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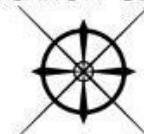
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ACKNOWLEDGEMENTS

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LEGAL DISCLAIMERS

This Guide is not intended as legal advice. It is not intended to, and cannot, substitute for sound legal advice from a competent, licensed attorney. Rather, it is meant to help readers understand the many issues that must be considered when establishing and operating a direct farm business. There is more to farming than just growing crops and selling to customers. The authors' hope is that this Guide will illustrate the legal issues that direct farm entrepreneurs must consider and then guide them towards experts and additional resources that will set their direct farm businesses on a track towards success.

The legal information provided by this Guide is a general overview of the many laws and regulations that may be applicable to a direct farm business. The reader should never assume that the information contained herein applies to his or her specific situation without consulting a competent attorney in his or her home state. Further, though the authors have made every effort to ensure the accuracy of the information in this Guide, they cannot guarantee that all of it is correct. Laws, regulations, and guidelines can change at any time, and the status of laws and regulations in the future cannot be predicted with any certainty. Therefore, every user of this Guide should at all times independently ensure that the legal information is up-to-date before using it in any way.

Any URLs provided herein are purely for the convenience of the user, and the authors of this guide disclaim any liability for the content of the referenced websites.

Finally, any opinions, findings and conclusions, or recommendations expressed in this Guide are those of the authors and do not necessarily reflect the view of the funding organizations.

INTRODUCTION

If you are reading this Guide, then you are probably well aware of the growing interest in local foods. Consumers seek out local producers for a variety of reasons: Some believe that locally-grown food is healthier, safer and tastier. Others hope that local farmers are more invested in the community and stewardship of the land. And many people buy locally because they want to learn more about where their food comes from and make connections with the people who produce it.



Although consumer demand is the primary motivation for expanded local food networks, national leaders, in an era of bioterrorism threats and increased energy costs, have recognized that direct farm businesses can play a critical role in local and regional food security plans. For example, the Federal Farmer-to-Consumer Direct Marketing Act (7 U.S.C. Chapter 63) recognizes the importance of direct farm businesses by funding state direct marketing assistance programs and directing a yearly survey to determine what methods of direct farm marketing are being used.

Direct farm businesses can meet these demands while increasing profitability for farmers and local producers. Selling directly to consumers increases the farmer's share of the consumer's food dollar, which often goes predominantly to brokers and processors in conventional food supply systems. Furthermore, building a connection with customers and the community can make farming a more enjoyable and rewarding experience.

However, managing a successful direct farm business can be difficult due to a labyrinthine set of laws and regulations. These rules touch upon nearly every action a producer might take, from the obvious (such as paying taxes or hiring employees) to the unexpected (such as designing livestock barns). Adding to the complexity, direct farm business rules are implemented and enforced by more than a dozen local, state, and federal government authorities that each have their own (sometimes overlapping) requirements. Just figuring out who to contact about a particular law or regulation can sometimes be a daunting task. Therefore, the authors developed this Guide to help clarify some of the most important rules pertaining to direct farm businesses and to provide guidance on how and where to get correct information about them. The goal of this Guide is to foster a more vibrant direct farm business

environment – not only for the farmers who bring locally-grown food to markets within their communities, but also for the consumers who buy that food.

The introductory section of this Guide is divided into four sections, each of which offers some basic information that should be helpful in understanding the other chapters of this Guide. These first four sections provide the general rules, but in some cases exceptions to those rules will apply. As noted below, farmers who are considering starting (or expanding) a direct farm business should consult with an attorney to ensure full compliance with all applicable rules and regulations.

I. USING THIS GUIDE

This Guide is divided into two primary sections. Section I outlines rules that apply to all farming operations, regardless of agricultural product and marketing strategy. Section II is organized according to agricultural products. Whether the reader starts with Section I or Section II probably doesn't matter, but it's important to consider the information from both sections when constructing a business plan. Following are a few additional notes about the guide.

Legal-eze: Because this Guide attempts to explain the law, the authors must use terms that have precise meaning to lawyers. Some common English words have a legal meaning that is different or more exact than the common usage, and others are phrases based in Latin. For the reader's convenience, there is a glossary of terms at the back of the guide. For further reference, Law.com's **legal dictionary**¹ is a useful website with explanations of many common legal terms.

Internet Links: Throughout this Guide, the authors have provided links to websites that provide additional information and resources. These online resources are highlighted in bold text; for ease of reading, the website URLs are provided in footnotes to the bolded terms. Internet links and resources do not always remain in one place, but the supporting documents referenced in this Guide are public, and a simple Google search on key terms can in some cases locate a broken link or its updated version or location.

Statutes and Regulations: References to specific statutes or regulations are accompanied by citations in parentheses so that the reader can look up the exact language of the text. Citations are also a helpful starting point for searching the Internet for more information or contacting the regulatory agency or an attorney. Below is an explanation of the most common citation formats and websites where the statutes and regulations can be obtained. In most cases, the first number is the Title, and the numbers following the code's name are chapters or subsections.

U.S.C. § ## are federal laws – otherwise collectively known as the U.S. Code. They can easily be accessed at www.gpoaccess.gov (official site) or at www.law.cornell.edu/uscode/ (Cornell University). Three of the most common federal statutes cited in this book are the Tax

¹ www.dictionary.law.com

Code, which is in Title 26; the Food, Drug and Cosmetic Act, which is in Title 21; and Agriculture, which is in Title 7.

C.F.R. ### are regulations implemented by federal agencies. IRS regulations are in Title 26 and FDA regulations are in Title 21. Department of Agriculture regulations are divided between Title 7 and Title 9. Selected CFR titles are available online at

<http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>

ILCS ##/#### are Illinois laws. Unlike the other codes, the number preceding ILCS is the chapter, and the numbers following ILCS are the sections and subsections. The statutes are available online at <http://www.ilga.gov/legislation/ilcs/ilcs.asp>

IAC ###.### is the Illinois Administrative Code. It is available online at

<http://www.ilga.gov/commission/jcar/admincode/titles.html>

Finally, a brief article on how to find laws in Illinois can be found on the University of Illinois Farmdoc website.²

Federal vs. State Law: Federal and state law do not always impose the same requirements, and often one establishes stricter standards. Always comply with the strictest standards – the existence of a more lenient law does not excuse non-compliance with the other government’s standards.

Checklists and Further Resources: At the end of each chapter there is a short checklist of the important issues to consider and/or information on additional resources.

II. OVERVIEW OF ADMINISTRATIVE AGENCIES

Before delving into the specifics of the laws and regulations, it may be useful to have a basic understanding of the state-federal regulatory system and which agencies have authority over what operations. The Constitution gives the U.S. Congress power to regulate any goods traveling in interstate commerce (i.e., goods that cross state lines). The U.S. Supreme Court has interpreted this to include regulatory power over activities that *affect* goods traveling in interstate commerce, even if those activities might take place completely within state lines.³ In addition, however, the Constitution allocates to the states the power to regulate everything not exclusively reserved for the federal government or protected by the Constitution. Therefore, states can impose additional regulations on items within their borders that are already subject to federal regulations, as well as regulate items and activities over which the federal

² http://www.farmdoc.illinois.edu/legal/articles/ALTBs/ALTB_05-03/ALTB_05-03.pdf

³ Perhaps the most striking example of this idea is *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Supreme Court held that a farmer who was growing wheat solely for his own private consumption was nonetheless subject to congressional regulation because the intrastate growth of wheat, viewed in the aggregate, had a “substantial economic effect” upon interstate commerce.

government does not have authority. The one limit on this allocation of power is that federal law is supreme over state law, so if the federal law contradicts or is inconsistent with a state law, the federal law controls.

Federal Agency Rulemaking

When Congress appoints a federal agency to implement rules, it is delegating congressional authority. Therefore, properly implemented regulations have the same authority as a statute written by Congress. “Properly implemented” means that the agency has promulgated the rules according to the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.), which outlines procedures for agency operation. The most common type of rulemaking procedure is notice and comment rulemaking, in which the agency issues a notice of proposed rulemaking in the Federal Register, receives comments from the public, and issues a final rule that takes into consideration the public’s comments. The less common form of rulemaking is known as formal rulemaking, which requires a trial-like procedure with hearings, testimony, and final decisions made on the record. Whether developed through notice and comment or formal rulemaking, all final agency rules are published in the Code of Federal Regulations (CFR).

Agencies also use guidance documents to establish policies that help the agency interpret and apply its own rules. These documents are also often called policy guides, technical information bulletins, or interpretive manuals. If not established through notice and comment or formal rule making, policies set forth in guidance documents are not binding upon the agency. Nonetheless, they help to guide and inform much of agency procedure, and many courts consider them to be persuasive evidence when determining the legitimacy or scope of an agency action.

State Rulemaking

Illinois has a comparable Administrative Procedure Act (5 ILCS 100) which imposes the notice and comment rulemaking procedure, with notices published in the Illinois Register and final rules codified in the Illinois Administrative Code (IAC). As noted above, federal laws often overlap with Illinois laws on the same subject. For example, although the United States Congress has Constitutional authority to regulate all foods that affect interstate commerce, the Food, Drug and Cosmetic Act gives the Food and Drug Administration (FDA) authority only over foods shipped in interstate commerce (21 U.S.C. § 331). However, Illinois regulates all food – including that produced and sold entirely *within* the state - under its own Food, Drug, and Cosmetic Act (IL FDCA) (410 ILCS 620). Often, the IL FDCA incorporates federal standards as Illinois law.

One exception to this jurisdictional division based on inter- vs. intra-state food sales pertains to product labeling. Congress has exercised its power over all foods affecting interstate commerce

by giving FDA the exclusive authority to regulate labeling of packaged foods (21 U.S.C. § 343-1); for the most part, then, states may not impose additional requirements.

III. THE FOOD AND DRUG ADMINISTRATION'S FOOD CODE

Every four years, the FDA publishes the FDA Food Code, which is a model regulation for state and local officials to use in regulating food retail and food service establishments. The Code's purpose is to provide regulators with a scientifically sound legal basis for regulating the food industry. States are not required to adopt the Food Code, but a significant number of states nonetheless incorporate it nearly verbatim into their regulations. Illinois has in large part adopted the Food Code, though it does differ from the federal model language on a few points. This has several important ramifications for producers in Illinois.

First, FDA publishes many guidance manuals and standards for interpreting and applying the Food Code, as well as the scientific rationale for the rules the Code proposes. Therefore, if an Illinois inspector, operating under the rules of the Illinois Department of Public Health, requires a particular material or process for production, the mandate likely has roots in the FDA's standards. Looking to the FDA's model rule may help the producer understand the purpose of the requirement or work with the inspector to reach an alternative solution that meets the food safety standards inspectors strive for.

The second consequence of the Food Code's near-universal adoption is that producers may find it easier to sell products out-of-state. All of Illinois's neighbors have adopted some version of the Food Code. Since the Food Code standardizes the rules, complying with Illinois's rules brings a producer very close to satisfying both federal and neighboring states' food safety rules. To be sure, some additional steps (or inspection certificates) may be necessary in order to sell products across state lines, but most producers who are in compliance with Illinois's requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

IV. ILLINOIS DEPARTMENT OF PUBLIC HEALTH

Numerous Illinois agencies regulate agricultural production and marketing - topics which individual chapters of this Guide cover in more detail. However, the Illinois Department of Public Health has issued general rules that apply to *all* food sales, which are addressed below.

Adulterated Food

The IL FDCA prohibits the sale of adulterated food (410 ILCS 620/3). "Adulterated" means "produced, prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered diseased, unwholesome, or injurious to health" (410 ILCS 620/10(a)(4)). Further, Illinois Department of Public Health ("IDPH") regulations require all food sold at retail or at food service establishments to be from

sources that comply with all applicable food safety and labeling laws (77 IAC 760.100; 77 IAC 750.100). This means everything sold in Illinois, other than raw, unprocessed commodities, must come from an inspected and licensed facility.

Construction and Sanitation of Food Processing Facilities

In addition to oversight of food content and labeling, the IDPH also has the authority to regulate the construction and sanitation of food production and processing facilities under the Illinois Sanitary Food Preparation Act (ISFPA) (410 ILCS 650). The Illinois Department of Agriculture (“IDOA”) enforces the ISFPA for meat and poultry facilities (410 ILCS 650/11).

IDPH inspectors certify facility compliance subject to general regulations concerning the construction, equipment, and processes for producing food (77 IAC Part 730). These regulations mandate surface sanitization, vermin control, sewage disposal, adequate clean water, sanitary facilities for employees, and adequate sanitation principles and processes. The regulations are necessarily vague because they apply to a variety of production facilities, and inspectors will interpret each regulation based on its applicability to a particular operation.

Food Processing Requirements

Processors must also comply with requirements that are specific to the type of food processed. IDPH bases these requirements on the unique health and safety risks inherent to each food, and many times, decisions on adequacy are made by local regulators or individual inspectors. IDPH communicates guidance to its inspectors through training and technical bulletins, which are guidance documents that facilitate consistent interpretation and application of the regulations, but are not binding rules. Therefore, an individual inspector’s or local IDPH office’s interpretation of the applicability of rules to unique facts may differ. In any case, inspectors cannot allow a facility to fall *below* the general standards established in the regulations.

Although IDPH is the primary agency regulating direct-to-consumer sales of food in Illinois, additional agencies have significant regulatory authority over the food supply chain. The following chart summarizes the agency activities.

AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

ACTIVITY	FEDERAL AGENCY	STATE AGENCY
Environmental permitting	Environmental Protection Agency (EPA)	Illinois Environmental Protection Agency
Employee relations	Occupational Safety and Health Administration (OSHA)	Illinois Department of Labor
Taxes	Internal Revenue Service (IRS)	Illinois Department of Revenue
Animal welfare	United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service	Illinois Department of Agriculture
Meat, poultry, & eggs	USDA Food Inspection Safety Services, for all products shipped across state lines	Illinois Department of Agriculture, for all products sold entirely within Illinois
Food other than meat, poultry, & eggs	Food and Drug Administration (FDA), for products shipped across state lines and labeling of <i>all</i> foods	Illinois Department of Public Health, Division of Food, Drugs, and Dairies, for all food sold in Illinois
Organics	USDA Agricultural Marketing Service (AMS)	n/a

SECTION I: FARMING OPERATIONS



CHAPTER 1: STRUCTURING THE BUSINESS

There are many types of direct farm businesses, such as farmer's markets, roadside stands, U-pick operations, agri-tourism businesses, Community Supported Agriculture (CSAs), mail order/Internet sites, and delivery service to homes, restaurants, schools, or institutions.

A direct farm business may consist of one of these types, or a combination. For example, a farmer might sell products at the farmer's market on Saturday and to a CSA during the week. Or a farmer could run a U-pick pumpkin farm, a roadside stand that sells foods made from pumpkins, and a bed and breakfast. But in any case, *the type of direct farm business selected triggers different legal considerations*. These considerations are covered within the different chapter topics throughout this Guide.

I. PLANNING THE DIRECT FARM BUSINESS

Feasibility Studies and Business Plans



The first step in the process of establishing a direct farm business is *planning*. It's a mistake to rush into a direct farm business without first determining the nature of the business and what it will cost to establish it. Begin by asking: "Is the business I am proposing feasible?" The Illinois Department of Commerce and Economic Opportunity (ILDCEO) has published a **comprehensive guide**⁴ to starting a small business, which includes the basics of how to conduct a *feasibility study*. The feasibility study portion of the comprehensive guide is available as a separate appendix.

The second step in the planning process is to develop a written business plan. The main advantage to writing out a business plan is that it will force farmers to think carefully about each aspect of their proposed business. It will also help identify weaknesses in strategy and flag areas in which additional help and expertise may be needed. Appendix B of the ILDCEO guide contains information on developing such a plan. The Illinois Entrepreneur Network also offers a **step-by-step guide**⁵ to developing a business plan.

Additional business planning resources are listed on the following page.

⁴ available at <http://www.ildceo.net/NR/rdonlyres/6870B1A1-B7B4-4FCA-B073-1A1DD76176CD/0/StartingYourBus1008.pdf>

⁵ available at http://dceo.net/NR/rdonlyres/B8CE5643-E765-43A0-8B7A-ADD5E5F61206/0/IL_Plan_JUL06.pdf

Business Planning Resources

1. **The Illinois Farm Beginnings Program** offers training opportunities for those interested in establishing sustainable, small-scale farming operations. Programs involve business planning seminars, on-field farm days that offer hands-on training, and one-on-one mentorship programs.

→ <http://illinoisfarmbeginnings.org/>

2. Business planning assistance is available from **Small Business Development Centers** (sponsored by the Illinois Entrepreneur Network and the Illinois Department of Commerce and Economic Opportunity (ILDCEO)).

→ <http://dceo.net/dceo/Bureaus/Entrepreneurship+and+Small+Business/>

3. **The Guide to Direct Farm Marketing**, published by The National Sustainable Agriculture Information Center, through the Appropriate Technology Transfer for Rural Areas (ATTRA) program, details several direct farm business alternatives (including case studies) and provides resources for further reference.

→ <http://www.ildceo.net/NR/rdonlyres/6870B1A1-B7B4-4FCA-B073-1A1DD76176CD/0/StartingYourBus1008.pdf>

4. **The Initiative for the Development of Entrepreneurs in Agriculture program (IDEA)**, sponsored by University of Illinois Extension, provides educational support and technical assistance for anyone interested in alternatives to commodity agriculture, including direct farm marketing. The IDEA website contains a directory with links to further resources on business planning, market and product development, and technical management of a farm, among others. The site also contains fact sheets that summarize many of these issues.

→ <http://web.extension.illinois.edu/iidea/index.html>

5. A particularly useful outgrowth of IDEA is the **Marketmaker™** website, which brings together agricultural supply chain partners. It specifically helps direct farm marketers by improving knowledge of where food consumers are located and how they make food-related purchasing decisions. The site provides searchable and map-able demographic, consumption, and census data that a producer can use to identify potential markets. Producers can also list themselves for free on Marketmaker, thereby becoming part of a searchable database that individual consumers, retailers, and restaurants use to find suppliers.

→ www.marketmaker.uiuc.edu

6. **How to Direct Market Farm Products on the Internet**, a 50-page guide published by the Agricultural Marketing Branch of the USDA in 2002, contains valuable information on the advantages of Internet marketing, advice on how to conduct market research and develop a marketing plan, and how to set up and market a website. The appendix contains examples of actual direct farm marketers on the Internet.

→ www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3101222

Assumed Name Registration

Direct farm business owners often adopt an "assumed name" for their business (e.g., Sunnyside Farm) when they do not wish to conduct the business in their real names (e.g., Jane and John Doe Farm). All assumed names must be registered, but the type of business entity farmers choose will determine where the registration paperwork is filed. The Illinois Assumed Business Name Act requires *sole proprietors and general partnerships* (discussed below) to file a certificate with the County Clerk in the county in which the business is being operated and publish notice in a newspaper of general circulation in the county of registration once a week for three consecutive weeks (805 ILCS 405). Failure to obtain the certificate constitutes a Class C misdemeanor for each day of unregistered operation. All other business entities with assumed names must file an application with the Illinois Secretary of State. Each type of business entity has a separate assumed name application form. The forms are available at the **Illinois Secretary of State's website**,⁶ among the forms for each type of business entity.

II. WHAT BUSINESS ENTITY SHOULD YOU CHOOSE?

One of the first steps in establishing any business is deciding the business entity – that is, the formal legal structure under which the business will operate. Typical farm business entities include the sole proprietorship, partnership or limited partnership, corporation (for-profit or nonprofit), S corporation, limited liability company (LLC), and cooperative.

Although this section touches on the tax implications of business form choice, the subject is discussed in more detail in the "Taxation" chapter of this Guide. Because the law treats certain forms of businesses differently than others, *the following generalized information should not be considered a substitute for consulting with a qualified attorney and/or accountant prior to choosing a business form*. Consulting with a professional is important because the entity selected affects potential tax and legal liabilities, as well as business succession and estate planning. In addition, each form varies as to setup cost and complexity.

For those interested in learning more detail about entity choices for the farm business, the National Agricultural Law Center at the University of Arkansas published in 2002 *An Overview of Organizational and Ownership Options Available to Agricultural Enterprises*. The article is divided into two sections. **Part I**⁷ covers general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships. **Part II**⁸ covers limited liability companies, corporations, and cooperatives. Although not specifically aimed at direct farm businesses in Illinois and therefore not a substitute for advice from legal counsel in Illinois, the overview is nonetheless helpful in understanding the legal and tax implications of the various business entities.

⁶ http://www.cyberdriveillinois.com/departments/business_services/publications_and_forms/home.html

⁷ http://www.nationalaglawcenter.org/assets/articles/goforth_ownership1.pdf

⁸ http://www.nationalaglawcenter.org/assets/articles/goforth_ownership2.pdf

Sole Proprietorships

The sole proprietorship is a business owned and operated by one individual.⁹ The majority of farms are owned as sole proprietorships, as they easily are formed and administered. If a sole proprietorship operates under an assumed name (e.g., John Doe operates a direct farm business using the name "Green Acres" instead of "John Doe's Farm"), the business must register with the county in which it operates. Registration requirements are explained elsewhere in this Guide in the section on Assumed Name Registration. A sole proprietorship must also register with the Illinois Department of Revenue for tax purposes.

Under a sole proprietorship, the law treats the owner and the business as one and the same. This makes the owner personally responsible for the *legal* and *tax* liabilities of the business. Therefore, a creditor of the business can force the owner to sell personal assets in order to pay the debts and obligations of the business; on the other hand, assets from the business may be used to satisfy personal debts (an action normally prohibited in most other business entities). Additionally, the individual owner is taxed personally on the profits generated by the sole proprietorship, which makes filing taxes somewhat easier.

A. Corporations

The Business Corporation Act of 1983 governs the formation and operation of corporations in Illinois (805 ILCS 5). The structure of a corporation can be complicated, but basically, a corporation consists of two separate parts: A *board of directors* and *shareholders*. Shareholders finance the corporation's existence by purchasing stock in it; each stock share represents an ownership stake in the corporation, though individual shareholders typically have no say in the day-to-day operations of the corporation. Rather, shareholders elect a board of directors, which is responsible for making all decisions related to the corporation's affairs. As a result of their position, members of the board of directors owe certain *fiduciary duties* to the corporation. A corporation is formed by filing articles of incorporation with the Illinois Secretary of State.¹⁰

The articles of incorporation dictate the management of the corporation's affairs and outline the issuance of shares to shareholders.

The corporate form is advantageous in some respects: The corporation is a separate legal entity from its owners (shareholders), who are therefore not personally liable for the corporation's

⁹ In a very limited exception, spouses may co-own a sole proprietorship. This can impact filing and paying taxes, but otherwise makes little difference.

¹⁰ The Illinois Secretary of State has published a 24-page **Guide for Organizing Domestic Corporations**, which is available at http://www.cyberdriveillinois.com/publications/pdf_publications/c179.pdf. This guide provides helpful information on: forming and filing the articles of incorporation; choosing the corporate name, registered agent, and corporate purpose; establishment of a board of directors; organizing the corporation; opting for close corporation form; and the forms and fees applicable to corporations in Illinois.

liabilities and debts. On the other hand, incorporation is time-consuming and expensive due to the paperwork and filings required by the statute. Further, there are many statutory and administrative formalities that *must* be followed when operating the corporation. Owners who fail to follow these formalities may lose their personal liability protection. Finally, corporations are subject to “double taxation” - the government taxes the corporation on its profits and the owners/shareholders pay individual income tax on profits distributed as dividends.

The Internal Revenue Service Code classifies corporations as either "Subchapter C corporations" or "Subchapter S corporations." The IRS considers all corporations C corporations unless shareholders elect S corporation status. Electing Subchapter S status with the IRS, if certain requirements are met, may avoid this double taxation problem.

S Corporations

S corporations elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation. A corporation elects S corporation status with the IRS by filing **Form 2553**.¹¹ Only after the IRS accepts the registration may the corporation file its taxes as an S corporation. Although avoiding double taxation is appealing, an S corporation can be difficult to establish due to many restrictions. S corporations can have no more than 100 shareholders and all must agree to the S corporation status. All shareholders must be U.S. citizens or resident aliens and only individuals, estates, certain exempt organizations, and certain trusts can be shareholders. The S corporation must be a U.S. company. Finally, an S corporation may have only one class of stock with limitations on the type of income that holders of that stock receive. Despite these limitations, the smaller scale of many direct farm businesses may make S corporations an attractive option.

Close Corporations

Close corporations are a form of corporation in which the stock is “closely held” by only a few individuals or families and is rarely, if ever, purchased or sold. Illinois law allows these entities to avoid some of the formalities of regular corporations while continuing to protect individual owners from liability. To be a close corporation, two basic requirements must be met: (1) the corporation’s Articles of Incorporation must state that the corporation is being organized as a close corporation, and (2) the corporation must place certain restrictions on the transfer of all its issued and outstanding stock shares. Once formed, the close corporation form gives its shareholders wide latitude to manage the business, primarily by permitting broad shareholder agreements and allowing shareholders to operate without a board of directors. Therefore, the close corporation may be a desirable option for stable businesses owned and operated by a few individuals, perhaps family members, instead of public shareholders.

¹¹ The form is available online at http://www.cyberdriveillinois.com/publications/pdf_publications/c179.pdf. Further instructions are available at <http://www.irs.gov/pub/irs-pdf/i2553.pdf>.

B. Partnerships

A *partnership* (also known as a *general partnership*) is an association of two or more persons who combine their labor, skill and/or property to carry on as co-owners of a business for profit. The Uniform Partnership Act (1997) ("UPA") governs the formation of partnerships in Illinois (805 ILCS 206). There are no formal requirements for formation of a partnership, and one may be formed by default if more than one person is carrying on a business. The entity itself is not taxed; instead, tax liability passes through to the individual partners in pro rata shares.

One key difference between a corporation and a partnership is that in a partnership, each partner/shareholder is an agent of the business and thus has the authority to enter into binding obligations (such as contracts and other business transactions) on behalf of the partnership. Moreover, all partners are *personally liable jointly and severally* for the debts and obligations of the partnership. This means that if the partnership lacks the assets to pay its debts, creditors may force the partners to pay the partnership's debts out of their personal assets. If one partner has no personal property, creditors can force the other partners to personally pay the full debts of the partnership, even if they were not personally responsible for the debt. Another disadvantage is that if one partner leaves the partnership, the partnership might automatically dissolve, depending on the circumstances of the partner's departure. In addition, partnership shares are not freely transferable and create special concerns for both business succession and estate planning. Despite these limitations, general partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status. From a liability perspective, however, other forms of partnership may be more desirable.

Limited Liability Partnerships

The formation of a *limited liability partnership* (LLP) is governed by Article 10 of the UPA (805 ILCS 206). There is no separate statute outside the UPA concerning LLPs. Under Article 3 of the UPA, all general partners in an LLP are shielded from *personal* liability for the debts and obligations of the partnership, regardless as to how the debt or obligation is created.¹² The *partnership* remains jointly and severally liable, however, for a partner's wrongful act or omission, or other actionable conduct, so long as the partner is acting in the ordinary course of business of the partnership or with authority of the partnership. This liability shield for partners is one important benefit of the LLP over the general partnership form.

To form a LLP, partners first must create a general partnership. Once formed as a partnership, members of the partnership must vote to amend the partnership agreement to become an LLP.

¹² Specifically, *see* 805 ILCS 206/306(c).

The LLP then files a statement of qualification with the **Illinois Secretary of State**.¹³ An LLP often is called a *registered* LLP because of this filing requirement. A renewal statement must be filed each year. Although not overly burdensome, the filing and fee requirements are one of the downsides to pursuing an LLP business form.

Limited Partnerships

The **limited partnership** (LP) addresses the problem of exposure of the partners to unlimited personal liability by separating the partnership into two classes: general partners, who remain personally liable for the partnership's obligations, and limited partners, who possess the same personal liability protection as the shareholders of a corporation. Although limited partners are shielded from personal liability, the *partnership* remains liable for the actions of a general partner's wrongful act or omission, or other actionable conduct.

The Uniform Limited Partnership Act (2001) governs the formation of limited partnerships in Illinois (805 ILCS 215). Among the requirements for formation and operation of an LP are filing a certificate and annual reports with the **Illinois Secretary of State**.¹⁴

One of the benefits of an LP is that limited partners may deduct their losses for taxation purposes up to the extent of their investment - an advantage not available to shareholders of corporations. Limited partnership interests also are freely transferable, but are subject to filing requirements and fees.

Limited Liability Limited Partnerships

The **limited liability limited partnership** (LLLP) is another business entity authorized by the Uniform Limited Partnership Act (2001) (805 ILCS 215). Unlike in the LP, the general partners in an LLLP are not personally liable for obligations of the partnership solely because they are general partners. The liabilities of the LLLP are the partnership's alone - similar to a corporation.

The LLLP must file **the same certificate**¹⁵ with the Illinois Secretary of State as an LP, but must elect LLLP status on the form and attach a statement indicating that the LP is an LLLP. Furthermore, each partner must consent to the filing of the business as an LLLP.

