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The Migrant and Seasonal Worker Protection Act: A Preliminary Analysis

by

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I. INTRODUCTION

April 14, 1983 marks the beginning of a new era in the ongoing effort by the Congress to extend protection to migrant and seasonal agricultural workers. On that date major new legislation, the Migrant and Seasonal Agricultural Worker Protection Act [hereinafter MSPA],[1] became effective, repealing and replacing The Farm Labor Contractor Registration Act of 1963 [hereinafter FLCRA].[2] Final regulations for the implementation of MSPA became effective on September 12, 1983.[3] While MSPA does carry forward certain features of FLCRA, its basic structure is substantially different. MSPA commands the attention of all agricultural employers, agricultural associations and farm labor contractors as the reach of its regulatory scheme is greater than that of FLCRA and its exemption scheme is significantly different. This article seeks briefly to trace developments that led to the enactment of MSPA, set forth its major features in some detail, identify possible problem areas, and offer some preliminary recommendations.

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1. Migrant and Seasonal Agricultural Worker Protection Act of 1983, Pub. L. No. 97-470, 1982 U.S. CODE CONG. & AD. NEWS (96 STAT.) 2583 (to be codified at 29 U.S.C. §§ 1801-1872) [hereinafter cited as MSPA].

2. Repealer at MSPA § 523, 96 Stat. 2600; effective 90 days from Jan. 14, 1983 as per MSPA § 524, 96 Stat. 2600. Various issues under FLCRA are discussed in Leather, *Surprise! You May be a Farm Labor Contractor: Recent Developments Under the Farm Labor Contractor Registration Act*, 1 AGRIC. L.J. 261 (1979); Vause, *The Farm Labor Contractor Registration Act*, 11 STETSON L. REV. 186 (1982); Comment, *Recent Developments Under the Farm Labor Contractor Registration Act*, 11 CAP. U.L. REV. 733 (1982); Note, *A Defense of the Farm Labor Contractor Registration Act*, 59 TEX. L. REV. 531 (1981).

3. 48 Fed. Reg. 36,741-36,765, 38,374 (1983) (to be codified at 29 C.F.R. pt 500). (Interim regulations were in effect from April 14, 1983 through September 11, 1983.) 48 Fed. Reg. 15,805, 36,576 (1983).

II. BACKGROUND

In the early 1960's it was revealed in certain Congressional hearings that crew leaders, now more commonly called farm labor contractors, were in many instances seriously mistreating their crew members.[4] A host of abuses were identified, including misrepresenting the nature and availability of work, providing inaccurate information about pay, transporting crews in uninsured, unsafe vehicles, forcing crew members to buy goods and services from the contractor at excessive prices, payroll irregularities, and supplying miserably inadequate housing.[5] There was also some indication that certain large corporate operations which used their own employees to recruit seasonal and migrant workers, rather than using the services of independent farm labor contractors, were guilty of similar abuses.[6] While not as prominent an issue, there was also evidence that farmers and growers were having difficulty with certain farm labor contractors who failed to honor agreements to provide crews for critical field work and harvesting or who pulled their crews off farms prematurely to move on to more profitable jobs.[7]

The response of the Congress was the enactment of the Farm Labor Contractor Registration Act of 1963.[8] That legislation was seriously flawed and did little to root out the problems which it was designed to address. A decade later and after a review of the situation Congress enacted the Farm Labor Contractor Registration Act Amendments of 1974[9] in an effort to increase the effectiveness of the regula-

4. S. REP. NO. 202, 88th Cong., 2d Sess. (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3690; S. REP. NO. 1295, 93d Cong., 2d Sess. 1-3 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6441, 6442.

5. *Id.*

6. *See, e.g.*, the allegations in Salinas v. Amalgamated Sugar Co., 341 F. Supp. 311 (D. Idaho 1972).

7. S. REP. NO. 1295, *supra* note 4 at 2.

8. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920 (1964) (codified at 7 U.S.C. §§ 2041-2053 (1964)) (principal amendments cited *infra* note 9) (repealed as indicated *supra* note 2).

9. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat 1652 (1974) (codified at 7 U.S.C. §§ 2041-2055 (1976)) (repealed as indicated *supra* note 2).

tory scheme. Intrastate as well as interstate activities became subject to regulation; farm labor contracting activities involving just one protected worker rather than ten or more were covered; penalties were increased and a civil remedy section was added.[10] There was some improvement in the lot of protected agricultural workers, but more significant was the spate of technical and for the most part fruitless litigation.

Much of the litigation focused on three areas—issues arising out of the FLCRA exemption scheme,[11] the exact nature of the requirement that the user of the services of a farm labor contractor make a determination that the contractor possessed a certificate of registration in full force and effect,[12] and problems with certain language in the civil remedy section added in 1974.[13]

Farmworkers became more and more dismayed as declining enforcement energies were increasingly focused on technical disputes.[14] Agricultural employers were alienated in increasing numbers by DOL enforcement activities which were viewed as nothing less than harassment.[15] Out of this unhappy situation came negotiations among interested par-

10. 1974 changes summarized at 128 CONG. REC. S11739 (daily ed. Sept. 17, 1982) (statement of Sen. Hatch).

11. *E.g.*, Donovan v. Heringer Ranches, Inc., 650 F.2d 1152 (9th Cir. 1981); Marshall v. Green Goddess Avocado Corp., 615 F.2d 851 (9th Cir. 1980); Marshall v. Silver Creek Packing Co., 615 F.2d 848 (9th Cir. 1980); Marshall v. Coastal Growers Ass'n, 598 F.2d 521 (9th Cir. 1979); Marshall v. Heringer Ranches, Inc., 466 F. Supp. 285 (E.D. Cal. 1979); DeLeon v. Ramirez, 465 F. Supp. 698 (S.D.N.Y. 1979); Marshall v. Bunting's Nurseries of Selbyville, 459 F. Supp. 92 (D. Md. 1978); Jenkins v. S & A Chaissan & Sons, Inc., 449 F. Supp. 216 (S.D.N.Y. 1978); Usery v. Golden Gem Growers, Inc., 417 F. Supp. 857 (M.D. Fla. 1976).

12. *E.g.*, Mountain Brook Orchards, Inc. v. Marshall, 640 F.2d 454 (3d Cir. 1981), Ruffner v. Reyes, 91 LAB. CAS. (CCH) ¶ 34,001 (S.D.N.Y. Mar. 10, 1981).

13. *E.g.*., Alvarez v. Joan of Arc, Inc., 658 F.2d 1217 (7th Cir. 1981).

14. While registrations rose by 1977 to include 8,212 farm labor contractors and 4,294 full time or regular employees engaged in contracting activities, the number of investors fell from 58 in 1979 to 40 in 1982, and the number of investigations from 5,708 in 1979 to a projected 3,600 for 1982 Hearings on Farm Labor Contractor Registration Act Before Subcommittee on Economic Opportunity of House Comm. on Ed. and Labor, 95th Cong., 2d Sess. 50 (1978); H.R. REP. NO. 885, 97th Cong., 2d Sess. 4, *reprinted* in 1982 U.S. CODE CONG. & AD. NEWS 4547, 4550.

15. H.R. REP. NO. 885, *supra* note 14 at 3-4; Statement of Sen. Hatch, *supra* note 10.

ties,[16] including the responsible Senate and House committees, resulting in the drafting of a consensus bill which was passed by both Houses in the closing days of the 97th Congress.[17] With the approval of the President on January 14, 1983, the Migrant and Seasonal Agricultural Worker Protection Act was born, to become effective ninety days later.[18]

The regulatory sweep of MSPA is much broader than that of FLCRA. Under the repealed scheme the focus was primarily upon a defined class of farm labor contractors who were required to register with DOL and to observe certain worker protection provisions. Particularly after the 1974 Amendments strengthened the regulatory scheme, exemptions from the definition of farm labor contractor became the focus of many court battles as DOL pressed for narrow readings that would extend the regulatory scheme to as many users of protected workers as possible, even to certain fixed-situs agricultural employers. Farmers, canning companies, packing sheds and other fixed-situs agricultural employers which did not fit the traditional mold of the transient farm labor contractor fought back, in some instances with success.[19] Success meant, of course, not being classed as a farm labor contractor or, if so classed, falling in one of the exempt categories. This meant total freedom from registration requirements and from virtually all worker protection requirements. The only significant remaining statutory duties were triggered if the farmer or canner engaged a farm labor contractor to provide a crew. It was necessary for such user to comply with the FLCRA requirements of determining that the contractor possessed a current certificate of re-

16. Among the parties included were the American Farm Bureau Federation, the AFL-CIO and its affiliate, the United Farm Workers of America, the Migrant Legal Action Program, the National Cotton Council, the National Council of Agricultural Employers, the National Food Processors Association, the United Fresh Fruit and Vegetable Association, and the Western Growers Association. Statement of Sen. Hatch, *supra* note 10 at S11738.

17. H.R. 7102, 97th Cong., 2d Sess. (passed House Sept. 29, 1983, passed Senate as amended Dec. 19, 1983, House concurred Dec. 20, 1983, approved by President Jan. 14, 1983, 19 WEEKLY COMP. PRES. DOC. 2 (Jan. 14, 1981)).

