R. 3723, 93d Cong. (1973); H.R. 6372, 94th Cong. (1975); H.R. 3792, 95th Cong. (1977); H.R. 2738, 105th Cong. (1997) (introducing a proposal, which was referred to the Committee on Agriculture on October 24, 1997).

233. *See, e.g.*, H.R. 2738, 105th Cong. (1997); H.R. 3792, 95th Cong. (1977); H.R. 6372, 94th Cong. (1975); H.R. 3723, 93d Cong. (1973); H.R. 14987, 92d Cong. (1972); H.R. 18706, 91st Cong. (1970); S. 2225, 91st Cong. 115 CONG. REC. 13631 (1969); S. 812, 91st Cong., 115 CONG. REC. 2340 (1969).

234. *See* H.R. 3535, 96th Cong. (1979) (introduced by Representative Panetta of California).

235. *See* Neil D. Hampton, *Viewpoint of the National Council of Farmer Cooperatives*, 24 NATIONAL CONFERENCE OF BARGAINING AND MARKETING COOPERATIVES, U.S. DEP'T OF AGRIC. 61 (1980).

236. *See* H.R. 2738, 105th Cong. (1997) (introducing a proposal that was referred to the Committee on Agriculture on October 24, 1997).

through grower associations by threatening to terminate contracts with association members or to move out of the members' states; growers' incomes are at disastrously low levels; growers are unable to bargain effectively for fair prices without the freedom to join grower associations; and integrators' interference with growers' right to association or failure to bargain in good faith with such associations is contrary to public interest.[237] Accordingly, the purpose of the FFCMA is to establish standards of fair practices for grower associations and integrators, provide standards for accreditation of grower associations, define mutual obligations of integrators and grower associations when bargaining, and provide a mechanism for enforcing such obligations.[238]

The FFCMA changes the AFPA in several ways. First, any association of producers wanting to bargain on behalf of growers must submit a petition of accreditation with the Secretary of Agriculture.[239] To maintain the accreditation, each association must: be owned and controlled by growers, bargain on behalf of its members, represent a sufficient number of growers to enable the association to function effectively, and submit an annual report to the Secretary of Agriculture.[240]

Second, integrators cannot refuse to bargain with accredited grower associations.[241] Some states already have an accreditation program, yet a national program is preferable to a state by state approach. In the poultry industry, for example, a state by state approach could result in having a different accredited association in Northwest Arkansas, Northeast Oklahoma, Southwest Missouri, and Southwest Kansas, even though these growers all raise birds for the same integrator. A troubling question concerning this proposal is what constitutes a sufficient number of growers to form an association.

Third, accredited associations and integrators must bargain in "good faith with respect to price, terms of sale, compensation . . . and other provi-

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237. *Id.* (citing section 2).

238. *See id. See also* A REPORT, *supra* note 20 (citing recommendation 3.8). The report suggested that federal regulations should be implemented to protect contract farmers. *See generally id.* The regulations should be based on existing state laws on contract farming, as in Minnesota, Wisconsin, and Kansas, as well as the Louisiana, Alabama, Oklahoma, Iowa, Florida and North Dakota legislative proposals. *See generally id.*

> The elements that should be considered for inclusion in a Federal law covering agricultural production contracts should include, but are not to be limited to, the following: a) accreditation of producer associations; b) promise of good faith by both parties; c) mediation, arbitration, or alternative dispute resolution; d) administration and enforcement of the law, including judicial review, civil remedies, and investigative powers by USDA; e) conditions for and notice of termination; f) notice and guidelines to renegotiate contract terms; g) recapture of producer investments for contract termination; h) a producer's lien; I) reimbursement for the costs of disposal of dead birds; j) parent company liability for contractors; k) duration of contract; l) payment terms; including prompt payment and accurate settlement sheets; m) formulas used to convert condemnations to live weight; n) per unit charges for feed and other inputs; o) factors to be used in ranking growers and determining performance payments; p) prohibition against discriminatory practices, such as undue preference, coercion against joining an organization, issuing false reports and including employees of the company in the ranking system; q) an express private right of action; r) contractor responsibility for environmental damages; s) grower's right to refuse livestock when delivered if livestock are in less than normal conditions; [and] t) capital construction requirements.

*Id.*

239. *See* A REPORT, *supra* note 20 (citing section 6).

240. *See id.*

241. *See id* (citing section 4).

sions relating to . . . the services rendered."[242] Many growers believe that a good faith requirement will enable them to increase their bargaining position with integrators and allow them to attain greater economic benefits. A good faith requirement, however, will not attain such results. A law that attempts to equalize bargaining power, such as a good faith requirement, does not usually succeed.[243] For example, the NLRMA requires that the employer and the employees' representative bargain in good faith with respect to wages, hours, and other terms and conditions of employment.[244] The NLRMA does not adequately strengthen the bargaining position of employees, because several years may pass before employees can attain a favorable result, and an employer's cost for violating the NLRMA is extremely low.[245] The lack of severe penalties for violations greatly hinders the NLRMA. Another problem is that good faith requirements usually have exceptions, which makes the law virtually useless. For example, the California Agricultural Labor Relations Act (CALRA) has a good faith bargaining requirement, yet in several situations, an employer may bargain in bad-faith.[246] According to the CALRA, an employer is exempt from bargaining in good faith if the workers will not receive higher wages due to the prevailing economic or competitive circumstances.[247] This exception would allow an integrator to bargain in bad faith, thus preventing growers from attaining greater economic benefits since the prevailing economic circumstances of the area are competitive. A third problem with the good faith requirement is that it is extremely vague, subjective, and a difficult standard to prove.[248] Quite often growers do not have the time or money to spend in a long judicial process, much less to prove that an integrator bargained in bad faith. Collectively these shortcomings illustrate why growers should not waste their resources on lobbying for a good faith requirement in either the AFPA or in a similar state law.

