

The “On-Farm Workstays” Project

On-Farm Mentors and Labor Law: Year-end Report, 2008

The information in this report is provided for informational purposes only and should not be construed as legal advice. The information is current for 2008 and is subject to change.

INTRODUCTION

Over 400 Northeast farmers currently offer on-farm “workstay” opportunities. A time-honored tradition, this is one way they get the help they need while passing along important farming skills. NEWOOF, a regional trainee-matching service, has profiled these farmers through annual surveys. 80-90% rank “providing farm labor” as “very important” or “the most important” reason for hosting trainees. But many of these farmers are poorly informed about their standing as agricultural employers. Many see themselves as educators hosting “interns” in exchange for labor. Others believe that “space in the barn and all the veggies you can eat” is not pay. While time a trainee spends in class or hands-on instruction can legitimately be considered “education,” the minute she performs work that contributes to a farm’s bottom line, she becomes an employee. For many farmers, this is an unpleasant surprise. In an increasingly regulatory environment, they are at serious risk.

Why focus on this topic? Experienced farmers have told us they want and need this information.¹ And aspiring farmers have told us that “learning from folks who are actually doing it” is the way they prefer to learn. Providing our next farming generation with the information and skills they need to succeed is critical. This project seeks to support on-farm mentors in this important task by addressing a serious gap in employment information and practice. We want to make this important information available to all trainee hosts and offer peer guidance to those who are open to self-assessment and willing – if not eager – to implement change.

Are trainees employees? On-farm mentors play an important role in helping to train the next generation of farmers. Good mentors see themselves more as teachers than as employers. By hosting “trainees” on their farms, they agree to impart a wide range of farming knowledge and skills in exchange for needed help on the farm. Their “trainees” (often called “interns” or “apprentices”) similarly see themselves as students and may willingly accept little or no monetary compensation for the work they do, viewing their education as sufficient compensation. However, with rare exception, the law views on-farm mentors as employers and their “interns” or “apprentices” as employees.

Because labor law does not recognize a farm mentor/trainee relationship, mentors who want to comply must unravel a tangle of regulations to try to understand what is required of them. While federal labor law applies nationwide, state labor laws are unique and local by-laws can add complications. Each individual farmer mentor’s case must be viewed in the context of its own location—both state and community.

The purpose of the Workstays Project is to educate mentors about existing labor laws and regulations² and to help them consider ways to design their “internships” or “apprenticeships” to both comply with existing law and to make it economically feasible to host trainees. Project leaders also hope that the

¹ Developing training materials on how to “research and comply with start-up and ongoing legal and regulatory requirements” scored highest in a regional survey of on-farm mentors’ stated educational and training needs.

² Northeast SARE LNE 07-255.

lessons learned through the project may lay the groundwork for appropriate legislative changes and/or the creation of a system that recognizes the educational nature of the mentor/trainee relationship.

The cost of legally hosting a trainee, especially if the farmer does not have other farm labor, can be prohibitive for many mentors. Many farmers who choose to be mentors have small-scale operations. In some instances the cost can be mitigated if the farmer meets certain criteria and his/her state has certain exemptions for agricultural labor. The Workstays Project focuses on three specific areas of labor law, all of which have cost implications:

- ✍ Wage & Hour laws
- ✍ Housing
- ✍ Workers' Compensation

This report summarizes key federal and state laws and regulations that affect on-farm mentors in Connecticut, Maine, Massachusetts, New Hampshire, New York, and Vermont. Research for the six remaining Northeast states is ongoing. See the Appendix for print and electronic information resources for agricultural employers located in states addressed in this report.