18. MSPA § 524 (to be codified at 29 U.S.C. § 1801).

19. *E.g.*, cases cited *supra* note 11.

gistration in full force and effect[20] and of following certain record-keeping provisions.[21]

With the advent of MSPA major changes have been introduced, the principal one being that compliance with affirmative worker protection requirements relating to disclosures, payroll practices, vehicle safety and other matters is no longer tied to the question of whether a person must register as a farm labor contractor. MSPA regulates three primary classes of persons—farm labor contractors,[22] agricultural associations,[23] and agricultural employers.[24] All are required to comply with prescribed worker protection requirements. However, only farm labor contractors and their employees are required to register with DOL.[25] The result is that worker protection provisions have a much broader application than under FLCRA, while at the same time fixed-situs agricultural employers and associations are relieved from registration requirements. The intent of MSPA is that registration requirements be imposed where they are most needed, to keep track of mobile and often hard to locate farm labor contractors, while at the same time increasing the number of persons responsible for observing worker protection requirements. It is to be noted, however, that the negotiated nature of MSPA led to the inclusion of a series of exemptions which leave totally unregulated certain persons who would otherwise fall into one of the three regulated categories.[26]

There is, in effect, a fourth regulated class with special statutory duties. This class encompasses those who own or control farm worker housing.[27] Such persons may be agricultural employers, agricultural associations or farm labor contractors, but might well not be.

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20. 7 U.S.C. § 2043(c) (1976) (repealed as indicated *supra* note 2).
21. 7 U.S.C. § 2050(c) (1976) (repealed as indicated *supra* note 2).
22. *See infra* note 29 and accompanying text.
23. *See infra* note 32 and accompanying text.
24. *See infra* note 31 and accompanying text.
25. MSPA § 101(a) (to be codified at 29 U.S.C. § 1811(a)); MSPA § 4(b) (to be codified at 29 U.S.C. § 1811(a)); MSPA § 4(b) (to be codified at 29 U.S.C. § 1803(b)).
26. MSPA § 4(a) (to be codified at 29 U.S.C. § 1803(a)).
27. MSPA § 203(a), (b), (c) (to be codified at 29 U.S.C. § 1823 (a), (b), (c)).

Also essential to an understanding of the scheme of MPSA is an appreciation of the distinction made between migrant agricultural workers and seasonal agricultural workers.[28] Workers in both classes may be the subject of farm labor contracting activities and thus trigger MSPA requirements. However, the nature of worker protection afforded by MSPA is slightly different for the two classes.

With this very general view of the structure of MSPA in mind, it is now possible to turn to a more detailed consideration of the Act and to explore some of the issues that are likely to arise in its administration.

III. ANALYSIS OF MSPA

MSPA opens with a statement of purpose, a series of definitions, and an articulation of an exemption scheme. Title I follows, setting forth certain requirements applicable only to farm labor contractors and their employees. Titles II and III set forth worker protection requirements for migrant and seasonal agricultural workers respectively. Title IV contains additional worker protections applicable to both classes of protected workers. Title V contains a number of general provisions dealing with enforcement, penalties, remedies, administration and other matters.

A. The Regulated Persons

1. The Statutory Definitions

As indicated, there are three principal classes of regulated persons under MSPA: farm labor contractors, agricultural employers, and agricultural associations. Consider the statutory definitions:

> The term "farm labor contractor" means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.[29] The term

28. *See infra* notes 55-63 and accompanying text.
29. MSPA § 3(7) (to be codified at 29 U.S.C. § 1802(7)).

> "farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.[30]
>
> The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.[31]
>
> The term "agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.[32]

The fact that regulated persons have been categorized means that MSPA can be tailored to require things of one class not required of another. The obvious example is the imposition of the registration requirement only on farm labor contractors.

Anyone familiar with FLCRA will immediately see that the FLCRA definition of "fee" is the definition of "farm labor contractor" and will recall the extensive litigation over the meaning of that term.[33] However, that litigation resulted principally from fixed-situs agricultural employers and associations seeking to escape being characterized and regulated as farm labor contractors. Since the "fee" concept has no relevance in the MSPA definitions of agricultural employer and agricultural association and since persons meeting those definitions are not to be classed as farm labor contractors it is to be anticipated that MSPA will generate little, if any, "fee" litigation. In any event, the definition of "fee" was reasonably well defined in the courts under MSPA, thus curtailing the need to further litigate the

30. MSPA § 3(6) (to be codified at 29 U.S.C. § 1802(6)).

31. MSPA § 3(a) (to be codified at 29 U.S.C. § 1802(2))

32 MSPA § 3(1) (to be codified at 29 U.S.C. § 1802(1)).

33. 7 U.S.C. § 2042 (c) (1976) (repealed as indicated *supra* note 2) defined "fee" to include "any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor." *See* collected cases construing the FLCRA definition at 2 AGRICULTURAL LAW § 6.67 (J. Davidson ed. 1981 and 1983 Supp.).

definition.[34]

2. The Joint-Employer Doctrine

A review of the MSPA definitions set forth above reveals that a person falls into a regulated category only if he engages in certain activities, i.e., "recruits, solicits, hires, employs, furnishes, or transports."[35] Certain of these activities may trigger some worker protection requirements, but not others. For example, MSPA disclosure requirements are in some instances triggered when a regulated person "recruits," but in other instances only if the regulated party makes an offer of employment.[36] Important MSPA requirements as to maintenance of payroll records, payment of wages and posting of prescribed notices are triggered when a person "employs" a protected worker.[37] Housing requirements are triggered when a person "provides housing for any migrant agricultural worker," and the terms "employs" and "recruits" are irrelevant.[38] A regulated party "using, or causing to be used" a vehicle for transportation of any migrant or seasonal worker falls under MSPA motor vehicle safety and insurance requirements, and events such as "hiring" or "employing" do not in and of themselves activate this aspect of the regulatory scheme.[39]

The term "employ" deserves special attention as MSPA gives it the same meaning that it has under the Fair Labor Standards Act.[40] As a result, such terms as "employer," "employee" and "independent contractor" are not to be construed in their limiting common law sense, thus opening the way for certain joint-employment situations where more than one person is responsible for carrying out worker pro-

34. *E.g.*, Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1220-21 (7th Cir. 1981) (holding that recovery of expenses not involving any profit constitutes a "fee"). Marshall v. Coastal Growers Ass'n, 598 F.2d 521, 523 (9th Cir. 1979).

35. *See supra* notes 29-30 and accompanying text.

36. *See infra* notes 82-84 and accompanying text.

37. *See infra* notes 85, 89 & 91 and accompanying text.

38. *See supra* note 27 and accompanying text.

39. *See infra* note 104 and accompanying text.

40. MSPA § 3(5) (to be codified at 29 U.S.C. § 1802(5)), incorporating the definition at section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(g)).

tection requirements.[41] Put another way, a protected worker engaged in one job may be in the position of employee to two or more employers at the same time. The most common example is where the farm labor contractor who has supplied a crew and the farmer on whose farm the work is being performed are potential joint-employers. By making joint-employers equally responsible for observing those MSPA requirements triggered when a regulated person "employs" a protected worker, the regulatory scheme is arguably strengthened. Indeed, the legislative history of MSPA indicates that the incorporation of the FLSA "joint-employment" doctrine provides a "central foundation" of MSPA.[42]

Of course, the "joint-employment" doctrine will not be relevant as to those requirements triggered by recruiting, providing of housing, using or causing the use of a motor vehicle, and the like. However, it should not be assumed that only one person will be responsible under MSPA in such instances. While the joint-employment doctrine will not bring dual responsibility, such a result is still clearly possible under other principles. For example, where a farmer "owns" farm worker housing and a farm labor contractor is at the same time in "control," both are exposed to MSPA requirements.[43] It is also easy to imagine circumstances where one person is engaged in the regulated use of a motor vehicle while another person is said to be causing the use.[44] Again, both are exposed to MSPA requirements.

3. Problems With the Term "Operates"

It is possible that some difficulty will be encountered in interpreting the term "operates" as it appears in the definition of agricultural employer.[45] The term is not defined in MSPA or in the regulations. It would seem clear that one

41. The terms "employ," "employer," "employee," and "joint employment" are defined in MSPA and in the regulations where extensive cites to controlling FLSA cases are set forth. 48 Fed. Reg. 36,745 (1983) (to be codified at 29 C.F.R. § 500.20(h), (i)).

42. H.R. REP. NO. 885, *supra* note 14, at 6.

43. 48 Fed. Reg. 36,752 (1983) (to be codified at 29 C.F.R. § 500.70(d)).

44. 48 Fed. Reg. 36,751 (1983) (to be codified at 29 C.F.R. § 500.70(c)).

45. *See supra* note 31 and accompanying text.

who does not own a farm, but who leases and farms it, "operates" it and is thus a potential agricultural employer. An absentee owner who hires a foreman to run the farm or ranch and to recruit, etc., migrant and seasonal agricultural workers is probably still an agricultural employer. The more difficult question is whether a broad reading of MSPA would cast a foreman into the category of agricultural employer as one who "operates." If so, the foreman would have a joint responsibility for observing worker protection requirements. If not, the foreman appears to fall outside all regulated classes. As an employee of an agricultural employer he is specifically excluded from the definition of farm labor contractor.[46]

An even more interesting question may arise where an absentee owner engages a farm manager, not as an employee but as an independent contractor, to run the farm or ranch. Unless such farm manager is classed as an operator and thus an agricultural employer, he will be classed as a farm labor contractor if he engages in farm labor contracting activities. This would follow from a finding that he is neither an agricultural employer nor an employee of an agricultural employer.[47]

The problem of the meaning of the term "operates" also surfaces in one of the MSPA exemptions and will be considered again at that point.[48]

4. Dual Status of Regulated Persons

Perhaps the most difficult questions which arise in the context of the definitions relate to what shall be referred to herein as dual-status operators. Clearly, a farmer who meets the definition of agricultural employer is not to be classed as a farm labor contractor.[49] However, it can hardly be the intent of MSPA to allow a person who would otherwise be a

46. *See supra* note 29 and accompanying text.

