

Agriculture, Child labor and Wage and Hour Laws

by M. Elizabeth Winters
DeWitt, Ross & Stevens
Madison, WI

I. FAIR LABOR STANDARDS ACT (“FLSA”)

A. General Overview

Generally, the FLSA regulates the wages and hours of work of public and private sector employees who fall within its scope. In particular, the FLSA does the following:

- a) establishes a minimum wage to be paid all covered employees;
- b) generally requires the payment of extra wages for hours worked in excess of 40 per workweek;
- c) proscribes the use of **oppressive** child labor in interstate commerce activities;
- d) prohibits wage discrimination on the basis of sex; and
- e) requires employers to retain certain records and reports.

B. Who is covered?

To be covered by the FLSA, an individual must be:

- a) an employee;
- b) engaged personally in commerce or in the production of goods for commerce or employed by an employer in an enterprise engaged in commerce or in the production of goods for commerce; and
- c) within the geographical area covered by the FLSA.

1. “Employee”

The FLSA defines “employee” as “any individual employed by an employer.”

2. “Employer”

The FLSA defines “employer” to include “any person acting directly or indirectly in the interest of an employer” in relation to an employee. In determining whether an individual or business entity is an employer, a good test is whether that individual or entity has:

- a) the right to hire and fire;
- b) the right to direct/control employees in their work;
- c) the right to set hours of work; and
- d) the obligation to pay wages.

3. FLSA v. Wisconsin Child Labor Law

Most employers, regardless of size of their organization, are subject to state child labor laws.

The FLSA requires employer compliance with state laws that establish a higher standard if those laws do not contravene the FLSA’s requirements. If state law contradicts the FLSA, such laws continue to apply to the employment of children who are outside the FLSA’s general coverage or who are specifically exempted or excepted from the FLSA’s requirements.

For purposes of this presentation, these materials will address the child labor laws within the context of the requirements under the FLSA and will note exceptions under Wisconsin law.

II EXEMPTIONS FOR AGRICULTURAL WORKERS

1. General Overview

There are two types of agricultural exemptions to the FLSA that may apply to the cranberry industry:

- a) an exemption from the minimum wage, equal pay and overtime provisions; and
- b) an exemption from the overtime pay requirements.

2. Complete overtime pay exemption

The FLSA grants complete exemption from its overtime pay provisions to:

- a) an employee employed in agriculture or in connection with the operation or maintenance of ditches canals, reservoirs, or waterways, not owned or operated on a sharecrop basis, and used exclusively for supply and storage of water for agricultural purposes; and
- b) an employee engaged (1) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same state, or (2) in transportation, whether or not performed by the farmer, between the farm and any point within the same state, of persons employed or to be employed in the harvesting of fruits or vegetables.

3. Minimum wage, equal pay, and overtime pay exemptions

Exemptions from the minimum wage, equal pay, and overtime pay requirements of the FLSA are granted to five types of agricultural workers:

- a) An employee whose employer did not, during any calendar quarter in the preceding calendar year, use more than 500 man-days of agricultural labor;
- b) an employee who is the parent, spouse, child, or other member of the employer's immediate family;
- c) a hand-harvest laborer who commutes daily from his residence to the farm, who has been employed in agriculture less than 13 weeks during the prior calendar, and who is paid on a piece-rate basis in an operation that is customarily and generally recognized in the region of employment as paying on a piece-rate basis;
- d) a hand-harvest laborer who is 16 years of age or under, (a) who is employed on the same farm as his parent or as a person standing in his parent's place, (b) who is paid on a piece-rate basis in an operation that is customarily and generally recognized in the region of employment as paying on a piece-rate basis, and (c) who is paid at the same piece-rate as employees on the same farm who are over 16;
- e) an employee who is principally engaged in the range of production of livestock.

4. FLSA Child Labor Provisions

The FLSA further does not apply to any employee employed in agriculture outside of school hours for the school district where the employee is living while so employed, **if** the Secretary of Labor has not declared an occupation to be particularly hazardous for children under 16 **and** the employee is:

- a) age 14 or 15;
- b) age 12 or 13 and either (1) the employment is with the consent of the parent or the person standing in the place of the parent or (2) the parent of such person is employed on the same farm as the child;

- c) age 10 or 11 and the employer has been granted a waiver by the Department of Labor for the child's employment as a hand harvest laborer during no more than eight weeks in any calendar year; or
- d) age 11 or under and is employed either (1) by a parent, or by a person standing in the place of the parent, on a farm owned and operated by the parent or person or (2) with the consent of the parent or person standing in place of the parent on a farm that qualifies for the man-days exemption from the FLSA's minimum wage, equal pay, and overtime pay rules.

1. Parental exemption.

As an exemption to the FLSA's child labor coverage, the statute permits parents or persons "standing in place of the parent" to employ their own children, or children in their custody, who are under age 16 in an occupation that is not found to be particularly hazardous for, or detrimental to the health or well-being of children between ages 16 and 18. Persons "standing in the place of the parent" are those who take children into their own homes and treat them as members of their own families, educating and supporting them as if they were their own. The parental exemption applies only where the child is exclusively employed by the parent or a stand-in, not when the child is dually employed by the parent and another person. Thus, the exemption is not available where the child works for a corporation, even if the parent owns substantially all its stock and is an active manager.

A parent or stand-in who operates a farm may employ a child under 16 on the farm even in an occupation which has been declared particularly hazardous for a child under 16.