Limited Liability Companies (LLC)

The Limited Liability Company Act governs the establishment and operation of LLCs in Illinois (805 ILCS 180). An LLC enjoys the benefits of both the LP and a corporation. Members of an

¹³ Forms are available at

http://www.cyberdriveillinois.com/departments/business_services/publications_and_forms/llp.html

¹⁴ Filing forms are available at

http://www.cyberdriveillinois.com/departments/business_services/publications_and_forms/lp.html

¹⁵ Available at http://www.cyberdriveillinois.com/departments/business_services/publications_and_forms/lp.html

LLC enjoy limited liability against claims and debts of the LLC and the favorable pass-through tax treatment of an LP. Yet they have more management flexibility because they can elect to manage the corporation themselves or designate managers through the articles of organization.

The Illinois Secretary of State has published a 16-page *Guide for Organizing Domestic Limited Liability Companies*,¹⁶ which provides helpful information on the articles of organization, filing the articles of organization, organizing the LLC, other required filings, and forms and fees.

LLCs, LLLPs, and LLPs are all very similar in that they provide three main advantages: liability shields for owners and managers, beneficial tax status, and flexible management options. They differ primarily as to how they are created. Depending on the specifics of the direct farm business, one model may offer greater benefits than the others. Therefore, it is important to speak with an attorney or a tax specialist when deciding which business form to use.

C. Cooperatives

A cooperative is a user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on amount of usage. Common reasons for forming agricultural cooperatives include improved marketing or access to markets and increased efficiency in delivering to markets.

In Illinois, The Agricultural Co-operative Act governs the formation and operation of an agricultural cooperative (805 ILCS 315). The Act requires an agricultural cooperative to be an association of eleven or more persons, a majority of whom are residents of Illinois and engaged in the production of agricultural products. The association may engage in cooperative activity in connection with a broad array of activities, including producing, marketing, or selling agricultural products; harvesting, processing, and storing agricultural products; manufacturing, selling or supplying the machinery; equipment or supplies in relation to these activities; financing of these activities; and providing business and education services for bona fide producers. The cooperative may only admit members, or issue capital stock to, those persons engaged in the production of agricultural products and/or cooperative associations. Finally, there are some very detailed rules restricting how and why profits can be distributed. An attorney familiar with cooperatives can provide specific details.

Cooperatives can be complex to establish and operate because they require coordinating numerous individuals. Moreover, there are several legal documents necessary to running an effective cooperative, including an organization agreement securing financial commitments and patronage, articles of incorporation to be filed with the **Secretary of State**,¹⁷ bylaws governing the management of the cooperative, marketing agreements between the cooperative and its

¹⁶ Available at http://www.cyberdriveillinois.com/publications/pdf_publications/c334.pdf

¹⁷ Forms are available at http://www.cyberdriveillinois.com/departments/business_services/publications_and_forms/bca.html

members, and membership applications. The details of operating a cooperative are beyond the scope of this Guide, but several online publications provide good general information on establishing a cooperative, including the legal aspects of the operation:

- USDA/Rural Business Cooperative Service, *Cooperative Information Report*,¹⁸ September 1996, contains information on how to start a cooperative.
- *The Farmer's Legal Guide to Producer Marketing Associations*¹⁹ by Doug O'Neil, D. Hamilton, and Robert Luedeman.
- USDA, *Cooperative Marketing Agreements: Legal Aspects*,²⁰ July 1992.
- USDA/Rural Business Cooperative Service, *Cooperative Information Report 40*,²¹ 1990, provides sample legal documents for cooperatives.

¹⁸ Available at <http://www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm>

¹⁹ Available at http://www.nationalaglawcenter.org/assets/articles/obrien_producemarketing_book.pdf

²⁰ Available at <http://www.rurdev.usda.gov/rbs/pub/rr106.pdf>

²¹ Available at <http://www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2>

CHAPTER 2 – SETTING UP THE DIRECT FARM BUSINESS

After finalizing a business plan and selecting a business entity through which to operate the direct farm business, the next steps are to:

- finalize a *site* for the direct farm business.
- obtain all necessary *permits, licenses and registrations* required by the State of Illinois and local governments.
- adequately *insure* the operation.

I. SITING

County zoning laws, environmental regulations, and potential nuisance claims are important considerations in choosing where to site a farm and may affect what activities are allowable on the land.

A. *County Zoning*

The Illinois Counties Code (55 ILCS 5/5) authorizes counties to regulate land use by implementing measures to regulate and restrict the location and use of buildings, structures and land (55 ILCS 5/5-12001). The county's seemingly broad power relating to land use is limited with respect to land used for agricultural purposes (*id.*). Specifically, counties may not impose regulations, eliminate uses, buildings, or structures, or require permits with respect to land used for agricultural purposes. However, counties may require certain setback lines for agricultural operations.

This raises the question of what exactly an "agricultural purpose" is, and more importantly, whether a direct farm business qualifies as one. The Counties Code defines an agricultural purpose as:

the growing of farm crops, truck garden crops, animal and poultry husbandry, apiculture, aquaculture, dairying, floriculture, horticulture, nurseries, tree farms, sod farms, pasturage, viticulture, and wholesale greenhouses when such agricultural purposes constitute the principal activity on the land. . . .

Example: Champaign County Zoning Ordinance

Roadside stands are permitted by right if operated by the farm operator in an area zoned agricultural. Roadside produce stands not operated by the actual farm operator may be allowed under a special use permit.

Rural specialty businesses are allowed by right if they qualify as a "minor" rural specialty business. To qualify as a "minor" rural specialty businesses, the total area of the specialty business (that is not otherwise "agriculture") must be less than one acre, total sales display area must be less than 2,000 sq. ft. (no more than 50% of which may be indoors), alcoholic beverages may not be sold unless produced on the premises, and the business may not include a "food service establishment" as defined by the Champaign County Health Ordinance (Ord. No. 573). An exception to this last requirement is that a "minor" rural specialty business may include a "food store" as defined by the county health ordinance. "Major businesses" require a special use permit from the county.

Agritourism presents a slightly more complex analysis regarding whether it is exempt from county zoning rules. If the operation meets the criteria above, it would qualify as a "minor" rural specialty business, and thus be allowed as a matter of right. However, if the business wished to use sound amplification equipment (for instance, a hayrack ride with "spooky" music on Halloween or a "Fall Farm Music Festival") the business would need a "Temporary Use Permit" as well as an "Entertainment and Recreation License" from the county.

More intensive farm business activities generally require special use permits. Examples might include farm chemical sales, livestock sales facilities, slaughter house or grain elevators.

Illinois court cases interpreting this definition indicate that the statute exempts the "production" of agricultural products from county zoning regulation, but the cases fail to specify whether associated direct farm businesses such as farm stands, U-pick operations or agritourism are "agricultural purposes" that are exempt from county zoning restrictions. In some instances, county zoning ordinances following the guidelines of the state statute may provide a precise answer. At the individual county level in Illinois, the zoning ordinance usually will specify that farm stands and U-pick operations are "agriculture," and thus exempt from further zoning restrictions. Whether other farm business operations (e.g., basic food processing such as bagging mixed lettuce) are exempt under the county rules can be more difficult to determine, and farmers who are unsure of their legal status should contact an attorney for guidance. The sidebar provides an example of one county's interpretation of "agricultural purpose."

An additional zoning/siting concern arises when farmland intersects urban areas--a common situation for many direct farm operations due to the proximity to potential consumers. As towns or other urban areas expand, counties or cities may change the land's zoning classifications. For example, towns may annex farmland previously under county jurisdiction and subject the property to municipal zoning. Other land use changes may result when the county

itself rezones land due to development pressures. In either situation, governments could rezone productive farmland from "agricultural" to "residential" or "commercial," etc. The existing farm operation would be grandfathered as a "non-conforming use," which would allow the

continuation of the farming operation, but prohibit other farm-related businesses such as farm stands or U-pick operations. Therefore, it is important to determine the precise zoning classification for the specific property, even if the property has been “farmed” continuously.

In sum, during the planning stage, a careful review of local zoning ordinances is essential. In addition to directly contacting the county clerk or local library for a copy of the applicable ordinances, links to many county and municipal rules can be found on the **Northern Illinois University College of Law website**.²²

B. Impacts on Neighboring Land

Farming operations, whether through generation of odors, particulates or even noise, can in some circumstances have a significant impact upon land surrounding the farm. Consequently, when choosing a farm site and planning production and processing activities, direct farm business owners should be aware of two legal issues concerning a farm’s impacts on neighboring land: Regulations on the siting of livestock facilities, and nuisance law.

Livestock Facilities

The *Illinois Livestock Management Facilities Act* (LMFA) (510 ILCS 77) and accompanying regulations (8 IAC Part 900) establishes requirements for the siting, design, construction and operation of livestock management and livestock waste-handling facilities. It also establishes a public information meeting process for facilities of a certain size. The legislature enacted the LMFA, in part, to control environmental and land use problems arising from the expansion and concentration of animal production.

The LMFA does not regulate all livestock farms; rather, it only applies to farms with a “livestock management facility,” which is “any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area” (510 ILCS 77/10.30). The LMFA would not apply to a pasture operation that uses only free-grazing techniques and temporary shelters.

Anyone who intends to build or expand a livestock management facility or livestock waste management facility must file notice with the Illinois Department of Agriculture (IDOA) (510 ILCS 77/11). Applicants should submit construction plans and IDOA’s **Notice of Intent to Construct form**.²³ Operators should submit the notice as soon as construction plans are finalized, because construction cannot begin until IDOA approves the plan (8 IAC 900.303).

The size of the proposed facility, calculated by “animal units,” affects how long the approval process will take. Farmers can determine the number of “animal units” on their farms by using

²² http://law.niu.edu/law/library/onlineresearch/legal_illinois_cities.shtml

²³ Available online at <http://www.agr.state.il.us/pdf/01noitcapplication.pdf>

the conversion chart available at the bottom of IDOA's **LMFA webpage**,²⁴ or by multiplying the number of animals they have by the conversion number for the type of animal they will be raising (see sidebar). The law treats all facilities under the same owner/operator within ¼ mile as a single facility (510 ILCS 77/10.30).

Animal Units Conversions

(1) Brood cows and slaughter and feeder cattle multiplied by 1.0.

(2) Milking dairy cows multiplied by 1.4.

(3) Young dairy stock multiplied by 0.6.

(4) Swine weighing over 55 pounds multiplied by 0.4.

(5) Swine weighing under 55 pounds multiplied by 0.03.

(6) Sheep, lambs, or goats multiplied by 0.1.

(7) Horses multiplied by 2.0.

(8) Turkeys multiplied by 0.02.

(9) Laying hens or broilers multiplied by 0.01 (if the facility has continuous overflow watering).

(10) Laying hens or broilers multiplied by 0.03 (if the facility has a liquid manure handling system).

(11) Ducks multiplied by 0.02.

At minimum, facilities that have more than 1,000 animal units and facilities that intend to use waste lagoons must file notice at least 37 days before beginning construction. Smaller facilities—i.e., those with less than 1,000 animal units and no lagoons—need only file notice 10 days in advance (510 ILCS 77/11). However, actual IDOA approval may take longer. Proposed facilities with over 1,000 animal units or with a lagoon must go through an IDOA public meeting process (8 IAC 900.401). The Department notifies the county, and the county board and residents have 30 days to request a public meeting. If someone requests a public hearing, the Department must hold the meeting within 15 days (8 IAC 900.405). There is a 30 day post-meeting comment period, and then the Department must make a decision within 15 days thereafter (8 IAC Part 900 Subpart D). If the facility is small or no one requests a public hearing, the Department should make its decision within 15 days (8 IAC 900.303(1)(b)).

Factors the IDOA will consider in deciding whether to approve a facility include siting, residential setback requirements and waste handling capacity. Setbacks do not apply to livestock management facilities serving fewer than 50 animal units, although these smaller facilities still must comply with the IL EPA “maximum feasible location” requirement (35 IAC 501.317). Essentially, this means that the facility must be as far from neighboring residences as possible or farther away than any already existing facilities (*id.*). Facilities serving 50 to 1,000 animal units must be set back ¼ mile from the nearest residence and ½ mile from the nearest populated

area. That distance increases by 440 feet for every additional 1,000 animal units the facility serves. If over 7,000 animal units, the facility must be set back ½ mile from the nearest residence and 1 mile from the nearest populated area. Setback distances may be decreased by innovative design or by obtaining waivers from the owners of residences located within the required setback distances. (510 ILCS 77/35; 8 IAC 900.202). The law and regulations impose

²⁴ <http://www.agr.state.il.us/Environment/LMFA/index.html>

additional siting and construction requirements on facilities proposed near 100 year flood plains and in karst areas²⁵ (510 ILCS 77/13; 8 IAC 900.502).

For more information on the LMFA, see **Illinois Department of Agriculture's webpage**.²⁶ Additional information on the LMFA, including a FAQ page, can be found on the University of Illinois Extension site, **EZ Regs**.²⁷ EZ Regs provides information on the application of environmental regulations on livestock and crop farms.

Nuisance Law

A nuisance is the substantial interference, either by act or omission, with a person's right to use and enjoy their property (*In re Chicago Flood Litigation*, 176 Ill.2d 179, 204 (1997)). The invasion of another's property must be (1) substantial, (2) either intentional or negligent, and (3) unreasonable (*Schiller v. Mitchell*, 357 Ill.App.3d 435, 441 (2005)). A nuisance may be a strong smell, loud noise, unsightly object, or some other condition causing substantial discomfort, so long as it is something that is perceptible to the senses (*Id.* at 442). Direct farm businesses must be aware of conditions they create that rise to the level of actionable nuisance, particularly those businesses in close proximity to land used for non-agricultural purposes. Courts have found some large livestock facilities to be a “nuisance” due to the presence of strong odors and flies such that neighbors can no longer use their property (e.g., unable to open windows in summer due to odors).

There are two types of nuisance claims: private and public. Private nuisance usually affects a single party or a definite, small number of individuals in the use or enjoyment of private rights (*Willmschen v. Trinity Lakes Improvement Ass'n*, 362 Ill.App.3d 546, 553 (2005)). Public nuisance generally is a condition affecting a substantial number of people or an entire neighborhood or community (*City of Chicago v. American Cyanamid Co.*, 355 Ill.App.3d 209, 214 (2005)).

Courts frequently balance the interests of both sides in determining liability for nuisance (*Gardner v. Int'l Shoe Co.*, 386 Ill. 418, 429 (1944)). Courts will also consider whether the complaining party came to the nuisance--that is, whether the condition existed when the complaining party acquired the property. While coming to the nuisance does not bar a nuisance action, it may help determine what, if any, damages are appropriate.

If a nuisance action is successful, the court may issue a temporary or permanent injunction, including an order shutting down the offending operation. In the alternative, a court may allow the nuisance to continue, but require the offending party to compensate the complaining party. Parties may also seek to permanently enjoin a potential or anticipated nuisance when it clearly

²⁵ Karst areas are areas where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater.

²⁶ <http://www.agr.state.il.us/Environment/LMFA/index.html>

²⁷ <http://web.extension.illinois.edu/ezregs/ezregs.cfm?section=viewquestions&ProfileID=1>

appears that a real and immediate nuisance would occur once the facility were to begin operation (*Nickels v. Burnett*, 343 Ill. App. 3d 654, 663 (2003)).

The *Illinois Farm Nuisance Suit Act* (740 ILCS 70) may protect some farmers from nuisance actions. Any farm that has been operating for more than one year, and was not a nuisance when it commenced operations, generally is immune from nuisance liability that results from changed circumstances in the surrounding area. The Act does not protect farmers from liability when they act negligently or operate the farm improperly. It is not clear whether the Act protects expansion of a farm's agricultural activity, or if the protection only applies to the farm as it existed when the surrounding area changed circumstances. Furthermore, courts in other states with similar statutes have sometimes found them unconstitutional because the government requires neighboring property owners to bear a burden -- the nuisance -- without compensation. Under the Illinois statute, a farmer who successfully defends against a nuisance suit typically does so at the expense of having had to hire a lawyer. Accordingly, the best defense for direct farm businesses is to operate in a reasonable, non-negligent manner and minimize potential interference with neighboring property.

II. REGISTRATION

A. *Animal Disease Traceability*

To protect the health of U.S. livestock and poultry and the economic well-being of those industries, the USDA's Animal and Plant Health Inspection Service (APHIS) developed the National Animal Identification System (NAIS) to identify and record the movement of livestock, poultry and other farmed animals throughout the United States. Through NAIS, APHIS aimed to achieve a 48-hour traceback of the movements of any diseased or exposed animal in the event of an animal disease outbreak.. NAIS consisted of three components: premises registration, animal identification and animal tracing. The program meant to protect livestock and poultry producers by enabling USDA to identify the location of a disease outbreak and which animals were exposed in order to limit the scope of quarantines and animal destruction while also adequately preventing any further spread. However, it met significant resistance from producers and state departments of agriculture. In February 2010, the USDA announced it would be overhauling the animal disease traceability system to apply only to animals traveling in interstate commerce and to be more flexible and accommodating to states' needs. Therefore, registration requirements of premises and animals for disease tracing are currently in flux. According to USDA press releases, the agency intends to develop a program in collaboration with states and tribal governments, and provide transparency through notice and comment rulemaking. For the most up-to-date information on the status of premises registration requirements, see **USDA's Animal Disease Traceability website**.²⁸

²⁸ <http://www.aphis.usda.gov/traceability/>

B. FDA Food Facility Registration

The Federal Food, Drug and Cosmetic Act (FDCA) requires all facilities that hold, pack, manufacture or produce food for animal or human consumption in the U.S. to register with the U.S. Food and Drug Administration (FDA) prior to beginning manufacturing/processing, packing, or holding food (21 U.S.C. § 350d). Facilities that fail to register face civil and/or criminal prosecution. However, many types of direct farm businesses are exempt from registration requirements (21 C.F.R. §1.226).²⁹ Farms, retail facilities, restaurants, nonprofit food facilities, fishing vessels, and operations regulated exclusively by USDA throughout the entire facility (e.g., facilities that handle exclusively meat, poultry, or egg products) are **exempt** from the registration requirement. Whether a direct farm business qualifies for an exception to the registration requirement depends on the definitions set forth in FDA regulations:

- **Farm** (21 C.F.R. § 1.227(b)(3)): A facility in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both. Washing, trimming of outer leaves of, and cooling produce are considered part of harvesting. The term “farm” includes:
 - Facilities that pack or hold food, provided that all food used in such activities is grown, raised, or consumed on that farm or another farm under the same ownership; and,
 - Facilities that manufacture/process food, provided that all food used in such activities is consumed on that farm or another farm under the same ownership.
- **Restaurant** (21 C.F.R. § 1.227(b)(10)): A facility that prepares and sells food directly to consumers for immediate consumption.
 - “Restaurant” includes entities in which food is provided to humans, such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens.
 - “Restaurant” also includes pet shelters, kennels, and veterinary facilities in which food is provided to animals.
 - “Restaurant” **does not** include facilities that provide food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers.

²⁹ FDA has published a helpful 16-page guide on facility registration (“What You Need to Know About Registration of Food Facilities”) that explains who must register (including exemptions) and how to register. It is available online at <http://www.directfarmbusiness.org/storage/fsbtreg.pdf>.

- **Retail Food Establishment** (21 C.F.R. § 1.227(b)(11)): A retail food establishment is defined by statute as “an establishment that sells food products directly to consumers as its primary function. *A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers* (emphasis added). A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term “consumers” does not include businesses. A “retail food establishment” includes grocery stores, convenience stores, and vending machine locations.”

Many questions arise as to whether a facility qualifies for an exemption under these definitions. FDA considers some facilities “mixed-type” that require registration. For example, a maple syrup operation that harvests maple sap and then heats the maple sap into syrup for sale *to a distributor or grocery store* is an example of mixed-type facility that requires registration, because even though taking sap from a tree is harvesting, heating sap into syrup is considered processing. Processing the sap for consumption off the farm removes the facility from the farm exception, and the facility would not qualify for the retail food establishment exception because the final product is not sold directly to consumers. On the other hand, if the farmer sold the sap only at a roadside stand, then it would qualify for the retail food establishment exception because the farmer would be selling directly to consumers.

The FDA has published a **guidance document**³⁰ that contains a long list of questions and answers regarding whether an exception to registration applies. There are also flowcharts at the end of this section that may assist in determining whether a facility is exempt from registration. Businesses that are uncertain whether they must register should contact an attorney or the FDA help line at 1-800-216-7331.

FDA maintains a **webpage**³¹ that contains step-by-step instructions and tutorials for registering online or by mail. Facilities are required to register only once. However, if information about the facility changes, the facility must update the registration within 60 days of the change. If a facility relocates, it must cancel the existing registration and submit a new registration. If the facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

³⁰ Available online at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm082703.htm#fn1>

³¹ <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm>

C. Federal and State Environmental Regulations

Farmers might also encounter issues with environmental permits and regulations. Because multiple agencies may have regulatory authority - depending on the environment and possible pollutants involved - environmental permitting is often very complex and individualized. This section provides a brief overview of some of the most common issues; however, it is not comprehensive. The Illinois Department of Agriculture maintains a **website**³² with information on the programs that it administers. The National Association of State Departments of Agriculture (NASDA), in conjunction with the National Agricultural Law Center, has published a more comprehensive *Guide to State Environmental Laws Affecting Illinois Agriculture*.³³ Certain federal environmental programs may also apply to agricultural operations, such as the Endangered Species Act and the Safe Drinking Water Act. The EPA has provided brief summaries of its programs on its **website**.³⁴ While these resources are useful starting points, farm operations should not rely exclusively on websites because they may not cover every potential environmental issue a farmer may encounter.

Finally, the Illinois Department of Commerce has an office of Regulatory Compliance Assistance to “help small businesses understand their environmental obligations.” Their **website**³⁵ may be a helpful place to start, but it is probably best to contact the agency directly to determine specific obligations based on the type of direct farm business.

Waste Management

There are multiple laws that require waste management plans, including the LMFA and the Federal Clean Water Act (CWA) (33 U.S.C. § 1541, *et seq.*). Three separate agencies in Illinois may require manure management plans: IL EPA, IDOA, and Illinois Natural Resources Conservation Service. Each agency’s requirements and operations subject to the requirements are different. However, University of Illinois Extension, in collaboration with these agencies, has developed a **website**³⁶ to help farmers create a management plan that will satisfy all three agencies. Following the steps on the website does not guarantee that all three agencies will approve the plan, but it is an excellent starting point.

The LMFA does not require livestock management facilities serving fewer than 1,000 animal units to prepare and maintain a formal waste management plan (510 ILCS 77/20(b); 8 IAC 900.802). However, when the facility closes, manure must be applied to land at agronomic rates consistent with the Illinois Agronomy Handbook (8 IAC 900.508). Waste management plans for

³² <http://www.agr.state.il.us/Environment/index.html>

³³ Available online at <http://www.nasda.org/nasda/nasda/foundation/state/Illinois.pdf>

³⁴ <http://www.epa.gov/agriculture/agmatrix.pdf>

³⁵

<http://www.ildceo.net/dceo/Bureaus/Entrepreneurship+and+Small+Business/Regulatory+Compliance+Assistance/default.htm>

³⁶ <http://web.extension.illinois.edu/immmp/auth/login.cfm>

larger facilities must address how to dispose of waste when a facility is removed from service (*id.*). The Act also requires that owners and operators have sufficient funds to clean up the facility after it closes (510 ILCS 77/17). Owners must remove all waste from non-lagoon livestock facilities within 12 months (510 ILCS 77/14(k)) and lagoons must be emptied within two years of closing (510 ILCS 77/15(e)). Finally, a certified livestock manager must manage all facilities with more than 300 animal units (510 ILCS 77/30).

Livestock waste handling facilities must be strong enough to hold the particular waste that they contain (510 ILCS 77/13). The Illinois EPA establishes construction standards for livestock waste handling facilities (35 IAC 506). Generally, non-lagoons must meet the standards in the Midwest Plan Services' *Livestock Waste Facilities Handbook* (510 ILCS 77/13; 35 IAC 506.304) and facilities using lagoons must comply with the "*Design of Anaerobic Lagoons for Animal Waste Management*" promulgated by the American Society of Agricultural Engineers or the national guidelines published by the USDA Natural Resource Conservation Service titled *Waste Treatment Lagoon* (510 ILCS 77/15; 35 IAC 506.204). The LMFA requires reporting of any release of waste of 25 gallons or more to IEPA (510 ILCS 77/18). The release can be reported using a form that is available from the **Illinois EPA**.³⁷

The Clean Water Act (33 U.S.C. § 1541, *et seq.*) (CWA) requires facilities that house exceptionally large numbers of animals to obtain permits under the National Pollutant Discharge Elimination System (NPDES). The Illinois Environmental Protection Agency (IEPA) administers the CWA in Illinois under an agreement with the Federal EPA. NPDES permits protect water quality by requiring facilities that release pollution into surface waters to treat their water discharges. IEPA sets pollutant limits for NPDES permits based on the facility's operation and the impairment of the water body to which the facility's water runs. All large concentrated animal feeding operations (CAFOs)³⁸ must obtain a permit, and medium CAFOs³⁹ must obtain a permit if they have man-made ditches or pipes carrying wastewater or manure from the operation to surface waters, or if the operation has animals that come into contact with surface waters in their confined areas. For more information on how to apply for a permit, see the IEPA's **CAFO website**.⁴⁰ Illinois EPA also addresses the permitting requirements of some

³⁷ Available at <http://www.epa.state.il.us/water/watershed/forms/livestock-waste.pdf>

³⁸ A facility is a large CAFO if it has more than 700 mature dairy cows; 1,000 veal calves; 1,000 beef cattle or heifers; 500 horses; 2,500 swine (each 55 lbs or more); 10,000 swine (each under 55 lbs); 10,000 sheep or lambs; 55,000 turkeys; 30,000 ducks (other than liquid manure handling systems); 5,000 ducks (liquid manure handling systems); 30,000 chickens (liquid manure handling systems); 125,000 chickens except laying hens (other than liquid manure handling systems); 82,000 laying hens (other than liquid manure handling systems).

³⁹ A facility is a medium CAFO if it has 200 - 699 mature dairy cows; 300 - 999 veal calves; 300 - 999 beef cattle or heifers; 150 - 499 horses; 750 - 2,499 swine (each 55 lbs or more); 3,000 - 9,999 swine (each under 55 lbs); 3,000 - 9,999 sheep or lambs; 16,500 - 54,999 turkeys; 10,000 - 29,999 ducks (other than liquid manure handling systems); 1,500 - 4,999 ducks (liquid manure handling systems); 9,000 - 29,999 chickens (liquid manure handling systems); 37,500 - 124,999 chickens except laying hens (other than liquid manure handling systems); 25,000 - 81,999 laying hens (other than liquid manure handling systems).

⁴⁰ <http://www.epa.state.il.us/water/cafo/>

common livestock scenarios through its fact sheet *Will an NPDES Permit be Required for my Operation?*⁴¹ The current federal rule is available on the **federal EPA website**.⁴² IEPA's livestock regulations are in 25 IAC Parts 501, 501, 560, 570 and 580.

As of the writing of this guide, there was a petition pending before the EPA to also regulate CAFO air emissions under the Clean Air Act. Updates on the status of that petition may be available through the **EPA's website**.⁴³

Wetlands

The federal Clean Water Act also requires landowners to obtain permits from the Army Corps of Engineers (the Corps) to discharge dredge or fill materials into waters of the United States (33 U.S.C. § 1344). Accordingly, a permit may be necessary prior to construction or farming in wetlands. These permits, known as Section 404 permits, are only an issue for new farms – the law has an exception for normal farming, silviculture and ranching activities that are part of an established operation (33 U.S.C. § 1344(f)). However, new farms, or farms resuming operations on land that has been unused for so long that modifications to the hydrological regime are necessary to commence operations, should first determine if a permit is necessary. The Corps defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas” (33 C.F.R. § 328.3). There are five Army Corps of Engineers districts in Illinois. The Illinois Department of Natural Resources maintains **a map**⁴⁴ that is useful for determining which district has jurisdiction.

Pesticide Regulation

The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Chapter 6) (FIFRA) requires EPA to approve *all* pesticides sold or distributed in the United States. Upon approval, the pesticides are subject to labeling requirements, and applicators must comply with the use and application restrictions on the labels. Applicators must meet training and certification standards. The FIFRA is also the law that established the worker protection standards discussed in the “Labor and Employment” section of this Guide. The *Illinois Pesticide Act* (415 ILCS 60) requires all pesticides in Illinois to be similarly registered with and labeled by the Illinois Department of Agriculture. The law also requires licensing of dealers and applicators. These requirements apply equally to organic and non-organic pesticides, though some pesticides are classified as “restricted use” and restrict use to only licensed applicators.

⁴¹ <http://www.epa.state.il.us/water/cafo/publications/common-scenarios-faq.pdf>

⁴² <http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm>

⁴³ www.epa.gov

⁴⁴ <http://dnr.state.il.us/wetlands/page62.htm>

Environmental Incentive Programs

Numerous state and federal programs provide financial and technical assistance to farmers who practice environmentally conscientious agriculture. These programs generally require the farmer to enroll their lands or sign a contract for a certain number of years. In exchange for implementing certain practices (or sometimes building structures), the farmer receives annual payments or technical assistance from the various agencies. A farmer's lands will probably need to be approved as eligible for the program (i.e., capable of furthering the program's purpose or priority goals) and will be subject to inspection to ensure ongoing compliance with the program. Providing detailed explanations of how all the programs work is beyond the scope of this guide. For more information on the federal programs, visit the **USDA's Natural Resource Conservation Service's webpage**.⁴⁵ For more information on Illinois-specific programs, visit the **Illinois Department of Natural Resources website**.⁴⁶

Direct farm businesses may also wish to participate in the National Organics Program. Under this program, once a farm has been certified as organic, it may place the official USDA Organic label on its products. For more information on Organic certification, see the "Organic Marketing" chapter of this Guide.