Fourth, FCMA states that if an integrator purchases products from growers under terms more favorable than those terms negotiated with an accredited association, then the integrator must offer the more favorable terms to the association.[249] This proposal is similar to the PSA law prohibiting an integrator from giving an unreasonable preference or advantage to any particular person.[250]

> In comparing terms, the Secretary of Agriculture shall take into

242. *Id.* (citing section 3).
243. *See* Hamilton, *supra* note 10, at 1105-06.
244. *See* 29 U.S.C. § 158(d) (1995 & Supp. 1996).
245. *See* Block, *supra* note 172, at 37; Block et. al., *supra* note 175, at 234; Block & Wolkinson, *supra* note 175, at 43; Getman, *supra* note 172, at 580 (stating that employers realize employee organizations can be defeated by breaking the law on regular basis); Kleiner, *supra* note 175, at 236.
246. *See* CAL LAB CODE §§ 1140-1166 (1997).
247. *See* PHILIP L. MARTIN, PROMISES TO KEEP: COLLECTIVE BARGAINING IN CALIFORNIA AGRICULTURE 214-15 (1996) (citing Dal Porto and Sons v. ALRB, 191 Cal. App. 3d 1195 (3d Dist. 1987)).
248. *See* Frederick, *supra* note 17, at 454.
249. *See* H.R. 2738, 105th Cong. (1997) (citing section 5(b)).
250. *See* 7 U.S.C. § 192 (b) (1996); *supra* notes 190-93 and accompanying text.

> consideration . . . any bonuses, premiums, hauling or loading allowances, reimbursement of expenses, or payment for special services of any character which may be paid by the handler, and any sums paid or agreed to be paid by the [integrator] for any other designated purpose than payment of the purchase prices.[251]

With the continual growth of contract farming in the United States and the infinite combination of payment formulas, the USDA should not be burdened with the task of analyzing every potential complaint brought under these provisions. If this provision is enacted, Congress should also provide the USDA with the authority to delegate its powers to the states. This would reduce the Secretary's burdens, while maintaining a uniform minimum standard that must be adhered to throughout all the states. If Congress does not enact this provision, then the USDA should have the power to delegate to the states its PSA power to prevent unreasonable preferences.

Fifth, at the request of an accredited association or an integrator, the Secretary of Agriculture may provide mediation services to the parties.[252]

Sixth,

> the Secretary of Agriculture may establish a procedure for compulsory and binding arbitration if the Secretary finds that an impasse in bargaining exists and such impasse will result in a serious interruption in the flow of an agricultural product to consumers or will cause substantial economic hardship to [growers and integrators] involved in the bargaining.[253]

A national mediation program creates uniformity among the states and would eliminate the uncertainties of a state-by-state dispute resolution approach. Typically, an integrator will reside in one state yet have integrators raising animals in another state. In this situation the question arises regarding which state's dispute resolution program would control. For example, could an integrator residing in North Carolina require a Minnesota grower to file a complaint with the North Carolina dispute resolution program? If so, then a Minnesota grower would be discouraged from filing a complaint, because he would not have the resources or the ability to resolve the dispute successfully in North Carolina. Therefore, a national program is much more feasible than a state by state approach.

Seventh, integrators must deduct an amount from the grower's payment and send this amount to an accredited association as dues or fees, if requested to do so by the growers.[254] This requirement already exists in

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251. H.R. 2738, 105th Cong. (1997) (citing section 5(b)).
252. *See id.* (citing section 5(c)).
253. *Id.*
254. *See id.* (citing section 7).

many states and should be extended to the national level.

Eighth, the Secretary of Agriculture shall have the power to conduct any investigation or hearings; to require any person to maintain records and provide such other information to the Secretary; to enter any premises in which records are required; to inspect any records; and to require the testimony of witnesses and the production of evidence under oath.[255] The Secretary shall make all records and other information available to the public, except in circumstances where such records would divulge confidential information.[256]

Ninth, upon a preponderance of the evidence, the Secretary may issue an order requiring any violator to cease and desist such violation, and also award damages to the harmed party in order to make that person whole.[257] The Secretary should also have the power to impose significant sanctions on violators. Without this power violators are not adequately deterred from violating the AFPA.

Tenth, the amended AFPA "shall not invalidate the provisions of existing or future State laws dealing with the same subject as the Act, except that such State law may not permit any action that is prohibited by this Act."[258] This provision should not only allow the states to enact similar laws, but provide the Secretary with the authority to certify states to enforce the AFPA. This would reduce the Secretary's burden of ensuring adequate enforcement of the AFPA, yet also provide a minimum floor with which the states must comply in regulating integrators.