WAGE & HOUR LAWS

Wage and hour laws were established to protect workers from exploitation and ensure that employees receive a minimum amount of compensation and be paid for working overtime. Employers must be aware of both the federal and their own state's minimum wage requirements. To avoid paying minimum wage some on-farm mentors are tempted to call their trainees "independent contractors" or "volunteers." Both designations are for all intents and purposes illegal. It is also very common for farmer mentors to offer "stipends" to trainees that, while acceptable to the trainee because of the educational trade-off, ignore wage and hour regulations. However, in some states there are exemptions an agricultural employer may qualify for that will allow an on-farm mentor to pay an hourly rate that when calculated over a week or month equal a typical "stipend." Those on-farm mentors will, of course, also need to pay close attention to laws governing withholding taxes, payroll taxes, and reporting of wages to both the trainee and state and federal taxing authorities.

Is my trainee agricultural labor? This is the first question a mentor must ask to determine what hourly rate is required. In many cases the answer is "no" or "not always." The Fair Labor Standards Act (FLSA) is a federal law that includes some exemptions for agricultural or farm labor. The federal definition of agricultural labor (which most states also adopt) does not include many activities that today's small diversified farms engage in, such as value added processing, retail sales or agri-tourism. Therefore, to qualify as agricultural labor a farmer may need to limit the work the trainee does. If the trainee does qualify as farm labor the farmer will be exempt from:

- ✍ Paying overtime
- ✍ Paying federal unemployment taxes if total farm wages are under \$20,000 in any calendar quarter of the previous year

If the trainee is agricultural labor and the farmer does not have more than 500 "man-days" of agricultural labor in a year (roughly equivalent to seven employees employed full-time in a calendar quarter) the farmer will be exempt from paying federal minimum wage. However, the farmer must still comply with state minimum wage laws. As an example of the differences in state laws, Massachusetts has a minimum agricultural wage while New York requires agricultural labor to be paid at the general state minimum wage. Other states exempt farm workers from state minimum wage

entirely. See the Appendix for a more detailed discussion of the 500 Man-Day exemption rules and documentation requirements.

If the trainee does not qualify as agricultural labor, minimum wage and overtime laws apply and the farmer has to pay both federal and state unemployment taxes if farm wages exceed \$1,500 in any calendar quarter. If a trainee qualifies as agricultural labor in some weeks and not others, the employer must pay minimum wage and overtime in the weeks the trainee does not qualify. The 2008 federal minimum wage is \$6.55/hour.

See the chart on the following page for applicable state wage and hour laws.

State	Wage & Hour Regulations
CT	<p>Connecticut does not have a separate minimum wage for agriculture or an exemption for agriculture except that minors working in agriculture may be paid at 85% of the state minimum wage. Thus, even if exempt from federal minimum wage, most agricultural workers in CT must be paid the state minimum wage which in 2008 is \$7.65/hr and will increase to \$8.00/hr January 1, 2009.</p> <p>Non-agricultural workers not otherwise exempt must also be paid the state minimum wage.</p> <p>There are limited allowances that an employer may make against minimum wage for housing and meals. An employer can also charge an employee rent for housing as long as the amount is reasonable and the employer recognizes the rent as income.</p> <p>Connecticut has a School-to-Career Program, targeted to high school students, through which students may be able to participate in unpaid internships. Students engaged in approved internships are not considered to be employees. Employers may also host college students who are enrolled in sanctioned programs in their schools as unpaid interns. It is incumbent on the employer to obtain documentation that the students are in sanctioned programs in order for them not to be considered employees.</p>
ME	<p>Maine does not have a separate agricultural minimum wage, but individuals employed in agriculture (except when employed for or on a farm with over 300,000 laying hens) are exempt from state minimum wage. Agricultural workers are paid federal minimum wage unless exempt under FLSA, in which case no minimum wage will apply.</p> <p>Wages may include reasonable costs to the employer furnishing food and lodging. Food and lodging must actually be used by the employee, clearly shown on the employee statement and wage records, and approved by the Bureau of Labor Standards.</p> <p>“Farmer” is listed as an “apprenticeable occupation” by Maine’s DOL. However, there is no indication that a farmer agreeing to become a registered program sponsor would receive exemptions to minimum wage, or other labor laws.</p> <p>Non-agricultural workers not otherwise exempt will be paid at the state minimum wage, which as of 10/1/08 was \$7.25/hr.</p>
MA	<p>Massachusetts has an agricultural minimum wage of \$1.60/hr. Thus, if agricultural workers are exempt from federal minimum wage under FLSA, they may be paid no less than \$1.60/hr.</p> <p>Non-agricultural workers, unless otherwise exempt, must be paid the state minimum wage, which in 2008 was \$8.00/hr.</p>