Finally, there are emerging markets which allow farmers to obtain payments in exchange for providing ecosystems services (i.e., tangible benefits that people obtain from ecosystems). These markets, known as ecosystems services markets or environmental markets, quantify activities, such as reducing emissions or setting aside land as nature preserves, and enable the owner to sell the service or benefit to interested parties. Conservation easements and land trusts - in which landowners agree to set aside parcels of land for conservation or wildlife protection - are examples of ecosystem services markets already in operation. Oftentimes, farmers can gain tax benefits from placing conservation easements on their land or transferring land into a land trust. The Land Conservancy of McHenry County maintains a **website**⁴⁷ that provides more general information about land conservation options in Illinois.

Developing markets include the greenhouse gas (GHG) carbon markets, such as the Chicago Climate Exchange, or those being considered in proposed federal cap and trade legislation. Section 2709 of the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill) directed the Secretary of Agriculture to "establish technical guidelines that outline science-based methods to measure the environmental services benefits from conservation and land management activities in order to facilitate the participation of farmers, ranchers, and forest landowners in emerging environmental services markets" (16 U.S.C. § 3845). As a result of this

⁴⁵ <http://www.nrcs.usda.gov/programs/>

⁴⁶ <http://dnr.state.il.us/OREP/pfc/Incentives.htm>

⁴⁷ <http://www.conservemc.org/Indopt.html>

legislation, the Department of Agriculture established the Office of Environmental Markets (OEM) in order to help facilitate the creation of market-based approaches to agriculture, rangeland, and forest conservation. More information on ecosystems services markets is available through the **USDA's Environmental Markets website**.⁴⁸

III. INSURANCE

To best determine the insurance needs of a direct farm business, start with a visit to a qualified insurance agent - preferably one who is familiar with how direct farm businesses operate. Farmers should be prepared to explain their operation in detail, and should request an insurance proposal from the agent that addresses the operation's every risk and potential amount of loss. Businesses may also wish to compare policies from multiple agents. Necessary insurance products may include premises liability (to cover liability for injuries that may occur on the property), workers' compensation, physical damage to business property, product liability, motor vehicle, crop insurance, and some kind of casualty insurance to cover transactions until title passes to the purchaser.

Many of these insurance needs may be incorporated into a basic farm insurance policy. These include losses to the farm dwellings and outbuildings, personal property (including tractors and other equipment), and premises liability arising from some incidental on-farm business operations. Depending upon the scale of the operation and the insurance company, roadside farm stands and U-pick enterprises may or may not be covered under incidental business operations in the basic farm insurance policy. Agritourism, petting zoos or seasonal farm festival activities generally are not considered incidental farm business operations for insurance purposes and will require specific endorsements. Insurance field agents can review all of these operations in order to implement best management practices that are designed to eliminate or reduce potential risks.

Additionally, farmers must consider their liability for selling produce contaminated with harmful bacterial pathogens. Though product liability issues generally are minimal in the commodity agriculture production business, especially when selling products for further processing later in the food supply chain. But when selling direct to the consumer, the risk of product liability increases, as the injurious product may be traced directly to the direct farm business. Many farmers mistakenly believe that their general farm insurance policy will protect them against liability resulting from harmful pathogens (e.g., Salmonella; E. coli) in raw and unprocessed fruits and vegetables. However, this may not be the case, because general farm insurance policies usually only cover injuries that occur on the farm premises, and foodborne illnesses typically occur somewhere else. In some cases, a general commercial liability insurance policy, or even separate product liability coverage, may be required.

⁴⁸ <http://www.fs.fed.us/ecosystems-services/OEM/index.shtml/index.shtml>

Furthermore, once a direct farm business transitions from agricultural commodity to *production* of processed goods, or *direct sales* to consumers of any kind, a basic farm policy may not cover injuries that occur in connection with that processing or sale – even if they occur on the premises insured by the farm policy. Some farm policies define “farming” and “business” separately and exclude any “business” operations – including, in some cases, U-pick operations – from policy coverage. In such a case, insurance coverage would not extend to a patron who trips on a rock in a U-pick parking lot on the premises and sues the farm owner for payment of her medical bills. And certainly, an on-farm business with a commercial scale kitchen would not qualify as “incidental” to the farm operation, but rather a commercial undertaking with particular insurance coverage needs.

Due to the variability of insurance coverage and prices depending upon the specific direct farm business, insurance needs and costs should be assessed early in the business planning process. Moreover, bank financing may require insurance expenses to be incorporated as part of the cost structure and profitability models in the business plan. Further, some potential customers (e.g., restaurants, institutional sales) may require proof of adequate insurance.

Again, it is important to discuss these issues with an insurance specialist and an attorney to ensure the business owner *and* the direct farm business have the necessary insurance coverage to protect the business assets and minimize personal liability exposure.

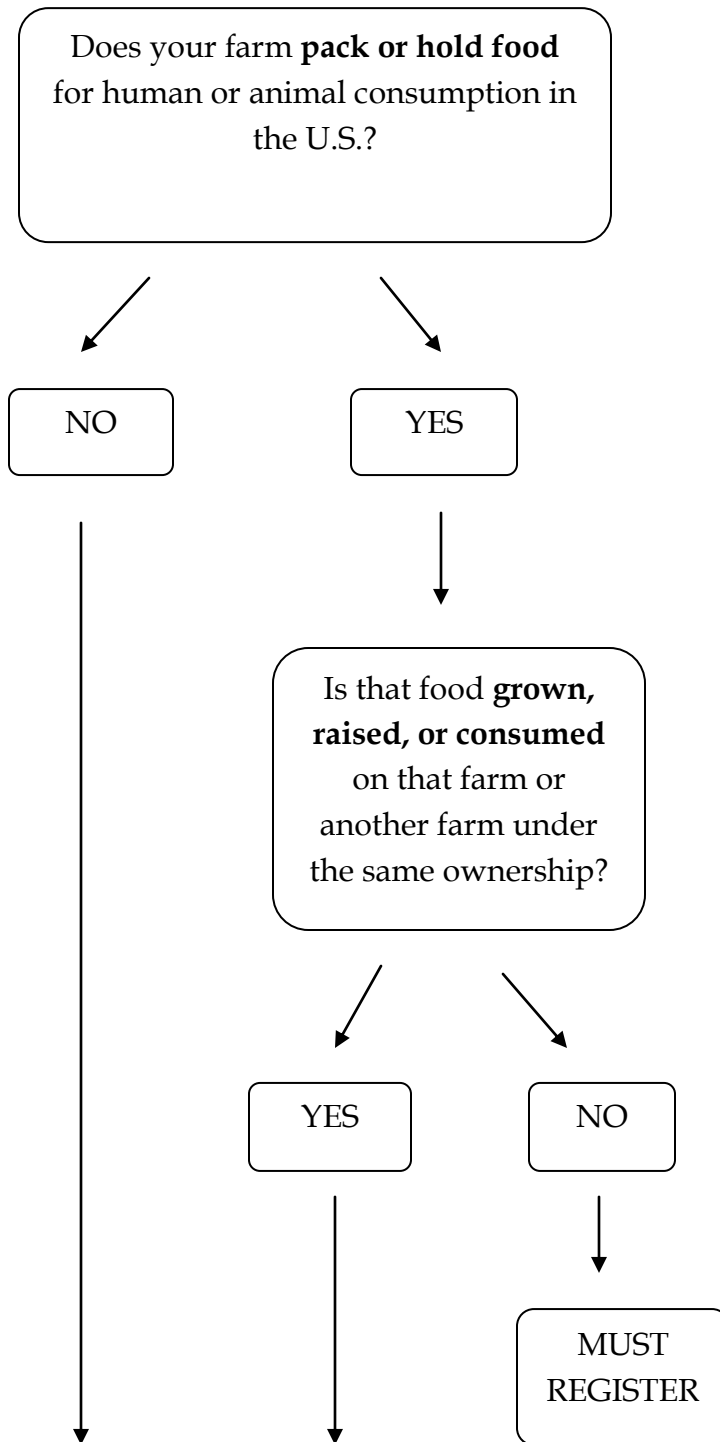
IV. CHECKLIST

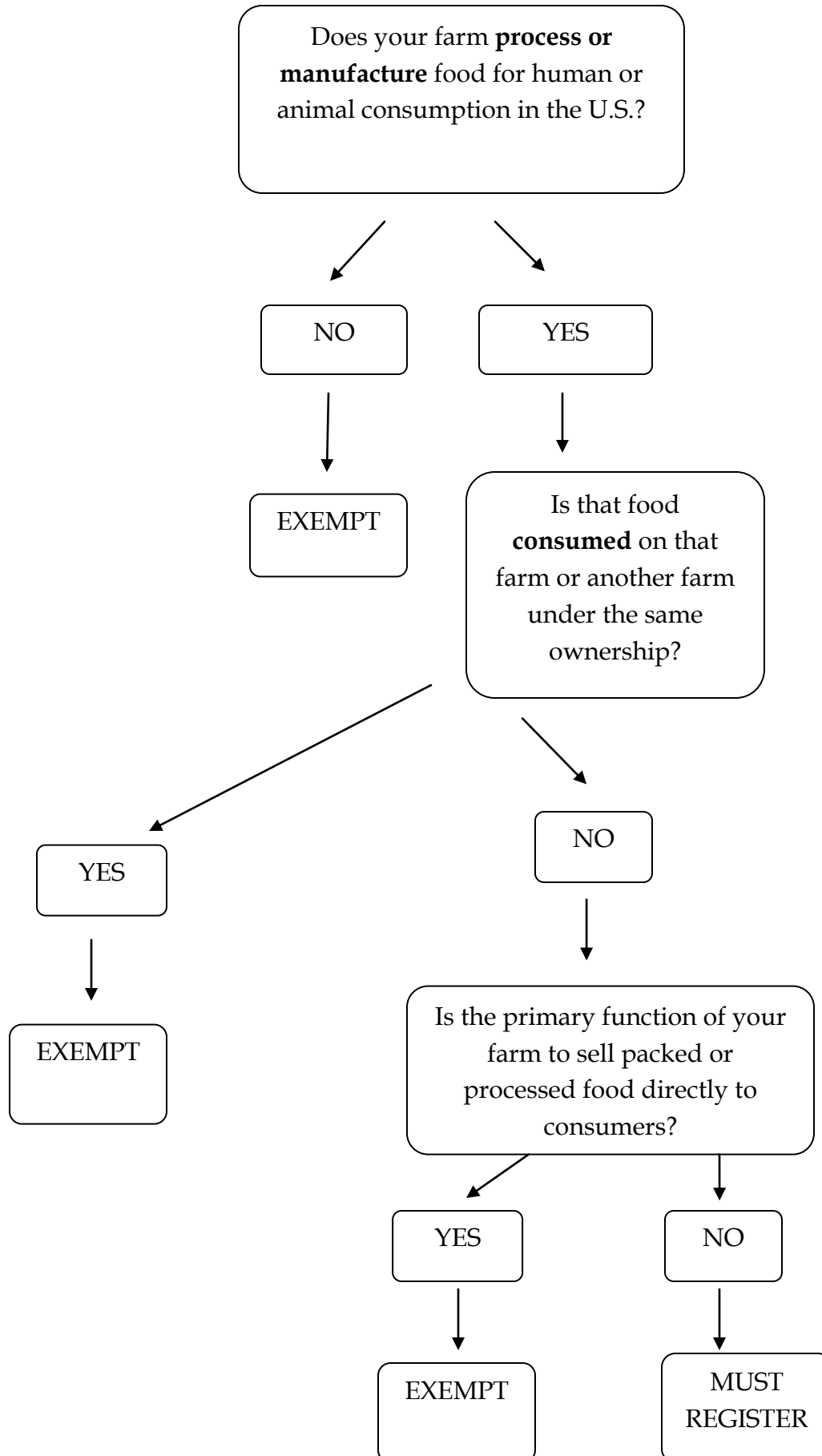
Have you...

- Considered where you want to **locate** your business? Depending on what type of business (u-pick, agri-tourism, farm stand, etc.) you are considering, this requires:
 - Reviewing applicable county and municipal **zoning laws** in your area;
 - determining permit requirements under the **Illinois Livestock Facilities Management Act**;
 - investigating whether any other environmental permits will be required under Illinois and federal environmental laws
- Looked into the **registration and permitting requirements**? Most registration steps are relatively simple, but failure to comply can have significant consequences.
- Informed yourself about **insurance options and costs**? Insurance (or lack thereof if something goes wrong) can represent a significant cost for a small-scale farmer. It should be considered as part of your initial overall business plan and not left as an afterthought.

KEY CONTACT INFORMATION

- **Illinois Department of Agriculture (info on the Livestock Facilities Management Act):**
 Ph: 217-785-2427
 Email: pio@agr.state.il.us
- **U.S. Food and Drug Administration (registration of food facilities help desk)**
 Ph: 1-800-216-7331 or 301-575-0156
- **Illinois Department of Commerce, Office of Regulatory Compliance (compliance with environmental regulations)**
 Ph: 800-252-3998
 Email: dceo.sbeap@illinois.gov.

DO I NEED TO REGISTER MY FARM WITH THE FDA?



Definitions

As used in this flowchart:

Holding means “storage of food. Holding facilities include warehouses, cold storage facilities, storage silos, grain elevators, and liquid storage tanks.” 21 C.F.R. § 1.227(b)(5).

Manufacturing/processing means “making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or ingredients. Examples of manufacturing/processing activities are cutting, peeling, trimming, washing, waxing, eviscerating, rendering, cooking, baking, freezing, cooling, pasteurizing, homogenizing, mixing, formulating, bottling, milling, grinding, extracting juice, distilling, labeling, or packaging.” 21 C.F.R. § 1.227(b)(6). For purposes of a farm facility, manufacturing/processing does *not* include “[w]ashing, trimming of outer leaves of, and cooling produce.” 21 C.F.R. § 1.227(b)(3).

Packing means “placing food into a container other than packaging the food.” 21 C.F.R. § 1.227(b)(9).

Packaging, when used as a verb, means “placing food into a container that directly contacts the food and that the consumer receives.” 21 C.F.R. § 1.227(b)(8).

Selling food directly to consumers as a “primary function”: A retail food establishment’s primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food product to all other buyers. 21 C.F.R. § 1.227(b)(11).

CHAPTER 3: MANAGING AND MARKETING THE DIRECT FARM BUSINESS

There are many components to successfully managing a direct farm business. Taxes and employment encompass such significant portions of law that they merit their own chapters in this Guide. However, there are many other management details that this chapter will address. First and foremost, contracts are subject to a myriad of laws, many of which protect farmers



from potential abuses. A direct farm business also needs to have effective marketing in order to reach potential customers and sell the product. This marketing plan may encompass many facets, including Internet marketing, procurement contracts, and valid intellectual property rights. And when a sale is made, the direct farm business must accurately measure its products in order to comply with state law. Finally, a successful direct farm business should consider estate planning in order to ensure efficient transitions in the future.

I. CONTRACTING

Contracts are an integral part of every business. Contractual agreements can take many forms: some are small cash transactions, while others are detailed documents resulting from lengthy negotiations. Regardless of the type of direct farm business, owners and managers should be familiar with certain basic contract principles that will help them run a smooth operation and protect their business interests.

A. General Contract Law

A contract is an agreement between two or more competent parties to do something in exchange for something of legal value. There are three basic elements of a valid contract: an offer, acceptance, and consideration. An offer is a committed and definite proposal that is sufficiently communicated to others. Acceptance is communicated when a party agrees to the exact proposal in the offer using clear and unequivocal terms. The final requirement, consideration, concerns the subject of the contract. Consideration is an explicitly bargained for benefit or detriment that has legal significance. This could be money, land, crops, or even a promise to provide products in the future.

The Uniform Commercial Code (UCC) (810 ILCS 5) is a uniform set of laws adopted in every state in order to facilitate interstate commerce. The American Law Institute develops the UCC and

then each state adopts it with minor variations that the state deems necessary for its local needs. The UCC covers a broad array of commerce issues, such as the rights and duties of creditors and debtors, how loans can be transferred between varying parties, and standards for forming and interpreting leases. Farmers need to be aware of the UCC, especially with regard to sale of goods, because it establishes unique rules for commercial transactions. Specifically, the UCC defines when a contract is formed between two merchants, sets standards for how contract terms are interpreted, provides default terms to cover contractual omissions, and defines what remedies are available if the contract is breached. It is important to note, however, that these UCC rules are the default law that courts will apply if contracting parties do not come to an agreement or fail to include a term in their agreement. Contracting parties are always free to negotiate alternative terms for their contract. Relevant provisions of the UCC are covered in more detail in the following discussion.

Oral Contracts, Written Contracts – Which One?

A contract does not necessarily have to be in writing in order to be binding and enforceable. In fact, many contracts are oral contracts, in which no writing ever exists. Small direct farm sales - for example, most roadside stand cash transactions - are usually oral contracts. When a farmer sets up a stand and communicates the availability of his produce in some way at a certain price, he has made an *offer*. By agreeing to pay the purchase price, the consumer *accepts* the offer, forming an enforceable contract. The *consideration* is the produce the farmer provides and the money the customer pays. The contract is *performed* (and thus complete) when the farmer receives the money and the customer receives the produce. In most cases, oral contracts are binding and enforceable—just like a written contract. There are instances, however, where a contract must be in writing to be enforceable.

As early as the 1600s, people recognized that certain contracts are particularly susceptible to misrepresentation. In response, the English Parliament adopted what is known as the “statute of frauds,” which requires that certain fraud-prone contracts be in writing to be enforceable. Following this English tradition, every state in the Union has adopted a version of the statute of frauds. The Illinois Frauds Act (740 ILCS 80) lists a number of circumstances specifically requiring a written contract, but there are two situations most relevant to farmers: First, contracts that will take more than one year to perform, and second, the sale of real property. Additionally, the UCC has its own statute of frauds provision, which requires contracts for the sale of goods totaling \$500 or more to be in writing (810 ILCS 5/2-201).

Contracts lasting more than a year can present themselves in many different forms. For example, a contract to sell grain could have an execution date that is more than a year away, making it fall within this section of the statute. The statute only applies to contracts that cannot possibly be performed within one year. The mere possibility that a contract will take longer than a year to perform does not force it into the statute. So, for example, a contract to sell the

milk of an animal for the rest of its life would not fall within the statute because there is no guarantee that the animal will live longer than one year. Similarly, if the contract is set up in a way that could potentially last more than a year but could also be completed within a year under certain circumstances (for example, a contract to design and build a house), it does not fall within this provision of the statute of frauds. Many community supported agriculture (CSA) contracts also might fall within this provision of the statute of frauds. For example, an agreement to receive delivery on produce through the end of the next year may or may not fall within the provision based upon the timing and terms of the contract. If the agreement requires taking delivery at a date that is more than one year away, it generally must be in writing.

The statute provides a slightly different rule when merchants are involved. Illinois law defines a merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction...” (810 ILCS 5/2-104). If both parties to a contract are merchants, an oral contract that would otherwise have to be in writing under the statute of frauds is binding if a confirmation of the oral contract is sent in writing within a reasonable time and neither party objects within ten days after the writing is received (810 ILCS 5/2-201)(2)). The Illinois Supreme Court has held that farmers are merchants when they market their crops (*Sierens v. Clausen*, 60 Ill. 2d 585, 589 (1975)); other activities, such as processing fruits into jellies and regularly marketing the goods, may fall under this special rule as well.

It may be useful to understand what constitutes a “writing.” To be enforceable, the written document must be signed by the party that has an obligation imposed upon them or by someone who is authorized to sign for them. The party seeking to enforce the contract is not required to have signed it: If a written document omits terms or includes a term that is different from what was actually agreed upon, the contract will usually still be binding. In fact, evidence of the oral agreement usually cannot be offered as evidence to show that the terms of the final written contract were supposed to be something else.

Although it may be difficult to understand when a written contract is technically required and when an oral contract will be enforceable, it is *always* a good business practice to put contracts in writing. Doing so protects legal interests and avoids potential disagreements that can lead to a negative business reputation and possible legal battles. When preparing a written contract, it is important to be thorough and accurate. At a minimum, the contract should contain the identities of the parties, the item(s) contracted for (including quantities and a clear description that includes quality standards), the negotiated price, and time and location of performance. It might also include ways the contract can be cancelled and what remedies each side will have if the other fails to perform. Contradictory oral statements made during negotiations will not typically override the terms contained in a written contract. Taking the time to prepare a well-crafted written document will increase the security of each side’s interest in the contract, reduce the chance of unmet expectations due to ambiguity, and create a tangible record in case any

problems do arise. Regardless of the dollar amount or the time involved in a contract, it is advisable to have an attorney review any important contract before signing it.

Excused Contract Performance

When a party breaks any of the provisions of a contractual agreement, they are considered to be *in breach* of the contract. However, in certain situations, courts may not impose liability for breach of contract. Situations where a party might be excused from performing contractual obligations can be placed into three broad categories. First, if circumstances create a situation where it is impossible to perform the contract, a party may be released from its obligations (“contractual impossibility”). Second, if performance is technically possible, but requiring a party to perform would be extremely unfair under the circumstances, then performance might be excused (“contractual impracticability”). Finally, a party might not be required to perform if the purpose for entering into the contract no longer exists or would no longer be furthered by performance of the contract (“frustration of purpose”).

Contractual Impossibility

The legal doctrine of contractual impossibility results from an unforeseen, unexpected event that occurs after a contract was created but before it was performed, and that makes performance of the contract impossible. This could occur when a particular piece essential to the contract is destroyed, or when a particular essential person to the contract dies or is otherwise incapacitated. The thing destroyed or the person incapacitated must be absolutely necessary to the contract in order for the impossibility doctrine to apply. A small non-essential element being destroyed does not lead to excusing the contract for impossibility. So, for example, if a farmer has a contract to sell a particular animal and the animal dies after the contract is formed but before the farmer delivers the animal to the purchaser, then both parties would be excused from performing under the contract.

This does not mean that every disaster leads to the escaping of contractual obligations. For example, if a party enters into a contract to sell 100 bushels of corn and, before delivering the harvest, a flood destroys the corn, the farmer is not excused from the contract because of impossibility. This is because the farmer could still purchase corn from another source and use it to fulfill his obligation. Unlike a particular deceased animal, corn is a commodity that can be replaced. The fact that a contract has become more difficult or more expensive to perform is not enough to make it impossible to perform.

Contractual Impracticability

Some courts may have sympathy for parties who find themselves in a position where performance, while not technically impossible, would be *impracticable* – that is, so difficult that requiring it would be unduly harsh. Courts have substantial discretion in deciding whether or

not performance should be excused because requiring performance would be impracticable or extremely unfair. For example, if a farmer contracts with a trucking company to deliver 100 truckloads of crops and all of the company's trucks are subsequently destroyed by fire, it would not be impossible for the trucker to perform, but it may be impractical. The company could purchase a new fleet of trucks and perform the contract, but a judge could find, in his or her discretion, that requiring performance under these circumstances is overly harsh and should be excused.

Frustration of Purpose

A third way that contract performance could be excused is frustration of purpose. Courts may excuse performance when the contract at issue was entered into for a particular underlying purpose which no longer exists as it did at the time of contract formation. For example, if a farmer contracts to buy feed for his cattle and all the cattle die from disease, the purpose of the contract (feeding the cattle) has been frustrated. It is still possible for the farmer to buy the feed, but he entered into the contract specifically to feed animals that no longer need to be fed. When the reason for the contract no longer exists, the contract may be set aside because of frustration of purpose.

Whether or not a contract performance will be excused is an intensely fact-specific determination. As a practical matter, if problems arise that may lead to a breach or inability to perform the contract, one should first attempt to renegotiate the terms of the agreement with the other party. If negotiations fail, hiring an attorney is the best way to protect oneself and explore legal options.

B. Contract Laws that Protect Farmers

Although contracts are personal and can vary greatly from negotiation to negotiation - even between the same two parties - there are some restrictions, obligations and remedies that federal and Illinois law impose upon certain agricultural contracts.

The Packers and Stockyards Act (P&SA) (7 U.S.C. §§ 181-229b) was enacted in 1921 to facilitate fair competition in livestock, meat, and poultry markets. The Act prohibits unfair, deceptive, unjustly discriminatory, fraudulent and anti-competitive practices. Livestock dealers are required to register and be bonded to protect producers. The P&SA will not apply to most direct farm businesses because farmers are not subject to the Act when buying livestock for their own purposes or when marketing their own livestock and livestock products. However, the Act's registration and bonding requirements may apply to agricultural cooperatives marketing livestock on their members' behalf. Furthermore, the Act provides several protections for farmers engaged in production contracts. The section on production contracts, below, discusses these in more detail. The Grain Inspection, Packers, and Stockyards

Administration (GIPSA), a sub-agency of the USDA, administers the P&SA. GIPSA has more information on its **website**.⁴⁹

The Perishable Agricultural Commodities Act (PACA) (7 U.S.C. §§ 499 *et seq.*) seeks to ensure fair trading practices for fruits and vegetables by requiring farmers to deliver produce as promised and buyers to pay within a reasonable period of time of receipt. The law requires anyone buying or selling or brokering contracts for more than 2,000 pounds per day or selling more than \$230,000 worth of produce in a year to obtain a PACA license. Farmers who sell only their own produce are not subject to the Act, but cooperative marketing associations that market the qualifying quantities are subject to it. USDA's Agricultural Marketing Service (AMS) enforces the law. If anyone violates the fair marketing requirements of the Act, the other party to the

contract can file a complaint with AMS. More information on licensing and complaints is available through **AMS's website**.⁵⁰

ADDITIONAL RESOURCES: PACA'S PROVISIONS

Farmer's Legal Action Group Handout, available at
<http://www.flaginc.org/topics/pubs/arts/PACAhandout2007.pdf>

National Agricultural Law Center's Overview, available at
<http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html>

The law also establishes a trust right to protect farmers who sell fruits and vegetables. If the farmer notifies a buyer that they intend to be covered by the trust, the buyer must hold the produce or any proceeds from the sale of it in trust for the farmer until the buyer has paid for the produce in full. The primary benefit of the trust is to make it easier for farmers to get paid when they file a court action. The trust also puts farmers ahead of other creditors if the buyer goes out of business or declares bankruptcy. Producers who are not subject to the Act can nonetheless get a PACA license in order to benefit from the PACA trust protections.

The Agricultural Fair Practices Act (7 U.S.C. §§ 2301-2306) was enacted in 1967 to protect farmers who belong to cooperatives from retaliation or coercion by handlers who are trying to limit producers' capacity to market and bargain cooperatively. The Act defines handlers as anyone who (1) acquires agricultural products from producers or associations of producers for processing or sale; or (2) grades, packages, handles, stores, or processes agricultural products received from producers or associations of producers; or (3) contracts or negotiates contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acts as an agent or broker for a handler in the performance of any of the above functions (7 U.S.C. § 2302(3)).

⁴⁹ <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=landing>

⁵⁰ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACAClaimorApplyforaLicense&rightNav1=FileaPACAClaimorApplyforaLicense&topNav=&leftNav=CommodityAreas&page=PACA&resultType>

The Act prohibits handlers from (1) coercing a producer to join a cooperative, or refusing to deal with a producer for joining a cooperative; (2) discriminating against a producer in price, quantity, quality or other terms due the producer's membership in a cooperative; (3) coercing or intimidating a producer to enter into, breach, or terminate a membership agreement or marketing contract with an association of producers or a handler; (4) attempting to bribe producers to quit or not join cooperatives; (5) making false reports about the activities and finances of a cooperative, and (6) conspiring with anyone else to do any of aforementioned (7 U.S.C. § 2303). If a producer feels a handler has violated the Act, she may bring a civil action for injuries incurred, or she may complain to the Secretary of Agriculture, who can then investigate and report the offender to the Attorney General for prosecution (7 U.S.C. § 2305). If a producer brings a civil action, courts may award attorneys' fees to the prevailing party (meaning that the loser may have to pay the winner's litigation costs) (*id.*). But because the Act requires the USDA to refer enforcement actions to the Department of Justice rather than bringing them directly against violators, it is often not strongly enforced.

C. *Special Contracts*

Production Contracts

ADDITIONAL RESOURCES: Illinois Production Contract Code

***The Illinois Attorney General
enforces the Code and
provides a useful summary
of its provisions on its
website:***

<http://www.illinoisattorneygeneral.gov/environment/agprodguide.pdf>

Production contracts are contracts in which a company hires a farmer to raise animals or crops for the company using seed or animals, feed, and other inputs that the company supplies. These types of contracts are governed by the Illinois Agricultural Production Contract Code (505 ILCS 17). The Code requires that production contracts meet certain standards of readability, such as being entirely in minimum ten point font (which effectively eliminates the fine print) and using commonly understood words and terms. Some contracts contain confidentiality clauses that restrict a farmer's ability to discuss the contract with anyone. The Code prohibits these clauses from restricting a farmer's right to discuss the contract with immediate family members and professional advisors such as attorneys, financial advisors, and farm managers. Although the farmer has a right to discuss the contract

with these people, the contract may require that such conversations be treated as confidential and restrict everyone's ability to disclose terms of the contract to anyone not within the protected relationships. The Code prohibits terms in contracts that would allow a contractor to unilaterally terminate the contract or terminate it without a good cause. Finally, in order to protect farmers from financial losses that may occur from termination of the contract, the Code imposes special requirements on contracts that require the farmer to make capital investments.