47. One who is neither an agricultural employer or association or an employee of either, falls into the MSPA definition of farm labor contractor if such person engages in a farm labor contracting activity. MSPA § 3(7) (to be codified at 29 U.S.C. § 1802(7)).

48. *See infra* note 159 and accompanying text.

49. *See supra* notes 29 & 31 and accompanying text.

farm labor contractor to escape that classification simply by operating his own farm and using thereon the crew that he eventually takes on the road. On the other hand, the legislative history makes it clear that it is not the intent of Congress to treat fixed-situs agricultural employers as farm labor contractors.[50] Thus, the farmer who sends his crew down the road to be hired by a neighbor for a few days is arguably still solely an agricultural employer. The difficult cases, if they do arise, may have to be resolved on the basis of whether the person running the crew is behaving as a fixed-situs or a transient operator. An agricultural employer who takes his own crew on the road and behaves in the manner of a non-fixed-situs operator would arguably achieve the status of farm labor contractor at some point.[51] In short, it would seem that an agricultural employer, having attained the status of agricultural employer as to a particular worker or crew, is not assured that such status will remain unaltered as to said employee or employees without regard to the use that is made of the particular worker or crew. Also, it would seem possible for a person to have a dual status under MSPA by acting as an agricultural employer as to a crew used on his own farm and as a farm labor contractor when he engages in farm labor contracting activities as to migrant or seasonal workers not engaged in his own operation.

Finally, it seems clear that, as under FLCRA, a group of farm labor contractors cannot shed that status and assume the status of an agricultural association by forming a cooperative for the purpose of carrying out farm labor contracting activities.[52]

5. Persons Who Own or Control Housing

As indicated, there is a fourth class of regulated persons—those who own or control housing supplied to migrant agricultural workers. Who falls into this regulated class? The regulations offer assistance:

> A farm labor contractor, agricultural employer, agricul-

50. H.R. REP. NO. 885, *supra* note 14, at 1-4.
51. *See supra* note 29 and accompanying text.
52. *See* 1978 Hearings, *supra* note 14, at 150.

> tural association *or other person* is deemed an "owner" of a housing facility or real property if said person has a legal or equitable interest in such facility or real property. (Emphasis added).[53] A farm labor contractor, agricultural employer, agricultural association *or other person* is in "control" of a housing facility or real property, regardless of the location of such facility, if said person is in charge of or has the power or authority to oversee, manage, superintend or administer the housing facility or real property either personally or through an authorized agent or employee, irrespective of whether compensation is paid for engaging in any of the aforesaid capacities. (Emphasis added).[54]

One who falls into the category of "other person" has duties under MSPA only as to housing and has none of the general obligations of other regulated parties.

B. The Protected Classes

MSPA departs from FLCRA by creating two classes of protected agricultural workers. Under MSPA, migrant agricultural workers are those individuals who are employed in agricultural employment of a seasonal or other temporary nature and who are required to be absent overnight from their permanent places of residence.[55] Specifically excluded are immediate family members of an agricultural employer or a farm labor contractor and certain legal alien workers.[56]

Seasonal agricultural workers under MSPA are those individuals who are employed in *certain* agricultural employment of a seasonal or other temporary nature and who are *not* required to be absent overnight from their permanent places of residence.[57] Seasonal agricultural workers are divided into two subclasses: those employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations regardless of how they travel to and

53. 48 Fed. Reg. 36,760 (1983) (to be codified at 29 C.F.R. § 500.130(b)).
54. 48 Fed. Reg. 36,760 (1983) (to be codified at 29 C.F.R. § 500.130(c)).
55. MSPA § 3(8)(A) (to be codified at 29 U.S.C. § 1802(8)(A)).
56. MSPA § 3(8)(B) (to be codified at 29 U.S.C. § 1802(8)(B)).
57. MSPA § 3(10)(A) (to be codified at 29 U.S.C. § 1802(10)(A)).

from work;[58] and those who are employed in canning, packing, ginning, seed conditioning or related research, or processing operations, but only if they are transported to or from the place of employment via a day-haul operation.[59]

Two further observations need to be made about the seasonal agricultural worker class. First, it is possible for a worker to be outside the class in the morning, but due to a change in work assignment to be within it in the afternoon.[60] More specifically, the legislative history indicates that any individual in agricultural employment, other than a migrant worker, who performs field work during any part of a day is defined as a seasonal agricultural worker during that period of time.[61] DOL takes the position that field work is defined by the type of activity and not by the duration of employment.[62] Second, MSPA makes it clear that migrant agricultural workers, family members and certain legal aliens do not fall in this class of agricultural workers.[63]

MSPA does leave certain agricultural workers outside of both the protected classes. The regulations indicate that certain foremen, supervisors and local residents employed essentially on a year round basis to perform various tasks and not primarily field work are not engaged in seasonal or temporary work.[64] Further, nonmigrant agricultural workers who do not fall in one of the subclasses of seasonal agricultural workers described above are not protected. An argument can be made that this would be so in the case of a worker brought in temporarily solely to drive a tractor and who goes home at night. This would not appear to be the type of field work contemplated by the definition. The same would arguably be true of a local worker brought in tempo-

58. MSPA § 3(10)(A)(i) (to be codified at 29 U.S.C. § 1802(10)(A)(i)).

59. MSPA § 10(A)(ii) (to be codified at 29 U.S.C. § 1802(10)(A)(ii)).

60. Legislative history indicates an intent that such a worker be afforded appropriate MSPA worker protections during the covered time period. H.R. REP. NO 885, *supra* note 14, at 9.

61. *See* Supplementary Information, 48 Fed Reg. 36.737 (1983).

62. *Id.*

63. MSPA § 10(B)(i), (ii), (iii) (to be codified at 29 U.S.C. § 1802(10)(B)(i), (ii), (iii)).

64. 48 Fed. Reg. 36.746 (1983) (to be codified at 29 C.F.R. § 500.20(iv), (v)).

rarily to help round up cattle but who is not required to stay overnight on the ranch.

Obviously, if a worker is neither a migrant nor seasonal agricultural worker, MSPA provides no protection and no basis for remedies for perceived wrongs. Equally obvious is the fact that an employer who has no migrant or seasonal agricultural workers cannot fall into any of the principal regulated classes.

C. The Registration Requirement

Title I of MSPA sets forth requirements having application only to farm labor contractors. MSPA is specific in its indication that Title I does not have application to an agricultural employer or agricultural association or to any employee of either.[65] Under Title I, farm labor contractors are required to register with DOL, as are employees of farm labor contractors, who must register either as farm labor contractors or farm labor contractor employees.[66] MSPA sets forth in some detail the registration process and enumerates circumstances under which the Secretary or his designate may refuse to issue or renew, or may suspend or revoke, a certificate of registration.[67] One required to register must carry a registration certificate when engaging in regulated activities and must display the certificate to persons to whom farm labor contracting services are to be provided.[68]

Registration for one farm labor contracting activity does not grant a general license to engage in all such activities. It is clear from MSPA that a registration certificate which authorizes hiring, employing or using migrant and

65. MSPA § 4(b) (to be codified at 29 U.S.C. § 1803(4)(b)).

66. MSPA § 101(a), (b) (to be codified at 29 U.S.C. § 1811(a), (b)).

67. Circumstances include: knowingly making a misrepresentation in the registration application; not being the real party in interest in the application or certificate where the real party in interest is a person who has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked, or does not qualify for a certificate, failing to comply with MSPA on regulations thereunder; failing to pay judgments obtained under MSPA or FLCRA; failing to comply with any final order of the Secretary under MSPA or FLCRA, being convicted of certain crimes within the preceding five years. MSPA § 103(a)(1)-(5) (to be codified as 29 U.S.C. § 1813(a)(1)-(5)).

68. MSPA § 101(c) (to be codified at 29 U.S.C. § 1811(c))

seasonal agricultural workers does not authorize the person to provide transportation, drive a vehicle or provide housing.[69] Each of these activities must be specifically authorized after appropriate application. The Certificate of Registration or the Farm Labor Contractor Employee Certificate of Registration will indicate precisely the activities in which the named person is authorized to engage.[70]

D. Illegal Aliens

In addition, Title I prohibits farm labor contractors from recruiting, hiring, employing or using, with knowledge, aliens except those lawfully admitted for permanent residence and those authorized by the Attorney General to accept employment.[71] Good faith reliance by the contractor on documents prescribed by the Secretary which show that the worker is not in an illegal class constitutes compliance so long as the contractor has no reason to believe that the alien is in the illegal class.[72]

E. Worker Protections

Title II sets forth protections for migrant agricultural workers and Title III protections for seasonal agricultural workers. Since the protections are largely the same they will not be discussed separately, although where differences exist they will be noted. Title III protections which apply to both protected classes are also discussed in this section.

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69. MSPA § 101(a) (to be codified at 29 U.S.C. § 1811(a)) states that the certificate of registration shall specify "which farm labor contracting activities such person is authorized to perform." The regulations articulate specific activities which will not be authorized by a general registration certificate unless specifically noted thereon: transporting a migrant or seasonal agricultural worker; driving a vehicle to transport same; housing a migrant agricultural worker. 48 Fed. Reg. 36,748-9 (1983) (to be codified at 29 C.F.R. § 500.48(c), (d), (e), (f)).

70. 48 Fed. Reg. 36,748 (1983) (to be codified at 29 C.F.R. § 500.48).

71. MSPA § 106(a) (to be codified at 29 U.S.C. § 1816(a)). S. 529, 98th Cong., 1st Sess., 129 CONG. REC. S6970-86 (1983) passed the Senate on May 18, 1983. If this or similar legislation passes the House and becomes law there will be major changes in who is classed as an illegal or undocumented alien and duties under MSPA will be affected.