### *B. The Rights Of Growers Under State Law*

#### *1. Does The Agricultural Fair Practices Act Preempt State Law?*

It has been suggested that section 2305 of the AFPA may preempt the states from requiring an integrator to bargain in good faith or to participate in a dispute resolution program.[259] This suggestion is based upon the United States Supreme Court's decision in *Michigan Canners and Freezers Association v. Agricultural Marketing & Bargaining Board.*[260] The Michigan Agricultural Marketing and Bargaining Act (MAMBA) went beyond the AFPA by establishing a state-administered system by which growers' associations are organized and certified as exclusive bargaining agents for all producers of a particular commodity.[261] In *Michigan Canners*, the Court stated that the AFPA contains no explicit pre-emptive language and does not reflect a congressional intent to preempt the entire field of agricultural-product market-

255. *See* H.R. 2738, 105th Cong. (1997) (citing section 8).
256. *See id.*
257. *See id.* (citing section 9).
258. *Id.* (citing section 11).
259. *See* Frederick, *supra* note 19, at 450-51.
260. 467 U.S. 461 (1984).
261. *See id.*

ing.[262]

The issue then becomes whether compliance with both the MAMBA and AFPA is possible.[263] The Court in *Michigan Canners* held that certain provisions of the MAMBA were preempted by the AFPA, since compliance with both acts was not possible.[264] Even though MAMBA did not explicitly require growers to join an association, it forced growers to pay fees to the association, bound them to the association's marketing contracts, and precluded growers from marketing their own products.[265] Thus, these provisions of MAMBA violated section 2303(a) of the AFPA, which prevents an integrator or growers' association from coercing any grower in the exercise of his right to join or refrain from joining a growers' association.[266]

Unlike the provisions in MAMBA, a state law requiring an integrator to bargain in good faith or to participate in a dispute resolution program is not preempted by sections of the AFPA. For example, one court interpreted section 2305 as protecting

> [t]he right of [an integrator], in the exercise of its sound business judgment, to continue to deal with one of its [growers] directly even though he may become a member of an association. And, it would appear that [section] 2305 should be interpreted to protect the [integrator's] right to deal directly with the [grower] even though the [grower] in joining the cooperative may have assigned exclusive agency rights to the association for the sale of its [products].[267]

Therefore, an integrator can lawfully refuse to deal with a growers' association that entered into an agreement with a grower after the grower is already under contract with the integrator.[268] Essentially, an integrator cannot be required to bargain with a growers' association as agent of the grower when

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262. *See id.* at 469 (setting forth the test for determining whether federal law preempts state law). The Court stated that:

> [f]ederal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. *E.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983). Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. *E.g., Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

*Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

263. *See* Michigan Canners and Freezers Ass'n, Inc., v. Agriculture Mktg. and Bargaining Bd., 467 U.S. 461, 469 (holding that the MAMBA conflicts with the AFPA by establishing accredited associations with the power to coerce all producers to sell products and pay a fee for service).

264. *See id.* at 461.

265. *See id.* at 478; Bayside Enterprises, Inc. v. Maine Agric. Bargaining Bd., 513 A.2d 1355 (Me. 1986) (holding that the AFPA preempts the Maine Act that prohibited integrator from bargaining with other growers while bargaining with growers' association).

266. *See* Michigan Canners, 467 U.S. at 478.

267. Lawson Milk, 386 F. Supp. at 237.

268. *See id.*

the integrator is already under contract with the grower. A state, however, may require an integrator to negotiate in good faith and to participate in a dispute resolution program with a grower or with an association, as the grower's agent, if the grower has not yet entered into a contract with the integrator. In sum, if compliance with both federal and state law is possible, then the state law is not preempted by the AFPA. This is because "the supervision of foodstuffs for market has always been deemed a matter of peculiarly local concern."[269]

### 2. *The Right To Form A Growers Association Under State Law*

Several states, including California, Iowa, Maine, Michigan, Minnesota, New Jersey, Ohio, Oregon and Washington, have enacted laws intended generally to provide farmers with the right to collective bargaining.[270] In some states, these laws (1) require the parties to negotiate in good faith;[271] (2) allow either party to refuse to sign a contract;[272] (3) require integrators to disclose certain information to growers and require standardized contract term provisions;[273] (4) require that integrators not provide more favorable prices to other growers than those terms provided the growers' association;[274] (5) require that the integrator deduct and forward a portion of

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269. Michigan Canners, 467 U.S. at 469-70 (1984) (citing Florida Lime & Avocado Growers, Inc. 373 U.S. 132, 144 (1963)).

270. *See, e.g.*, CAL. FOOD & AGRIC. CODE §§ 54401-62 (West 1986 & Supp. 1998); IDAHO CODE §§ 22-3901 to 22-3906 (1995); KAN. STAT. ANN. §§ 16-1501 to 16-1506 (1995) (applying only to swine contracts); Maine Agricultural Marketing and Bargaining Act of 1973, ME. REV. STAT. ANN. tit. 13, §§ 1953-65 (West 1981 & Supp. 1997); Michigan Agricultural Marketing and Bargaining Act, MICH. COMP. LAWS §§ 290.701 to 290.727 (1984 and Supp. 1998); Minnesota Agricultural Marketing and Bargaining Act of 1973, MINN. STAT. §§ 17.691 to 17.701 (1998); New Jersey Agricultural Cooperative Associations Act, N.J. REV. STAT. §§4:13-1 to 4:13-50 (1998); Ohio Cooperatives Act, OHIO REV. CODE ANN. §§ 1729.18 to 1729.99 (Anderson 1997); OR. REV. STAT. §§ 646.515 to 646.545 (1997); Washington Agricultural Marketing and Fair Practices Act, WASH. REV. CODE ANN. §§ 15.83.005 to 15.83.905 (West 1993).

271. *See, e.g.*, ME. REV. STAT. ANN. tit. 13, § 1953 (West 1981 &Supp. 1997) (stating that growers will be adversely affected unless integrators are required to bargain in good faith with growers' associations); MICH. COMP. LAWS. § 290.713 (1984 & Supp. 1998) (requiring parties to meet at reasonable times and negotiate in good faith). The law does not obligate either party to agree to a proposal or make a concession. *See id. See also* BLACK'S LAW DICTIONARY 693 (6th ed. 1990) (defining good faith as an intangible and abstract quality that encompasses honest intention and absence of design to seek unconscionable advantage).