The Illinois Attorney General enforces the Code and provides a useful summary of its provisions on **its website**.⁵¹

Federal law provides several additional protections for poultry and swine producers entering into production contracts.⁵² First, the 2002 Farm Bill contains a provision that protects poultry and livestock producers from non-disclosure provisions in their production contracts (7 U.S.C. § 229b). Second, the Packers and Stockyards Act (P&SA) generally prohibits poultry dealers and swine contractors from engaging in unfair, unjustly discriminatory or deceptive trade practices (7 U.S.C. § 192). When hiring growers to perform production contracts, the P&SA requires the first page of these contracts to conspicuously disclose whether capital investments are necessary to perform the contract (7 U.S.C. § 197a(b)). The P&SA authorizes the Secretary of Agriculture, through GIPSA, to institute investigations and compel dealers and contractors to pay damages to injured parties for violations of the Act; producers may also petition GIPSA for an investigation and reparation (7 U.S.C. § 210). Alternatively, the producer may bring a lawsuit against the dealer or contractor in federal court (7 U.S.C. § 209).

GIPSA exercises its authority over swine contracts on a case by case basis; therefore, there are no regulations that specifically address what constitutes unfair, unjustly discriminatory, or deceptive trade practices for swine contracts. However, there are specific GIPSA regulations applicable to poultry production contracts. The rules require poultry dealers to provide the grower with the true written contract on the day they provide the grower with the poultry

⁵¹ <http://www.illinoisattorneygeneral.gov/environment/agprodguide.pdf>

⁵² Although much of the federal legislation covered in this Guide does not apply to purely intrastate commerce, the Packers and Stockyards Act likely does, due to the provision which states "for the purpose of this Act . . . a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries..." (7 U.S.C. § 183). In *Stafford v. Wallace*, 258 U.S. 495 (1922), the U.S. Supreme Court held that a wholly intrastate transaction at a stockyard was nonetheless part of the "current of commerce" and therefore fell within the purview of the P&SA. More recently, relying on the Supreme Court's decision in *Stafford v. Wallace*, the U.S. Court of Appeals for the D.C. Circuit interpreted a nearly identical provision in the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(b)(4), ruling that fruit shipped and delivered purely intrastate, but handled by a dealer who commonly ships fruit out of state, had entered the current of commerce. *The Produce Place v. U.S. Dept. of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996). In their analogy, the court stated:

[T]he current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown.

Id. at 175-176. Under such a standard, an Illinois producer who contracts with an Illinois poultry dealer to raise poultry to be sold exclusively to Illinois consumers *may* not be subject to the Packers and Stockyards Act and GIPSA's regulations. However, given the broad sweep of jurisdiction courts have given the agencies, it would be more reasonable to tailor actions to the assumption that the rules do apply.

house specifications (9 C.F.R. § 201.100(a)). This is intended to guard against the practice of inducing producers to take out loans to build production houses, then changing the terms of the promised contract after the producer is in a situation where rejecting the contract might lead to loss of the producer's home or business. The contract terms must include the contract's duration and grounds for termination, all terms relating to the payment (including how feed costs and live weights and slaughter weights will be calculated), and whether a Performance Improvement Plan (a probationary program for growers who fail to meet minimum performance standards) exists and if so, the factors for its application (9 C.F.R. § 201.100(c)). The GIPSA regulation also expands the scope of the anti-non-disclosure rules to allow producers to consult with other producers who have contracts with the poultry dealer (9 C.F.R. § 201.100(b)).

Requirements and Output Contracts

Requirements and output contracts are two types of agreements that can provide some security to producers as well as those who buy directly from farmers in bulk. The concept behind these agreements is simple: In a requirements contract, the buyer agrees to purchase all of a product that they may require or use from a certain party. Similarly, an output contract is an agreement by a purchaser to sell all of a product that they produce to a particular buyer. Direct farm businesses may find these types of contracts useful when dealing with institutional buyers or restaurants.

Entering into a requirements or output contract is not a green light for producers to simply increase production, knowing that a party is contractually bound to purchase everything that the producer can churn out. The UCC puts some restrictions on these types of contracts. Section 2-306 of the UCC imposes a duty of "good faith" on the parties to the contract (810 ILCS 5/2-306(1)). This means that neither side can demand or produce a quantity that is unreasonably disproportionate to the quantity that was estimated by the parties at the time of contract formation. If the parties failed to make any estimates at the inception of the contract, the UCC restricts quantities to those "normal" or "comparable" to what would ordinarily be required or produced. However, the UCC does not specifically identify how those terms should be defined.

The specific language used in a requirements or output contract can be very important. The contract must use assertive language such as "require," "need," "can use," and so on. Using equivocal language such as "might want to use" or "wish" does not create a binding requirements or output contract. While such language does not prohibit parties from agreeing to deal with one another, it is not sufficiently definite to impose an enforceable duty on the parties. When parties fail to use definite language but act as though they formed a valid requirements or output contract, they are acting under a series of mini-contracts. While such ad-hoc mini-contracts may produce satisfactory results in the short term, producers should realize that indefinite contractual terms may, in the event of a dispute, result in a contract that

fails to bind either party to its terms (and is thus unenforceable). However, when drafted carefully, requirements and output contracts can provide some security for parties. Farmers can produce at normal levels with confidence that all of their output will be purchased, and buyers are given some assurance that their needs will be filled. Because of the large volume typically associated with these types of arrangements, parties should be careful when agreeing to terms and should, at a minimum, have an attorney review these documents prior to agreeing to the terms to ensure that they fully understand the obligations and likely outcomes of the contract.

Procurement Contracts

Procurement contracts can be an advantageous way for a direct farm business to make significant sales. The USDA purchases large quantities of commodities through various procurement programs in order to supply food for school lunch programs, prisons, international food aid and other programs. USDA's programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive

bidding process. Information for small businesses is compiled by the USDA and **available online**.⁵³ The Agricultural Marketing Service (a subsidiary of the USDA) provides commodity-specific information on its **website**.⁵⁴

ADDITIONAL RESOURCES:

Food Labeling

The FDA's Food Labeling Guide details the intricacies of food claims.

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/ucm064919.htm>

The FTC generally uses the same guidelines for claims made in food advertising.

<http://www.ftc.gov/bcp/policystmt/ad-food.shtm>

The state of Illinois also administers a procurement program through the Department of Central Management Services. The Illinois Procurement Code (30 ILCS 500) is not agriculturally specific, but it does provide for set-asides of certain contracts for small businesses (30 ILCS 500/45-45). The Code also prioritizes environmentally preferable products (30 ILCS 500/45-26) and agricultural products grown within the state of Illinois (30 ILCS 500/45-50). All initiations for contract bids must be published in the **Illinois Procurement Bulletin**.⁵⁵ More information on selling to the state of Illinois is available **online**.⁵⁶

II. MARKETING

At its core, direct farm business marketing is about informing consumers about product offerings and building a reputation to foster repeat business. Effective marketing techniques can

⁵³ <http://www.dm.usda.gov/procurement/business/procedure.htm>

⁵⁴

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateQ&navID=CommodityPurchasing&leftNav=CommodityPurchasing&page=CommodityPurchasing&acct=AMSPW>

⁵⁵ Available online at <http://www.purchase.state.il.us/ipb/IPBHomeP.nsf/HomePage?OpenFrameset>

⁵⁶ <http://www.sell2.illinois.gov/>

include sales flyers, posters at farmers' markets, roadside signs, and Internet marketing. This guide addresses legal issues pertaining to labeling and advertising, a few specific issues related to the Internet, and basic intellectual property issues that may arise in the context of direct farm businesses.

ADDITIONAL RESOURCES:

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<http://www.ftc.gov/bcp/policystmt/ad-food.shtm>

A. Labeling and Advertising

Labeling is regulated by the Food and Drug Administration (FDA) under the Food, Drug and Cosmetic Act (21 U.S.C. Chapter 9), which prohibits selling "adulterated" or "misbranded" food. The Federal Trade Commission (FTC) regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer's decisionmaking process) and is likely to mislead consumers. A statement is unfair if it causes

or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers. These laws have implications for several types of claims a direct farm business may wish to make about its products, whether on its labels or in its advertising: Health claims, structure/function claims, and nutrient content claims. Each is briefly addressed below.

Nutrition Labeling

Section 403(q) of the federal Food, Drug and Cosmetic Act requires that all packaged foods sold at retail bear a nutrition label that includes an ingredients list, nutrition content information, and the name of the food producer. However, the law contains several exemptions designed to benefit small producers – one based on the size of the operation and one based on the volume of a particular food product. The exemptions based on company size apply to retailers with annual gross sales of not more than \$500,000 *or* annual gross food sales to consumers of not more than \$50,000 (21 C.F.R. §§ 101(j)(1) and 101.36(h)(1)). If a producer falls into this category of exemption, it does *not* need to file a notice with the Food and Drug Administration before beginning production. The exemption for low-volume food applies if a producer employs an average of less than 100 employees and sells fewer than 100,000 units of the particular product in a one-year period (21C.F.R. §§ 101(j)(18) and 101.36(h)(2)). To claim this exemption, a

producer must annually file a notice with the FDA, *unless* the producer is (1) not an importer, (2) has fewer than 10 full-time employees, and (3) annually produces less than 10,000 units of the food product. However, in all cases, if the particular product being sold makes a certain health claim, or provides any other nutritional information on the label or in advertising, then the small business exemption *does not* apply.

For more information on nutrition labeling, and to obtain a small business labeling exemption form, visit the **FDA's website**.⁵⁷ The FDA also publishes a comprehensive **Food Labeling Guide**⁵⁸ that outlines the requirements of the agency's food labeling laws.

Allergy Labeling Requirements

The Federal Food Allergen Labeling and Consumer Protection Act of 2004 requires foods that contain, or that are derived from, a "major food allergen" to specifically state that information on its label (21 U.S.C. § 343(w)(1)). The Act defines a "major food allergen" as (1) milk, (2) eggs, (3) fish, (4) Crustacean shellfish, (5) tree nuts, (6) wheat, (7) peanuts, or (8) soybeans. The law states that the allergen information may be conveyed in one of two ways: (1) by printing the word "Contains," followed by the name of the food source from which the major food allergen is derived, immediately after or adjacent to the list of food ingredients; *or* (2) by placing the common or usual name of the major food allergen in the list of ingredients and following it in parentheses with the name of the food source from which the major food allergen is derived.

The allergen labeling requirement applies to all packaged foods except meat, poultry, and egg products. Raw agricultural commodities (e.g., fruits and vegetables) also are not required to bear allergy labels. Notably, the allergen labeling rules do *not* contain any exemptions for small producers. Therefore, if direct farm businesses produce a product that contains one of the eight major food allergens listed above, it will have to provide an ingredients list for that product and comply with the allergen labeling requirements.

The FDA has published a **Food Allergen Labeling Guide**⁵⁹ that examines the allergen labeling requirements in further detail.

⁵⁷

<http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm053857.htm>

⁵⁸

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/default.htm>

⁵⁹

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm059116.htm>

Health Claims

Health claims describe a relationship between the food (or a component of it) and reducing the risk of a disease or health-related condition. For instance, a label might claim “low fat diets rich in fiber-containing grain products, fruits, and vegetables may reduce the risk of some types of cancer, a disease associated with many factors.” Producers who wish to place a health claim on a label must first have that claim approved by the FDA. Approved health claims are listed in Appendix C of FDA’s food labeling guide. If a claim is not approved, a food producer can petition the FDA to approve the claim, and must support the petition with sufficient scientific evidence. A label may also contain a *qualified health claim*, which is a health claim supported by emerging scientific evidence which suggests that the claim may be valid but that is not strong enough to meet the standard necessary to be a health claim. Like health claims, qualified health claims must be preapproved by the FDA through a petition. Failure to obtain pre-approval causes the food to be “misbranded” and therefore subject to FDA enforcement.

Structure/Function Claims

Structure/function claims describe the role of a nutrient in affecting normal structure or function in humans (for instance, “calcium helps build strong bones”). FDA pre-approval of such claims is not required, but the statements must be truthful and not misleading. For more information on these types of claims, see the FDA’s **Small Entity Compliance Guide on Structure/Function Claims**.⁶⁰

Nutrient Content Claims

Nutrient content claims characterize the level of a nutrient in a food, such “high in vitamin A;” they also encompass claims such as “low fat” and “light” foods. The FDA prohibits these claims unless specifically approved in FDA’s regulations (21 C.F.R. § 101.13 and subpart D). Raw fruits and vegetables and fish are not required to contain nutritional content labels, but the FDA provides posters for voluntary labeling of their nutritional content.

B. Illinois Domestic Marketing Logos

Three different product logos are available to farmers in Illinois who seek to differentiate their products based on locality and farm ownership.

⁶⁰ Available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/DietarySupplements/ucm103340.htm>



The Illinois Products Logo

The Illinois Products Logo Program was designed to help Illinois consumers identify and purchase food and agricultural products made in Illinois. Any entity that produces, processes or packages an agricultural or food product in Illinois can participate in the program free-of-charge. An **application**⁶¹ must be submitted that certifies, among other things, that the applicant does indeed produce, process or package a product in Illinois and that the IDOA can identify and promote the product in any of its marketing/promotional activities.



"Illinois: Where Fresh Is" Logo

The "Illinois: Where Fresh Is" Logo program provides a complimentary logo that producers may place on their produce, fruits and other horticultural commodities produced in Illinois. The "Where Fresh Is" program is sponsored by the Illinois Department of Agriculture and is intended to promote locally grown produce and farmers' markets. The **application**⁶² for the program can be found on the Illinois Department of Agriculture's website.



Centennial and Sesquicentennial Farms Program

For farmers whose farm has been owned by the same family of lineal or collateral descent for at least 100 or 150 years, a sign marker is available to post at the farm to designate that food and agricultural products produced, processed or packaged on these farms come from a centennial or sesquicentennial farm. The owner must submit an application containing detailed information on the property, including a certification that the property has indeed been owned continuously by a family member for at least 100 or 150 years. The application must include

⁶¹ Available at <http://www.agr.state.il.us/pdf/LOGOAP.PDF>

⁶² Available at <http://www.agr.state.il.us/markets/farmers/whererefreshisap.pdf>

certification by a member of the Illinois Land Title Association or a recognized title searcher as to the continual familial ownership. Both the **centennial application**⁶³ and the **sesquicentennial application**⁶⁴ can be downloaded from the Illinois Department of Agriculture's website. If the producer wishes to put the logo on the product as a marketing tool, the producer must seek written authorization from the IDOA (the holder of the registered mark on file with the Illinois Office of the Secretary of State).

C. Internet Marketing

Many small businesses consider an Internet presence to be an essential part of their business strategy. The Internet and other forms of electronic communication (email or social networking sites such as Facebook) can help direct farm businesses sell to customers who would otherwise be unable to visit the retail operation due to distance, time, or other factors. USDA's Agriculture and Marketing Service (AMS) has published an informative brochure, **How To Direct-Market Farm Products on the Internet**,⁶⁵ that explains many issues related to Internet marketing of farm products. The brochure encourages farm businesses to identify Internet marketing goals (save time, save labor, increase market access, provide customers information) and to research the potential market before setting up a website. Other things to consider are the cost and feasibility of shipping products and loss of personal interaction (which may be precisely what customers are looking for when buying from a direct farm business).

In addition to setting up a webpage or sending customers email, a direct farm business may list itself on some local or national online farm business directories such as **Illinois MarketMaker**⁶⁶ (an Illinois-wide directory hosted by the University of Illinois) or the IDOA's **Food and Agribusiness Guide**⁶⁷ (a directory hosted by the Illinois Department of Agriculture). These directories help farmers disseminate information on their products and reach consumers as well as commercial retailers or businesses such as restaurants. Although the Internet's flexibility as a marketing tool makes it an attractive option for direct farm businesses, farmers should be aware of several important legal issues that may arise in the context of doing business on the Internet.

Shipping Products

If the farm's products can be shipped by mail, a website that allows customers to place orders online can be an important aspect of the direct farm business. Sending perishable goods through the mail, however, can be costly and requires careful packaging. If food needs to be shipped cold, the USDA recommends shipping with dry ice, foam coolers, and polyethylene

⁶³ Available at <http://www.agr.state.il.us/pdf/CENTAP.PDF>

⁶⁴ Available at <http://www.agr.state.il.us/pdf/SesqCentap.pdf>

⁶⁵ Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3101222>

⁶⁶ <http://www.marketmaker.illinois.edu/>

⁶⁷ <http://www.agr.state.il.us/markets/mis/index.php>

film to provide additional insulation. The package should contain clear labels that say “contains dry ice” and “keep refrigerated,” and it should be shipped by the fastest means possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. The USDA also provides a helpful **guide of safe handling times**⁶⁸ for a large variety of mail-order foods. Keep in mind that shipping food out of state may subject the business to federal laws the operation may not otherwise have to comply with.

The Federal Trade Commission’s (FTC) Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435) also applies to sales made over the Internet. The Rule regulates shipment promises, unexpected delivery delays and customer refunds. To comply with the Rule, a seller must have a reasonable basis for promising shipment within a certain time frame. If online advertising does not specify the shipment period, the seller must have a reasonable basis for believing that they can ship within 30 days. If shipment cannot be made within the promised time period, then the seller must notify the customer of the delay and provide the customer with the option of cancelling the order and receiving a full refund. Sellers who cannot fill an order have the right to cancel it but must notify the customer of the cancellation and refund payment to the customer in full.

Protecting Customers' Personal Information

If a business allows consumers to enter personal information into its website, the FTC requires that the business have a plan to safeguard that information. There are no specific requirements that a business information security plan must follow. Adequate safeguards depend on various factors, such as the size and nature of the business and the amount and type of information collected on the Internet. The FTC maintains a **website**⁶⁹ to assist businesses in complying with consumer protection requirements.

Email Marketing

Emailing a weekly, monthly or annual newsletter avoids the cost and hassle of printing and sending documents via mail. Short email updates concerning revised hours of operation or seasonality may be a convenient way to communicate with customers. All commercial email from a business to a consumer is regulated by the FTC’s CAN-SPAM Act (15 U.S.C. § 7701 et seq.). When sending commercial emails, the “from” and “to” lines and routing information must be accurate and identify who initiated the email, and may not contain deceptive subject lines. The email must give the recipient an opt-out method if they do not wish to receive any more commercial emails from the business. The email must also be identified as an advertisement and include the sender’s valid physical postal address. As a general rule, emails

⁶⁸ Available at http://www.fsis.usda.gov/Factsheets/Mail_Order_Food_Safety_Table/index.asp

⁶⁹ <http://www.ftc.gov/infosecurity/>

concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of this Act can result in significant fines.

Taxation of Internet Sales

Determining the taxes owed on Internet sales can be complex. For the most part, however, Illinois direct farm businesses will need to collect state and local sales taxes if a sale takes place in Illinois or the product is delivered to an Illinois address. The local tax rate to be applied depends upon where the order is accepted. A U.S. Supreme Court decision prohibits states from requiring out-of-state retailers to collect and remit the sales tax for the state where the product is delivered if the retailer has no physical presence in the state (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state. Therefore, if an Illinois retailer ships merchandise out of state, it does not have to collect and remit the out-of-state sales tax (86 IAC §§ 130.605, 130.610).

D. Signage

City and County Signage Requirements

Farmers who operate on-farm direct-to-consumer businesses such as U-pick operations and produce stands may wish to create signs directing consumers to their place of business. For the most part, Illinois law delegates the power to regulate commercial signage to local government authorities (e.g., cities, townships, and municipalities). Though signage law varies from city to city and county to county, any sign used for commercial purposes (that is, to advertise a place of business) should follow the law of the municipal or county sign code in which the sign is located. Some local units of government do not have sign codes, in which case there would be no restrictions on the sign, *unless* it is within view of a federal aid highway (discussed below). But generally speaking, most municipalities and counties do regulate the placement of commercial signs, and many of them restrict the placement of “off-premises” signs other than billboards (which in turn have their own restrictions).

Depending on the applicable sign code, direct farm businesses may be limited to only on-premises signs advertising their operations – which may or may not require a permit. For example, the sign code for McLean County, Illinois, defines “business signs” as signs that “direct attention to a business . . . conducted . . . upon the premises where such sign is located,” and requires a permit for these signs. Therefore, a sign on the premises of a U-Pick operation in McLean County advertising the business would require a permit. The county defines an “off-premises directional sign” as a sign that “gives direction to an establishment in the Agriculture District,” but flatly prohibits these signs for “home occupations.” Therefore, in McLean County,

an off-premises sign that directs customers to a U-Pick operation may not be permitted, depending on how the county defines “home occupation.”

The example above reinforces the need to examine the sign code of the city or county in which business is located prior to putting up signs (either on-premises or off) to advertise a business, and to contact an attorney for additional guidance if necessary. In any case, a city or county sign code that prohibits off-premises directional signs might create difficulty for businesses in rural or isolated areas away from main highways. As a result, the Illinois Department of Transportation (IDOT) offers the Tourist-Oriented Directional Signing Program (TODS), in which IDOT will make, install, and maintain signs at intersections in rural areas that direct motorists to local, tourist-oriented businesses. To be eligible for the TODS program, a direct farm business (1) cannot have an entrance along a state highway where it could place its own sign, and (2) must be oriented towards tourism, with the majority of business income derived from motorists not living within 25 air miles of the business. Eligible “tourist-oriented” businesses include, but are not limited to, orchard/tree farms and produce stands. There is a \$100 non-refundable processing fee, as well as a \$70 annual maintenance fee for each sign. More information is available on the TODS program **website**.⁷⁰

State Signage Requirements

Signs and billboards of all kinds – including on-premises signs – within view of a federal aid interstate highway require a sign permit from IDOT. For more information, and to obtain an application form, visit the Illinois Department of Transportation **website**.⁷¹

III. INTELLECTUAL PROPERTY

Marketing a business often involves developing and protecting intellectual property (IP). Intellectual property is basically creations of the mind: inventions, literary and artistic works, as well as symbols, names, images, and designs used in commerce. Specific forms of IP protection include trademarks, patents, copyrights, and trade secrets. Each may be important to the direct farm business in that ownership of the intellectual property gives the right to *prevent others* from doing certain activities without permission. These rights are important because they protect the investment the owner has made in developing the IP. Understanding the basics of IP protection will also help the direct farm business avoid having any actions for violations of IP rights brought against them.

A. Trademarks and Trade Names

Trademarks may be the most useful form of IP for the direct farm business. A trademark is used to distinguish *goods and services* from those manufactured or sold by others – it is the

⁷⁰ <http://www.dot.state.il.us/tods/tods.html>

⁷¹ <http://www.dot.state.il.us/landacq/billboards.html>

symbol that customers use to identify a product and equate with goodwill. A trademark can be a name, symbol, sound, or color. It is also possible to register the design, packaging, or other element of appearance so long as the element is both nonfunctional and distinctive. This is known as "trade dress." By contrast, trade names are used to identify a person's *business or vocation*. While there may be some overlap between trade names and trademarks, if a name is used only as a trade name it may not be registered with the USPTO. Courts have held, however, that a trade name may have trademark protection if the business adopts a stylized font and other design features that would set the name apart from regular text.

Registration of Trademarks and Trade Names

Mere use of a particular mark makes it a trademark – the mark does not need to be registered in order to establish rights. However, rights may be limited to the geographic region where the unregistered mark has been used if another business subsequently registers an infringing mark. The older, unregistered mark owner will have superior rights in the region where the mark was being used, and the newly registered mark owner will have superior rights in the rest of the state or country. Therefore, registration is beneficial because it gives notice of the claim of ownership throughout the state or nation, so that the owner can challenge someone else's use of the mark anywhere even if he or she is not currently marketing any products in the region. The symbol for trademark, "TM," may be used whenever rights are asserted, but the use of the federal registration symbol, ®, may only be used after a mark is registered with the USPTO (not while the application is pending).

Trademark registration is available at both the state and federal level. To be valid, the trademark must appear on the goods, their container, or on the displays associated with the goods. Federal registration of a trademark is done through the United States Patent and Trademark Office (USPTO). Federal registration can be costly: \$275-\$325 per mark per class of product (for instance, a sheep farmer wishing to trademark both her wool yarn and artisan cheese would have to file two applications because yarns and cheeses are in different classes). The USPTO also recommends hiring an attorney who is familiar with trademark law, because applicants are expected to comply with all procedural and substantive rules. Despite its cost and complexity, federal registration has several benefits. First, it allows the trademark owner to bring suit in federal court (in addition to state court) and to register the trademark with the United States Customs and Border Protection (CBP) in order to stop the importation of infringing goods into the United States. Second, federal registration protects and ensures the legitimacy of the trademark throughout the country. For more information, including a link to the USPTO's searchable trademark database, visit the **USPTO's trademark website**.⁷²

State registration is much less expensive and cumbersome than the federal system, but it provides protection only within Illinois. Currently it costs \$10 to file a two-page application,

⁷² <http://www.uspto.gov/trademarks/index.jsp>

which is accompanied by straightforward instructions. Application forms can be found online at the **Secretary of State's website**.⁷³ Illinois also provides a **searchable online database**⁷⁴ of all trademarks registered within the state. Federal trademark registration lasts ten years, state registration lasts five years, and both can be renewed so long as the mark is being used in commerce.

In order to be registered and enforceable, trademarks may not be generic or highly descriptive terms and cannot infringe on an existing trademark. A phrase or slogan commonly used to refer to a category of product, or that merely describes or praises the product, is incapable of being distinctive enough to be used as a trademark. For example, an attempt to register the phrase "the best beer in America" as a trademark for Sam Adams Beer was rejected by the USPTO as too descriptive. Similarly, a court rejected the trademark "Beef Stick" because the term merely described the kind of good and did not distinguish the manufacturer (*Hickory Farms v. Snackmasters*, 509 F. Supp. 2d 716 (N.D. Ill. 2007)). The USPTO will use the "likelihood of confusion test" to determine whether an applicant's mark infringes on an already registered mark. The examiner looks at the similarity of the two marks and the commercial relationship of the products to assess whether consumers are likely to be confused about the source of the product. If the USPTO finds likelihood of confusion, an application will be rejected. This is the same test that courts use when a trademark owner brings a suit asserting infringement of a trademark.

Registering a trademark has two primary advantages. First, as a direct farm business builds a reputation with customers, registration guards against others who might wish to capitalize on the business's success by using or closely mimicking the trademark. Secondly, registration protects the business from infringing upon already-existing registered trademarks. If a business is found to be infringing on another's trademark, it will have to stop using the mark, which could confuse customers. It may also have to pay fines, disgorge profits made from use of the infringing mark, and pay the other side's attorney's fees - all of which could be very costly.

B. Patents

A patent grants the inventor the right to exclude others from making, using, or selling a particular invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years. In the United States, a patent is issued by the USPTO. To obtain a patent, an invention must be *new* - meaning that it was not known or used by others in the United States or "patented or described in a printed publication in a foreign country" - and it cannot be *obvious*. There are different kinds of patents, but the most common farm-related ones are plant patents and patents on genetically modified plants. Plant patents are also available to someone who has invented or discovered and asexually reproduced a distinct and new variety

⁷³ http://www.cyberdriveillinois.com/departments/business_services/publications_and_forms/trademark.html

⁷⁴ http://www.cyberdriveillinois.com/departments/business_services/trademark.html

of plant, other than a tuber-propagated plant or a plant found in an uncultivated state. A plant patent precludes others from asexually reproducing or selling or using the patented plant for 20 years from the filing of the patent application. Plant protection certificates, which are not patents but provide patent-like protection for sexually reproduced seeds and tubers, are available for newly developed plant cultivars. The Plant Variety Protection Office of the USDA's Agricultural Marketing Service issues plant protection certificates. If a direct farm business is licensed to use a patented product, such as genetically modified seed, it should rigorously comply with the licensing agreement. Some companies are very aggressive about enforcing their contracts.

Farmers who believe they have a new and non-obvious process or device should contact a patent attorney for assistance in obtaining a patent. The inventor should keep in mind that obtaining a patent can be very costly and time consuming, and the potential profitability of the device may not justify pursuing a patent. General information on patents and resources for finding a patent attorney are available on the **USPTO's website**.⁷⁵

C. Copyrights

A copyright protects "original works of authorship fixed in any tangible medium of expression." Although literary works come to mind as examples of copyrighted material, copyright protection in the direct farm business context could extend to categories such as pictures and graphics, sound recordings, movies, and other information related to the direct farm business operation. A copyright does not protect actual ideas or methods, but instead gives the owner certain exclusive rights to the way the copyrighted work is *used*. For example, in many circumstances a copyright owner has the exclusive right to reproduce the work, to make derivative works, and to display the work publicly. The owner also has the exclusive right to authorize others to do the same. Pictures of growing crops or a farmers' market used on the direct farm business website or on promotional material would qualify for copyright protection. On the other hand, unpermitted use of another's pictures (perhaps copied from the Internet) could constitute infringement upon the copyrights of another.