72. MSPA § 106(b) (to be codified at 29 U.S.C. § 1816(b)).

1. Disclosure of Information

Certain disclosures must be made to migrant and seasonal agricultural workers by farm labor contractors, agricultural employers and agricultural associations. The disclosures must include the following information: place of employment;[73] wage or piece rates to be paid;[74] crops and work assignments;[75] period of employment;[76] transportation and other employee benefits to be provided and charges, if any, for same;[77] worker's compensation and unemployment insurance;[78] existence of any strike or other labor dispute;[79] commissions to be received by a regulated party upon sale of goods or services by workers by area establishments;[80] and, as to migrant workers only, housing arrangements and charges, if any.[81] In the case of migrant agricultural workers these disclosures are to be made in writing at the time of recruitment.[82] The same is true as to seasonal agricultural workers recruited for canning and other enumerated opera-

73. MSPA § 201(a)(1) (to be codified at 29 U.S.C. § 1821(a)(1)); MSPA § 301(a)(1)(A) (to be codified at 29 U.S.C. § 1831(a)(1)(A)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

74. MSPA § 201(a)(2) (to be codified at 29 U.S.C. § 1821(a)(2)); MSPA § 301(a)(1)(B) (to be codified at 29 U.S.C. § 1831(a)(1)(B)). 48 Fed. Reg. 36,752 (1983) (to be codified at 29 C.F.R. § 500.75(b)(2)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

75. MSPA § 201(a)(3) (to be codified at 29 U.S.C. § 1821(a)(3)); MSPA § 301(a)(1)(C) (to be codified at 29 U.S.C. § 1831(a)(1)(C)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

76. MSPA § 201(a)(4) (to be codified at 29 U.S.C. § 1821(a)(4)); MSPA § 301(a)(1)(D) (to be codified at 29 U.S.C. § 1831(a)(1)(D)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

77. MSPA § 201(a)(5) (to be codified at 29 U.S.C. § 1821(a)(5)); MSPA § 301(a)(1)(E) (to be codified at 29 U.S.C. § 1831(a)(1)(E)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

78. 48 Fed. Reg. 36,752 (1983) (to be codified at 29 C.F.R. § 500.75(b)(6)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

79. MSPA § 201(a)(6) (to be codified at 29 U.S.C. § 1821(a)(6)); MSPA § 301(a)(1)(F) (to be codified at 29 U.S.C. § 1831(a)(1)(F)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983).

80. MSPA § 201(a)(7) (to be codified at 29 U.S.C. § 1821(a)(7)); MSPA § 301(a)(1)(G) (to be codified at 29 U.S.C. § 1831(a)(1)(G)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,376 (1983)

81. MSPA § 201(a)(5) (to be codified at 29 U.S.C. § 1821(a)(5)). The prescribed form for written disclosure appears at 48 Fed. Reg. 38,377 (1983).

82. MSPA § 201(a) (to be codified at 29 U.S.C. § 1821(a)).

tions through a day-haul operation.[83] As to other seasonal agricultural workers the disclosures are required only if requested by individual workers when an offer of employment is made.[84]

Additionally, each farm labor contractor, agricultural association or employer which employs any migrant or seasonal agricultural worker is required to post and keep posted in a conspicuous place at the place of employment a poster provided by the Secretary which sets out MSPA worker rights and protections.[85] Among other things, the poster contains a statement that the migrant or seasonal agricultural worker has the right to request and obtain a written statement from the employer which shall contain the disclosures discussed above.[86] There is a distinct requirement, contained in Title III, that a farm labor contractor, without regard to other statutory duties, obtain at each place of employment and make available for inspection a written statement of the conditions of employment enumerated above.[87]

Certain additional disclosures as to housing provided to agricultural migrant workers are discussed hereinafter.

2. Wage and Payroll Requirements

MSPA and the regulations articulate the required content of payroll records.[88] Each regulated party who employs any migrant or seasonal agricultural worker is to maintain such records for three years.[89] Where a joint-employment situation does not exist the employer required to keep the records must furnish copies for that place of employment to the person to whom the workers were provided and the latter

83. MSPA § 301(a)(2) (to be codified at 29 U.S.C. § 1831(a)(2)).

84. MSPA § 301(a)(1) (to be codified at 29 U.S.C. § 1831(a)(1)).

85. MSPA § 201(b) (to be codified at 29 U.S.C. § 1821(b)); MSPA § 301(b) (to be codified at 29 U.S.C. § 1831(b)).

86. *Id.* The poster is reproduced at 48 Fed. Reg. 38,375 (1983).

87. MSPA § 403 (to be codified at 29 U.S.C. § 1843).

88. MSPA § 201(d)(1) (to be codified at 29 U.S.C. § 1821(d)(1)); MSPA § 301(c)(1) (to be codified at 29 U.S.C. § 1831(c)(1)).

89. *Id.* Note again that the key concept is employ, thus opening the way for "joint employment" situations as discussed *supra* at notes 40-44 and accompanying text.

must maintain the copies for a period of three years.[90] This would occur most commonly where the farm labor contractor who has supplied a crew is the sole employer because the farmer to whom the workers were supplied has not been sufficiently involved to trigger the joint-employment doctrine.

Each regulated party employing a migrant or seasonal agricultural worker must provide an itemized statement to such employee at the end of each pay period.[91] Wages are to be paid on time and at intervals of no more than two weeks or semi-monthly.[92]

3. Housing Requirements

It has already been established that a person who owns or controls a facility or real property that is used as housing for migrant agricultural workers is regulated.[93] Workers are provided protection by certain preoccupancy requirements and by ongoing disclosure requirements.

All such housing must comply with applicable "substantive" federal and state safety and health standards.[94] A question exists as to whether Congress intended MSPA to extend housing standards to units which would otherwise not have to be in compliance with existing "substantive" standards. For example, an owner might argue that since he has not used Job Services he has not triggered ETA standards. The same owner might also argue that since he is not an employer OSHA regulations have no application. DOL takes the position that even if the owner in a non-MSPA setting would be able to duck the indicated regulations, MSPA requires that he be in compliance if the housing is used as

90. 48 Fed. Reg. 36,753 (1983) (to be codified at 29 C.F.R. § 500.80(b), (c)).

91. MSPA § 201(d)(2) (to be codified at 29 U.S.C. § 1821(d)(2)); MSPA § 301(c)(2) (to be codified at 29 U.S.C. § 1821(c)(2)). The required wage statement form is reproduced at 48 Fed. Reg. 38,378 (English), 38,379 (Spanish) (1983).

92. MSPA § 202(a) (to be codified at 29 U.S.C. § 1822(a)); MSPA § 302(a) (to be codified at 29 U.S.C. § 1832(a)); 48 Fed. Reg. 36,753 (1983) (to be codified at 29 C.F.R. § 500.80(d)).

93. *See supra* notes 53 & 54 and accompanying text.

94. MSPA § 203(a) (to be codified at 29 U.S.C. § 1823(a)). OSHA standards appear at 29 C.F.R. § 1910.142 (1982), and ETA standards at 20 C.F.R. §§ 654.404-.417 (1982). For a discussion of these standards *see* AGRICULTURAL LAW § 6.46 (Davidson ed. 1981 and 1983 Supp.).

housing for migrant agricultural workers.[95] While that position has considerable merit given the overall scope and purpose of MSPA, it is not unlikely that there will be litigation to resolve the issue.

Where MSPA applies, an inspection certificate showing compliance is required prior to worker occupancy, except where there is a timely request for inspection and the responsible state or local authority fails to act within 45 days prior to the date of occupancy.[96] Failure of the authority to inspect upon request does not, however, excuse compliance with applicable standards.[97]

The certificate of occupancy must be posted unless it is unavailable for the reason stated above.[98] In addition the farm labor contractor, agricultural employer or agricultural association providing the housing must post in a conspicuous place and keep posted, or present to each worker in writing, certain terms and conditions of occupancy as set forth in the regulations.[99]

There is an exclusion from the housing safety and health requirements for persons who, in the ordinary course of their business, regularly provide housing on a commercial basis to the general public and who provide housing to migrant agricultural workers on the same or comparable terms and conditions.[100] This so-called innkeeper exclusion is to be narrowly construed, but does seem likely to produce some difficult cases as where an old motel, still open to the public, is gradually used more and more to house migrant agricultural workers.[101]

95. *See* Supplementary Information, 48 Fed. Reg. 36,739-40 (1983).

96. MSPA § 203(b)(2) (to be codified at 29 U.S.C. § 1823(b)(2)).

97. 48 Fed. Reg. 36,760 (1983) (to be codified at 29 C.F.R. § 500.135(d)).

98. 48 Fed. Reg. 36,760 (1983) (to be codified at 29 C.F.R. § 500.135(b)).

99. MSPA § 201(c) (to be codified at 29 U.S.C. § 1821(c)). The prescribed form for posted notice appears at 48 Fed. Reg. 38,377 (1983).

100. MSPA § 203(c) (to be codified at 29 U.S.C. § 1823(c)). Migrant labor housing is not to be brought within this exception simply by offering lodging to the general public. 48 Fed. Reg. 36,760 (1983) (to be codified at 29 C.F.R. § 500.131).

101. H.R. REP. NO. 885, *supra* note 14, at 18; *Before the House Labor Standards Subcomm.*, 97th Cong., 2d Sess., 128 CONG. REC. S11748-49 (daily ed. Sept. 17, 1982) (statement of Robert Collyer, Deputy Under Secretary of Labor).