272. *See, e.g.*, CAL. FOOD & AGRIC. CODE §§ 54451-58 (West 1986 & Supp. 1993) (requiring conciliation by the American Arbitration Association).

273. *See, e.g.*, WIS. ADMIN. CODE § Ag. 101.01 (1997) (requiring a list of terms that must be clearly and conspicuously disclosed in all contracts including the amount of payment, all deductions, and the formula for determining payment); S. 1094, 2d Legis. Sess. (Iowa 1994) (introduced by Littlefield) (requiring various provisions in contracts between growers and integrators). *See also* Hamilton, *supra* note 10, at 1092 (citing the proposed Iowa legislation).

> Provisions included in the contract relate to the following: (1) the exchange of financial information, including any perfected security interests in the livestock (the contractor could grant the grower a security interest to secure the contractor's performance); (2) the party responsible for insurance; (3) the delivery of livestock to the feeder, including terms on notice, delays, and compensation for delays; (4) the grower's right to refuse livestock when delivered if it was in less than "normal" condition; (5) information on the payment of expenses related to feeding and sheltering the livestock; (6) a term on the use of veterinary care; (7) any requirements relating to construction of capital improvements required; (8) a term on death or loss of the livestock and who bears that risk (the law provided a shifting presumption related to timing of death from the date of arrival and that the cost of disposal was to be shared); (9) procedures for contract termination, including (a) the conditions or actions which could result in termination, but the contractor could not remove livestock merely due to a grower's refusal to agree to changes in the contract, and (b) grounds for termination could not be based on a subjective evaluation of the feeder's husbandry practices unless done by a person other than the owner (the provision was to require a method for notice of termination and a minimum period of notice, as well as providing terms for automatic renewals); (10) compensation paid to the feeder, including the manner of compensation and when it was due (if the contract included profit sharing, then information on the sale of the animals was required to be given to the feeder); and (11) a mediation or arbitration requirement.

*Id.*

274. *See, e.g.*, ME. REV. STAT. ANN. tit. 13, § 1958 (West 1981 & Supp. 1997).

the grower's payment to the association;[275] (6) list several unfair practices that integrators and growers' associations may not engage in;[276] (7) provide for dispute resolution;[277] (8) mandate party settlements;[278] (9) require reporting of swine and poultry contracts;[279] (10) authorize the state's agricultural department to adopt regulations;[280] (11) require the department to issue reports;[281] and (14) allow recovery for damages, court costs, and attorney fees.[282]

These state statutes are not without shortcomings and ambiguities.[283] First, growers are not adequately taking advantage of these state laws and joining bargaining associations. Second, even if growers utilized these laws, only Oregon and Washington allow for a civil suit against those violating these provisions.[284] In the other states, an injured party must file a complaint with the state.[285] Additionally, integrators do not have an incentive to obey the law, since only light penalties are imposed for violations.[286] To remedy this problem, these states must impose significantly higher penalties on violators to discourage violations of the law. Finally, the states have failed to implement regulations other than those enacted at the federal level.[287] For

275. *See, e.g.*, CAL. FOOD & AGRIC. CODE § 58451 (West 1986 & Supp. 1998) (requiring a deduction only if the growers' association is nonprofit organization); IDAHO CODE §§ 22-3901 to 22-3906 (1995 & Supp. 1998) (requiring a deduction for nonprofit growers' association); N.J. REV. STAT.§ 4:13-26.1 (1973) (creating civil liability for failure to deduct payments).

276. *See, e.g.*, CAL. FOOD & AGRIC. CODE § 54431 (West 1986 & Supp. 1998); ME. REV. STAT. ANN. tit. 13, § 1965 (West 1981 & Supp. 1997); MICH. COMP. LAWS § 290.704 (West 1984); MINN. STAT. § 17.696 (West 1981); N.J. REV. STAT. § 4:13-45 (1973); OHIO REV. CODE ANN. § 1729.181 (Anderson 1997) (applying only to contracts for the purchase of milk, fruits, vegetables, sweet corn, or other canning crops); OR. REV. STAT. § 646.535 (1997); WASH. REV. CODE ANN. § 15.83.030 to 15.83.040 (West 1993).

277. *See, e.g.*, CAL. FOOD & AGRIC. CODE §§ 54451-58 (West 1986 & Supp. 1998) (providing dispute resolution to parties, if one party requests such, and the party that violates these provisions will be fined up to $10,000 per violation); ME. REV. STAT. ANN. tit. 13, § 1958-B (West 1981 & Supp. 1997) (requiring both parties to mediate in good faith and mandating mediation of any matter that remains in dispute 30 days prior to the contract date); MICH. COMP. LAWS § 290.714 (West 1984 & Supp. 1998) (providing for mediation at either party's request).

278. ME. REV. STAT. ANN. tit. 13, § 1958-B2. (West 1981 & Supp. 1997) (mandating and binding mediation).

279. *Cf.* IOWA CODE ANN § 9H.5B (West 1995 & Supp. 1997); MICH. COMP. LAWS § 290.725 (1984) (requiring a growers' association to send a copy of the contract to the department); OHIO REV. CODE ANN. § 1729.24 (Anderson 1997) (requiring the growers' associations to file an annual report); S.D. CODIFIED LAWS § 40-15A to 40-14 (1991) (requiring that meat packers with annual sales over $100 million report specific information annually).

280. *See, e.g.*,ME. REV. STAT. ANN. tit. 13, § 1956 (West 1981 & Supp. 1997); MICH. COMP. LAWS § 290.703 (West 1984 & Supp. 1998); MINN. STAT.§ 17.701 (West 1981 & Supp. 1998); WASH. REV. CODE § 15.83.100 (West 1993); *See also* Kelley, *supra* note 9, at 407.