A work does not have to be published or even registered with the Copyright Office to gain protection. Copyrights attach once a work is "created" - that is, once it has been fixed in a tangible medium of expression such as a copy or recording. Even so, registration is important for providing a public record of the copyright claim. Registration also provides significant advantages regarding the enforcement of rights in courts and with Customs and Border Protection. Other information on copyrights, including a searchable database of registrations

⁷⁵ <http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent>

and up-to-date fee information, can be found at the United States Copyright Office's **website**.⁷⁶

The site includes a link to step-by-step instructions on obtaining a copyright.

ADDITIONAL RESOURCES:
Standard Weights and Measures

The Illinois General Assembly maintains lists of standard weights and measures on its website.

Agricultural commodities:

<http://www.ilga.gov/commission/jcar/admincode/008/00800600ZZ9998bR.html>

All others:

<http://www.ilga.gov/commission/jcar/admincode/008/00800600ZZ9998cR.html>

D. Trade Secrets

A trade secret is information that companies make an effort to keep secret in order to give them an advantage over their competitors. Unlike other forms of intellectual property, there is no federal regulation of trade secrets. Even so, most states, including Illinois, have now adopted statutes modeled after the Uniform Trade Secrets Act; Illinois' provisions are codified at 765 ILCS 1065 et seq.

Enforceability generally relies on showing two things:

1. that the information had been secret enough to give a competitive advantage; and
2. that measures were taken to keep others from obtaining or using the information.

Although the agriculture community has traditionally shared innovation, there may be certain trade secrets that

provide the direct farm business an important commercial advantage that warrants protection. Typical examples could include a list of regular customers built up over time, a special recipe for apple preserves, or a secret fertilizer method for growing the best vegetables. In such cases, the employer should require employees to sign non-disclosure agreements and/or non-compete agreements. A typical non-disclosure agreement includes a definition of the confidential information, any exclusion from confidential information, the obligations of the employee to not disclose the information, and a time period in which former employees must maintain the secret. There are exclusions on the scope and duration of non-disclosure agreements, so an attorney may be helpful in drafting a proper enforceable agreement.

IV. WEIGHTS AND MEASURES

The last issue pertinent to selling products direct from the farm (besides the meat of the matter, food safety regulations) is accurately weighing and measuring the product. The Illinois Weights and Measures Act (225 ILCS 470) and the Department of Agriculture's implementing rules (8 IAC Part 600) apply to all sales of commodities within the state. The Act seeks to ensure accurate measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed and by certifying the accuracy of

⁷⁶ <http://www.copyright.gov/>

scales. Direct farm businesses must make sure that any instruments and devices used in commerce for weighing and measuring comply with the provisions of this Act.

Commodities in liquid form must be sold by liquid measure or by weight. All other commodities must be sold by weight, by measure of length and area, or by count. Vegetables may be sold by the head or bunch (225 ILCS 470/23).

Bushels of agricultural commodities must meet the requirements established by the Department of Agriculture (225 ILCS 470/52). The Standard Weight per Bushel for Agriculture Commodities varies depending on the item.

Pre-packaged commodities must identify on the outside of the package (1) the commodity in the package, (2) the net quantity of the contents in terms of weight, measure or count, and (3) the name and the place of business of the source of the commodity if sold elsewhere than on the premises where it was packed (225 ILCS 470/24).

Any commercial weighing and measuring device must be marked with the name of the manufacturer and the serial number (225 ILCS 470/36) and must have been issued a Certificate of Conformance by the National Conference on Weights and Measures (NCWM) which signifies that the device complies with the requirements of the National Institute of Standards and Technology's Handbooks. (225 ILCS 470/30). To find out if a device is certified by the NCWM, enter the requested criteria into the **NTEP Certificate Database Search**.⁷⁷

Inspectors from the Department of Agriculture may make inspections of commercial weighing and measuring devices at any time (225 ILCS 470/10). The **inspection fees**⁷⁸ vary depending on the type and size of the device, and are set out in 8 IAC § 600.310. If the device is found not to be in compliance with the Act, the inspector may order that the device be corrected or confiscated and destroyed (225 ILCS 470/14). Use of devices that are either incorrect or uncertified could incur fines of no less than \$500 for the first offense, \$1500 on a second offense, and no less than \$2500 for a third offense (225 ILCS 470/56).

V. LOOKING TO THE FUTURE: ESTATE PLANNING

Estate planning may not seem like an important component of managing a direct farm business, but it is critical for farmers who wish to keep the farm in the family for future generations. The USDA estimates that 80% of farmers do not have estate plans in place. Without an estate plan, the estate will go through probate court, which means that it may take years to settle the distribution of land and assets among heirs and creditors. Meanwhile, younger generations may not be able to make business decisions or plant the crops necessary to continue the operation. The probate court also applies a set of default rules for distribution that may not be

⁷⁷ <http://www.ncwm.net/certificates>

⁷⁸ Available online at <http://www.ilga.gov/commission/jcar/admincode/008/008006000C03100R.html>

beneficial for the business or the family's wishes: For instance, if the farm has been used to secure equipment, land may be sold off to pay debtors instead of passed down to children, even though there may be other ways to satisfy the debts. Estate planning is highly personal because it involves decisions concerning family and wealth distribution. This guide cannot provide comprehensive information on estate planning; rather, business owners are strongly encouraged to contact an attorney to develop an estate plan.

VI. CHECKLIST

Have you...

- Addressed contractual issues for your operations? This requires:
 - Understanding terms and consequences of any contracts you have agreed to, both oral and written.
 - Knowing when the law requires you to have a written contract in order to enforce it against the other party.
 - Complying with the formal requirements for the creation of production contracts and requirements/output contracts, if used.
- Developed a marketing plan?
 - Do your current practices comply with FDA and FTC law? Are any methods you are considering likely to create legal problems?
 - Are your products properly labeled?
 - Is your Internet business in compliance with all requirements for shipping products, protecting personal information, email marketing, and taxation of goods?
 - Do you have intellectual property you want to protect? Are you infringing on someone else's intellectual property?
- Arranged for state inspection and approval of your scales and measuring devices?
- Considered estate planning for your farm?

KEY CONTACT INFORMATION

U.S. Department of Agriculture's Agricultural Marketing Service (Farmers' Markets and Local Food Marketing Program)

Ph: (202) 720-8317

U.S. Patent and Trademark Office (Customer Support Center for patents & trademarks)

Ph: 1-800-786-9199

U.S. Copyright Office (general questions)

Ph: (202) 707-5959 or 1-877-476-0778 (toll free)

CHAPTER 4: TAXATION

Farm taxation rules are detailed, complex and subject to frequent change. The general information that follows is not a substitute for consulting with a qualified attorney and/or tax professional.

This chapter is organized by the type of tax for which the direct farm business may be liable, such as income, self-employment and employment, sales, excise, and property taxes. Because each direct farm business requires its own particular tax analysis, a thorough discussion of tax liability is beyond the scope of this Guide. The sections in this chapter provide basic information on types of taxes, forms and sources of additional information, but it is important to contact a professional for more detailed guidance.

I. REQUIREMENTS AT SET-UP

A. Federal Registration Requirements

A direct farm business may need to obtain a federal employer identification number (EIN) to identify the business entity. If the answer to any of the following questions is yes,⁷⁹ the operation needs an EIN:

- Does the business have employees?
- Is the business operated as a corporation or a partnership?
- Does the business file any of these tax returns: Employment, Excise, or Alcohol, Tobacco and Firearms?
- Does the business withhold taxes on income, other than wages, paid to a non-resident alien?
- Does the business have a Keogh plan?
- Is the business involved with any of the following types of organizations?
 - Trusts, except certain grantor-owned revocable trusts, IRAs, Exempt Organization Business Income Tax Returns
 - Estates
 - Real estate mortgage investment conduits

⁷⁹ These questions are also on the IRS's website: <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html>

- Non-profit organizations
- Farmers' cooperatives
- Plan administrators

B. Illinois Registration Requirements

All persons, including all types of business entities, that sell tangible personal property (e.g., food) to consumers must register with the Illinois Department of Revenue before conducting business or hiring any employees in Illinois (86 IAC 130.701). Registration can be done online through the **Illinois Business Gateway**⁸⁰ in person or via mail. The owner must display the registration in a prominent location at the business site.

If a business hires any employees, it must register with the **Illinois Department of Employment Security**.⁸¹ The Labor and Employment chapter of this Guide covers labor and employment requirements in greater detail.

II. TAXATION OF BUSINESS INCOME

A. Federal Taxation (26 U.S.C. Subtitle A)

As noted above, a thorough discussion of the intricacies of business tax is beyond the scope of this Guide. This is particularly true of business income taxes, in which complex rules specific to each type of entity, base income and any deductions and/or credits depend upon the operations of the particular business.

An excellent place to start any research is *Publication 225: Farmer's Tax Guide*. The guide, published by the IRS, is available through the IRS **Agricultural Tax Center website**.⁸² The guide covers tax issues specific to farming, including records, accounting methods, income and expenses, expenses associated with soil and water conservation, asset basis, depreciation/depletion/amortization, gains and losses, disposition of property, installment sales, casualties/theft/condemnation, self-employment tax, employment tax, excise tax, estimated taxes, filing a return, and where to get help. In addition, the website **www.ruraltax.org** covers a wide range of tax issues relevant to farmers and direct farm businesses, including who is a "farmer" for tax purposes, filing dates and estimated tax payments, self-employment taxes, and others.

⁸⁰ <https://www.revenue.state.il.us/app/ibri/>

⁸¹ <http://www.ides.state.il.us/employer/uitax.asp>

⁸² <http://www.irs.gov/businesses/small/industries/article/0,,id=201608,00.html>

For information and publications on the taxation of each type of business entity, as well as necessary forms, go to the online **IRS A-Z Index for Businesses**.⁸³

ADDITIONAL RESOURCES:

Federal Taxation

Partnerships

IRS Publication 541 provides a more detailed overview of federal taxation of partnerships.

<http://www.irs.gov/pub/irs-pdf/p541.pdf>

Corporations

IRS Publication 542 outlines some of the basic tax considerations relevant to corporations.

<http://www.irs.gov/pub/irs-pdf/p542.pdf>

Investment Income

Taxation of investment income is covered in IRS Publication 550.

<http://www.irs.gov/pub/irs-pdf/p550.pdf>

Sole Proprietorships

Sole proprietorships file taxes along with the owners' income tax using Form 1040. The IRS considers a sole proprietor as self-employed, and also liable for self-employment tax, estimated taxes, social security and Medicare taxes, income tax withholding (if the business has employees), and federal unemployment tax (FUTA). These taxes are imposed on all employers and discussed in detail in Section 4, below.

Partnerships

Partnerships file Form 1065 to report earnings, but do not pay taxes. Rather, the tax liability "passes through," meaning that each partner pays taxes on her share of the partnership's earnings as part of her personal income taxes. Accordingly, a partner who owns a 70% share in the business would pay taxes on 70% of the partnership's earnings. Each partner must pay taxes on their share of partnership's earnings, even if no distribution is made. For instance, if the partnership reinvests all of the earnings in expanding the business, partners would still pay taxes on their share of the undistributed earnings. Similarly, partnership losses pass through to individuals and are deductible by the individual up to the partner's basis⁸⁴ in the partnership.

Corporations

Corporations pay taxes on their profits (and can deduct a certain amount of their losses). Generally, the corporation must make estimated tax payments throughout the year (using form

⁸³ <http://www.irs.gov/businesses/small/article/0,,id=154770,00.html>

⁸⁴ Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

1120-W). At the end of the year it makes a final calculation and reports its taxes using Form 1120.

As noted in the introduction, shareholders must pay taxes on the corporate profits distributed to shareholders. Corporations may distribute profits in several ways, such as dividend payments, increased stock ownership, changes in types of stock, etc. The IRS considers all of these distributions as taxable income. Of course, if shareholders work for the corporation, a common situation in small corporations, the shareholder/employee must pay individual income taxes on their wages/salary.

S corporations

S corporations, except in limited circumstances, do not pay taxes. Instead, earnings and losses pass through to the shareholders, who pay taxes on these earnings based on their individual income level. The earnings are allocated on a per share, per day basis, with shareholders liable for taxes on these earnings even if there is no cash distribution. An S corporation reports earnings and losses on Form 1120S.

Limited Liability Companies (LLC)

Owners of an LLC may elect to organize as a sole proprietorship (as an entity to be disregarded as separate from its owner, or "disregarded entity"), partnership, or corporation. If the LLC has one owner, the IRS automatically will treat the LLC as a sole proprietorship unless the LLC elects treatment as a corporation. Similarly, if the LLC has two or more owners, the IRS automatically will treat the LLC as a partnership unless it elects otherwise. The LLC may elect corporate status using Form 8832. Sole proprietorships or partnerships do not have to file Form 8832 unless they wish to be treated as a corporation.

Single-member/owner sole proprietorship LLCs file an individual tax return (1040, Schedule C, E or F). Multiple-member/owner LLCs file a partnership return (Form 1065). LLCs electing corporate treatment file a corporate return (1120 or 1120S).

Cooperatives

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative, as a non-profit, typically is not taxed, as any earnings pass through to individual patrons of the cooperative. The cooperative reports profits on Form 1120-C and patrons report income on form 1099-patr. For a primer on the federal taxation of cooperatives, the USDA Rural Development maintains a **website**⁸⁵ that contains many publications related to the taxation of cooperatives, including *Cooperative Information Report 23, The Tax Treatment of*

⁸⁵ <http://www.rurdev.usda.gov/rbs/pub/legal.htm>

ADDITIONAL RESOURCES: State Taxation

The State of Illinois Business Portal has online information regarding business income taxes, including links to forms and contacts for additional assistance.

<http://business.illinois.gov/taxinfo/income.cfm>

The Illinois Department of Revenue maintains a website containing publications and forms.

<http://www.iltax.com/taxforms/>

Cooperatives, published by the USDA Rural Development program. *IRS Publication 225: Farm Income* also touches on cooperative reporting of taxes.

B. State Taxation

In addition to federal income taxes, the direct farm business is subject to Illinois business income taxes. The Illinois Income Tax Act (35 ILCS 5) and Title 86 of the Illinois Administrative Code govern income taxation for Illinois direct farm businesses.

Illinois bases its taxes on the federal tax structures, although there may be some variations in taxable income based on differences in allowable deductions and credits. A major difference between Illinois and federal taxes is the Personal Property Tax Replacement Tax (“replacement tax”). In 1970, Illinois amended its constitution to abolish local personal property taxes on businesses. In 1979, the legislature enacted the “replacement tax” to allow the state to collect taxes and distribute money to localities to replace the lost personal

property revenue. Corporations, S corporations, LLCs, partnerships, trusts, and public utilities pay the replacement tax. The tax rate varies according to type of business entity.

Corporations

Corporations in Illinois pay an income tax as well as the replacement tax. The replacement tax on corporations is 2.5%. Corporations file form IL-1120.

S corporations do not pay the Illinois income tax, which is paid by the shareholders. If the S corporation has non-resident shareholders, the S corporation must make a pass-through entity tax payment on their behalf and notify the shareholder of the amount of the payment. An S corporation must also pay the replacement tax, which is 1.5%. S corporations must file form IL-1120-ST.

Partnerships

Partnerships also pay the 1.5% replacement tax and make the pass-through entity payment. To pay the replacement tax, a partnership must file form IL-1065. Like at the federal level, partnerships do not pay an income tax. Instead, their income passes through to the partners pro-rata, with the partners reporting the income on their personal tax returns.

Cooperatives

Cooperatives are treated as corporations under the Illinois tax code (86 IAC 100.9750(b)). The code does not differentiate between cooperatives organized under the general Cooperative Act (805 ILCS 310) and the Agricultural Cooperative Act (805 ILCS 315). Although considered a nonprofit if organized under the Agricultural Cooperative Act, the Illinois Department of Revenue treats the cooperative as a for-profit entity subject to many of the same taxes as other businesses.

III. EMPLOYMENT AND SELF EMPLOYMENT TAXES

This section provides brief summaries of the taxes employers must withhold. For more comprehensive information, see *IRS Publication 15: Employers Tax Guide*, which contains instructions on the intricacies of withholding federal taxes from employees' wages. *Publication 51: The Agricultural Employer's Tax Guide*, covers common issues that arise in the agricultural context, such as social security numbers (which prove an employee is authorized to work in the United States) versus individual taxpayer identification numbers (which look similar to SSNs, but are given to aliens who *are not* authorized to work in United States). Federal laws governing employment taxation are in Subtitle C of Title 26 of the U.S. Code, with implementing regulations in Part 31 of Title 26 of the Code of Federal Regulations. The Illinois income tax provision is located at 35 ILCS 5, with the implementing regulations in 86 IAC Part 100.

A. If the Direct Farm Business Has Employees

Employers are responsible for withholding and submitting federal and state employment taxes on behalf of their employees. Federal employment taxes to be withheld include the Federal Income Tax and Social Security/Medicare (FICA) taxes; employers must also withhold Illinois income tax.

A direct farm business must register with the Illinois Department of Employment Security within 30 days of starting operation if it hires any employees, including corporate officers. This can be done electronically or by mail using Illinois form UI-1. Forms are available on the Illinois Department of Employment Security's **website**.⁸⁶

Employee Income Taxes

Withholding federal income taxes from employees entails obtaining a W-4 form from each employee that indicates what withholding allowances they qualify for and what class (e.g., single or married) they fall into. The employer uses this information to calculate the employee's tax rate using the IRS's withholding tables, which are available in *IRS Publication 15-T*. The IRS

⁸⁶ <http://www.ides.state.il.us/forms/default.asp>

bases withholdings on base pay, as well as supplemental wages (such as overtime pay) and fringe benefits (for instance, providing farm employees fresh produce or other farm products to satisfy their weekly grocery needs). The IRS excludes some fringe benefits, such as the *de minimis* exception that covers small benefits for which it would be inconvenient and unreasonable to have to keep an accounting of (for instance, allowing employees to occasionally take home small quantities of produce). If an employee is a non-resident alien, the employee must register as single (even if married) and the employer must adjust the calculation of the

**ADDITIONAL RESOURCES: State
Tax Guides for Employers**

**The Illinois Department of
Revenue (IDOR) publishes
several guides for employers on
state income tax withholding:**

**Publication 130: Who Is
Required to Withhold Illinois
Income Tax**

<http://www.revenue.state.il.us/Publications/Pubs/Pub-130.pdf>

**Publication 131: Withholding
Income Tax Filing and Payment
Requirements**

<http://www.revenue.state.il.us/publications/Pubs/Pub-131.pdf>

taxable income for each pay period. Some employees may qualify for an exemption from income tax withholding if they did not owe taxes in the previous year and do not expect to owe taxes the next year. Such employees should indicate this on their W-4. Employers must report and remit taxes either bi-weekly or monthly, depending on tax liabilities from previous years. Which form to use (941, 944 or 8901) depends on the amount of taxes deposited.

If an employer must withhold federal taxes, they will also most likely have to withhold Illinois income taxes.

Employees must fill out form IL-W-4 for employers to determine which exemptions the employee qualifies for. Even if an employee is exempt from federal withholding, the employer may still have to withhold Illinois income taxes. For example, employers must withhold Illinois income taxes when the work is “localized” (i.e. occurs mostly) in Illinois, unless the employee is a resident of Iowa, Kentucky, Michigan, or Wisconsin. If the employee is not a resident of Illinois, the employer probably also needs to withhold income taxes for the employee’s resident state. As at the federal level, employers calculate withholdings using tables published in **Booklet IL-700T**,

Withholding Income Tax Tables.⁸⁷ The IDOR uses the amount of taxes paid in previous years to determine how and when a business reports and pays the withholding taxes in the current year.

Social Security and Medicare Taxes

Social Security and Medicare taxes pay for employees’ benefits upon retirement. These taxes are known collectively as Federal Insurance Contributions Act taxes, or "FICA" taxes. Social Security and Medicare taxes have different rates, and the Social Security Tax has a wage base

⁸⁷ Available online at <http://www.revenue.state.il.us/taxforms/Withholding/IL-700-T.pdf>.

cap--a maximum limit on the wages subject to the Social Security tax. The employee pays the tax from his/her wages, and the employer makes a matching payment. Form 943 is used to file income taxes and FICA taxes withheld for farm workers. Employers deposit these taxes on a weekly or monthly basis, depending on the total taxes reported for a two year lookback period (e.g., the lookback period for 2010 extends to 2008).

Unemployment Insurance Taxes

Almost every employer pays unemployment taxes. Although an employer must pay both federal and state unemployment insurance taxes, paying the Illinois unemployment taxes may allow an employer to receive credit towards some of the federal unemployment tax. The Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.) and the Illinois Unemployment Insurance Act (820 ILCS 405) govern whether agricultural operations must pay an unemployment insurance tax on cash wages paid to employees.

An agricultural operation is considered an employer subject to the Federal and State Acts if: (a) during any calendar quarter in the calendar year or preceding calendar year the operation paid wages of \$20,000 or more for agricultural labor, or (b) the farmer employs 10 or more individual employees for some portion of a day during each of 20 different calendar weeks (26 U.S.C. § 3306(c)(5); 820 ILCS § 405/211.4(1)).

The federal tax is paid using Form 940, with deposits generally required quarterly. For 2008 and 2009, the rate was 6.2% of the first \$7,000 paid to each employee, but there is a credit of up to 5.4% for paying state unemployment taxes. *Publication 51: Agricultural Employer's Tax Guide* describes federal unemployment taxes.

An Illinois employer subject to the tax must pay quarterly contributions on its taxable payroll for the entire year that the employer is subject to the tax *and* for the entire following year. So if a farm pays less than \$20,000 in wages for the first three quarters, then pays more than \$20,000 during the fourth quarter, it becomes covered by the Act and must pay taxes on the payrolls from *all* four quarters. The Illinois Department of Employment Security (IDES) should send all liable employers form UI-3/40 every quarter to report. If IDES neglects to send the form, it is the responsibility of the employer to obtain the form and pay on time. The Illinois Department of Employment Security has published a brochure titled **Fast Facts For Employers**⁸⁸ that has a section on unemployment insurance. For more detailed information, see the **IDES's employer website**.⁸⁹

⁸⁸ Available online at <http://www.ides.state.il.us/pdf/employers/FastFacts.pdf>

⁸⁹ <http://www.ides.state.il.us/employer/default.asp>

B. Farmers Who Are Self-Employed

Many farmers are self-employed. The self-employment tax is a Social Security and Medicare tax paid by persons who work for themselves. Farmers carrying on the direct farm business as a sole proprietor or member of a partnership, or who are otherwise in business for themselves, are "self-employed" and must pay self-employment tax if their earnings are \$400 or more. The self-employment tax rate for 2009 is 15.3% on the first \$106,800, and 2.9% on any additional income. Income subject to the Social Security Tax is capped, and 50% of the self-employment tax due is deductible from total income on Form 1040. Individuals must report self-employment taxes on Schedule SE. The IRS's *Farmer's Tax Guide* provides additional details regarding the self-employment tax rules.



IV. SALES AND SERVICES TAXES

Direct farm businesses that sell food and/or other goods to customers are responsible for collecting state and local sales and services taxes (as discussed below). Direct farm businesses that purchase goods may be responsible for paying sales tax, but in some instances the purchases will be exempt.

A. Sales Tax

Sales tax is levied on a business's receipts from the sale of tangible personal property to purchasers for use or consumption. Sales tax is actually a combination of *occupation* taxes imposed on a business's receipts from the sale of goods used or consumed by consumers, and *use* taxes imposed on consumers that purchase items for personal use or consumption from a business. Sellers owe *occupation* taxes, but they reimburse themselves by collecting a *use* tax from the consumer (86 IAC § 130.101(d)).

The *Retailers' Occupation Use Tax Act* (35 ILCS 120) and regulations (86 IAC part 130) govern occupation taxation. The *Use Tax Act* (35 ILCS 105) and regulations (86 IAC part 150) outline use tax rules.

Who Pays?

Persons engaged in the business of selling tangible personal property in Illinois to purchasers for use or consumption must pay retailers' occupation taxes (86 IAC § 130.101). This includes agricultural producers (86 IAC 130.1905), agricultural cooperatives (86 IAC § 130.1945), nurserymen (86 IAC § 130.1965(c)), hatcheries (86 IAC § 130.1970), sellers of feed and breeding

livestock (86 IAC § 130.2100), and vendors of meals (including restaurants and boarding houses) (86 IAC § 130.2145). If a direct farm business operates a "place of public amusement" (e.g., a pumpkin patch) and, auxiliary to the operation of that business, sells refreshments, beverages, or other tangible personal property to purchasers for use or consumption, occupation taxes would apply to those sales, but the tax would not apply to the admission fee to the pumpkin patch (80 IAC § 130.2030(a)).

If the direct farm business sells an item to a purchaser for resale (e.g. to a restaurant or grocery store), the transaction is exempt from occupation taxes (86 IAC § 130.120(c)). In a resale situation, the seller should obtain a certificate of resale from the purchaser to demonstrate that the transaction is indeed exempt (86 IAC § 130.1405). In addition, the regulations exempt some items from the occupation/use tax altogether (86 IAC §§ 130.120, 130.305-.351) (*see purchases for the farm, below*) and certain food items have a lower tax rate (*see computation, below*).

Computing the Sales Tax

Retailers compute their tax liability by applying the effective tax rate to the gross receipts from the sale (86 IAC § 130.101(a)(1) and (b)). The term "gross receipts" includes all consideration (payments) received by the seller, except trades in personal property (86 IAC § 130.401).

The state tax rate is 6.25% on general merchandise (86 IAC § 130.101), and 1% on certain food purchases explained below (86 IAC § 130.310). Local governments (townships, counties, cities) may charge additional taxes on sales. Accordingly, the direct farm business should contact localities to determine what additional rates may apply. The Department of Revenue's website also has a **tax rate finder**⁹⁰ to determine rates by location.

The tax rate for food is based on whether it is intended for consumption on or off the premises. Food for human consumption *off the premises*, and not for immediate consumption, has a 1% tax rate (86 IAC § 130.310). The general 6.25% rate applies to all other food. The regulations define food as "any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice." This definition is important in the case, for example, of a pumpkin patch that sells pie pumpkins and gourds. The pie pumpkin, if not intended for consumption on the premises, qualifies for the 1% tax rate. The gourd, if not edible, is taxed at the 6.25% rate.

The regulation also establishes standards for determining whether food is intended for consumption on or off the premises (86 IAC § 130.310). According to the regulations, restaurants, concession stands, snack shops, and other establishments that sell food primarily (more than 50%) in individualized servings are deemed to sell food for immediate

⁹⁰ <http://www.revenue.state.il.us/Publications/taxratefinder.htm>

consumption, and have a 6.25% tax rate. In contrast, the regulations assess a 1% rate to delicatessens, bakeries, markets and dairies that sell food primarily (more than 50%) in quantities greater than individual-sized servings. However, if the facility provides an area for consumption of food on the premises, the higher tax rate will apply to that food unless there is a separate system utilized to calculate sales of food for consumption on the premises and the area where food is sold for on-premises consumption has a physical partition from the other areas. Regardless of partitions, the 6.25% rate applies to all sales of *hot foods*.

Soft drinks sales, including carbonated water, are subject to the higher 6.25% rate regardless of where consumed. Milk, coffee, tea, non-carbonated water, or fruit or vegetable drinks containing 50% or more juice are not soft drinks, and therefore, if not consumed on premises, qualify for the reduced 1% rate. Alcohol is always subject to the higher rate.

The retailer should provide the customer with a receipt showing details of the transaction (86 IAC § 150.601). A separate item on the receipt should state the use tax (86 IAC § 150.401(b)). If it does not, the Department of Revenue will assume that the retailer did not collect the tax unless a sign is visible indicating that the sales price includes the tax (86 IAC § 150.401(c)). It is unlawful to represent to a customer that seller will absorb the sales tax, or that the seller will not add it to the sales price (86 IAC § 150.515). The regulations provide for methods of calculating tax on sales of items subject to differing tax rates (86 IAC § 150.525).

Paying the Sales Tax

On the twentieth day of every calendar month, a business must file a sales tax return for the preceding month with the Department of Revenue (86 IAC § 130.510(a)). This can be done for free on the **IDOR website**⁹¹ if certain conditions are met. Some businesses can also file over the phone (telefile); the instructions are available **online**.⁹² The Department of Revenue may authorize quarterly filings if the average monthly sales tax liability does not exceed \$200 (86 IAC § 130.502), or annually if the average monthly liability does not exceed \$50 (86 IAC § 130.510). The tax is due at the time of filing (86 IAC § 130.525). In addition, the Department may require weekly payments if sales tax liability exceeds certain amounts. Businesses must file returns for every reporting period, even if no tax is collected (86 IAC § 130.545). The returns must contain or be verified by a written declaration that the filing is made under penalty of perjury (86 IAC § 130.560).

The retailer can deduct, as an allowance for collecting the tax, 1.75% of the use tax collected, or \$5.00 per calendar year, whichever is greater (86 IAC § 150.905). Retailers cannot claim the deduction if the tax is paid late.

