

Federal Labor Laws and Farm to Institution Sales in New England: *How to Make Sure Your Farm is in Compliance*

New England farmers contribute to a robust regional food system. Farmers provide healthful food to consumers, treat farm workers fairly, and act as stewards of the region's farmland, while maintaining viable farm business operations. It can be difficult to balance these many goals, particularly when new opportunities to diversify your farm business may come with new sets of regulations.

This publication will address the Fair Labor Standards Act of 1938 (FLSA) and the conditions under which farm workers are and are not exempt from time and a half overtime pay in certain Farm to Institution marketing activities.

New England schools, hospitals, nursing homes, and colleges are buying local vegetables, fruits, meat, poultry and other farm products in record numbers. But these institutions are different than other wholesale buyers – they may want product that is processed, they may need a volume delivered that is too large for any one farm to fill, or they may be interested in buying from a farm in a neighboring state.

If your farm is relatively large and is engaged in any of the above activities to satisfy orders from institutional buyers, then there is a chance that your workers may NOT be engaged in “agricultural work” as defined by labor law. If your workers are not engaged in agricultural work according to this definition in any given week, they are not exempt from overtime pay for that week, and failure to pay overtime could result in expensive fines to your farm, in addition to providing the affected workers back pay.

In addition to the issues addressed in this publication, farm operators must be in compliance with, and maintain records that demonstrate compliance with, federal and state regulations that are not discussed in this publication, including:

- Housing; Landlord/ Tenant Law; Workers' Compensation and Safety; Food Safety; Field Sanitation; Occupational Health and Safety (OSHA); Family Medical Leave Act (FMLA)
- Worker transportation, first aid, drinking water, paycheck deductions, and child labor regulations also covered in the Fair Labor Standards Act (FLSA), the Migrant & Seasonal Agricultural Worker Protection Act (MSPA), and additional H-2A regulations.

The following information is intended to

provide a first step to understanding whether your farm operation is in compliance with labor law.

These guidelines are not complete – if you are concerned about whether or not you are in compliance, you should consult with a lawyer.

Definition of Agricultural Work

The Fair Labor Standards Act (FLSA) of 1938 exempts employers from paying certain workers from overtime pay “when employed in agriculture or in certain related activities or in certain operations with respect to agricultural or horticultural commodities.”

Workers employed in “agriculture” (as defined in Section 3(f) of the Act) are exempt from the Act's overtime requirements under 29 U.S.C. § 203(f). Section 13(b)(12) of the FLSA, which provides an exemption from the overtime requirements of the FLSA for any worker employed in “agriculture.”

The FLSA defines “agriculture” as including “farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of U.S.C. Title 12), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an

incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”¹

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How do I know when farm activities are “exempt”?

What does the Department of Labor consider to be a “relatively large” farm operation? What does “agriculture or certain related activities” mean for aggregation, processing, or cross-state Farm to Institution sales? How do you know what “counts” as agriculture and what does not?

Three important concepts guide whether or not your farm is subject to Department of Labor federal minimum wage and overtime exemptions: “Man Days”, “Mixed goods”, and “Primary vs. Secondary agricultural activities.”

“Man Days”

The Department of Labor uses a concept referred to as “man days” to first determine whether your farm operation is small enough to be exempt from paying workers the federal minimum wage (though not from your state’s minimum wage) and overtime wages. Farms that use fewer than 500 “man days” in every quarter of the previous calendar year are exempt from federal minimum wages and overtime, while those who use more than 500 “man days” in any one quarter of the previous calendar year are not exempt.

To calculate a “man day,” first exclude all workers who are immediate family members of the farm owner. Each non-family worker who performed agricultural work at least one hour on any single day has worked a “man day.” Add each of these “man days” together over each calendar quarter. If the number is greater than 499, your farm operation is not exempt from federal minimum and overtime wage requirements.

“Mixed Goods”

The term “mixed goods” refers to goods that are not produced on your farm. Farm workers who handle “mixed goods” in the course of their employment are NOT engaged in agricultural work as defined by FLSA, and they are NOT EXEMPT from overtime pay for the work week in which they handle these goods. This can include, for example, peeling carrots for a neighbor’s farm, buying and packing a neighbor’s potatoes with your own to sell wholesale, or transporting other farmers’ products across state lines.

“Primary vs. Secondary” Agricultural Activities

Primary – If a farm worker is engaged in a “Primary” function, it does not matter where they do the activity or who employs them – they are exempt from overtime. Primary activities include: Cultivation, tillage, dairying, harvesting, livestock, bees, poultry, book keeping. Workers could be field workers, tractor operators, loaders and drivers, or farm office personnel, for example.