281. *See, e.g.*, CAL. FOOD & AGRIC. CODE §§ 54442-43 (West 1986) (requiring the board to report on unfair trade practices, investigations, and the need for mechanisms to resolve bargaining disputes and other issues); ME. REV. STAT. ANN. tit. 13, § 1956 (West 1981 & Supp. 1997) (requiring the board to issue an annual report on unfair practices, investigations and hearings, other issues, and recommended changes).

282. *But see* ME. REV. STAT. ANN. tit. 13, § 1965 (West 1981 & Supp. 1997) (requiring violators to cease unlawful activities, preventing the department from awarding damages to the wronged party, and requiring a party that knowingly files a frivolous charge to pay reasonable attorney fees and double the amount of other reasonable costs to the defendant).

283. *See* Kelley, *supra* note 9, at 408.

284. *See* OR. REV. STAT. ANN. § 646.545 (1978) (allowing an individual producer to maintain an action for damages, including reasonable costs prescribed by law and reasonable attorney fees); WASH. REV. CODE § 15.83.070 (West 1993) (permitting an injured person to sue a violator in court and reeover damages, including attorney fees and the cost of the suit).

285. *See, e.g.*, CAL. FOOD & AGRIC. CODE § 54404 (West 1986 & Supp. 1998); ME. REV. STAT. ANN. tit. 13, § 1956 (West 1981 & Supp. 1997); MICH. COMP. LAWS § 290.704 (West 1984 & Supp. 1998); MINN. STAT. § 17.70 (West 1981); N.J. REV. STAT. § 4:13 to 4:46 (1973); OHIO REV. CODE ANN.§ 1729.181(B) (Anderson 1997); WASH. REV. CODE ANN. § 15.83.050 (West 1993). *But see* CAL. FOOD & AGRIC. CODE § 54404.5 (West 1986 & Supp. 1998) (requiring the party that filed the complaint to pay the cost of the hearing if the alleged defendant is found innocent); ME. REV. STAT. ANN. tit. 13, § 1965 (West 1981 & Supp. 1997).

286. *See, e.g.*, CAL. FOOD & AGRIC. CODE § 54404 (West 1986 & Supp. 1998) (providing a penalty of $500 to $5,000 for each day per willful violation); ME. REV. STAT. ANN. tit. 13, § 1965 (West 1981 & Supp. 1997) (limiting the refusal to bargain or unfair practice violation at $5,000 per day); MICH. COMP. LAWS § 290.722 (West 1984 & Supp. 1998) (fixing the penalty for wilfully disobeying an enforcement order as not to exceed $500 per day per the discretion of court); MINN. STAT. § 17.70 (West 1981) (penalizing violator by injunction only); N.J. REV. STAT. § 4:13 to 4:48 (1973) (imposing a penalty of $100 to $500 per offense); OHIO REV. CODE ANN.§ 1729.99 (Anderson 1997) (providing a fine of $50 to $2,500 for each offense); WASH. REV. CODE ANN. § 15.83.080 (West 1993) (allowing the director to impose a $5,000 civil penalty for each offense).

these laws to benefit growers, at a minimum, these states must regulate integrators more vigorously, provide growers with a civil suit, and impose higher penalties on violators.

### *3. Iowa and Wisconsin Dispute Resolution Programs*

Iowa and Wisconsin have enacted dispute resolution programs. Both programs apply to disputes arising from farming contracts. These programs are good models for establishing either a voluntary or mandatory national dispute resolution program.

#### *a. Iowa*

Iowa enacted a farm mediation program in 1995.[288] The Iowa legislature established the farm mediation program because "[l]egal proceedings may be a costly, time-consuming, and inefficient means of settling disputes in which a farm resident is a party. Disputes may be better resolved in an informal setting where understanding and accommodation may replace a formal and adversarial proceeding."[289] The farm mediation program applies to a controversy between a farm resident and another person if the controversy relates to either the performance of a party's duties under a farming contract or a person's action that the other party is alleging creates a nuisance and interference with the enjoyment of that other party.[290] Either party to the conflict may request mediation of the dispute by applying to the farm mediation service. Before either party may initiate a civil proceeding to resolve a dispute, that party must file a request for mediation with the farm mediation services.[291] The civil proceeding cannot begin unless the complainant receives a mediation release, the court determines the delay required for the mediation would cause the person to suffer irreparable harm, or the court finds that the dispute involves a class action.[292]

#### *b. Wisconsin*

Wisconsin also established a farm mediation and arbitration department that may promulgate rules necessary to establish a farm mediation and arbitration program.[293] To participate in the mediation or arbitration program either the farmer or the other party to the dispute shall submit a written request to the department.[294] If the parties have a written agreement to resolve an issue that is before a court, the court shall dismiss the action and it will be resolved by the farm mediation or arbitration program.[295] The law

287. *See, e.g.*, CODE ME. R. § 01-020 (1998).
288. IOWA CODE ANN. §§ 654B.1-.11 (West 1995 & Supp. 1997).
289. *Id.* (citing historical and statutory notes).
290. *See id.* at § 654B.1.
291. *See id.* at § 654B.2.
292. *See* IOWA CODE ANN. § 645B.3 (West 1995 & Supp. 1997).
293. *See* WIS. ADMIN. CODE § 93.50 (2) (f) (1990 & Supp. 1997).
294. *See id.* at § 93.50 (3) (b).

classifies a farmer as any person who owns or leases a total of sixty acres or more of land that is agricultural property, and whose gross sales of farm products for the preceding year equaled $20,000 or more.[296] The program specifically applies to disputes involving any farming contract between a farmer and another person, under which the farmer cares for and feeds livestock owned by the other party.[297]