NH	<p>New Hampshire does not have a separate agricultural minimum wage, but individuals employed in agriculture are exempt from state minimum wage. So agricultural workers will be paid federal minimum wage unless exempt under FSLA, in which case no minimum wage will apply.</p> <p>Non-agricultural workers, unless otherwise exempt, must be paid the higher of the federal or state minimum wage, which as of 9/1/08 was \$7.25.</p> <p>No deductions from wages may be made for meals and lodging for agricultural workers.</p>
NY	<p>New York does not have a separate minimum wage for agriculture or an exemption from state minimum wage for agricultural workers except for those employers whose total cash remuneration paid to <u>all</u> persons employed on the farm in the previous year is under \$3,000. Thus, even if exempt from federal minimum wage, most agricultural workers in NY must be paid the state minimum wage, which in 2008 was \$7.15/hr, even if they are exempt for federal minimum wage under FLSA.</p> <p>A specific credit may be granted toward the minimum wage for meals and/or lodging provided by the employer.</p> <p>Payments in kind (e.g., farm products for consumption by the employee) acceptable to the employee may be considered part of the minimum wage, but shall not be valued at more than the farm market value at the time such payments were made.</p> <p>There is no exemption from minimum wage for student-learners except for the limited number of student-learners in Commissioner of Labor-approved vocational education training programs in agriculture sponsored by recognized educational, nonprofit or governmental agencies or authorities.</p>
VT	<p>Vermont does not have a separate agricultural minimum wage, but individuals employed in agriculture are exempt from state minimum wage. So agricultural workers will be paid federal minimum wage unless exempt under FSLA, in which case no minimum wage will apply.</p> <p>Non-agricultural workers, unless otherwise exempt, must be paid the state minimum wage, which was \$7.68 in 2008 and will increase to \$8.06 as of 1/1/09.</p>

EMPLOYEE HOUSING

One of the ways on-farm mentors typically compensate trainees is to provide housing, often in temporary or permanent structures located on their farms. These accommodations, while perfectly acceptable to most trainees, may not adhere to regulations set out by federal and/or state agencies for housing employees.

Employee housing is governed by the Migrant and Seasonal Workers Protection Act (MSWPA) and OSHA, as well as by local zoning and building code regulations. Trainees who do not return to their own permanent residence at night may be considered migrants, and their housing on the farm may be considered a “temporary farm labor camp.” Farmers who qualify for MSWPA’s 500 Man-Day exemption are exempt from MSWPA regulations but are still subject to OSHA regulations. However, if a farmer has employed 10 or fewer persons at all times during the past twelve months and is not currently maintaining a temporary labor camp, the farm qualifies as an “exempt workplace” under OSHA’s small farm exemption. This means that the farm operation is exempt from OSHA enforcement activity (i.e., inspection, etc.) but does not mean that the farm is exempt from the regulations themselves. Some states have state OSHAs that have additional regulations, and the farm labor camp definition appears to vary from state to state.

It appears that a farmer may avoid the burden of complying with OSHA housing regulations if a trainee lives in the farmer’s home or if the trainee rents accommodations off the farm. If living in the farmer’s home, local zoning regulations and building codes would still apply. Of course, if a trainee returns to his permanent home at night (i.e., is a “local,”) housing regulations do not apply.