Secondary – A farm worker engaged in a “secondary function” must be engaged in agricultural activities ON the land leased or owned by their employer, and with products grown by that employer. Secondary activities include: Packing, processing, preparing for market, first-stop-from-the-field delivery.

In addition, agricultural workers who transport product from the field to the first place of marketing or processing, even if the employer is not the farm, are excluded from overtime.

How do I calculate wages?

Minimum Wages

All workers must earn at least the hourly minimum wage rate, regardless of whether they are paid hourly, salaried, or piece-rate. Higher state statutory wage rates supersede federal wage rates. As of January 1, 2016, non-H-2A agricultural minimum wage rates are:

\$9.60/ hour in CT, VT, and RI;

\$8.00/ hour in MA;

\$7.25/ hour in ME and NH.

For example, if a pieceworker in Connecticut earns \$1 per box, picks 300 boxes in a week, and works 50 hours in that week, they are earning \$6.00/ hour, which is less than Connecticut’s \$9.60 minimum wage.

In 2016, H-2A minimum wages are \$11.74/ hour in all six New England states, higher than the state minimum wages in each state. If H-2A workers who will be engaged in aggregation, processing, or transportation of goods, these activities must be included in your H-2A application. As long as the activities are included, the FLSA overtime exemption regulations noted above apply to H-2A workers.

Overtime Wages

Unless your farm has met the 500 “man days” criteria for overtime exemption, a worker must be paid time and a half overtime for every hour worked above 40, if, during the course of that week that worker:

1. handles mixed goods,
2. is engaged in a secondary activity with mixed goods or not on the employer’s farm, or
3. transports products beyond the first place of marketing or processing.

Corresponding Employment & the Adverse Effect Wage Act (AEWA)

In addition, in compliance with the Adverse Effect Wage Act (AEWA), “corresponding workers” — workers who perform the same activities — must receive the highest prevailing wage among workers engaged in those activities. For example, if “corresponding workers” work alongside H-2A workers while unloading a truck, all workers must be paid at least the H-2A minimum wage of \$11.74/ hour.

Examples of violations

Scenario	Worker Exempt from Overtime?
Your farm peels and cubes all of the winter squash you grow for sales to a university. Your neighbor hires you to peel and cube her winter squash for sales to a local grocery store. One worker supervises the processing, and works 60 hours that week.	No
Your made a verbal agreement with a large hospital to deliver 1,500 lbs of paste tomatoes the third week of August. However, your tomato yield suffered from a blight and you can only provide 1,000 lbs. To make up the difference, your neighbor agrees to sell you 500 lbs of paste tomatoes. If you don't meet the order, you will lose the hospital's business in the future. You pack up both your and your neighbor's tomatoes at your farm and deliver the whole order. Instead, you pick up your neighbor's tomatoes at his farm, then deliver the whole order.	No Yes
Your farm is in a very rural area, and you aggregate products from other farmers in your region to deliver to schools. Your workers pick up products from other farms, bring them to your farm where you accept orders from schools, and pack different products from different farms into each school's delivery. Your workers then deliver the products to schools across the region.	No
You rent space in a commercial kitchen to make tomato sauce for a college. You use only your own tomatoes, peppers, and onions as ingredients in the sauce. You hire a chef to supervise your workers to cook and can the sauce in the rented kitchen.	No
Your farm is located in Massachusetts, right on the border with New Hampshire. The nearest public school is in New Hampshire, right along a delivery route to your main wholesale grocery account. Your truck driver often drops off a box or two of produce to the school, and the school pays in cash.	Yes
Last year you employed 6 non-family workers. In the first quarter (Jan-March, or 13 weeks) only one worker was employed, and she worked 2 days per week (26 “man days”). In the second and fourth quarters (April-June and Oct-Dec), three workers each worked 2 days per week (156 “man days”). In the third quarter (July-Sept), all 6 workers each worked 4 days per week (312 “man days”).	Yes

How to Avoid a Department of Labor Investigation:

1. Educate yourself about state and federal laws, particularly if your farm operation has recently engaged in new agricultural activities.
2. Seek legal advice if you are concerned about your compliance.
3. Follow all guidelines received.
4. Maintain all worker- and employment- related records for three years.

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¹ Kessler, J. (2006). United States Department of Labor Wages and Hours Division. FLSA2006-17NA. http://www.dol.gov/whd/opinion/FLSANA/2006/2006_07_06_17NA_FLSA.htm

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