### *4. State Laws Protecting Individual Growers*

#### *a. Minnesota*

Minnesota enacted a law to protect growers whose contracts are terminated by the integrator, yet who still have significant debts that were incurred as conditions to a farming contract.[298] The Minnesota statute has several requirements. First, each integrator must file a copy of any grower contract with the state.[299] This notifies the state of which integrators are conducting business in the state and with which growers. Second, an integrator generally shall not cancel a contract requiring a grower to make a capital investment in facilities that cost $100,000 or more and that have a useful life of five years or more.[300] The integrator may only cancel the contract in three circumstances. The first circumstance is when the grower receives a 180 day written notice of cancellation and the grower is reimbursed for damages incurred by an investment in the facilities, as required by the contract.[301] The second circumstance is when the grower either abandons the contract relationship voluntarily or is convicted of an offense that is directly related to the business conducted under the contract.[302] The third circumstance is when the grower breaches a contract provision that requires a capital investment.[303] The integrator may cancel the contract only after the grower is provided with a ninety day written notice that states the reasons for cancellation, and the grower fails to correct the breach within sixty days of receipt of the notice.[304] The last exception should be limited so that an integrator cannot require a grower to make unnecessary capital investments. Without this limitation an integrator could require a grower to make significant capital investments simply to terminate the contract.

Like the Iowa and Wisconsin laws, Minnesota requires that each farming contract shall provide for resolution of any contract disputes by either mediation or arbitration.[305] Either party may make a written request to the

295. *See id.* at § 93.50 (2m) (c).
296. *See id.* at § 93.50 (1) (d).
297. *See* WIS. ADMIN. CODE § 93.50 (3) (am) 3 (1990 & Supp. 1997).
298. *See* MINN. STAT. §§ 17.90 to 17.98 (West 1998).
299. *See* MINN. R. 1572.0020 (7) (1998) (noting that integrators must submit samples of contracts to the Department of Agriculture 30 days before offering a contract to growers).
300. *See* MINN. STAT. § 17.92(1) (1998).
301. *See id.*
302. *See id.*
303. *See id.* at § 17.92(2).
304. *See* MINN. STAT. § 17.92(2) (1998).

Minnesota Commissioner of Agriculture for dispute resolution services to facilitate resolution of the dispute.[306] The Minnesota law also requires that both parties adhere to an implied promise of good faith;[307] allows an injured party to recover damages, court costs, and attorney fees when a party breaches the implied promise of good faith;[308] and enables the Commissioner to adopt regulations that prohibit specific trade practices.[309]

*b. Kansas*

The Kansas statute does not apply to farming contracts in general, but only applies to swine contracts and swine marketing pools.[310] The Kansas statute, like the Minnesota statute, is unique in that it protects swine growers who make significant investments in accordance with the contract provisions from having an integrator cancel the contract.[311] The statute requires that integrators negotiate in good faith with a grower (or growers' association) pay a fair price, and make prompt payments.[312] Unfortunately, the Kansas statute does not define a significant investment, or a fair price. These terms are so ambiguous that a grower has no direction as to when his rights are violated. This ambiguity renders these provisions useless to the average grower who lacks the resources and ability to challenge an integrator.

The Kansas statute also requires an implied promise of good faith by the parties.[313] However, this good faith requirement is not enough to adequately protect growers. Under the law, an injured grower may recover damages, court costs, and attorney fees if the other party breaches the implied promise of good faith.[314] The Kansas law goes further in providing growers with statutory relief than most states, but the law needs to provide the Kansas Department of Agriculture with the ability to sanction violators. Without strict penalties, violators are not sufficiently deterred from committing violations.

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305. *See id.* at § 17.91.
306. *See id.*; MINN. R. 572.0010 (1998).
307. *See* MINN. STAT. § 19.94 (1998).
308. *See id.*
309. *See id.* at § 17.945; MINN. R. 1572.0045 (1998).
310. *See* KAN. STAT. ANN. §§ 16-1501 to 1506 (1995).
311. *See id.* at § 16-1502. This provision provides:
(a) Except as provided in subsection (b), if a producer fails to comply with the provisions of a contract that requires a capital investment in excess of $100,000 or more and has a useful life of five years or more, a contractor may not terminate or cancel that contract until: (1) The contractor has given written notice with all the reasons for the termination or cancellation at least 90 days before termination or cancellation or as provided in subsection (b) and (2) the producer who receives the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice.
(b) The 90-day notice period and 60-day notice period under subsections (a) (1) and (2) are waived and the contract may be terminated or canceled immediately if the alleged grounds for termination or cancellation are: (1) Voluntary abandonment of the contract relationship by the producer; (2) conviction of the producer of an offense directly related to the business contracted under the contract; (3) material breach of the contract by the producer; (4) a failure to care for the swine in accordance with good animal husbandry practices; (5) the bankruptcy or insolvency of the producer; or (6) an acceleration of any indebtedness secured by the property on which the swine are being raised.
*Id.*
312. *See* KAN. STAT. ANN. § 16-1504(a) (1995).
313. *See id.* at § 16-1501(e).
314. *See id.*

Another feature of the Kansas statute is that all swine contracts between growers and integrators must contain language providing for resolution of any contract disputes by either mediation or arbitration.[315] A party to the contract may make a written request to the state board of agriculture for dispute resolution services.[316] These provisions resemble the dispute resolution laws of Iowa, Minnesota, and Wisconsin. Whether the state's dispute resolution program provides growers with any additional bargaining power is untested. The Kansas statute also requires each swine growers' associations to register with the Kansas Department of Agriculture[317] and provides the Secretary of Agriculture with the authority to promulgate regulations to implement these provisions.[318]

### *5. Proposed State Laws*

Several states, including Alabama, Florida, Louisiana, North Carolina, Oklahoma,[319] and Mississippi, have recently introduced legislation to protect growers.[320] A few states have proposed that the parties negotiate and perform their contractual duties in good faith.[321] However, growers should not waste their energy trying to pass a good faith requirement in the state legislatures, since such provisions do not adequately increase growers' bargaining positions.