⁹¹ <http://www.revenue.state.il.us/Businesses/stwebfile.htm>

⁹² <http://www.revenue.state.il.us/Businesses/telefile.htm>

Retailers also must keep records to verify sales (86 IAC §§ 130.801-.825; 150.1305). On a very general level, the records need to be precise enough to enable an IDOR accounting of what taxes the business should have collected. For instance, cash register tapes from each day would satisfy the requirement. For the most part, these records need to be kept for at least three years unless IDOR authorizes earlier destruction.

B. Service Tax

The service tax is very similar to a sales tax, but applies to personal property sold incident to a service (35 ICLS § 110, 115; 86 IAC Part 140). For instance, when a mechanic sells a car part to a customer in order to make a repair on the car, the service tax applies. The tax is applied to the sold personal property, and does not apply to the full cost of the service (e.g. labor). The regulations assess the service tax as applied to food at the same rates as for sales tax, so the difference should be immaterial for most direct farm businesses (86 IAC 140.26).

Purchases for the Farm

When a direct farm business purchases items from another business that are related to farm production, the purchase is exempt from the sales (use) tax (35 ILCS § 105/3-5). These include: farm chemicals; certain farm machinery and equipment and replacement parts (greenhouse structures such as horticultural polyhouses or hoop houses qualify as machinery or equipment, as well as lighting and mesh tables for the greenhouse, and carts protecting the plants during shipment); and precision farming equipment such as computers and GPS devices. Farm production includes raising livestock, crops for human and livestock consumption, production of seed stock for purposes of providing a food product or for propagation of feed grains for animal consumption, animal husbandry, floriculture, viticulture, aquaculture, and horticulture (35 ILCS § 105/3-35; 86 IAC §§ 130.120 and 130.1955).

When a direct farm business purchases farm machinery or equipment primarily for the purpose of farm production incident to the purchase of *service*, the goods are exempt from the 6.25% service occupation/use tax (35 ILCS §§ 110/3-5, 115/3-5). The regulations' definition of "farm machinery" is the same as the one used for the occupation/use tax, above. The sale of farm chemicals incident to a spraying service is exempt from the service use tax (86 IAC § 140.125(m)).

Hotel Operators Occupation Tax

Illinois charges a tax to all hotel operators, including inns, motels, rooming houses, etc. (35 ILCS § 145). Therefore, it would apply to an agritourism operations running a bed and breakfast or a guest ranch where customers stay on a farm and learn about the farm's operations. The tax is 5% of 94% of the occupation rate (what the guest pays to stay at the farm). The rate includes the monetary value of services, so if "guests" pay for their stay by working on the farm, the

monetary value of the labor is subject to the tax. The tax rate for permanent residents (anyone who stays for more than 30 consecutive days) is 1% of 94% of the occupation rate (86 IAC §§ 480.101, 480.105). Localities often charge a similar tax, so direct farm businesses wishing to rent living quarters should also check with local government.

V. EXCISE TAXES

An excise tax is a tax levied on the purchase of a specific good. The most common excise tax that a direct farm business may encounter is the motor fuel excise tax. Under both federal and Illinois statutes, certain uses of fuel, such as farm use, are nontaxable. The user therefore may be able to seek a credit or refund of the excise tax paid for fuel. Credits or refunds are available for many types of fuel.

A. Federal Fuel Excise Taxes

The Internal Revenue Code (26 U.S.C. §§ 4081 and 4041) and regulations (26 C.F.R. §§ 48.6420-1 and 48.4041-9) govern federal fuel taxation. *IRS Publication 510: Excise Taxes* and *IRS Publication 225: Farmer's Tax Guide* explain fuel excise taxes, as well as which uses of fuel qualify for tax credits and refunds. Fuel used on a farm for farming purposes and fuel used for off-highway business purposes are exempt from excise taxes. Farmers may claim the tax as a credit at the end of the year or obtain quarterly refunds of the tax, depending on how the fuel was used. To substantiate claims, the IRS requires businesses to keep certain records, such as the name and address of the person who sold the fuel.

The term "farm" includes operations such as livestock, dairy, fish, poultry, fruit, fur-bearing animals, and truck farms, orchards, plantations, ranches, nurseries, ranges, and feed yards, as well as greenhouses used primarily for raising agricultural or horticultural commodities. "Farming purposes" include cultivating crops, raising livestock or other animals, operating and maintaining the farm and its equipment, handling and storing raw commodities, and caring for trees if they are a minor part of the overall farm operation. Fuel used for aerial spraying also qualifies for an exemption, including fuel used to travel from the airfield to the farm. Non-farm uses that *are subject to the excise tax* include fuel used off the farm such as on the highway for transportation of livestock, feed, crops or equipment; fuel used in processing, packaging, freezing, or canning operations; and fuel used in processing crude maple sap for syrup or sugar. Taxes paid for fuel used on the farm may be claimed as a tax credit at the end of the year by using Form 4136.

The IRS also exempts fuel used off-highway in a trade, business or income producing activity. This exemption does not apply to fuel used in a highway vehicle registered or required to be registered for use on public highways, including boats. Nontaxable uses in this category include fuels used in stationary machines such as generators, compressors, power saws and similar equipment; fuels used for cleaning purposes; and fuel for forklift trucks,

bulldozers, and earthmovers. Some fuels that would not otherwise qualify for the farming exemption may qualify for this exemption - fuel used to boil sap into syrup, for example. A business can recoup excise taxes on fuel used off highway for business purposes either by claiming a credit (using Form 4136) or a refund. Taxpayers use Form 8849 and Schedule 1 (which details the federal excise tax rates) to claim a refund of excise taxes paid on fuel used off-highway for business purposes. Taxpayers that pay over \$750 in excise taxes in one quarter can claim a refund at the end of a quarter rather than waiting until the end of the year. Claims not exceeding \$750 in one quarter can carry over to the next quarter.

B. Illinois Fuel Excise Taxes

The *Motor Fuel Tax Law* (35 ILCS 505) and accompanying regulations (86 IAC Part 500) govern fuel taxation in Illinois. Any person who uses motor fuel for purposes other than operating a motor vehicle on a public highway can seek a refund of the state excise tax on fuel (35 ILCS 505/13). Refunds are available to farmers for gasoline (taxed at 19 cents/gallon) and un-dyed diesel fuel (taxed at 21 1/2 cents/gallon). Form RMTF-11-A is the form used to make an Illinois motor fuel tax refund claim. Purchasers must retain proof of taxes paid.

VI. PROPERTY TAXES

Direct farm businesses must pay local property taxes each year on real property owned by the business. If a farmer leases land from an owner who is otherwise exempt from paying property taxes (e.g., a governmental entity), the farmer must nonetheless pay property taxes on the rented land.

The Illinois Property Tax Code (35 ILCS 200) governs property taxation in Illinois. Typically, the assessment on real property is 33 1/3% of fair market value, and is calculated in two-year cycles. However, farmland has a different assessment formula based on the "agricultural economic value" or "use value." Computation of this value is complex, but in sum, the value is based on statewide studies of land use under average management, soil productivity (a rating assigned to each soil type based on its ability to produce crops), and net income of farms in the state.

The Director of IDOR then converts the use value into the equalized assessed value, depending on the type of farmland. Equalized assessed values for croplands⁹³ are one third of the

⁹³ The definition of "crop" appears to include both the growing of commodity crops and specialty crops, although the soil productivity index used in calculating the agricultural use value only includes calculations for commodity crops. The statute (35 ILCS 200/10-25) defines "crop" as the definition set by the U.S. Census Bureau (which would now be by the Department of Agriculture's National Agricultural Statistics Service (NASS), the agency that conducts the agricultural census every 5 years). NASS classifies crop production using the North American Industry Classification System (NAICS), which includes under "crops" the growing of specialty crops.

agricultural economic value. Permanent pasture is one third of the assessment rate of the land if planted in crops. Other farmland is one sixth of the crop assessment rate. Wasteland has no assessed value unless it contributes to the productivity of the farm.

The county assessor notes each of the farm's land use categories and takes the equalized assessed value for each soil productivity index to arrive at the farm's total assessed value. Department of Revenue regulations specify farmland assessment review procedures (86 IAC 110.165).

In order to qualify for farmland assessment levels, the property must meet the legal definition of "farm" for the previous two years. The Code defines "farm" as:

Any property used solely for the growing and harvesting of crops; for the feeding, breeding and management of livestock; for dairying or for any other agricultural or horticultural use or combination thereof; including, but not limited to, hay, grain, fruit, truck or vegetable crops, floriculture, mushroom growing, plant or tree nurseries, orchards, forestry, sod farming and greenhouses; and the keeping, raising and feeding of livestock or poultry, including dairying, poultry, swine, sheep, beef cattle, ponies or horses, fur farming, bees, fish and wildlife farming.

The term "farm" does not include property primarily used for residential purposes, even though some farm products may be grown or farm animals bred or fed on the property incidental to its primary residential use. The assessment value for farm dwellings and parcels of property on which farm dwellings are immediately situated is 33 1/3% of fair market value (rather than the agricultural economic value) (35 ILCS 200/10-145).

Improvements, which include buildings such as on-farm retail stores or processing facilities for value added products, are assessed as part of the farm when such buildings contribute in whole or in part to the operation of the farm. Their assessment value is 33 1/3% of the value of the building's contribution to the farm's productivity, which is usually similar to the building's fair market value (35 ILCS 200/10-140).

VII. CHECKLIST

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Registered with the Illinois Department of Revenue?
- Obtained the necessary forms and established proper taxing procedures for your business entity?
- Obtained the appropriate forms and established good record keeping procedures for:
 - income, Medicare and social security tax withholdings?
 - collection and remission? Don't forget about local sales taxes on top of the state's!
 - fuel excise tax reimbursements and credits?
- Looked up your land's assessed value and calculated your current property taxes and how changed land uses could alter the tax value?

KEY CONTACT INFORMATION

U.S. Internal Revenue Service (general help)

Ph: 1-800-829-1040 (assistance for individuals)

Ph: 1-800-829-4933 (assistance for businesses)

To find a local Taxpayer Assistance Center (which offer face-to-face tax assistance), visit <http://www.irs.gov/localcontacts/index.html> (zipcode search).

Illinois Department of Revenue, Central Registration Division (business registration)

Ph: 217-785-3707

Email: rev.int-reg@illinois.gov

CHAPTER 5: LABOR AND EMPLOYMENT

Several federal and Illinois laws address labor and employment issues in the agricultural context. This chapter is meant to provide an overview of fair labor standards, migrant and seasonal workers protections, occupational health and safety, workers compensation, and employee liability. These are only some of the employment issues a direct farm business might encounter. The information contained on these pages should not be understood as all-inclusive, and in all situations an attorney should be consulted regarding compliance with labor and employment laws applicable to a specific operation.

I. FAIR LABOR STANDARDS

A. *The Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) is the federal law that establishes minimum wages (currently \$7.25, but see Illinois below) and maximum hours worked per week (40 hours, over which amount employees must be paid time and a half), and prohibits employment discrimination and child labor (29 U.S.C. §§ 206; 207; 206; 212, respectively).

However, *there are exceptions to these laws for agricultural employees* (29 U.S.C. § 213; 29 C.F.R Part 780). To qualify for the exceptions, the employee's activity must fall under the Act's definition of agriculture, which is "farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities. . . the raising of livestock, bees, fur-bearing animals, or poultry, or any practices (including forestry or lumbering operations) performed by a farmer or on a farm *as 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" (29 U.S.C. § 203(f), emphasis added).

The Department of Labor divides the definition into two branches: primary agriculture and secondary agriculture (29 C.F.R. § 780.105). The primary definition includes farming in all its branches and the specific farming operations enumerated in the definition above (*id.*). These activities always qualify for the agricultural exemption, regardless of the employer's purpose in performing the activities (for instance, a factory owner operates a farm for experimental purposes for the factory) (29 C.F.R. § 780.106). The secondary meaning of "agriculture," which encompasses operations that do not fall within the primary meaning of the term, requires that work be " . . . performed by a farmer or on a farm as an incident to or in conjunction with such [primary agriculture] farming operations . . ." (*id.*). Analysis of whether the work is performed "by a farmer" (29 C.F.R. §§ 780.130-780.133) or "on a farm" (29 C.F.R. §§ 780.134-136) and is "incidental to or in conjunction with" the primary agricultural farming operations (29 C.F.R.

§§780.137-780.157) is complex and highly fact specific. If employees are doing work that may be “incidental or in conjunction with” the primary farming activity, or doing work off the farm, or performing work on another farmer’s products, the employer should consult an attorney or contact the local U.S. Department of Labor’s Wages & Hours division before relying on the agriculture exemption to the FLSA. Contact information is available on the Department of Labor **website**.⁹⁴ For more general information, the U.S. Department of Labor maintains an agriculturally oriented **compliance webpage**.⁹⁵

Minimum Wage & Overtime Exceptions

Agricultural employees are always exempt from federal *overtime* requirements (29 U.S.C. § 213(b)(12)). The agricultural exemption applies on a workweek basis. An employee who performs any activities that do not qualify under the definition of agriculture would not be exempt from FLSA rules (under the Agricultural Labor Exemption) for that workweek (29 C.F.R. § 780.10). The Act also exempts from the overtime requirements a significant number of agricultural-related activities, including (1) drivers or driver's helpers making local deliveries if the employee is compensated on a per trip basis; (2) agricultural employees who are also employed in affiliated livestock auctioning; (3) employees involved in the processing of maple sap into sugar or syrup; (4) employees engaged in the transportation of fruits or vegetables from the farm to the place of first processing or first marketing within the same state; and (5) employees who transport other employees to any point within the same state for the purpose of harvesting fruits or vegetables (29 U.S.C. §§ 213(b)(11), (13), (15), & (16)).

Agricultural employees (as well as fishing and fish farming employees) are exempt from **both** the federal minimum wage and overtime requirements if any of the following apply (29 U.S.C. § 213(a)):

- the employer did not use more than 500 man-days⁹⁶ of labor during any quarter of the preceding year;
- the employee is an immediate family member;
- the employee is a hand laborer paid on a piece-rate basis who commutes from his/her home each day and was not employed in agriculture more than 13 weeks in the preceding year;
- the employee is a family member under the age of 16 working on the same farm as the parent or surrogate parent who is paid on a piece-rate basis and is paid at the same rate as those over 16; OR

⁹⁴ <http://www.dol.gov/whd/america2.htm#Illinois>

⁹⁵ <http://www.dol.gov/compliance/topics/wages-agricultural.htm>

⁹⁶ A “man day” is defined as any day where any employee performs agricultural work for at least one hour.

- the employee is principally engaged in the production of range livestock.

B. Federal Child Labor Laws

Generally, children must be at least 16 years old to work on a farm during school hours (29 C.F.R. § 570.2). During non-school hours, children who are 14 can work on a farm, and 12 and 13-year-olds may work on a farm either with parental consent or when working on the farm with the parent. Children under 12 may only work on their family's farm or on a farm that is exempt under 29 U.S.C. § 213(a)(6) (29 U.S.C. § 213(c)(1)). Children under the age of 16 cannot work in agriculture in a particularly hazardous position, except when employed by their parents on a farm owned or operated by the parents (29 U.S.C. § 213(c)(2)). Hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous farm chemicals. The full list is available at 29 C.F.R. § 570.71.



Under very limited circumstances, 10- to 12-year-olds can be employed off of the family farm for hand harvesting, but an employer must apply for a waiver and demonstrate that the industry seeking to employ the children will suffer severe disruption without the child labor (29 U.S.C. § 213(c)(4); 29 C.F.R. §§ 575.1-575.9).

The Illinois Minimum Wage Law

The Illinois Minimum Wage Law (820 ILCS 105) sets minimum wages higher than federal law. The current rate is \$8.25 an hour for persons 18 years of age or older, but an employer can pay 50 cents less than the minimum wage for the first 90 days of employment and to those under 18. Employers with fewer than four employees (not counting family members) are exempt from paying the minimum wage (820 ILCS 105/3(d)(1)). The Illinois Act contains the same agriculture exemptions as the federal law (820 ILCS 105/3(d)(2)).

The Illinois Child Labor Law

The Illinois Child Labor Law (820 ILCS 205/1) has prohibitions similar to the FLSA for agricultural child labor. However, the Illinois standards are less protective than the federal standards. When state law differs from federal law, an employer must comply with the more protective standards. Therefore, this Guide does not detail the Illinois child labor hours rules.

However, Illinois does impose an additional requirement that employers obtain an employment certificate for the minor prior to employing them (820 ILCS 205/6). The certificate, issued by an officer at the employee's school, verifies that the minor is old enough to work, is physically capable of doing of the work, and that the employment will not interfere with the employee's education. Employers must keep the employee's employment records for at least three years, irrespective of whether the employee has been terminated (56 IAC 250.500).

II. OCCUPATIONAL HEALTH AND SAFETY

A. *Occupational Safety and Health Act*

The federal Occupational Safety and Health Act (OSHA) (29 U.S.C. Chapter 15) and implementing regulations (29 C.F.R. Parts 1900-2009) establish safety and health standards for agricultural employees. The Act does not cover self-employed persons or farms that employ only the farmer's immediate relatives. The funding appropriations bill for 2009 (as well as appropriations bills for the past 30 years) prohibits the Occupational Safety and Health Administration (OSHA) from spending any funds on enforcement against farms that have fewer than ten employees and have not had a *temporary labor camp* in the previous 12 months (Fiscal Year 2009 Omnibus, P.L. 111-8 (3/11/09)). This means that the law and regulations technically apply to small farms, but functionally, there is nothing OSHA can do if a small farmer fails to comply with the rules. Nonetheless, the *Illinois Health and Safety Act* (820 ILCS 225) and implementing regulations (56 IAC Part 350) adopt the standards set by the federal Department of Labor. Therefore, the Illinois Department of Labor uses the federal rules and regulations for *all* farm operations, and the size of the farm will not excuse a farmer's failure to ensure the safety of his or her employees under the Act.

29 C.F.R. Part 1928 lists most of the OSHA regulations for farms. The regulations require roll-over protective structures for tractors, protective frames and enclosures for wheel-type agricultural tractors, safety mechanisms for farming equipment and provision of bathrooms and hand washing facilities for field sanitation (29 C.F.R. §§ 1928.51, 1928.52-.53, 1928.57, and 1928.110, respectively). Part 1928 incorporates some regulations from Part 1910, including requiring that employers maintain minimum standards at temporary labor camps, communicate information to employees on hazardous chemicals, retain DOT markings, placards and labels, store and handle anhydrous ammonia safely, adhere to safety standards in logging operations, attach a "slow moving vehicle" sign on any equipment that travels at less than 25 miles per hour on public roads, and institute monitoring of and controls for employee's exposure to cadmium (29 C.F.R. §§ 1910.142, 1910.1200, 1910.1201, 1910.111(a)&(b), 1910.266, 1910.145, and 1910.1027, respectively). *Agricultural operations are exempt from all the other provisions of Part 1910, which establishes general operational safety standards* (29 C.F.R. § 1928.21(b)).

However, agricultural employers remain subject to several other important OSHA provisions and regulations pertaining to signs, record keeping, injury reporting, and first aid training. Employers must post signs in the workplace notifying employees of the protections OSHA provides (29 C.F.R. § 1903.2). Employers must keep records of all reportable work-related injuries (29 C.F.R. § 1904.4). An injury qualifies as reportable if it causes death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional (29 C.F.R. § 1904.7). Employers who never employ more than 10 employees at any given time do not need to keep OSHA injury and illness records, unless OSHA informs them in writing that they must keep such records (29 C.F.R. § 1904.1). However, these employers must report to OSHA within eight hours if an incident kills an employee or hospitalizes more than three employees (29 C.F.R. § 1094.39). The employer can report via phone by calling a local OSHA office or OSHA's central line at 1-800-321-OSHA (1-800-321-6742) (*id.*). At the end of every year, employers must review their log of injuries, ensure and certify its accuracy, and provide a report to OSHA (29 C.F.R. § 1904.32). Employers must keep these records for five years (29 C.F.R. § 1904.33).

B. The Toxic Substances Disclosure to Employees Act

The Toxic Substances Disclosure to Employees Act (820 ILCS 255) is an Illinois law that imposes disclosure requirements on employers. However, federal OSHA regulations on hazardous communication preempt the Illinois law (29 C.F.R. § 1910.1200). Therefore, the Illinois Department of Labor enforces the federal regulations rather than the Illinois law. Employers must maintain information on how to handle and detect dangerous chemicals in the workplace, as well as provide training and information to employees. The regulations do not apply to toxic substances regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Instead, the FIFRA requirements discussed below for labeling/posting apply.

C. Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. Chapter 6) requires the U.S. Environmental Protection Agency to regulate the production and use of farm chemicals. Pursuant to FIFRA, the EPA has promulgated a Worker Protection Standard (WPS) for agricultural pesticides. The standard requires employers to provide safety training and access to information on pesticides used on the farm. Employers must protect workers from exposure during pesticide mixing and application, as well as notify workers and restrict entry to sites after application. Finally, employers must provide adequate soap and water for clean up, and emergency assistance if a worker is injured by a pesticide. The EPA has provided a **WPS compliance manual**⁹⁷ for employers on its website.

⁹⁷ <http://www.epa.gov/oecaagct/htc.html>

III. MIGRANT/SEASONAL WORKERS

A. The Migrant and Seasonal Worker Protection Act

The Migrant and Seasonal Worker Protection Act (MSWPA) (29 U.S.C. Chapter 20) and its regulations (29 C.F.R. Part 500) establish standards for the employment of migrant and seasonal agricultural workers. It also requires employers to make certain disclosures and maintain employment records.

Hiring

Some direct farm businesses use a Farm Labor Contractor (FLC) to obtain migrant or seasonal workers. FLCs recruit, pay, and transport workers to the needed locations. In return, the direct farm business pays the FLC a fee. FLCs must register and obtain a certificate with the Illinois Department of Labor pursuant to the MSWPA (29 C.F.R. §§ 500.1, 500.40) and the Illinois Farm Labor Contractor Certification Act (225 ILCS 505). However, because the federal government has delegated certification of FLCs to the State of Illinois, FLCs need only register with the Illinois Department of Labor. An employee of a registered FLC must obtain a Farm Labor Contractor Employee Certificate of Registration (29 C.F.R. § 500.40). The direct farm business should ensure that it deals only with a registered FLC.

If the owners or employees of a direct farm business recruit their own workers instead of contracting with an FLC, the business need not register as a farm labor contractor if it qualifies as a family or small business (29 C.F.R. § 500.30). Entities qualify for the family business exception if the owner of the farm or immediate family member does the labor contracting (29 C.F.R. § 500.20(a)). If the operation used less than 500 man-days of seasonal or migrant labor during every quarter of the preceding year, it qualifies for the small business exception (29 C.F.R. § 500.30(b)). The regulation defines a “man-day” as any day in which an employee performs agricultural labor for at least one hour.

Wages

Employers must pay migrant and seasonal workers when wages are due, which must be at least every two weeks (29 C.F.R. § 500.81).

Disclosures

FLCs and employers not exempt from the Act must disclose certain information to the employee at the time of recruitment, including (1) the location of the work; (2) wage rates; (3) the type of work involved; (4) the period of employment; (5) any transportation or housing to be provided and how much this will cost the employee; (6) whether workers' compensation or unemployment benefits are provided, and if so, disclosure of the insurance company's information; (7) whether the operation is the target of a strike; and (8) any arrangement

whereby the employer is to receive a commission from another establishment for sales made to workers (29 U.S.C. § 1821(a); 29 C.F.R. § 500.75(b)). The employer must display and maintain a poster provided by the Department of Labor outlining employee rights under the MSWPA (29 U.S.C. § 1821(b); 29 C.F.R. § 500.75(c)). The employer must provide the terms of employment in writing (29 C.F.R. § 500.75(d)).

Information must be provided to the worker in his/her own language, where necessary and reasonable (29 U.S.C. § 1821(g); 29 C.F.R. § 500.78).

Providing Housing or Transportation

If the employer provides housing, the employer must disclose in writing, or post in a conspicuous place, the terms of such housing (29 U.S.C. § 1821(c); 29 C.F.R. § 500.75(c)). A state or local health authority (or other appropriate entity) must certify that any housing the employer provides complies with federal health and safety standards (29 C.F.R. §§ 500.130, 500.135). Likewise, the employer must insure any transportation the employer provides and it must comply with vehicle safety standards (29 C.F.R. §§ 500.100, 500.121).

Recordkeeping

Employers must keep individual employee records for the following: (1) the basis on which wages are paid; (2) the number of piecework units earned, if paid on a piecework basis; (3) number of hours worked; (4) total pay period earnings; (5) specific sums withheld and the purpose of each sum withheld; and (6) net pay. Employers must keep the records for three years and *provide all the information to the employee no less often than every two weeks* (29 U.S.C. § 1821(d); 29 C.F.R. § 500.80).

Prohibitions

The MSWPA prohibits employers from requiring that migrant or seasonal workers purchase goods or services solely from their employer (29 U.S.C. § 1829(b); 29 C.F.R. § 500.73).

H-2A Visas

If there is a seasonal shortage of domestic agricultural workers, a direct farm business may be able to recruit foreign agricultural workers under the H-2A visa program of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(H)(ii)(a)) and its accompanying regulations (8 C.F.R. § 214.2(h)(5) (Immigration and Naturalization Service regulations) and 20 C.F.R. §§ 655.90-655.215 (Department of Labor Regulations)). The employer must petition for certification to recruit foreign workers and demonstrate a shortage of domestic workers. If certified, the employer must comply with several requirements, including ongoing recruiting of domestic workers and providing housing, meals and transportation to recruited foreign workers. The

MSWPA does not apply to workers employed under the H-2A visa program, but H-2A employers must comply with all other federal laws such as the FLSA and OHSA.

The Department of Labor maintains a **website**⁹⁸ that provides step-by-step instructions on how the H-2A program works, including links to forms.

B. Unpaid Interns

For many small farms, hiring unpaid interns is a common practice. They provide much needed labor, and the intern benefits by receiving valuable mentoring and experience. However, if the intern is doing work on the farm that contributes to the farm's profitability, he or she is an employee and the farm business must take care to comply with applicable employment laws. If a farm qualifies for the minimum wage exception delineated above (employing fewer than 500 man-days per quarter), the federal and Illinois rules set no minimum wage, thereby allowing employers not to pay interns. This is somewhat unusual – many states have minimum wages, even for agricultural employees, and there are numerous instances of the government assessing small farms large fines for violating minimum wage rules. If interns are not being paid, the farm should nonetheless have them clock in and out as if they were paid employees. The farm should also keep meticulous records of their unpaid interns, including names, employment dates, and duration of service. If a disgruntled intern complains to the Department of Labor, and the farm becomes the subject of an investigation, it is important to have a paper trail documenting the farm's compliance with the laws. Even if an internship is exempt from the minimum wage requirements, the farm is not exempt from complying with the other employment laws: For instance, OSHA and FIFRA rules still apply, housing and transportation must meet minimum standards, and workers' compensation (see discussion below) is necessary if the farm employs more than 400 man-days per quarter. Farms employing paid and unpaid employees must count the unpaid employees' man-days toward the 400 for workers' compensation purposes.

Both federal and Illinois law authorize employers to employ student-learners at less than minimum wage if they meet the applicable requirements and obtain a license prior to employing the student learner. At the federal level, the student-learner, in addition to being at least 16 years old, must be currently receiving instruction in an accredited school, college or university and be employed by the direct farm business on a part-time basis pursuant to a bona fide vocational training program (29 C.F.R. Part 520). The employer must pay the student-learner at least 75% of the applicable FLSA minimum wage. Illinois allows employers to pay learners 70% of the Illinois minimum wage for the duration of their training if the employer obtains a permit for the learner's employment (820 ILCS 105/6). The training cannot last more than six months; in addition, the employer must also show that there is a bona fide training program for the occupation and that the length of the training period is reasonable in light of

⁹⁸ <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>

the skills required to attain a level of minimum proficiency (56 IAC 210.600). It is generally difficult for farms to qualify to employ student learners at sub-minimum wages.

Making an internship a positive experience for the farmer and the intern requires more than simply expecting the intern to show up and work. It requires carefully recruiting and selecting interns mentally and physically prepared for the nature of the work and developing a realistic plan for what and how they will learn. The New England Small Farms Institute publishes two guides that can assist in hiring interns and ensuring positive experiences. *Cultivating a New Crop of Farmers – Is On-Farm Mentoring Right for You and Your Farm? A Decision Making Workbook*, for \$20, contain worksheets covering all aspects of mentoring. *The On-Farm Mentor's Guide – Practical Approaches to Teaching on the Farm*, for \$35, provides more detailed guidance. The publications are available through **NESFI's website**.⁹⁹

One of the best ways to ensure a positive experience is to develop an internship agreement that outlines the hours and work expected, the housing provided (if any), food and fresh produce arrangements, and what mentoring the farmer will provide. Both the farmer and the intern should sign the agreement. Clearly defined expectations at the outset will help prevent conflicts, or worse yet, an intern who abandons the farm mid-season. It will also be beneficial to the farmer to have a clearly delineated agreement in case of a Department of Labor audit or inspection.