2. Examples of particularly hazardous occupations for children under 16.

The following are a few of the occupations that the Department of Labor has identified as particularly hazardous occupations in agriculture for children under age 16:

- a) operating a tractor that has more than 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor;
- b) working from a ladder or scaffold, painting repairing, or building structures, pruning trees picking fruit, etc., at a height of more than 20 feet;
- c) working inside (1) a fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere, (2) an upright silo within 2 weeks after silage has been added or when a top loading device is in operation position, (3) a manure pit, or (4) a horizontal silo while operating a tractor for packing purposes;
- d) handling or applying agricultural chemicals classified as toxic by the Federal Insecticide, Fungicide and Rodentile Act;
- e) transporting, transferring, or applying anhydrous ammonia; and
- f) operation of forage harvester, forage blower, auger conveyor, or the unloading mechanism of a non-gravity type self-unloading wagon or trailer, non-walking-type rotary tiller.

3. Examples of non-hazardous agricultural activities for children under 16.

The following activities in agriculture have not been found by the Department of Labor to be hazardous for the employment of children under age 16:

- a) handling chemical pesticides and fertilizers that have not been characterized as toxic by the Federal Insecticide, Fungicide and Rodenticide Act;
- b) driving a truck, automobile, or bus in the arm proper and serving as a helper on that sort of vehicle;
- c) Loading or unloading trucks
- d) operating garden type tractors
- e) picking vegetables and berries, and placing them on conveyors or in containers
- f) working from ladders at heights of less than 20 feet, such as picking of mot fruits;
- g) hand planting and cultivation; and
- h) handling of irrigation pipes.

5. Small Farms

1. “Man Days” Exemption

The minimum wage, equal pay, and overtime pay provisions of the FLSA do not apply to employees employed in agriculture, if their employer did not, during any calendar quarter during the preceding calendar year, use more than 500-man days of agricultural labor.

2. Who may assert exemption?

Although the “man-days” exemption was intended to exempt workers on small and family-size farms, any person acting directly or indirectly in the interest of an employer in relation to an employee may assert the exemption. It is not necessary that the employer be a farmer; it is sufficient that the employer may be an individual, partnership, or corporation.

3. 500-man-day limit

A “man-day” is any day during which an employee performs any agricultural labor for not less than one hour. 500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter. However, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-days test even though he may have only two or three full-time employees.

The man-days of all agricultural workers, unless specifically excluded, of an employer, whether he is the owner of a single farm, the owner of an enterprise consisting of several farms, a tenant farmer, an independent contractor, etc., are to be counted for purposes of the “man-days” exemption, whether they are employed at one place or several widely-scattered places. Thus, if an employer owns and operates two farms, it is the total number of man-days used on both farms, and not that used on each farm, that determines whether he meets the 500-man-day test. Similarly, an independent contractor who harvests crops on different farms must total all the man-days of agricultural labor used on all the farms. Since a man-day can be as short as one hour, there may be days on which employees work for two different farmers for a man-day, and in that event they would be included for that day in the man-days count of both farmers.

In applying the “man-days” exemption, it is necessary to consider each of the four calendar quarters (January 1- March 31; April 1-June 30; July 1-September 30; October 1-December 31) in the preceding calendar year (January 1- December 31), and if any calendar quarter of the preceding calendar year, the employer used more than 500 man-days of agricultural labor, he is not exempt, but must comply during the current year with the FLSA with respect to any employee not otherwise exempt, regardless of the number of man-days of agricultural labor used in the current year.

6. Family Exemption

The FLSA’s minimum wage, equal pay, and overtime pay provisions do not apply to employees engaged in agriculture and are either the parent, spouse, child, or other member of the employer’s immediate family.

This exemption applies to the specific relationship mentioned, even though they are employed by an employer who otherwise used more than 500 man-days of agricultural labor in a calendar year.

According to the Department of labor, only the following will be considered as other members of the employer's immediate family: stepchildren, foster children, stepparents, and foster parents. Other relatives, even when living permanently in the same household as the employer, are not considered to be immediate family members.

III MINIMUM WAGE

1. Federal

All employers covered under the federal law must pay their employees \$5.15 an hour **unless** the employee is under the age of 20 and within the first 90 days of employment, and in that case, the employer must pay the employee \$4.25 an hour. However, an employer who employs persons under the age of 20 and pays such persons \$4.25 an hour, should take care not to displace other workers who are over the age of 20.

2. Wisconsin

All Wisconsin employers must pay their agricultural workers covered under Wisconsin minimum wage at least \$4.55 an hour for adults and \$4.20 an hour for minors.

IV RECORD KEEPING AND RETENTION REQUIREMENTS

There is no requirement that an employer maintain personnel files, *per se*. However, several state and federal laws require employers to keep certain records. Outlined below are the *minimum* requirements. An employer may choose to retain records beyond the minimum time frame required.

Notwithstanding the minimum requirement, any records relating to an ongoing legal claim must never be destroyed even if the minimum retention time frame has expired. This includes other records related to the ongoing lawsuit. For example, if a job applicant files a charge alleging discriminatory hiring practices, the company may not throw out all applications in excess of one year old.

Medical records must always be kept separate from other personnel files and only accessible on a need to know basis.

1. Records Related to Hiring
2. Job Evaluations
3. Occupational Injury and Illness
4. Affirmative Action Plans
5. Wage and Hour Records
6. Handicapped Workers Paid at a Subminimum Wage
7. Federal Contractors
8. Pensions, Profit Sharing and Other Employee Benefit Plans

1. Polygraph Testing

A. Apprenticeship Programs

B. Employment of Minors and Student Learners

V. POSTING REQUIREMENTS

A copy of required Wisconsin and Federal Posters are included in the Appendix attached to these materials.