4. General Standards as to Disclosures

It is a violation of MSPA to knowingly provide false or misleading information to any migrant or seasonal agricultural worker in the disclosures discussed hereinabove.[102] Further, there are instances where it is required that disclosures be provided in languages other than English.[103]

5. Motor Vehicle Safety

Pursuant to Title IV vehicles used or caused to be used by an agricultural employer, agricultural association, or farm labor contractor to transport a migrant or seasonal agricultural worker are subject to certain safety standards and insurance requirements.[104]

Vehicles, other than passenger automobiles or station wagons, used or caused to be used in a day-haul operation or for any trip of a distance greater than 75 miles are subject to the standards promulgated under section 204(a)(3a) of the Interstate Commerce Act without regard to mileage or boundary line limitations contained therein.[105] Vehicles intended for such use must also meet those standards.[106]

Other vehicles, and in particular passenger automobiles and station wagons, "used only for transportation" are required to meet distinct less elaborate standards promulgated under MSPA and appearing in the regulations.[107] While the requirements are several, noticeably missing is a restriction on carrying tools and other equipment in the passenger compartment or in the rear in the case of a station wagon. Some argument might be made that such hazards are "other defects" along with the specified passenger compartment

102. MSPA § 201(f) (to be codified at 29 U.S.C. § 1821(f)); MSPA § 301(e) (to be codified at 29 U.S.C. § 1831(e)).

103. MSPA § 201(g) (to be codified at 29 U.S.C. § 1821(g)); MSPA § 301(f) (to be codified at 29 U.S.C. § 1831(f)).

104. MSPA § 401(a)(1), (b)(1) (to be codified at 29 U.S.C. § 1841(a)(1), (b)(1)).

105. 48 Fed. Reg. 36,755 (1983) (to be codified at 29 C.F.R. § 500.105(a)).

106. 48 Fed Reg. 36,754 (1983) (to be codified at 29 C.F.R. § 500.102(e)).

107. 48 Fed. Reg. 36,755 (1983) (to be codified at 29 C.F.R. § 500.104)). Under circumstances where a pickup truck is used to transport workers only in the cab, it may be classed as a station wagon. 48 Fed. Reg. 36,754 (1983) (to be codified at 29 C.F.R. § 500.102(f)).

hazards: openings and rusted areas.[108] While the intent is far from clear, it is possible to read the regulations to require compliance with DOT standards where passenger automobiles and station wagons are used not only for transportation of workers, but also to carry tools and other equipment. If this approach is taken, the DOT regulations on stowing tools and equipment will be operative, as well as the balance of those regulations.[109]

Certain exclusions from the vehicle safety standards do exist. The first applies to the transportation of a worker on a tractor, combine, harvester, picker or similar machine where the worker is actually carrying on the activities for which the machine was designed.[110] A second exclusion applies to the transportation of family members.[111] A final exclusion covers carpools created by workers using one of the workers' vehicles so long as the farm labor contractor does not participate and the transportation is not specifically directed or requested by the employer.[112]

An insurance policy or liability bond providing specified levels of coverage is required for each vehicle used to transport any migrant or seasonal agricultural worker.[113] Certain adjustments in coverage are possible when workers' compensation coverage is provided as required by state law.[114] In order to satisfy requirements placed on those who must have coverage, insurance carriers and bonding companies will have to issue policies that are not subject to cancellation, rescission or suspension during the policy term except upon 30 days notice with reasons appended to the Administrator of the Wage and Hour Division.[115]

108. 48 Fed. Reg. 36,755 (1983) (to be codified at 29 C.F.R. § 500.104(n)).

109. 48 Fed. Reg. 36,756 (1983) (to be codified at 29 C.F.R. § 500.105(2)(vii)(D)). Note that applicable DOT standards have been incorporated full text into the MSPA regulations (to be codified at 29 C.F.R. § 500.105).

110. 48 Fed. Reg. 36,754 (1983) (to be codified at 29 C.F.R. § 500.103(a)).

111. 48 Fed. Reg. 36,754 (1983) (to be codified at 29 C.F.R. § 500.103(b)).

112. 48 Fed. Reg. 36,754 (1983) (to be codified at 29 C.F.R. § 500.103(c)).

113. 48 Fed. Reg. 36,758 (1983) (to be codified at 29 C.F.R. §§ 500.120-.121).

114. 48 Fed. Reg. 36,758-59 (1983) (to be codified at 29 C.F.R. § 500.122).

115. 48 Fed. Reg. 36,759 (1983) (to be codified at 29 C.F.R. § 500.127).

6. Compliance with Agreements

MSPA prohibits farm labor contractors, agricultural employers and agricultural associations from violating "without justification" the terms of any working arrangement made with migrant or seasonal agricultural workers.[116] MSPA does not require that such agreement be in writing to be subject to the rule. There is a companion provision making it a MSPA violation for a farm labor contractor to violate without justification a written agreement with an agricultural employer or association relating to a contracting or worker protection matter.[117]

7. Confirmation of Registration

Also part of the worker protection scheme is the Title IV requirement that no person shall utilize the services of a farm labor contractor to supply migrant or seasonal agricultural workers unless that person first takes steps to determine that the contractor possesses a valid certificate of registration which authorizes the activity for which the contractor is utilized.[118] The importance of the requirement to the integrity and the self-enforcement mechanisms of the regulatory system is obvious, but it is also to be noted that a similar provision under FLCRA produced some difficult litigation. A brief review of the FLCRA cases will set the stage for commentary on the MSPA requirement.

In *Mountain Brook Orchards v. Marshall*,[119] a contractor who was in "control" of housing presented a grower with a current unrevoked registration certificate marked "not authorized" for housing. The grower used the contractor for activities including supplying housing and was cited for a violation of FLCRA for engaging an unregistered contrac-

116. MSPA § 202(c) (to be codified at 29 U.S.C. § 1822(c)); MSPA § 302(c) (to be codified at 29 U.S.C. § 1832(c)). The regulations suggest that "normally" "without justification" would not include failure to comply given acts of God, conditions beyond the person's control, or unforeseeable conditions. 48 Fed. Reg. 36,752 (1983) (to be codified at 29 C.F.R. § 500.72(a)).

117. MSPA § 404(a) (to be codified at 29 U.S.C. § 1855(a)). This responds to the concern discussed *supra* at text accompanying note 7.

118. MSPA § 402 (to be codified at 29 U.S.C. § 1842).

119. 640 F.2d 454 (3d Cir. 1981).

tor.[120] The grower argued that the certificate, which was otherwise in order, was in "full force and effect" as required by FLCRA.[121] The Third Circuit concluded that FLCRA required that the grower not only determine that there was a current certificate but that it authorized all activities for which the contractor was to be engaged.[122] While MSPA no longer uses the "full force and effect" language it clearly embraces the holding of *Mountain Brook Orchards* by requiring reasonable steps to determine that a farm labor contractor possesses "a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized."[123]

A more distressing case from the employers' perspective is *Ruffner v. Reyes*,[124] where the certificate displayed by the contractor was in order on its face, but according to the court was not in "full force and effect" because motor vehicle insurance had lapsed. The only way the grower could have determined this would have been to contact DOL. Nevertheless, the grower was found to have violated FLCRA. MSPA appears to reject *Ruffner*, as it drops the "full force and effect" language and requires only a determination that the certificate is "valid."[125]

Reasonable steps to make the required determination are set forth in MSPA: reliance on possession of a certificate of registration, or confirmation of registration by contact with the public registry required to be maintained by DOL.[126] Until it is made absolutely clear that reliance on a certificate which is valid on its face is sufficient under MSPA, an abundance of caution might still dictate contact

120 *Id.*

121. 7 U.S.C. § 2043(c) (1976) (repealed as indicated *supra* note 2) provided: "No person shall engage the services of any farm labor contractor to supply farm laborers unless he first determines that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor."

122. 640 F.2d 454, 459 (3d Cir. 1981).

123. MSPA § 402 (to be codified at 29 U.S.C. § 1842)

124. 91 LAB. CAS. (CCH) ¶ 34,001 (S.D.N.Y. Mar. 10, 1981).

125. MSPA § 402 (to be codified at 29 U.S.C. § 1842).

126. *Id.*

with the public registry.[127]

Exempt status under FLCRA did not relieve one who used a farm labor contractor to obtain a crew from making the required check on registration. The MSPA exemptions, to be discussed hereinafter, relieve an exempt party from all duties under the Act, including determining the status of one to be engaged to provide farm labor contracting services. However, an exempt party who is aware of MSPA and is not simply operating in a state of general ignorance of the law would be well advised to deal only with registered contractors as a protection against getting called as a witness in proceedings against the contractor and as a general though hardly one-hundred percent assurance that other laws such as FLSA minimum wage requirements are in fact being obeyed.

F. Worker Protection Generally

The above worker protection provisions are clearly designed to root out and stop a host of abusive practices. A good many of these protections existed under the scheme of FLCRA. The major change under MSPA is that observance of worker protection provisions is required not only of farm labor contractors and their employees, but of persons not under the registration requirements, in particular agricultural employers and agricultural associations. Given the joint-employment doctrine as incorporated into MSPA, the requirement of compliance by nonexempt agricultural employers and agricultural associations with at least some MSPA worker protection provisions will be commonplace even where a farm labor contractor is in the picture.[128] Also, by not making the duty to observe worker protection requirements turn on the registration issue, MSPA addresses ongoing concerns about abusive practices by certain large

127. Contact with the public registry may be made by mail directed to Administrator, Wage and Hour Division, Attn; MSPA, U.S. Department of Labor, Washington, D.C. 20210, or by telephone call to 1-800-368-1008, a toll-free number, during the hours of 8:15 a.m. to 4:45 p.m., Eastern time, on weekdays. (Calls in the Washington, D.C. metropolitan area may be made to 523-6058). 48 Fed. Reg. 36,762 (1983) (to be codified at 29 C.F.R. § 500.170).