If a farming operation hires employees, the owner must take into consideration the risk that an employee may be injured. An employer should (and *must*, in circumstances governed by OSHA) take affirmative measures to ensure a safe workplace. If accident-prevention measures fail, employers may be liable for an employee's injury. Employers may also be liable if one of their employees commits a tort (an injury or other legal wrong) against a fellow employee or third party. This section discusses the employer's liability exposure resulting from an injured employee and the employer's potential liability arising from a situation in which an employee injures a third party.

If an employee of a direct farm business is injured, the injured employee can seek compensation in *one* of two ways-- a claim under the Illinois Workers' Compensation Act or a common law action for tort. An employee may only seek damages through tort if the injury is not subject to workers' compensation (210 ILCS 305/5(a)).

A. Workers' Compensation

The Illinois Workers' Compensation Act (820 ILCS 305) and the *Illinois Workers Occupational Disease Act* (820 ILCS 310) require almost all employers to obtain workers' compensation insurance to cover medical treatment and lost pay owed to employees injured on the job,

⁹⁹ <http://www.smallfarm.org/main/bookstore/publications/>

regardless of fault. The Illinois Workers' Compensation Commission has a fee schedule for payment of medical treatment and sets and caps the daily disability pay. In exchange, the Act bars employees from suing employers under tort law. This ban protects employers from the courts' unpredictability and absence of limits on compensation awards.

An "agricultural enterprise," however, is exempt from the workers' compensation program if it employs less than 400 working days of agricultural labor per quarter in any quarter in the preceding year, excluding family members (820 ILCS § 305/3(19)). Even if exempt from the law, businesses can elect to be covered by filing notice with the Illinois Workers' Compensation Commission and obtaining appropriate insurance.

Some aspects of a direct farm marketing operation, however, may not fall under the "agricultural enterprise" exception. If any of the operation's employees engage in activities that would not qualify as a traditional farming activity – processing food, for example – or if the employee's time is divided between agricultural and non-agricultural activities, the direct farm business should consult an attorney to determine the applicability of the Illinois Workers' Compensation Act.

If a court holds that a direct farm business is liable for an employee's claim and the operation was required to obtain workers' compensation insurance but failed to do so, the direct farm business will have to pay all of the workers' compensation benefits. It is unlikely that the operation's general insurance policy would cover such a liability, and the benefits owed to the injured employee can be quite costly. On the other hand, workers' compensation insurance itself can be very expensive. For these reasons, it is important to consult a lawyer to determine the business's precise needs. Furthermore, the Act imposes significant fines for failure to obtain workers' compensation insurance. Negligently failing to maintain coverage can be a class A misdemeanor with a fine up to \$2,500; knowingly failing to have insurance can be a class 4 felony with a fine up to \$25,000. In addition, the government can fine employers \$500 per day for every day that they failed to have coverage.

B. Employer Liability When Exempt from Workers' Compensation Requirements

In cases where employers are exempt from mandatory workers' compensation insurance coverage, Illinois' common law tort principles will determine an employer's liability for an employee's on-the-job injuries. A tort is an injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit. Torts are part of the *common law*, which is the body of laws and rules that courts (rather than legislatures or other lawmaking bodies) create as they issue decisions.¹⁰⁰ However, the legislature can modify the common law by passing legislation, and in several instances, the Illinois legislature has modified traditional

¹⁰⁰ For this reason, many of the cites given are for cases that describe the rule, rather than for a codified rule found in a statute or regulation.

common law rules and created special rules for tort liability within the employer-employee context.

Employer's Negligence

Although there are many legally recognized harms, the most common claim is for negligence. Whether a person was negligent and caused an injury is a highly fact-specific issue that courts must decide on a case-by-case basis. To avoid being negligent, an employer must use the standard of care to protect his or her employees from workplace injury that an ordinary, prudent and reasonable person would use under the same circumstances. The standard of care obligates an employer to protect only against *reasonably foreseeable* injuries, not every injury that may occur. An employer is liable for injuries resulting from any workplace hazards that she knows or *should have known* about, including, but not limited to, product defects and dangers on her property. She also has a *duty to warn* her employees of these hazards. "Knows or should have known of" requires that an employer must also act prudently and reasonably in seeking out and discovering potential workplace dangers.

Contributory Negligence of the Employee

In Illinois, a negligent employer may avoid liability if a jury determines that the employee was also negligent and was more than 50% responsible for his/her injury (735 ILCS 5/2-1116). This reduction in damages is based on the theory of *contributory negligence*, which bars an injured victim from recovering any damages if he or she was primarily responsible for the injury. If the employee was negligent but contributed less than 50% to their injury, the employee's monetary award for damages is reduced proportionally according to the amount by which the employee's negligence contributed to his/her injury.

Assumption of the Risk

Assumption of the risk is an implied or express agreement between the employer and employee that the employee assumes the risk of injury that is inherent to performing the tasks necessary to accomplish the job (*Chicago and E. IL RR Co. v. Heerey*, 203 Ill. 492 (1903)). An employer cannot be held liable for an injury that the employee assumed the risk of incurring. An employee only may assume known risks, and such risks do not include the risk of the employer's negligence – that is, the employer still has the duty to reasonably maintain a safe workplace. For instance, an employee helping with cattle assumes the risk of getting kicked and could not hold the employer responsible for any injuries resulting from a kick from a steer, but an employee helping harvest apples probably does not assume the risk of being knocked off a ladder by an errant cow in the orchard. Assumption of the risk is a defense that reduces the an injured employee's recovery by the amount which the jury finds the employee was responsible (*Betts v. Manville Personal Injury Trust*, 225 Ill. App. 3d 822, 904 (1992)). This defense is only available where there is an employment or other contractual relationship between the employer and the

injured person (*Goad v. Evans*, 191 Ill. App. 3d 283 (4th Dist. 1989), *Reed v. Zellers*, 273 Ill. App. 18 (3d Dist. 1933)).

C. Employer Responsibility for Employee's Injury to Others

This section discusses the employer's potential liability when an employee injures a third party (whether on or off-farm) or a fellow employee.

Employees Injuring Third Parties

An employer may be *jointly and severally liable* for the injuries to third parties caused by the actions of its employees through the theory of *respondeat superior* ("the master shall answer for his servant"). "Joint and several" liability is a legal theory of liability recognized in most states – including Illinois – which allows a party injured by multiple tortfeasors (wrongdoers) to hold just one of those tortfeasors *fully liable* for the whole of his injury, even if that tortfeasor was only partially responsible for the harm. The party held fully responsible may then seek *contribution* from the other wrongdoers according to their respective shares of liability. For liability to occur under *respondeat superior*, the employee's action, whether negligent or willing/knowing, must have been committed in the course of the employment and with some notion of furthering the employer's business.

For the employer to be liable, there must have been an employer-employee relationship, rather than that of an independent contractor. The question of whether an employer/employee relationship exists is based on the facts of each individual case. An agreement disclaiming an employment relationship is not enough to show that a relationship did not exist (*Tansey v. Robinson*, 24 Ill. App. 2d 227, 234 (1960)). Instead, the actual practice between the employer and the employee will determine the relationship. A number of evidentiary factors may be taken into account, including the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required for the work to be done, and who provides the tools, materials, or equipment. Of these, the *right to control* how the work is performed (not actual control) is the most important (*Lang v. Silva*, 306 Ill. App. 3d 960, 872 (5th District, 1999)).

Scope of Employment

For an employer to be vicariously liable for an employee's torts under the doctrine of *respondeat superior*, the torts must have been committed within the scope of the employment (*Pyne v. Witmer*, 129 Ill.2d 321, 359 (1989)). An activity "is within the scope of employment if (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is [motivated], at least in part, by a purpose to serve the master" (*id.*). One obvious example is an employee who causes a traffic accident while delivering produce to the market. However, if an employee causes a traffic accident in her own car while driving home

ADDITIONAL RESOURCES: Labor and Employment Law

The USDA's 63-page Summary of Federal Laws Affecting Agricultural Employees is a good primer on the federal labor and employment laws that are explained in the previous pages, and includes discussion of some federal laws not covered in this guide.

<http://www.ers.usda.gov/Publications/AH719/>

The U.S. Department of Labor (DOL) Compliance Assistance Guide has a subsection specifically directed to agricultural employers.

<http://www.dol.gov/compliance/guide/>

DOL also has a compliance assistance website that provides information on all of the major DOL laws regarding employment.

<http://www.dol.gov/compliance/laws/main.htm>

The Illinois Department of Labor maintains a website listing the labor and employment laws that it enforces.

<http://www.state.il.us/agency/idol/laws/laws.HTM>

after work, she is probably not acting within the scope of her employment and her employer would therefore not be liable for any resulting injuries.

As when the employer's negligence injures an employee, the employer may raise contributory negligence as a defense when an employee injures a third party. If the victim knew of and assumed the risk of the injury they incurred or contributed more than 50% to their own injury, the employer will not be liable, notwithstanding their employee's negligence. For example, if the third party involved in the traffic accident with the employee delivering the produce ran a stop sign, the third party's own negligence would reduce or preclude any recovery.

Employers may also be liable for an employee's tortious conduct under the theory of negligent hiring or retention. In these cases, if an employer knew or should have known that the employee was likely to harm someone, the employer is directly liable for their own negligence (*Van Horne v. Muller*, 185 Ill. 2d 299, 310 (1999)).

Employees Injuring Other Employees

An employer is not liable for the negligent actions of one employee against another employee unless the employer knew, or had reason to know, that the negligent employee should not have been hired or should not have remained in his/her employ. An employer can also be held liable if the employer did not provide the proper means for the negligent employee to carry out his or her duties. An employer is responsible for ensuring that all employees follow health and safety procedures. An employer cannot shield itself from liability by delegating this responsibility to supervisors. If the employer has delegated health and safety duties to a supervisor or foreman, the

supervisor's negligent actions causing injuries to a fellow employee may be imputed to the employer. This means the employer can be held responsible for the supervisor's actions as if the employer had done the act.

The best way to avoid liability is to act with reasonable care and exercise due diligence. Make sure tools and equipment are safe and in proper working order. Supervise employees and do not ask them to do tasks that are outside the scope of expected dangers on a farm. If an employee could injure others, such as in an auto accident while making deliveries, ensure that they are a responsible and reliable employee before entrusting them with a task. Nonetheless, no liability can be completely prevented. These potential liabilities are one of many reasons it is important for farmers to have insurance that covers tort liability and the cost of defending a lawsuit. Although a general farm liability policy (see the "Setting Up a Direct Farm Business" chapter of this Guide) may cover some bodily injuries that could occur on the farm, such as injuries to trespassers, it likely does not cover everything. In particular, as discussed above, workers compensation insurance may be necessary to cover injuries to employees. Therefore it is imperative that you discuss and verify your liability coverage with your insurance agent.

IV. CHECKLIST

- Have you read and understood the agricultural exceptions to the FLSA and Illinois's minimum wage law? If you intend to take advantage of the exceptions, have you verified that employees' activities qualify?
- If you intend to employ minors, do you understand the restrictions on the hours and activities in which they may be employed? Have you obtained necessary certificates for each minor?
- Have you obtained equipment and developed operational procedures necessary to comply with OSHA, FIFRA and other employee-protection laws?
- Have you complied with any necessary paperwork and disclosure requirements for migrant workers you may employ?
- If employing unpaid interns, have you established reasonable recordkeeping for ensuring and verifying compliance with all minimum wage, hours and worker safety laws? have you developed a plan for ensuring the experience meets yours and the intern's expectations?
- Have you discussed workers' compensation insurance, and any other employee liabilities, with your insurer or an attorney?

KEY CONTACT INFORMATION**U.S. Department of Labor, Wage and Hour Division (compliance assistance)**

Ph: 1-866-4USWAGE (1-866-487-9243)

Chicago District Office: (312) 596-7230

Springfield District Office: (217) 793-5028

Illinois Department of Labor (general contact information)

Chicago Office: 312-793-2800

Springfield Office: 217-782-6206

Marion Office: 618-993-7090

SECTION II - REGULATION BY PRODUCT



CHAPTER 1 - DAIRY

Food safety authorities impose more regulations on dairy than almost any other food product. Multiple and intertwined federal and state laws and regulations impose very high standards on anyone handling dairy products. Consequently, dairy farmers must work very closely with regulators to ensure compliance with complex regulations. This section provides an overview of the various regulatory entities and dairy-specific issues, but it cannot serve as a substitute for contacting the local Illinois Department of Public Health (IDPH) office to discuss plans *before starting*.

I. FEDERAL REGULATION

Federal law technically only applies to dairy products that move in interstate commerce. However, Illinois law incorporates many of the federal regulations, and various federal services - such as the USDA grading system - are available to dairy farmers regardless of whether they sell across state lines.

A. *The Food and Drug Administration*

The Food and Drug Administration (FDA) administers the Federal Food, Drug and Cosmetic Act, which prohibits adulterated or misbranded food from entering interstate commerce (21 U.S.C. §331). Understanding the nuances of the legal definitions of “adulterated” and “misbranded” is tricky, but it should be sufficient to know that FDA considers a food adulterated if it contains any “poisonous or deleterious substance” or if it is “filthy, putrid, decomposed” or otherwise unfit for food (21 U.S.C. § 342), and misbranded if it does not comply with FDA labeling standards (21 U.S.C. § 343). For dairy farmers, this means that all milk and milk products that will be shipped across state lines must comply with FDA standards of identity, which generally require pasteurization unless the product is a cheese that is exempt (21 C.F.R. § 1240.61; parts 131; 133)¹⁰¹. Further, all milk and milk products must also adhere to the Grade A Pasteurized Milk Ordinance (PMO), which is available on the **FDA’s website**.¹⁰²

The PMO is a 300-page model regulation published by the FDA. Many states, including Illinois, use the PMO as their standard for sanitation of all milk products (77 IAC § 775.30), whether the products ship in state or out of state. Farmers who are interested in starting a dairy direct farm business, including processing or production of milk products (cheese, ice cream, etc.), should

¹⁰¹ 21 C.F.R. § 1240.61 exempts certain cheeses from pasteurization if they are subject to alternative pasteurization procedures that are defined in the cheese’s standard of identity, for instance aged for at least 60 days (21 C.F.R. part 133).

¹⁰² <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSModelDocuments/PasteurizedMilkOrdinance2007/default.htm>

read the PMO carefully. If a dairy wants to be on the Interstate Milk Shippers (IMS) list, the National Conference of Interstate Milk Shippers requires the State Milk Sanitation Rating Authorities to certify that the dairy attains the milk sanitation compliance and enforcement ratings in the PMO. More information about inclusion on the IMS list is available on the **FDA's website**.¹⁰³

The PMO prohibits the misbranding and adulteration of milk and milk products, requires permits and inspection of milk production and processing (including transportation), and prescribes labeling rules. The PMO also sets forth specific standards for production and processing. Grocery stores, restaurants, and other similar establishments that sell milk and milk products at retail are exempt from PMO requirements as long as no processing occurs and a permitted establishment supplies the milk. Brokers, agents, and distributors that purchase milk and milk products from permitted establishments are also exempt from permitting requirements.

B. United States Department of Agriculture (USDA)

The USDA administers a variety of programs for promoting or benefiting dairy. A full listing of USDA dairy programs can be found online on the **AMS website**.¹⁰⁴ This section addresses only grading and standards, milk marketing orders, and mandatory reporting.

Grading and Standards

The USDA provides grading and standards services to certify that products are of a certain quality (7 C.F.R. Part 58). To qualify for the grading and standards service, the USDA must first inspect a dairy plant and approve it as being in compliance with USDA's sanitary standards. A producer can then request grading services. Use of the program is voluntary, but it is important for producers who want to market to schools and other institutions that require foods to meet certain standards. For more information on the benefits of the grading and standards program, as well as information on how to apply for inspection and certification, visit the **USDA's website**.¹⁰⁵

Federal Milk Marketing Orders

Milk Marketing Orders are the USDA's means of stabilizing supply for consumers and providing uniform prices for producers. The Agricultural Marketing Service (AMS, a

¹⁰³ <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/FederalStatePrograms/InterstateMilkShippersList/default.htm#rules>

¹⁰⁴ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy>

¹⁰⁵ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=DairyGrading&description=Dairy+Grading>

department of the USDA) uses the orders to routinely set the minimum price that dairy farmers must be paid for fluid milk within a given geographic area (7 U.S.C. § 608c(5)). AMS establishes its orders using formal rulemaking procedures, and the regulations are in 7 C.F.R. Parts 1000-1170. The orders apply to “handlers” (7 C.F.R. §§ 1030.30, 1032.30), which are anyone operating pool or non-pool plants, anyone receiving milk for processing and redistribution, or anyone brokering milk for processing (7 C.F.R. § 1000.9). AMS also considers cooperatives to be handlers, although they have a slightly different structure for determining payment amounts to their producers (*id.*). Most direct-to-consumer dairies are producer-handlers, which are producers who also process and distribute their own milk (7 C.F.R. §§ 1030.10; 1032.10). In order to be a producer-handler, a producer must be able to (1) demonstrate ownership of the animals and control over their care, (2) demonstrate ownership of the production and processing equipment, and (3) show that the operation is entirely at the owner’s risk (7 C.F.R. §§ 1030.10(e); 1032.10(e)).

Prior to June 1, 2010, producer-handlers were not subject to the minimum price orders. However, on April 23, 2010, the USDA issued a final rule that subjects producer-handlers who distribute over 3 million pounds a month to the marketing orders (75 Fed. Reg. 21157). The effect of this new rule is that exceptionally large dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.¹⁰⁶

There are currently 11 Federal Milk Marketing Order Areas. Most of Illinois falls within the Central Order (7 C.F.R. Part 1032; <http://www.fmmacentral.com/>), although parts of Northern Illinois fall within the Upper Midwest Order (7 C.F.R. Part 1030, <http://www.fmma30.com/>). Each Order provides the minimum price a fluid milk handler must pay producers in that region. The intended use of the milk determines the “class,” which in turn determines the price. (7 C.F.R. § 1000.40). Class I, which covers milk intended for consumption as milk, is the most valuable. Class II includes, but is not limited to, milk that will be cottage cheese, frozen desserts, sour cream, custards, pancake mixes, and buttermilk biscuits. Class III is milk for products such as cream cheese and cheeses that may be grated, shredded or crumbled. Class IV, the least valuable, is milk for butter, sweetened condensed milk, and dried milk. Each month, the Milk Market Administrator will issue price orders which then adjust based on the value of the components of the milk (butterfat, protein and other solids) and the price differential for the county where the product is delivered. The calculations are somewhat confusing, although the AMS attempts to explain the method on **its website**.¹⁰⁷ Dairy farmers who believe that their

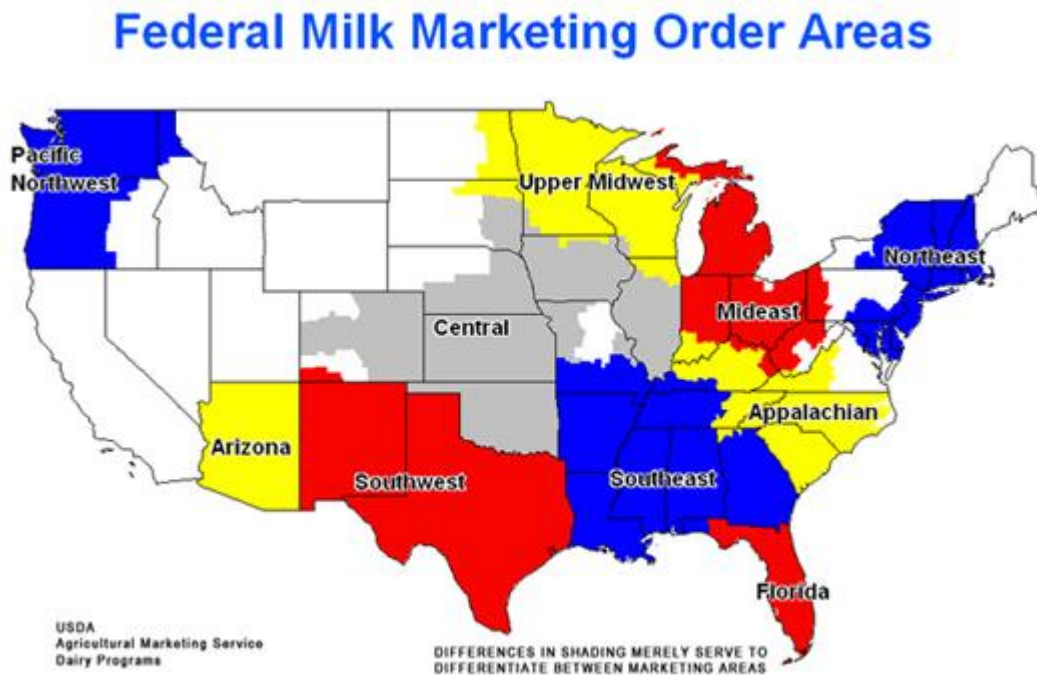
¹⁰⁶

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateO&navID=prodhandlerHearingFederalMilkMarketingOrders&rightNav1=prodhandlerHearingFederalMilkMarketingOrders&topNav=&leftNav=CommodityAreas&page=FMMOrder21&resultType=&acct=dgeninfo>

¹⁰⁷

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateD&navID=IndustryMarketingan>

handler is not paying the mandated minimum price for milk should contact the director of the applicable Milk Marketing Order region.



Mandatory Price and Storage Reporting

Mandatory price and storage reporting requirements are authorized by amendments to the Agricultural Marketing Act (7 U.S.C. § 1637b). Mandatory reporting provides reliable information to calculate the pricing factors used in the Milk Marketing Order formulas. Even if a producer-handler is not subject to the Milk Marketing Order, he or she is likely still subject to some reporting requirements.

Price reporting requires manufacturers of cheddar cheese, butter, nonfat dry milk, and dry whey to submit weekly reports including the price, quantity, and moisture content, where applicable (7 C.F.R. §§ 1170.7, 1170.8). Manufacturers that process and market less than 1 million pounds of dairy products (cheese, butter and other items that are not fluid milk) per year are exempt (7 C.F.R. § 1170.9). Dairy products with a higher value than the basic commodity (for instance, kosher butter produced with a rabbi on site or organic milks) are also exempt from price reporting requirements (7 C.F.R. § 1170.8). It is the obligation of the producer to track annual production and report if they exceed the 1 million pound exemption. Reports must include the

“name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content where applicable.” (7 U.S.C. § 1170.4(a)). A weekly price report must be submitted to the National Agricultural Statistics Service (NASS) by noon every Wednesday using the appropriate form. The forms are available on the **NASS website**.¹⁰⁸

Storage reporting requires those who store butter, anhydrous milk fat (AMF), butter oil, and natural cheeses to submit monthly reports on quantity (7 C.F.R. §§ 1170.7(b), 1170.10)). There is no exemption based on quantity for the storage report requirement. Manufacturing plants must make monthly storage reports of the dairy products that they have on hand (7 C.F.R. § 1170.7(b)). Dairy products are those used to set prices for Class III and Class IV milk under the Milk Marketing Orders (7 C.F.R. § 1170.4). This includes cream cheese, cheeses that can be shredded, grated or crumbled, butter, evaporated and sweetened condensed milk, and any dried form of milk (7 C.F.R. § 1000.40). The report must indicate the name, address, and stocks on hand at the end of the month for each storage location.

The reporting requirement applies to “all warehouses or facilities, artificially cooled to a temperature of 50 degrees Fahrenheit or lower, where dairy products generally are placed and held for 30 days or more” (7 C.F.R. § 1170.10(a)(1)). Stocks in refrigerated space maintained by wholesalers, jobbers, distributors, and chain stores are exempt, but a direct farm business maintaining stocks of its own products would not be exempt from reporting. Reportable products include salted and unsalted butter, anhydrous milk fat (AMF), butter oil, and natural cheese including: barrel and cheese to be processed, American type cheeses (cheddar, Monterey, Colby, etc.), Swiss cheese, and other natural cheese types (brick, mozzarella, Muenster, Parmesan, etc.). Processed cheese is excluded (7 C.F.R. § 1170.10(a)(2)(i)). All manufacturers of nonfat dry milk and dry whey must report all stocks on hand (7 C.F.R. § 1170.10(b)). NASS mails the monthly reporting forms to producers (73 Fed. Reg. 34175, 34176 (June 17, 2008)).

II. STATE REGULATION

It is *imperative* to contact the Illinois Department of Public Health (IDPH) as early as possible in the planning stages of a dairy operation, because the regulations are complex and exacting. IDPH should work closely with a farmer to ensure the dairy operation will operate legally. Regional inspectors oversee the bulk of the dairy inspection and permitting process, so start by contacting the regional IDPH office.

A. Inspections & Permitting

The Illinois Food, Drug, and Cosmetics Act (IFDCA) (410 ILCS 620) and the Grade A Pasteurized Milk and Milk Products Act (PMMPA) (410 ILCS 635/3) govern dairy producers in

¹⁰⁸ http://www.nass.usda.gov/Data_and_Statistics/Dairy_Products_Mandatory_Program/index.asp

Illinois. Regulations for licensing and subsequent inspection of dairy farms and dairy plants are found in two places: Grade A Pasteurized Milk and Milk Products regulations (77 IAC Part 775), and Regulations for Manufactured Dairy Products (77 IAC Part 785).

The Illinois Food Drug and Cosmetic Act (410 ILCS 6120)

The IFDCA is similar to the federal FDCA (FFDCA) in that it prohibits misbranded or adulterated food from entering the marketplace, and it incorporates the federal standards of identity and definitions as the state standards except insofar as they are modified or rejected by the Illinois Department of Public Health (410 ILCS 620/9). The IDPH has not modified or rejected the federal standards of identity. Instead, the Illinois Pasteurized Milk and Milk Product Regulations explicitly incorporate the federal standard of identity for milk (77 IAC § 775.20(3)(a), 21 C.F.R. 131.110) and the Manufactured Dairy Products regulations specifically adopt the federal standard of identity for cheeses and related products (77 IAC § 785.120(a)(12), 21 C.F.R. Part 133).

The Illinois Grade A Pasteurized Milk and Milk Products Act (PMMPA) (410 ILCS 635)

The PMMPA regulates construction and operation of dairies and dairy handlers to ensure cleanliness and safe manufacturing practices. The Act also prohibits the sale of unpasteurized milk for human consumption, unless it is sold on the farm (410 ILCS 635/8). As discussed above, the Illinois PMMPA regulations incorporate the latest federal Grade A PMO for all aspects of dairy production, processing and handling (77 IAC § 775.20-775.30). However, some of the Illinois regulations differ slightly from the federal Grade A PMO.

The Illinois PMMPA requires prospective dairy farmers and/or dairy plants that produce milk to submit construction, reconstruction, or alteration plans to IDPH for approval before beginning any work (410 ILCS 635/7). IDPH will conduct a plan review to ensure that the pipeline design, equipment, barns, etc. are likely to pass inspection. This review should be completed within 30 days (77 IAC 775.80). IDPH will work with farmers to ensure that their plans meet the specific requirements for the type of dairy farm or plant that they will operate,¹⁰⁹ but they *will not guarantee that any construction will meet the permitting standards*. This could mean that, after construction has been completed, further modifications and further inspections may be needed before a permit can be obtained. To minimize risk, farmers should get a guarantee from the manufacturer that they will accept a return or work to make modifications that the IDPH may subsequently require.

¹⁰⁹ 77 IAC §§ 775.20, 775.30 incorporate and modify the Federal Grade A PMO for all dairy product; 77 IAC 785 subpart C establishes standards for dairy farms; 77 IAC 785 subpart D establishes standards for dairy manufactures; 77 IAC 785 subpart E has additional standards for dry milk products; 77 IAC 785 subpart F has additional standards for butter and similar products; 77 IAC 785 subparts G & H cover manufacturing and packaging of cheeses.

After receiving preconstruction approval and completing construction, all dairy farms, plants, and receiving and transfer stations that produce and market milk must apply for a permit from IDPH (410 ILCS 635/5). IDPH does not have any written guidance on the application process, but multiple authorities explained to the authors that IDPH first inspects the plant to ensure the facility, equipment, and manufacturing process (and any labels, if it is a processing plant) comply with the requirements of the acts and regulations. If the facility passes inspection, the inspector will provide the owner with an application form to submit to the central IDPH office. IDPH then approves the permit when the regional office that conducted the inspection confirms that the dairy complies with all rules and regulations. Operators must conspicuously display their permits at the dairy farm (410 ILCS 635/9).



The law defines a “dairy farm” as where the cows and goats are kept and the milk is produced (410 ILCS 635/3(b)(1)).^{110,111} There is no fee for a dairy farm permit (410 ILCS 635/5.1). For a dairy farm to receive a permit, the milking facility will need to meet cleanliness requirements and the herd will need to meet certain health requirements. The farmer must be able to demonstrate the herd is free of and protected from tuberculosis (PMO §8(1)), 77 IAC 785.300(b)) and free from or under an eradication program for brucellosis (PMO §§8(2) and (3); 77 IAC 785.300(c)). Finally, the farmer cannot sell milk from cows known to be infected with mastitis or milk containing prohibited drug residues or pesticides (77 IAC 384.300(d), citing 21 CFR 193 and 40 CFR 180).