Several of the proposals aimed at protecting growers that are pending in state legislatures mirror the AFPA, the PSA, or the regulations promulgated under such acts. These provisions include: prohibiting integrators from making false reports about finances, management or activities of a growers' association;[322] preventing integrators from discriminating, coercing or intimidating a grower from joining a growers association;[323] prohibiting unfair, unjustly discriminatory or deceptive practices;[324] requiring integrators to provide growers with information used to determine their payments;[325] and mandating integrators to ensure that all scales operate accurately.[326] Even though these are important laws that theoretically could help protect growers, such laws already exist at the federal level, and the growers still lack significant bargaining power. If the states are going to provide growers with any notable relief, then they must move beyond simply mirroring existing

315. *See id.* at § 16-1505.
316. *See* KAN. STAT. ANN. §16-1505 (1995).
317. *See id.* at § 16-1503(a).
318. *See id.* at § 16-1506.
319. *See* Hamilton, *supra* note 10, at 1085-93 (discussing the proposed legislation from several states designed to protect contract growers). *See also A New Dawn For Contract Poultry Farmers, National Contract Poultry Growers Association* (visited Apr. 8, 1998)<http://www.web-span.com/pga/legislate/ index/html> [hereinafter *A New Dawn*].
320. *See* 1996 Miss. Laws 783 (vetoed by the Governor of Mississippi). *See also* KEITH G. MEYERS ET. AL., AGRICULTURAL LAW 59 (1985) (citation omitted) (noting that in 1996 the Governor of Mississippi vetoed House Bill No. 783); *A New Dawn*, *supra* note 319.
321. *See generally A New Dawn*, *supra* note 319.
322. *See id.* (citation omitted).
323. *See id.* (citation omitted).
324. *See id.* (referring to the proposed legislation from Louisiana).
325. *See A New Dawn*, *supra* note 319. (citing to the proposed legislation from Louisiana and North Carolina).
326. *See id.*

federal law.

Some proposals do go beyond existing federal laws. These proposals are directed more towards protecting individual growers rather than empowering growers as a collective bargaining association. The first category is modeled after the Minnesota and Kansas laws.[327] These proposals include: forbidding integrators from using threats of contract cancellation to force growers to make capital improvements;[328] requiring integrators to give a grower 180 days written notice before canceling the farming contract; and mandating integrators to reimburse a grower when canceling if the grower's facilities cost at least $25,000 and have five or more years of useful life.[329] The second category is modeled after the Wisconsin[330] and Iowa laws,[331] which provide the parties with a state operated mediation or arbitration program.[332] The third category goes beyond existing federal and state laws by: requiring integrators to reimburse growers for dead bird disposal;[333] providing certain administrative remedies;[334] and allowing growers to recover damages, attorney fees and punitive damages against integrators that violate the law.[335]

### *C. Recommendations*

As contract farming continues to increase in the United States, so do the tensions between integrators and growers. In lobbying Congress for relief, growers must concentrate their efforts on legislation that will be effective. Growers must also focus on legislation that integrators will not vigorously oppose. This is important because growers do not have the resources to waste on lobbying for legislation that will ultimately fail.

In the past, integrators have successfully opposed attempts to amend the AFPA and to implement state legislation.[336] Accordingly, growers must focus on legislation that will increase their rights, yet also survive politically. If not, growers will not be able to address the four problem areas of contract farming, as indicated by the 1990 Minnesota Agricultural Contracts Taskforce report.[337]

The first problem area of slow or non-payment by integrators is resolved by the PSA statutory trusts for livestock and poultry.[338] The second problem of growers being unaware of their rights can be resolved if the USDA requires integrators to provide growers with an approved information

327. *See supra* notes 298-318 and accompanying text.
328. *See A New Dawn*, *supra* note 319 (referring to the proposed legislation from North Carolina and Mississippi).
329. *See id.*
330. *See supra* notes 293-97 and accompanying text (discussing Wisconsin statutes).
331. *See supra* notes 288-92 and accompanying text (discussing Iowa statutes).
332. *See A New Dawn*, *supra* note 319.
333. *See id.*
334. *See id.*
335. *See id.*
336. *See* Hamilton, *supra* note 10, at 1102.
337. *See* Kelley, *supra* note 9, at 399-400 (citing AGRICULTURAL CONTRACTS TASKFORCE, MINN. DEP'T OF AGRIC., FINAL REPORT TO THE 1990 LEGISLATURE 6 (1990)).
338. *See* 7 U.S.C. § 196 (1980).

booklet. The booklet would include: the state and federal laws that protect growers; legal issues that individuals should consider before entering into a farming contract; the phone numbers of growers' associations, Farmers Legal Action Group, or other organizations that assist growers; the state and federal phone numbers for filing complaints under the PSA, the AFPA and state laws; a low and high range for the average cost of becoming a grower; a low and high range for the estimated gross and net returns a grower may expect; and any other information the USDA deems important. In creating this information booklet, the USDA should seek the cooperation of the National Association of State Departments of Agriculture, growers' associations, and integrators. The USDA should require integrators to provide this booklet under its powers to prohibit unlawful practices under the PSA.[339] Without this requirement integrators are providing growers with inadequate information, which in turn allows the integrators to give unreasonable preferences to some growers, to disadvantage other growers, and to manipulate the price of inputs and payments which growers receive.[340] Requiring integrators to provide their growers with a USDA-approved information booklet would not place an undue burden on either the USDA or the integrators.