128. *See supra* note 40 & 44 and accompanying text.

agribusiness employers that do their own recruiting and hiring and which tended to escape regulation under FLCRA. Thus, while compromises were made in hammering out MSPA, as the following discussion of exemptions will more fully reveal, the wide application of worker protection requirements is a major step foward for migrant and seasonal agricultural workers.

The addition in MSPA of the joint-employment doctrine and the carry over, albeit in a somewhat modified form, of the confirmation of registration requirement, arguably give MSPA considerable self-enforcement potential. Knowledgeable fixed-situs operators who use farm labor contractors will check registration and will also check to see that worker protection requirements are being observed, given the distinct possibility of shared responsibility for compliance. A large degree of self-enforcement is typically the key to an effective regulatory scheme, and while it is premature to assess MSPA on this count, there is at least a promise of greater compliance than there was under FLCRA, quite apart from any increase in enforcement efforts by DOL.

G. Exemptions

The MSPA exemption provisions simply indicate which persons are not subject to the Act. An exemption, if one applies, means that no part of MSPA applies. While certain of the exemptions now to be discussed appeared in almost identical form in FLCRA, they were used there to modify or limit the statutory definition of farm labor contractor.[129] Here the exemptions are freestanding.

1. Common Carriers

Common carriers are exempt to the extent that they would be farm labor contractors solely because of engaging in transporting any migrant or seasonal agricultural worker,

129. 7 U.S.C. § 2042(b)(1)-(9) (1976) (as amended, repealed as indicated *supra* note 2)

one of the farm labor contracting activities.[130] Doubtless, the theory is in part that such carriers are already subject to regulation.

2. Labor Organizations

Labor organizations as defined in the Labor Management Relations Act are exempt without regard to the exclusion of agricultural employees in that Act.[131] Similarly, labor organizations as defined under applicable state labor relations laws are exempt.[132]

3. Nonprofit Organizations

Nonprofit charitable organizations or public or private nonprofit education institutions are also exempt.[133] A similar exemption existed under FLCRA but contained the added term "similar organization."[134] That led to claims of exemption by certain agricultural cooperatives which fell under the FLCRA definition of farm labor contractor given their involvement in farm labor contracting activities. The courts, considering perceived legislative intent and a principle of narrow construction, disagreed.[135] To put this issue to rest, Congress in MSPA did not include the term "similar organization," seeking to make clear that the exemption does not extend to agricultural cooperatives. Thus, as has already been explained, agricultural cooperatives are regulated as agricultural associations under MSPA. Even if the language of the MSPA exemption still contained the reference to "similar organizations" much of the impetus for agricultural cooperatives to try to come under it has been removed by virtue of the absence in MSPA of any requirement for a fixed-situs agricultural cooperative to register as a farm labor contractor. Registration, rather than the worker

130. MSPA § 4(a)(3)(A) (to be codified at 29 U.S.C. § 1803(a)(3)(A)).

131. MSPA § 4(a)(3)(B) (to be codified at 29 U.S.C. § 1803(a)(4)(b)).

132. *Id.*

133. MSPA § 4(a)(3)(c) (to be codified at 29 U.S.C. § 1803(a)(3)(C)) provides "Any nonprofit charitable organization or public or private nonprofit educational institution."

134. 7 U.S.C. § 2042(b)(1) (1976) (repealed as indicated *supra* note 2).

135. *E.g.*, Marshall v. Coastal Growers Ass'n, 598 F.2d 521 (9th Cir. 1979).

protection requirements, was the particularly troublesome aspect of FLCRA.

4. Local Short-term Contracting Activity

The next MSPA exemption extends to any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of his permanent place of residence and does so for not more than thirteen weeks per year.[136] This exemption is similar to one added to FLCRA in 1974 when the Act was made applicable to intrastate activities.[137] The MSPA regulations make it clear that if such a person "solicits" a crew member from a distance greater than twenty-five miles from his permanent place of residence or from across a state line, the exemption is lost.[138] Also, the exemption is not to be read to permit a local operator to be exempt from the first thirteen weeks of his activity during a year and to be subjected to MSPA only for later weeks.[139]

5. Certain Custom Operations

The next exemption extends to any custom combine, hay harvesting, or sheep shearing operation.[140] The House Report indicates that the phrase "any custom combine" operation is to be construed to pertain solely to grain.[141] This limited reading is also reflected in the regulations.[142] Where this leaves custom combining of oil crops such as sunflower seeds, soybeans and cottonseed is not clear.[143]

6. Certain Poultry Operations

An exemption is provided for custom poultry harvest-

136 MSPA § 4(a)(3)(D) (to be codified as 29 U.S.C. § 1803(a)(3)(D)).

137. 7 U.S.C. § 2042(b)(4) (1976) (repealed as indicated *supra* note 2).

138. 48 Fed. Reg. 36,747 (1983) (to be codified at 29 C.F.R. § 500.30(f)(1)).

139. 48 Fed. Reg. 36,747 (1983) (to be codified at 29 C.F.R. § 500.30(f)(2)).

140. MSPA § 4(a)(3)(E) (to be codified at 29 U.S.C. § 1803(a)(3)(E)).

141. H.R. REP. NO. 885, *supra* note 14, at 11.

142 48 Fed. Reg. 36,747 (1983) (to be codified at 29 C.F.R. § 500.30(g)). The regulations characterize custom operations as those provided to a farmer on a contract basis by one who provides the necessary equipment and labor and who specializes in providing such services and activities.

143. Assuming sunflower seeds, soybeans, and cotton seed are not characterized as grain generally, might they be here?

ing, breeding, debeaking, desexing, or health service operations provided the employees of such operations are not regularly required to be away from their permanent places of residence other than during their normal working hours.[144] A similar exemption in FLCRA used the term "domicile" rather than "permanent place of residence."[145] The change is designed to reflect an intent that the exemption apply only when the employee's permanent home is involved as opposed to temporary or seasonal accommodations such as a labor camp.[146]

7. Certain Seed and Tobacco Operations

Exempt status is extended to any person whose principal occupation or business is not agricultural employment, such as a teacher or coach, when such person supplies workers who are either full-time students whose principal occupation is not agricultural employment, or other individuals whose principal occupation is not agricultural employment, such as a homemaker, to detassel, rogue, or otherwise engage in the production of seed and "related and incidental agricultural employment."[147] The exemption is lost if such employees are required to be away from their permanent place of residence overnight or if there are individuals under 18 years of age providing transportation on behalf of the crew leader.[148]

At first glance the phrase "related and incidental agricultural employment" appears to be something of a loose end as it could arguably refer to most anything. However, the legislative history indicates that the intent is that the related and incidental activities must be related to the work assignments specified in the statute.[149]

The reading of the exemption is complicated by further language in the legislative history which indicates that seed

144. MSPA § 4(a)(3)(F) (to be codified at 29 U.S.C. § 1803(a)(3)(F)).
145. 7 U.S.C. § 2042(B)(9) (1976) (repealed as indicated *supra* note 2).
146. H.R. REP. NO. 885, *supra* note 14, at 11.
147. MSPA § 4(a)(3)(G)(i) (to be codified at 29 U.S.C. § 1803(a)(3)(i)).
148. *Id.*
149. H.R. REP. NO. 885, *supra* note 14, at 11.

research activities are "related" and that visits to seed plots for pollination and on-site examination do not cause loss of the exemption even if overnight travel is involved.[150] Since the Act itself states that the exemption is lost if workers are "required" to be away overnight, rather than "regularly required" as in the poultry exemption, the legislative history is not particularly persuasive as to the legal impact of "required" overnight travel.[151]

A similar exemption applies to suppliers of the same categories of workers to string or harvest shade grown tobacco operations except that the overnight limitation is not present.[152]

A further exemption extends to persons to the extent that they are supplied with students and others just described for agricultural employment in the indicated seed and tobacco work.[153]

8. Certain Employees

An employee of any of the exempt persons described thus far [items 1 through 7] is also exempt from the application of MSPA when performing farm labor contracting activities within the scope of such exemptions exclusively for such a person.[154] This exemption is crafted so as to eliminate a troublesome issue that resulted in litigation under FLCRA. There, employees of certain exempt parties were exempt only if they engaged in farm labor contracting activities on behalf of such exempt employer "on no more than an incidental basis."[155] What the phrase meant was anyone's guess, and the courts were kept busy trying to articulate a test.[156]

150. *Id.* at 11-12.

151. Compare MSPA § 4(a)(3)(G)(i), *supra* note 147, with MSPA § 4(a)(3)(F), *supra* note 144.

152. MSPA § 4(a)(3)(H)(i) (to be codified at 29 U.S.C. § 1803(a)(3)(H)(i)).

153. MSPA § 4(a)(3)(G)(ii)) (to be codified at 29 U.S.C. § 1803(a)(3)(G)(ii)); MSPA § 4(a)(3)(H)(ii) (to be codified at 29 U.S.C. § 1803(a)(3)(H)(ii)).

154. MSPA § 4(a)(3)(I) (to be codified at 29 U.S.C. § 1803(a)(3)(I)).

155. 7 U.S.C. § 2042(b)(3) (1976) (repealed as indicated *supra* note 2).