State	Federal & State Governing Bodies for Employee Housing
CT	MSWPA and OSHA. Connecticut’s state OSHA regulates only state and municipal employees, so employee housing on farms is governed solely by federal OSHA regulations.
ME	MSWPA and OSHA. Maine does not have a state OSHA for private sector workplaces so employee housing on farms is governed solely by federal OSHA regulations.
MA	MSWPA, OSHA and MA Department of Public Health. In MA registration of a farm labor camp is made through application to the MDPH, which enforces OSHA regulations. If housing only one employee, registration is not required.
NH	MSWPA and OSHA. New Hampshire does not have a state OSHA, so employee housing on farms is governed solely by federal OSHA regulations.
NY	MSWPA, OSHA and NY Department of Safety and Health. In NY a farmer must register a “temporary labor camp” if 5 or more employees are living in such housing. A person who comes into the state to work and does not go home at night is considered a migrant.
VT	MSWPA, OSHA and VOSHA (Vermont Occupational Safety and Health). Vermont has adopted federal OSHA and enforces OSHA regulations, so employee housing on farms is governed by VOSHA.

WORKERS' COMPENSATION

Workers' compensation insurance provides benefits to employees for occupational injuries or disease and thus provides important worker protection. However, the premiums can be quite expensive. Workers' compensation insurance laws are state-based. In all the states we have researched to date workers' compensation is mandatory for farm workers except in very limited instances (see chart below).

Workers' compensation insurance is perhaps the most burdensome cost for on-farm mentors because there are virtually no exceptions and because there usually are minimum premiums. Thus, a farm with one trainee (employee) may pay the same premium as one with two or three employees. It is also important to note, however, that farmers are not being singled out here. All small businesses with one or two employees face the same expense.

Premiums are based on payroll, the type of job, and the employer's experience rating. Thus, premiums are likely to be higher for new employers that have no track record than for those who have a good record of employee safety.

State	Workers' Compensation Requirements & Agricultural Exceptions
CT	Required for all employees, no exceptions
ME	Required except for: <ul style="list-style-type: none"> a) Employers who have employees engaged in agriculture or aquaculture as seasonal or casual laborers, if the employer maintains at least \$25,000 in employers' liability insurance, with at least \$5,000 in medical coverage. b) Employers of six or fewer agricultural or aquacultural laborers, if the employer maintains employers' liability insurance of at least \$100,000 multiplied by the number of full time equivalent employees and has at least \$5,000 in medical payments coverage.
MA	Required for all employees, no exceptions.
NH	Required for all employees, no exceptions. In addition, workers' compensation insurance must be purchased prior to hiring and employers are subject to the New Hampshire safety program regulations that are part of workers' compensation law.
NY	Required for all employees except farm workers whose employer paid less than \$1,200 for farm labor in the preceding calendar year. It is important to note that in all for-profit businesses part-time employees, borrowed employees, leased employees, family members and volunteers are included under the workers' compensation law. Also included are unpaid student interns. NY workers' compensation law also requires employers to provide disability insurance to employees to cover injury or illness off the job. There is an exception for farm laborers (i.e., field workers).
VT	Required except for people engaged in agriculture or farm employment for an employer whose aggregate payroll is less than \$2,000 in a calendar quarter.

CONCLUSION

Almost without exception, on-farm trainees – interns, apprentices – are employees. Farmers contemplating whether to host trainees need to consider both the costs of providing safe and legal workstays and the risks involved in failing to do so. A farmer who already has other employees, and thus has employee recordkeeping systems in place, and a track record in the workers' compensation system, will likely find employer-related costs of adding a trainee less burdensome than a farmer who is becoming an employer for the first time. By careful planning of a trainee's work schedule and duties, a farmer may be able to reduce some costs such as paying overtime and, depending on the state, may be able to offer a wage that reflects the trainee's lack of experience. But most on-farm mentors will not be able to avoid the cost of workers' compensation insurance. And all on-farm mentors will need to consider the cost of the time they give to educating trainees who are not students in any legal sense, and who are not likely to provide long-term benefits to the farm once they are trained. Potential on-farm mentors will want to fully consider their motivations for having trainees, and how the costs to host trainees will affect their bottom line.

Questions? Contact the On-farm Workstays Project,
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