The third problem area, growers having unequal bargaining power, and the fourth problem area, interpreting contract rights and responsibilities, are much more difficult to resolve. Some growers argue that the federal or state government should require both parties to negotiate and perform the contract in "good faith." As previously illustrated, however, good faith requirements do not adequately strengthen the bargaining position of growers.[341] Problems associated with good faith requirements include the fact that employers often violate the provision because penalties are extremely light, the provision has several exceptions that render the provision virtually meaningless, and good faith requirements are too vague and subjective to have any real value.[342]

A more effective means of resolving disputes between integrators and growers is the use of a disinterested third party.[343] If Congress is unwilling to enact a national contract farming dispute resolution program, then the USDA should build upon the experiences of the Wisconsin and Iowa programs to establish a national program.[344] The USDA should emphasize the importance of integrator cooperation with the USDA. By working with the

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339. *See id.* at § 228 (authorizing the Secretary to make regulations under PSA).

340. *See id.* at § 192(b). "It shall be unlawful . . . [for an integrator to] [m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." *See id. See* 7 U.S.C. at § 192(e).

> It shall be unlawful . . . [for an integrator to] [e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce . . .

*Id.*

341. *See supra* notes 242-48 and accompanying text.

342. *See id.*

343. *See* Hamilton, *supra* note 10, at 1105-06 (stating that the regulation is likely to be more successful if the goal is to create a fair and informed business relationship between parties and to provide procedural protections to growers, such as notice of termination, right to prompt payment and a dispute resolution mechanism).

344. *See supra* notes 288-92 and accompanying text.

USDA, the government would be more inclined to implement fewer regulations directed at integrators' activities. Under this program, each integrator would establish an internal mediation or arbitration program. Each program would have a three person hearing committee, one selected by the integrator, one selected by the growers, and a neutral third-party appointed by the USDA. Either party could file a written request to the committee, which would hold a hearing within seven to ten days of receipt. The USDA could experiment with different programs to determine whether the parties could appeal their decision to the USDA National Appeals Division. An alternative program is for the USDA to establish and maintain the dispute resolution program.

A national dispute resolution program does not involve the same negative implications that come with the implementation of more regulations. The negative implications of increased regulation includes: high administrative costs for the government, the continuing evolution of contract farming terms and issues, the fact that growers and integrators can typically resolve their unique set of differences better than the legislature, the establishment of unfavorable contract interpretations and trade practices through private litigation, the resistance of integrators to being regulated, and, the resistance of farmers to regulation can be avoided with such a dispute resolution program.[345] Therefore, the USDA needs to first concentrate its efforts on facilitating a means for integrators and growers to resolve their differences. If this does not work, the USDA should then sanction the integrators with strict regulations.

In addition to these suggestions, Congress should give the USDA the power to issue penalties and sanctions for those who violate the AFPA and the PSA. Without the ability to penalize violators, an integrator has little incentive to obey the law. Furthermore, if growers feel that regulations are necessary, such as the requirement to weigh live birds and feed, they should continue to lobby both the USDA and their state representatives for the promulgation of such regulations. Generally, lobbying the USDA to implement regulations is more favorable than a state by state approach, which lacks uniformity. Unfortunately, a state by state approach affects the location of an integrator's production more than the integrator-grower relationship.[346] However, growers should not ignore the possibility of state regulation to provide a remedy to a unique set of circumstances or prove to be a model for the national level. Finally, growers must further organize themselves into growers' associations. Individually, a grower cannot expect to have any input into the terms of a contract, but collectively, growers may be able to attain concessions from an integrator.

345. *See* Hamilton, *supra* note 10, at 1101-06 (1995) (citing North Dakota's attempt to enact legislation as an example that growers fear that regulation will take away potential opportunities).

346. *See id.* at 1104 (citation omitted) (stating that regulations are likely to influence the geographic location of various activities in food production and the distribution chain, rather than the method of coordination, unless such legislation is uniform from state to state).

## V. CONCLUSION

Contract farming in the United States has increased dramatically over the past few decades. As contract farming becomes more popular, tensions between growers and integrators will also increase. This shift in America's agriculture raises several legal and social issues. The primary question is whether contract growers are independent contractors or employees. An analysis of the IRS "right to control" test proves that growers are truly independent contractors. The subjectivity of the right to control test, however, allows the possibility that a grower could be an independent contractor under one law and an employee under another law. Nevertheless, the analysis of this test illustrates that growers, in general, will always be independent contractors.

As independent contractors, growers do not have the same legal protections as employees. Over the past decade, public debate has centered on the economic effects and the fairness of contract farming to growers. Critics argue that growers assume half of the financial risks of a farming contract, yet they are reduced to low-wage employees. In order to protect the growers and give them increased bargaining power with integrators, several recommendations should be followed. For example, a national dispute resolution program should be implemented by the USDA, a USDA-sponsored information booklet should be created that integrators would be required to give to any grower with which they contract, Congress should mandate power for the USDA to issue significant administrative penalties to those who violate the AFPA and the PSA; the USDA should delegate enforcement powers to the states; the PSA should continue to use livestock and poultry trusts; the USDA should continue to implement regulations under the PSA to prevent integrators from committing unfair practices; the states should experiment with different programs or regulations to determine the most effective means of protecting growers; and most importantly, growers must join together in growers' associations in greater numbers. In conclusion, as the face of America's agriculture continues to change, so must the role of our state and federal agricultural departments if we hope to meet the challenges of the twenty-first century.