156. *E.g.*, Usery v. Golden Gem Growers, Inc., 417 F. Supp. 857, 861-62 (M.D. Fla. 1976); Donovan v. Herringer Ranches, Inc., 650 F.2d 1152, 1154 (9th Cir., 1981), *aff'g.* Marshall v. Herringer Ranches, Inc., 466 F. Supp. 285 (E.D. Cal. 1979); Izaguirre v. Tankersley, 516 F. Supp. 755, 758-59 (D. Or. 1981).

The exemption under MSPA appears to apply even where the indicated employee devotes full time to farm labor contracting activities. It is to be noted that the employee exemption in MSPA does not apply to employees of the exempt person described in the next section on family businesses and small businesses.[157]

Before leaving the employee exemption certain difficult issues need to be addressed. Why was the employee exemption inserted at all? If one assumes that employees, other than employees of farm labor contractors, are not regulated by MSPA, the exemption may seem to be superfluous. A simple explanation may be that since certain of the persons who could claim the above-discussed exemptions [items 1 through 7] have characteristics of farm labor contractors, it was necessary to create a specific exemption for their employees to insure that the latter would also enjoy exempt status. Recall that employees of farm labor contractors are subject to both the registration and worker protection provisions of the Act.

Others, particularly those who wish MSPA to have as broad a reach as possible, may take the position that employees of agricultural employers and agricultural associations can be regulated parties under MSPA and that this is the true reason for the inclusion of the employee exemption. At first blush this seems to be an untenable position, for to be a regulated party under MSPA, one must fall into one of the regulated categories. Employees of agricultural associations and agricultural employers are specifically exempted from the definition of farm labor contractor.[158] That leaves just one available argument—that an employee can somehow be classed as an agricultural employer. This possibility, however remote, raises once again the question of the meaning of the term "operates" in the MSPA definition of agricultural employer.

There are instances where farms and other operations are owned by an absentee landowner, one who is disabled,

157. It applies only to employees of exempt persons listed at MSPA § 4(3)(A)-4(3)(H).

158. MSPA § 3(7) (to be codified at 29 U.S.C. § 1802(7)).

or one who is retired from active farming. Sometimes they are run by a hired foreman. Assuming that such a foreman is an employee and not an independent contractor, and assuming that he engages in recruiting, etc., might it be possible to characterize such a foreman as an agricultural employer? This turns on the construction to be given the term "operates" as it appears in the definition of agricultural employer.[159] If it is to be given a limited reading and extended only to non-owners when they are lessees of the premises, such foremen would not fall into a regulated class. Responsibility for observing worker protections would fall solely on the absent, disabled or retired owner. To read the term "operates" more broadly means that the foreman might be classed as an agricultural employer and be subject to regulation, though not to registration as he continues to be an employee of an agricultural employer. The advantage of the broader reading is that the entire onus for violations would not fall on a largely inactive owner, but would be shared with the person in charge of day to day operations. The disadvantage is that once a broader look is taken at the term "operates" the proverbial can of worms is opened and employee activities would have to be examined on a case by case basis to ascertain when they rise to the level of "operates."

The analysis is somewhat simpler if the absentee owner, guardian of a disabled owner, or retired party engages a farm manager to operate the farm. Assuming independent contractor status for the manager, one of two results seem probable. Either the manager will be classed as one who "operates" and thus be subject to regulation as an "agricultural employer" or, failing that, will fall into the definition of farm labor contractor.[160] Since the underlying intent of the Act is not to treat fixed-situs persons as farm labor contractors and since such a manager will typically be a nontran-

159 MSPA § 3(2) (to be codified at 29 U.S.C. § 1802(2)).

160. A person not falling in one of the exempt categories and who is neither an agricultural employer or employee of same (or an agricultural association or employee of same) and who engages in a farm labor contracting activity for a fee is within the definition of farm labor contractor. *See supra* note 29 and accompanying text.

sient local person, the solution is probably to treat the manager as an operator and thus an agricultural employer.

Distinct problems exist as to employees of agricultural associations since the definition does not refer to one who "operates."[161] Yet questions may arise as to whether it is just the artificial entity that is regulated and subject to being charged with violations of worker protection provisions, or whether individual employees who operate or manage are also exposed. Indeed, the same question could be asked about the status of the employees of an agricultural employer operating in corporate form. Perhaps it was the intent of Congress to let fines, civil penalties and money damage awards against the artificial entity be the impetus for private internal sanctions against employees who get the entity in trouble. Then again, it is impossible to say that such intent is clearly articulated anywhere.

These issues surrounding the status of employees and the meaning of the term "operates" may well generate MSPA litigation.

9. Family Businesses and Small Businesses

Given the continuing effort to exempt small farms from much employment legislation otherwise applicable to agriculture, it is not surprising to discover such an effort in MSPA. The family business exemption extends to:

> Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin packing shed, or nursery, which is owned or operated exclusively by such individual or immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.[162]

The narrow definition of immediate family which extends only to spouse, children, parents and brothers and sisters will require careful attention by those seeking to rely on it.

The small business exemption extends to:

> Any person, other than a farm labor contractor, for

161. *See supra* note 32 and accompanying text.

162. MSPA § 4(a)(1) (to be codified at 29 U.S.C. § 1803(a)(1)).

> whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A) is applicable.[163]

The reference, of course, is to the familiar 500 man-days test which is met and the above exemption lost if the employer uses 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.[164] The significance of this exemption may not be as great as some may have anticipated. In a joint-employment situation under FLSA the man-days generated are counted toward the total man-days of each employer.[165]

It is clear that the family business exemption is lost if an employee who is not an immediate family member is engaged to carry out farm labor contracting activities. That would not appear to be the case, however, if an exempt small business used an employee, related or unrelated, to perform such duties.

Since the employee exemption discussed above is not applicable to family businesses and small businesses, the question arises as to the status of such employees when engaging in farm labor contracting activities. In the case of the family business it would appear that the immediate family member employee would be protected under the exemption if it is otherwise available. If the exemption is lost the questions discussed in the preceding section [8] are raised.[166] In the case of a small business it seems unlikely that the employee would be able to claim the man-days exemption personally and again the issues discussed in the preceding section [8] are raised.[167]

Use of a farm manager with independent contractor status would surely forfeit the family business exemption and arguably the small business exemption as well. The status of the farm manager would be as already discussed.[168]

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163. MSPA § 4(a)(2) (to be codified at 29 U.S.C. § 1803(a)(2)).
164. 29 U.S.C. § 213(a)(6)(A) (1976).
165. 29 C.F.R. § 780.331(d) (1982).
166. *See supra* note 159 and accompanying text.
167. *Id.*
168. *See supra* note 160 and accompanying text.

H. Administration of MSPA

Administration and enforcement of MSPA is the responsibility of DOL.[169] Certain functions may, however, be delegated to the states.[170] Upon approval of a state plan an agreement may be entered into whereby the state is assigned such functions as taking applications for certificates of registration, issuing of such certificates, conducting of various investigations, and enforcing MSPA. State performance must be comparable to DOL performance.[171] Funding may be provided to states in this connection. Any states which become so involved will, however, be administering MSPA and the regulations thereunder.[172]

Compliance with MSPA does not excuse persons from compliance with applicable state laws and regulations.[173]

The federal administrator is directed to establish and maintain a public registry of all persons issued a Certificate of Registration or a Farm Labor Contractor Employee Certificate of Registration.[174] The importance of this public registry has already been discussed.[175]

I. Enforcement

1. Criminal Penalties

Violations of MSPA or regulations promulgated thereunder may result in criminal sanctions. Any person who "willfully and knowingly" commits violations is subject, upon conviction, to a fine of not more than $1,000 or impris-

169. This includes authority to issue rules and regulations. MSPA § 511 (to be codified at 29 U.S.C. § 1861)).

170. MSPA § 513(a), (b) (to be codified at 29 U.S.C. § 1863(a), (b)).

171. *See* Supplemental Information, 48 Fed. Reg. 36,740 (1983).

172. Unlike some federal statutes, the Williams – Steiger Occupational Safety and Health Act for example, MSPA does not provide for arrangements whereby states will enforce their own statutes and regulations with the federal role reduced to seeing that state standards and administration measure up to federal requirements.

173. MSPA § 521 (to be codified at 29 U.S.C. § 1871); *see* COLO. REV. STAT. §§ 8-41-10 to 8-4-113 (1963); CAL. LAB. CODE §§ 1682-1699; OR. REV. STAT. §§ 658, 405-455 (1977); WASH. REV. CODE ANN. §§ 19.30.010-19.30.900 (1978); N.Y. LAB. LAW § 212 (1965).

174. MSPA § 402 (to be codified at 29 U.S.C. § 1842).

175. *See supra* note 127 and accompanying text.

onment not to exceed one year, or both.[176] A subsequent conviction may result in a fine of not more than $10,000 or imprisonment for not to exceed three years, or both.[177] Under certain conditions a farm labor contractor who has violated the prohibition against employing illegal aliens may be fined $10,000 or be imprisoned for three years, or both, upon first conviction.[178]

2. Civil Money Penalties

Civil money penalties may be assessed against any person who violates MSPA or regulations thereunder.[179] In determining the amount of the civil penalty, which can be as much as $1,000 per violation, certain factors set forth in the regulations are to be taken into consideration.[180] One of these factors is the record of the person under FLCRA.

3. Injunctions

MSPA empowers the United States District Courts to issue temporary or permanent injunctions in appropriate cases.[181]

4. Other Administrative Remedies

Violators who are required to be registered under MSPA face distinct sanctions. For any one of a number of reasons enumerated in the Act, registration may be refused, not renewed, suspended or revoked administratively.[182] MSPA provides that under certain circumstances a farm labor contractor may be denied the facilities and services of

176. MSPA § 501(a) (to be codified at 29 U.S.C. § 851(a)).

177. *Id.*

178. MSPA § 501(b) (to be codified at 29 U.S.C. § 1851(b)) provides this consequence in the case of a farm labor contractor who has violated the prohibition against employing illegal aliens where that contractor has been refused issuance or renewal of registration, has failed to obtain same, or whose certificate has been suspended or revoked.

179. MSPA § 503(a)(1) (to be codified at 29 U.S.C. § 1853(a)(1)).

180. 48 Fed. Reg. 36,761 (1983) (to be codified at 29 C.F.R. § 500.143(b)).

181. MSPA § 502(a) (to be codified at 29 U.S.C. § 1852(a)).

182. *See supra* note 67.

Job Services offices.[183] The regulations suggest that this may be true as to agricultural employers and associations as well. Generally, administrative proceedings under MSPA will be governed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, which became effective July 15, 1983.[184]

5. Private Right of Action

When FLCRA was amended in 1974 a private right of action for money damages for aggrieved workers was added.[185] Litigation resulted because of difficulty in determining the true intent of the statutory liquidated damages clause, a provision which was often resorted to because of the difficulty in showing more than nominal money damages.[186] The issue was whether the court was compelled to

183. MSPA § 101(d) (to be codified at 29 U.S.C. § 1811(d)), provides this consequence if a farm labor contractor refuses or fails to produce a certificate of registration when asked. *See supra* note 53 and accompanying text. This consequence is serious for any contractor who uses interstate job orders placed through the system authorized by the Wagner-Peyser Act, 29 U.S.C. § 49(a)-49(1) (1976). The regulations appear to contemplate denial of access to Job Service agencies to *any* person found to have violated MSPA. 48 Fed. Reg. 36,743 (1983) (to be codified at 29 C.F.R. § 500.1(f)).

184. 48 Fed. Reg. 36,763 (1983) (to be codified at 29 C.F.R. § 500.220). The rules are at 48 Fed. Reg. 32,538 (to be codified at 29 C.F.R. pt. 18).

185. 7 U.S.C. § 2050a(b) (1976) (repealed as indicated *supra* note 2), provided in part: "If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief."

186. The 7th Circuit saga illustrates the difficulty with this issue. In De La Fuente v. Stokely-Van Camp, Inc., 514 F. Supp. 68, 79-80 (C.D. Ill. 1981), the court concluded that liquidated damages could be awarded on a fair and equitable basis *up to* $500 per worker per FLCRA violation. The court felt that awards of $500 for every technical violation would yield massive awards of a punitive nature which Congress could never have intended. The potential in that case was 16 violations × $50 × 380 workers × 3 years = $12,160,000.00. However, the 7th Circuit then held in Espinoza v. Stokely-Van Camp, Inc., 641 F.2d 535 (7th Cir. 1981), and in Alvarez v. Joan of Arc, Inc., 649 F.2d 299 (7th Cir. 1981, appearing only in advance sheet and later withdrawn) that the plain language of the statute (see *supra* note 165) dictated an award of $500 per violation. However, after reviewing certain legislative history which spoke of "*up to* $500," the 7th Circuit on rehearing reversed its position on this issue only, withdrew its initial opinion in *Alvarez*, and substituted the opinion now reported at 658 F.2d 1217 (7th Cir. 1981) which holds that the court has discretion to award liquidated damages *up to* $500. *Espinoza* was, of course, overruled in part, 658

order $500 in damages per plaintiff per violation or whether the court had discretion to award liquidated damages in some lesser amount.[187]

MSPA preserves the private right of action with no limit on recovery of actual damages.[188] MSPA clearly resolves the issue as to liquidated damages by providing that the court has discretion in cases of intentional violations to award up to $500 per plaintiff per violation.[189] A $500,000 limit is placed on the total damage award in a class action.[190]

6. Remedies in Cases of Discrimination

MSPA provides that in addition to other equitable relief the United States District Courts may order an employer to rehire or reinstate a migrant or seasonal agricultural worker with back pay where it is demonstrated that such worker was discharged or otherwise discriminated against because of filing a MSPA complaint or engaging in certain other activities including testifying or planning to testify in MSPA proceedings.[191]

7. Interference With Enforcement

Finally, MSPA adds a new provision making it a violation of the Act for any person to unlawfully resist, oppose, impede, intimidate or interfere with an official engaged in MSPA enforcement activities.[192] This provision was included because of reports of an increasing number of threats of bodily harm directed at enforcement officers.[193]

F.2d 1217, 1221 (7th Cir. 1981), and *De La Fuente* turns out to have been correctly decided.

187. *Id.*

188. MSPA § 504(c)(1) (to be codified at 29 U.S.C. § 1854(c)(1)).

189. *Id.*

190. *Id.*

191. MSPA § 505(a) (to be codified at 29 U.S.C. § 1855(a)). The regulations require that a protected worker who claims discrimination file a complaint with the Secretary no later than 180 days after the alleged incident. 48 Fed. Reg. 36,744 (1983) (to be codified at 29 C.F.R. § 500.9(b)).

192. MSPA § 512(c) (to be codified at 29 U.S.C. § 1862(c)).

193. Collyer, *supra* note 101, at S11749.

8. Attorneys' Fees

The Equal Access to Justice Act allows the prevailing private party to recover attorneys' fees and other litigation expenses in certain cases involving the government.[194] The provisions reach most civil actions involving the United States and adversary adjudicative proceedings before federal agencies as well. MSPA regulations specifically indicate the potential availability of such relief in adversary proceedings which involve the modification, suspension or revocation of registration as a farm labor contractor and those which involve the imposition of a civil money penalty.[195] Such relief is specifically made unavailable by the regulations in proceedings involving the refusal to issue or renew a certificate of registration.[196]

IV. SOME PRELIMINARY RECOMMENDATIONS

Given the fact that this article was written within a matter of weeks after the effective date of MSPA, recommendations must for the most part be very general in nature.

First, to the extent that potential problems with interpretation of MSPA have been identified herein, clarification might well be in order particularly as MSPA regulations continue to evolve. In particular, the articulation of a definition of the term "operates" in the definition of agricultural employer and the clarification of the status of certain employees engaged in farm labor contracting activities would appear to deserve priority attention.

Second, while there are certainly indications that the self-enforcement potential of MSPA is considerably greater than that of the now repealed FLCRA, the recommendation of the House Committee that DOL focus its enforcement efforts on "true abuses" and in general "redouble" its efforts

194. Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412). For a helpful discussion of EAJA see Watkins, *A Statutory Primer: Attorneys' Fees Against the U.S. Under the Equal Access to Justice Act*, 1983 ARK. L. NOTES 77.

195. 48 Fed. Reg. 36,764 (1983) (codified at 29 C.F.R. § 500.262(c)).

196. *Id.*

deserve to be followed.[197] MSPA does help in this regard by eliminating many of the technical problems present in FLCRA. To the extent that the number of investigators and the number of investigations may need to be increased, adequate funding should be provided.[198] The House Committee found that today many migrant and seasonal agricultural workers remain, as in the past, the most abused of all workers in the United States.[199] The effort to cure the failure of FLCRA should not be undermined by a failure to properly fund the enforcement of MSPA.

Third, the House Committee states that it intends to actively oversee the operations of DOL in this area.[200] It is hoped that the Committee will indeed carry out this intent. In so doing, there should be, among other things, a continuing examination of the MSPA exemption scheme with a view to determining if there is evidence of exempt persons taking advantage of their status to the disadvantage of migrant and seasonal agricultural workers. The exemptions reflect the input of many interest groups and the compromises that were struck clearly paved the way for the prompt passage of MSPA. However, the continuation of each exemption should be earned, not assumed.[201] As with all exemption schemes associated with agricultural employment legislation, there is a nagging question as to whether the support that they provide to small and family operations can be permanently justified. The need to support small and family operations is rarely questioned, but whether exemption schemes which may force workers to contribute indirectly to the subsidy are appropriate is a pressing, though admittedly complicated issue.

Fourth, when agricultural employment exemption schemes in various laws are viewed together they present an incredible maze to which MSPA adds some new twists and

197. H.R. REP. NO. 885, *supra* note 14, at 4.

198. *See supra* note 14.

199. H.R. REP. NO. 885, *supra* note 14, at 2.

200. *Id.* at 4.

201. *See supra* note 16.

turns.[202] One commentator has observed:

> However, while most programs leave many small *employers* uncovered, they cover substantial proportions of total agricultural *employment* and *production*, as well as most nonfarm employment. This creates a competitive norm for all employers. Rather than disadvantage larger farms, the managerial burdens imposed by these measures fall hardest on small employers because of the specialized knowledge required to deal efficiently with labor management and regulation. The cost of acquiring and maintaining this expertise creates, in essence, another fixed cost to be spread over all units of production.[203]

Passage of MSPA is another reminder of the need for a comprehensive review of federal regulation of agricultural employment.

Finally, and in light of what has just been indicated, it is strongly suggested that DOL and others responsible for disseminating information mount a considerable effort to inform and train the agricultural community, including those employed therein, with regard to rights and duties under MSPA. Money so spent should yield more results per dollar than that expended on enforcement activities.

202. *See generally* D. PEDERSEN AND D. DAHL, AGRICULTURAL EMPLOYMENT LAW AND POLICY (North Central Regional Research Publication No. 279, also designated N.C. Project 117 Monograph No. 10, Aug. 1981).

203. Holt, *Farm Labor and the Structure of Agriculture*, STRUCTURE ISSUES OF AMERICAN AGRICULTURE 143, 148 (U.S. Dep't of Agriculture, Agric. Econ. Rep. 438, 1979).