A “milk plant” is anywhere the milk is collected, handled, processed, stored, pasteurized, aseptically processed, bottled or prepared for distribution (410 ILCS § 635/3(b)(3)).¹¹² There is a \$100 fee for processing plant permits, which must be renewed annually (410 ILCS 635/5.1).

¹¹⁰ The exact definition states “a place or premise where one or more cows or goats are kept, and from which a part or all of the milk or milk products are provided, sold or offered for sale to a milk plant, transfer station, or receiving station” (410 ILCS 635/3(b)(1)).

¹¹¹ This is one of the instances where the Illinois definition differs from the federal Grade A PMO, which defines a “dairy farm” as “any place or premises where one (1) or more lactating animals (cows, goats, sheep, water buffalo, or other hooved mammal) are kept for milking purposes, and from which a part or all of the milk or milk product(s) is provided, sold or offered for sale to a milk plant, receiving station or transfer station” (PMO §1L). Although the Illinois definition only covers cows and goats, it is probably safest to assume the IDPH will still assert jurisdiction and impose the PMO standards on operations raising other animals, such as sheep.

¹¹² The Illinois regulations also state that “when ‘plant’ is used in connection with the production, transportation, grading, or use of milk, it means any plant that handles or purchases milk for manufacturing purposes; when used in connection with requirements for plants or licensing of plants, it means only those plants that manufacture dairy products” (77 IAC 785.110).

Once permitted, a facility must frequently test its products and undergo ongoing inspections and testing by IDPH (410 ILCS 635/10). The regulations also require processors to maintain records of tests and submit monthly raw producer samples and quality counts (77 IAC §§ 785.220(b); 785.230(b), 785.270). Generally, these tests and samples are submitted to IDPH by large dairy cooperatives that receive milk from dairy farmers. Representatives from milk plants must visit producers that do not meet the requirements to inspect the facilities and offer assistance (77 Ill. Adm. Code 785.280). Some smaller farms and all farms that produce their own milk and dairy products must submit these tests directly to approved milk laboratories. The FDA maintains a list of milk laboratories approved by federal and state agencies **on its website**.¹¹³

The Butter and Cheese Factories Act (410 ILCS 610)

This law requires butter and cheese manufacturers who are organized as a cooperative or using a dividend plan to post a \$6,000 bond with the Secretary of State before beginning manufacturing. It also imposes reporting requirements of production quantities, sales, prices, and dividends paid.

B. Organic Milk

Farmers interested in producing and marketing certified organic milk must follow USDA's Agricultural Marketing Service (AMS) organic standards (7 CFR Part 205). The regulations generally require the dairy to manage the animals according to certain standards and obtain certification from an accredited certifying entity. For more information on organic management and certification, see the "Organic Marketing" chapter of this Guide.

C. Animal Welfare

Illinois dairy farmers should also be aware of regulations concerning livestock, such as animal health laws and land use/siting laws, administered by IDOA. The "Meat and Poultry" chapter of this Guide covers the Illinois Livestock Facilities Management Act (505 ILCS 77) and other environmental concerns; it also provides further information on various livestock welfare and health laws.

D. Milk Promotion Board

The Illinois Milk Promotion Act (505 ILCS 95) established the Illinois Milk Promotion Board to develop milk promotion programs for the Illinois dairy industry. Generally, the first purchaser of milk (the cooperative or processor) collects "checkoff" contributions from the dairy farm operator. This fee is mandatory for all producers of Grade A and Grade B milk, whether they are selling it as fluid milk or producing it into dairy products and selling directly to consumers.

¹¹³ <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/FederalStatePrograms/InterstateMilkShippersList/default.htm#lb>

Dairy farmers that produce and distribute their own dairy products must submit the checkoffs directly. Ten cents per hundred weight (100 pounds) is collected for the Illinois Board and five cents per hundred weight is collected for the National Dairy Council. These rates are authorized by the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128 and Section 1150.152 of the Dairy Promotion Order promulgated pursuant to the Act. The order is available on the **AMS's website**.¹¹⁴ Dairy producers have a strong culture of enforcement of the checkoff program, and the National Dairy Board audits co-ops and other producers to ensure compliance with the Act. More information on activities of the National Dairy Council is available on the **Dairy Checkoff website**.¹¹⁵

III. RAW MILK

Raw milk is milk that has not been pasteurized. Some consumers believe raw milk strengthens the immune system, and pasteurization eliminates valuable bacteria and proteins. However, raw milk can be a source of dangerous pathogens such as salmonella, E. coli, and listeria. Although the FDA requires pasteurization of milk sold in interstate commerce, (21 C.F.R. §1240.61) states regulate the sale of raw milk within the state. Illinois law requires pasteurization of milk for human consumption unless the consumer buys the milk *on the farm* and the milk complies with IDPH's other regulations (410 ILCS 635/8). The following list summarizes how IDPH interprets this exception for raw milk sales.

- 1) The farm must have an IDPH dairy farm permit, which is *free* (410 ILCS 635/5).
- 2) Consumers must provide their own container for the milk. Dairy farmers can (and should) transfer the raw milk to a bulk tank for cooling and storage, but consumers must provide their own container to be filled in a sanitary fashion with the raw milk from the tank. This is because a bottling operation is a "milk plant," which is distinct from a "dairy farm" where the animals are kept and milked (410 ILCS 635/3(b)(3) & (1)). The language of the exception does not include "plants," so IDPH requires all "milk plants" to pasteurize their milk (410 ILCS 635/5).
- 3) The farm cannot process the raw milk into any raw milk products. This follows the same logic as the previous rule – because processing removes the facility from the definition of a "dairy farm" it no longer qualifies for the exemption. Farmers interested in producing raw milk cheese should be aware that the federal standards of identity allow "alternative pasteurization" process for certain cheeses (21 C.F.R. 1240.61), such as Parmesan (21 C.F.R. 133.165) and Roquefort (21 CFR 133.184). All raw milk cheeses must be aged at least 60 days. Producers must go through the

¹¹⁴ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004583>

¹¹⁵ <http://www.dairycheckoff.com/DairyCheckoff>

IDPH inspection and permitting process and should expect that the regulators are going to be very particular about ensuring the safety of the product.

- 4) The IDPH prohibits advertising that raw milk is for sale, including any kind of signage on the premises of the farm indicating the sale of raw milk for human consumption, any announcement on the farm's website and any other standard forms of advertising. This means all information must be spread by word of mouth. Some consumers post information on online directories to let other raw milk consumers know what farms have raw milk available for purchase. IDPH does not prohibit this so long as the farmers are not affiliated with those directories. The likely rationale for this restriction is that the section of the Act which prohibits the actual sale of raw milk also prohibits "*offering for sale*" raw milk (410 ILCS 635/8). However, the provision that exempts dairy farms from pasteurizing milk "*sold or distributed*" on the farm does not exempt "*offering for sale.*"

Another way producers in other states distribute milk to customers is through a cow-share program, in which consumers sign a contract to purchase a "share" in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives milk from "their" cow without technically "purchasing" raw milk. This business model has two drawbacks. First, drafting a legally sound contract may be prohibitively difficult or expensive. Second, there is no clear authority on the legality of cow-share programs in Illinois. Although some states recognize and regulate cow-share programs, they have come under attack in several neighboring states. Given their tenuous legal validity and the political and regulatory opposition to raw milk, they may not be an ideal business model for farmers in Illinois.

Selling raw milk exposes the farmers who provide it to potential lawsuits for illnesses. Although there are no recent cases in Illinois concerning liability for illness as a result of drinking contaminated raw milk, farmers should take all precautions possible to make sure the milk is clean in order to protect against liability. This is true regardless of whether the farmer is selling directly to consumers on the farm or is providing milk through a cow share program.

IV. RBGH FREE LABELING

Recombinant Bovine Growth Hormone (rBGH, commercially sold as Posilac) is a genetically engineered hormone that is designed to increase milk production by dairy cattle. Although the FDA has approved the use of the hormone and takes the position that there is no difference between milk from cows treated with rBGH and those not treated with it, many consumers (and therefore retailers) have a strong preference for milk that comes from untreated cattle. To address this consumer demand, some milk producers wish to label their milk as "rBGH free." Such labels were banned in Illinois in the 1990s; however, Stonyfield Farm, Organic Valley, Ben & Jerry's, and Whole Foods challenged the Illinois law on First Amendment grounds. In a

subsequent out-of-court settlement, the plaintiffs and IDPH agreed that labels could state that the milk is “from cows not treated with artificial growth hormones.” However, labels cannot use the term “rBGH free,” and they must state that the FDA has found no difference between milk from rBGH-treated cows and milk from untreated cows. These rules are consistent with FDA’s national labeling standards. As part of the permitting process for dairy plants, the IDPH evaluates any labeling that the plant will be using, so plants should work with their local permitting authority in order to develop a non-misleading label. Additionally, the Illinois Food, Drug and Cosmetic Act (IFDCA) prohibits “false advertisement” (410 ILCS 620/3.5), which seems to give IDPH authority over a dairy’s advertising. Thus, advertisements will need to be consistent with the agreed upon labeling.

V. CHECKLIST

Have you...?

- Contacted the Dairy Division of the Illinois Department of Public Health to discuss what is necessary to produce the product you wish to sell?
- Followed all steps in the IDPH/PMMPA dairy farm and dairy handler permitting and inspection process?
 - submitted construction, reconstruction, or alteration plans to IDPH for approval
 - applied for a permit from IDPH
 - complied with ongoing IDPH product testing and inspection
- Chosen a record keeping system for tracking, reporting and remitting fees for the price and storage reporting and milk checkoff program?
- Developed labeling and marketing strategies?

KEY CONTACT INFORMATION**Illinois Division of Public Health, Division of Foods, Drugs, and Dairies**

Ph: 217-785-2439 (main)

Regional office contact search: <http://www.idph.state.il.us/local/map.htm>

CHAPTER 2 – EGGS

Several laws and agencies regulate egg sales. At the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) share regulatory authority. In Illinois, the Illinois Egg and Egg Products Act (410 ILCS 615) and accompanying regulations (8 IAC 65) govern the sale of eggs. The Illinois Department of Agriculture (IDOA) administers the state-level program.

I. FEDERAL OVERSIGHT OF EGGS

As mentioned above, there are two primary agencies that regulate eggs at the federal level, the FDA and the USDA. The Egg Products Inspection Act (EPIA) (21 U.S.C. Chapter 15) authorizes



the USDA to inspect eggs and egg products and establish standards for uniformity of eggs. The EPIA applies to eggs shipped in interstate and intrastate commerce, but has exemptions for small producers. The Food and Drug Administration (FDA), under the authority of the Federal Food, Drug and Cosmetic Act (FDCA) (21 U.S.C. § 341), issues and enforces standards of identity for egg products and requires shell egg producers to implement measures to prevent *Salmonella* Enteritidis. The FDCA applies only to eggs shipped in interstate commerce. Many direct farm businesses selling their eggs will not be subject to the

federal rules, but determining application of the federal law to a specific operation can be difficult. A brief discussion follows.

USDA's Oversight of Eggs

Within USDA, the Agricultural Marketing Service (AMS) and Food Safety and Inspection Service (FSIS) administer programs that are relevant to egg producers. AMS prohibits buying, selling, or transporting or offering to buy, sell, or transport restricted eggs, unless exemptions apply (7 C.F.R. § 57.700). Exemptions are discussed in the next section. Restricted eggs are eggs that are checks, dirties, incubator rejects, inedible, leakers or loss (unfit for human food) (7 C.F.R. § 57.1).¹¹⁶ Restricted eggs must be sent to a processing facility (overseen by FSIS, discussed below), destroyed, or processed into animal food (7 C.F.R. § 57.720).

AMS enforces the prohibition through periodic inspections of facilities, transport vehicles, and records of all persons engaged in the business of transporting, shipping, or receiving eggs" (7

¹¹⁶ This same section of the Code provides definitions of checks, dirties, incubator rejects, inedible, leakers or loss eggs. Many of the definitions are nearly identical to Illinois's law, discussed below. For this reason, and because Illinois law and inspectors are more likely to regulate the direct farm business selling eggs, the definitions are spelled out in the Illinois section only.

C.F.R. § 57.28). The EPIA requires AMS to inspect handlers packing shell eggs for sale to the end-consumer at least once per calendar quarter, unless exempt (21 U.S.C. § 1034). The term “handler” means any person who engages in buying or selling any eggs or processing any egg product for human food; the term includes poultry producers (21 U.S.C. § 1033(e)).

AMS also provides voluntary grading services for class, quality, quantity, or condition and any combination thereof (7 C.F.R. Part 56). Inspection by federal or authorized state graders must be requested, and will cost a fee. More information on requesting egg grading services, as well as the form to do so, is available through AMS’s grading **website**.¹¹⁷ AMS’s official standards, grades and weight classes are available **here**.¹¹⁸

AMS Exemptions

AMS exempts egg producers from the restrictions and inspections if they sell eggs from their own flocks directly to consumers via a door-to-door retail route or at a place of business away from the site of production *so long as* they sell fewer than 30 dozen eggs per sale (7 C.F.R. § 57.100(c)). The producer must own and operate the business and personally transport the eggs. The eggs must meet the standards for U.S. Consumer Grade B shell eggs (*id.*). Producers with fewer than 3,000 hens, producers selling directly to household consumers, and egg packers selling on site directly to consumers are also exempt from AMS’s regulations (7 C.F.R. § 57.100(d)-(f)).

Processing Subject to FSIS

The EPIA requires USDA to continuously inspect plants processing eggs into egg products (21 U.S.C. § 1034). The Act defines egg products as “any dried, frozen or liquid eggs, with or without added ingredients” (21 U.S.C. § 1052(f)). All egg products must undergo pasteurization (21 U.S.C. § 1036). FSIS oversees the inspection of egg processing plants (9 C.F.R. § 590.24). The procedures and standards for inspections are in 9 C.F.R. Part 590. Producers who process their own eggs and sell directly to consumers are exempt from continuous inspection under the FSIS regulations (9 C.F.R. § 590.100(e)). However, they must apply for an exemption and their facility and operating procedures must meet all otherwise applicable standards. Although not subject to continuous inspection, exempted facilities must undergo periodic FSIS inspections (9 C.F.R. § 590.600-650).

FDA’s Oversight of Eggs

In addition to USDA’s regulation under the EIPA, the FDA regulates eggs under the FDCA. FDA specifies standards of identity for egg products, including dried and frozen eggs (21

¹¹⁷ <http://www.ams.usda.gov/AMSV1.0/Grading>

¹¹⁸ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376>

C.F.R. Part 160). If a food does not meet the standard of identity, it is misbranded according to the FDCA (21 U.S.C. § 343(g)).

Furthermore, some shell egg producers must adhere to FDA's Salmonella testing, handling and treatment standards. Producers with 3,000 or more laying hens at a particular farm that produce shell eggs for the table market, and that do not sell all of their eggs directly to consumers, are subject to the additional Salmonella prevention standards (21 C.F.R Part 118).¹¹⁹ The regulations require these producers to (1) develop a written *Salmonella* Enteritidis prevention plan that involves procuring pullets that are SE monitored, (2) use a bio-security program limiting visitors and controlling cross contamination between houses, (3) control rodents, flies and pests, and (4) clean poultry houses between flocks if there was a positive SE test (21 C.F.R. § 118.4). Producers must perform environmental testing for SE when laying hens are 40 to 45 weeks old and 4 to 6 weeks after molt; if an environmental test is positive for SE the producer must conduct shell egg testing (21 C.F.R. §§ 118.5 and 118.6). Producers must maintain a written SE prevention plan as well as records to verify compliance, which they must make available within 24 hours of receipt of an official agency request (21 C.F.R. § 118.10). Shell eggs being held or transported must be refrigerated at or below 45 degrees Fahrenheit ambient temperature beginning 36 hours after laying (21 C.F.R. § 118.4). This refrigeration requirement applies to shell egg producers as well as individuals transporting or holding shell eggs (21 C.F.R. § 118.1).

Regardless of whether eggs are sold interstate or intrastate, the FDA requires all shell eggs for distribution to the consumer to have a safe handling label or be treated to kill Salmonella (21 C.F.R. § 101.17(h)). The label must read: "**SAFE HANDLING INSTRUCTIONS:** To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly." The statement must appear on the label prominently, conspicuously, and in a type size no smaller than one-sixteenth of one inch. The statement must appear in a hairline box and the words "safe handling instructions" must appear in bold capital letters.

II. ILLINOIS REGULATION OF EGGS

The following summarizes the most important aspects of the Illinois statute and regulations that most likely apply to a direct farm business. This summary is not intended to comprehensively discuss all aspects of egg production regulations in Illinois, and is not a substitute for obtaining legal advice prior to starting an egg operation.

¹¹⁹ Conversely, producers who have fewer than 3,000 hens and sell all of their eggs directly to consumers are exempt. Producers who process their eggs into egg product are also exempt, but may be subject to FSIS's egg processing oversight.

Definitions

The Illinois Egg and Egg Products Act (410 ILCS 615) begins by setting forth definitions of terms. A *producer* is someone who raises hens for eggs, but does not grade or candle the eggs. A *producer-dealer* is someone who grades, candles and sells eggs from their *own* flock either on or off premises to household consumers, institutional consumers, distributors, and manufacturers. The distinction between a producer and a producer-dealer is important because in some instances producers qualify for exceptions not available to producer-dealers. A direct farm business also qualifies as a *distributor* if it sells eggs to retailers or institutional customers, or to her own retail outlets or stores. A *handler* includes a producer-dealer who is in the business of distributing or processing eggs or egg products and may include the receiving, assembling, cleaning, grading, sorting, candling, packing or otherwise preparing for market and selling eggs or egg products, or using eggs in the preparation of food. A *packer* means any person who grades, sizes, candles, and packs eggs for purpose of resale.

The Act also provides definitions of standards for eggs. A “*check*” means an egg that has a broken shell or crack in the shell but has its membranes intact and whose contents are not leaking. *Dirty egg* means an egg that has a shell that is unbroken, but has adhering dirt or foreign material, or prominent stains on the shell surface, or moderate stains covering more than 1/4 of the shell surface. *Inedible eggs* are any eggs of the following description: black rot, yellow rot, white rot, mixed rot (addled egg), sour egg, egg with a green white, egg with a stuck yolk, moldy egg, musty egg, egg showing a blood ring, egg containing any embryo chick (at or beyond the blood ring stage), and any egg that is adulterated as that term is defined pursuant to the Federal Food, Drug and Cosmetic Act. *Leaker* means an egg that has a crack or break in the shell and shell membranes to the extent that the egg contents are exposed or are exuding or free to exude through the shell. *Loss* means an egg that is unfit for human food because it is smashed or broken so that its contents are leaking; or overheated, frozen, or contaminated; or an incubator reject; or because it contains bloody white, large meat spots, a large quantity of blood, or other foreign material.

Licensing

*With limited exception, ALL producer-dealers, distributors, handlers and packers must **have a license**¹²⁰ from the State of Illinois to sell eggs.*

Licenses are full or limited. A producer-dealer who sells only graded eggs from his or her own flock of 3,000 birds or less may obtain a limited license for \$15. A producer-dealer selling eggs produced from 3,000 or more birds must obtain a \$50 full license. Producer-dealers should obtain their licenses prior to beginning business, and must renew annually. Each separate business location requires a license, which must hang in a conspicuous location. It is important

¹²⁰ Applications are available at <http://www.agr.state.il.us/pdf/egglicense.pdf>

to note that local health departments may require additional licenses to sell within their respective jurisdictions.

License Exemptions

A producer-dealer who sells *nest-run* eggs (not candled or graded) directly to household consumers from the flock on the premises, or sells to a holder of an Illinois Egg License, does not need an Illinois Egg License. In addition, an Illinois Egg License is unnecessary if all eggs go to the manufacture of a food product (e.g., a farm that uses its eggs in baked goods). Although these limited activities may not need an Illinois Egg License, other requirements (such as storage or packaging rules) may still apply.

Inspections

Each case of eggs (Grade AA, A or B) sold in Illinois is subject to an inspection fee to cover the cost of enforcing the Act. The fee cannot exceed 6 cents per 30 dozen eggs. The first handler of the eggs is responsible for payment of the fee to the Agricultural Master Fund/Auxiliary Egg Inspection Fund. The invoice (see below) must contain both the price and the amount of the inspection fee. The person responsible for the inspection fee must submit a report on the number of "master containers" (containers of 30 dozen eggs per case) subject to the inspection fee every three months on a form supplied by IDOA. Persons selling fewer than 600 master containers must only report annually. Remittance of the fee must accompany the report.

IDOA inspectors may enter the premises on any business day during regular hours of business, with or without the owner or manager present. The inspector may sample, without reimbursement, any eggs for analysis or testing. The inspector may also review invoices, cases or containers, and equipment. The inspector may seize any product, document or equipment found in violation of the Act.

Other Requirements

Food Safety. No person may sell eggs or egg products for human consumption that are unfit for human food. Eggs or egg products are unfit for human consumption if they are classified as an inedible or loss egg. Egg products are also unfit for human consumption if adulterated, unwholesome, non-inspected, or otherwise unfit for human consumption. Eggs that are checks, dirties, incubator rejects, inedibles, leakers or loss eggs are "restricted" and cannot be sold directly to consumers. As an exception to the rule, producers may sell checks and dirties directly to consumers on the premises where they are produced. A processing plant that undergoes continuous inspection by IDOA may use checks and dirties for human food provided that the facility pasteurizes the eggs.

Sellers, including producer-dealers, must *candle and grade* all eggs for sale *off the premises*, such as at the retail level or purchased by institutional customers, or at farmers' markets. Further, they

must hold them at 45 degrees Fahrenheit or below after processing until they reach the retailer. Eggs must be Grade B or better. Eggs sold at retail must be in new, consumer-size containers - no bulk eggs may be sold to retailers. Federal grading standards apply in Illinois.

A producer can sell *nest run* eggs produced *from his or her own premises* directly to household consumers without candling or grading the eggs. These sales must occur on the premises. The producer must hold the nest run eggs at 60 degrees Fahrenheit or less at all times. For packaging these eggs, producers may use unmarked, new packages or unmarked good condition, used consumer-size containers.

Illinois regulations also establish minimum sanitation and operating requirements for both retailers and grading plants that are not federally inspected. The facility's construction must be sufficient to keep out rodents. Operators must keep rooms and equipment where the eggs are candled, graded and packaged reasonably clean during the day and must thoroughly clean the rooms at the end of each day. Coolers must be in a clean, sanitary condition. Operators may not hand wash eggs and wash water must be potable and at least 20 degrees above the temperature of the eggs, or 90 degrees Fahrenheit, whichever is higher. Similarly, retailers must keep storage areas clean and sanitary. More importantly, retailers must rotate the eggs so that the first in are the first sold. Eggs past their sell-by date (see labeling, below) may not be sold.



Labeling. The package label for eggs for sale at the wholesale or retail level must identify the egg grade and size, the name of the packer, address of the packer, distributor or retailer, the packing or candling date and the expiration or "sell by" code. For Grade AA eggs, the code must indicate a date (month and day) up to 15 days after the packing date. For all other grades, the code should represent a date up to 30 days after the date of pack. Labeling must be in bold type with letters at least 3/8 inch high, and may not contain any abbreviations. Only producers who sell eggs from their own flock can make the packing claim that the eggs are "fresh eggs," "newly-laid eggs," or similar language. Producers labeling their eggs as "organic" must have USDA certification, as discussed in the "Organic Marketing" chapter of this Guide. USDA does not maintain standards for other terms sometimes applied to eggs, such as "free range," "vegetarian fed," "natural," or "omega-3." Nonetheless, the misbranding provision of the FDCA still applies, so producers should not use these terms unless they can support the claims.

USDA regulates the use of some terms on poultry meat, which may inform what practices justify use of a particular label on eggs. Further guidance is available on the **FSIS website**.¹²¹

Invoice Documentation. Each producer-dealer, packer, handler or distributor who sells candled and graded eggs to a retailer, institutional consumer, bakery, or concern that purchases eggs for serving to guests must furnish the purchaser with an invoice or other accounting document covering each sale. The invoice must show the name and address of the seller and purchaser, as well as the exact grade and size of the eggs purchased. Copies of the invoices must be kept for a period of 30 days.

¹²¹ http://www.fsis.usda.gov/Fact_Sheets/Meat_&_Poultry_Labeling_Terms/index.asp

III. CHECKLIST

If you're going to sell eggs, make sure you have answered the following questions:

- How many chickens do you have?
- Who are your customers (end user, institutions, processor)?
- Where will your sales take place (on or off the premises)?
 - On farm sales have fewer regulations, but limit available customers
 - Flock size can determine which regulations apply
- If you plan to sell off the farm:
 - Do you have the capacity to grade, candle, and inspect your eggs?
 - Have you figured out how to package and transport the eggs?
 - Are you responsible for keeping track of and remitting any fees? If so, what is your record keeping system?
- Have you obtained the appropriate licenses? You may want to check with local health departments in addition to IDOA to see if they require other licenses, such as retailers' license.

KEY CONTACT INFORMATION

USDA's Agricultural Marketing Service, Poultry Programs, Shell Eggs (egg grading and certification)

Ph: (202) 720-3271

Illinois Department of Agriculture, Division of Food Safety and Animal Protection (state licensing requirements)

Ph: (217) 524-1550

CHAPTER 3 – FRUITS AND VEGETABLES

Health regulators generally have a more permissive approach to raw fruits and vegetables relative to any other product sold by a direct farm business. However, if a direct farm business wants to sell value-added products, such as canned goods and juices, it is a different story. Because these items have a long and sordid history of harboring dangerous bacteria, Illinois Department of Public Health (IDPH) has significant concerns about safety in production. Consequently, all processed products must be prepared in approved facilities and most processes must undergo pre-approval by IDPH.

Before describing the regulations that pertain to each group, it is important to understand the difference between raw and processed foods. The Illinois Food, Drug and Cosmetic Act (IL-FDCA) defines a *raw agricultural commodity* as “any food in its raw or natural state, including all fruits that are washed, colored or otherwise treated in their unpeeled natural form before marketing” (410 ILCS 620/2.18). IDPH defines “processing” to mean manufacturing, compounding, intermixing or preparing food products for sale or for customer service (77 IAC 750.10, 77 IAC 760.20). An example of this difference is raw versus processed lettuce – a washed head of lettuce is raw, while bagged salad mix is processed. A good rule of thumb would be that produce sold in any form other



than how it came off the plant or out of the ground may be “processed” and subject to additional regulations.

I. UNPROCESSED FRUITS, VEGETABLES AND MUSHROOMS

Probably the most common way to sell fruits and vegetables is as raw, unprocessed commodities. If a direct farm business is selling raw, unprocessed fruits and vegetables, the regulations limit pesticide residues and prohibit selling rotten or filthy food. Additionally, the Illinois Department of Public Health (IDPH) has specific guidelines for selling mushrooms.

Federal Law Requirements

As noted, the federal Food and Drug Administration is the federal agency charged with ensuring the safety of food commodities sold in the United States. However, until recently, the FDA imposed no formal rules on unprocessed fruits and vegetables at the farm level, simply because it did not have the statutory authority to do so. Instead, the FDA was limited to

publishing non-binding guidance documents on best practices for the growing, harvesting, and processing of fresh fruits and vegetables.

This has changed with the passage in early 2011 of the Food Safety Modernization Act (FSMA), the most significant food safety legislation since the 1938 passage for the FFDCA. The intent of the FSMA is to close some of the gaps in the existing food safety system. Key additions/revisions to the existing food safety framework include:

The ability of FDA to mandate food safety measures at the farm level for fruit and vegetable production. Previously, agricultural production (i.e., farming) was the exclusive purview of the USDA, with very limited exceptions such as shell egg production. But Section 105 of the FSMA directs the FDA, by way of formal rulemaking, to “establish minimum standards for the safe production and harvesting of those types of fruits and vegetables, including specific mixes or categories of fruits and vegetables, that are raw agricultural commodities for which the Secretary has determined that such standards minimize the risk of serious adverse health consequences or death” (H.R. 2751 § 105 (to be codified at 21 U.S.C. § 419(a)(1)(A))).

As of this writing (March 2011), these rules have not yet been formalized, but the law states that FDA’s rules should be (1) sufficiently flexible so as to apply to fruit and vegetable producers of all sizes, including those that sell directly to consumers; (2) include, with respect to growing, harvesting, sorting, packing, and storage operations, “science-based minimum standards related to soil amendments, hygiene, packaging, temperature controls, animals in the growing area, and water,” (3) not conflict with or duplicate requirements of the National Organic Program.

The FDA already has established such standards by way of its **Good Agricultural Practices (GAP) Guide**¹²² for fruit and vegetable production, though this Guide is not law and compliance is therefore voluntary. However, fruit and vegetable producers who wish to get an idea of what FDA’s rules might eventually look like – or who wish to reduce the risk of bacterial contamination in their produce – may find the Guide to be a helpful resource for altering or refining growing and production processes.

FDA authority to create a system of hazard analysis risk and risk based prevention control (HACCP) in all food processing facilities: A Hazard Analysis and Critical Control Point (HACCP) system is a prevention-based food-safety system designed to prevent, reduce to acceptable levels, or eliminate the microbial, chemical, and physical hazards associated with food production. HACCP’s main advantage is that it is a proactive rather than reactive method of containing

¹²²

<http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf>

contamination: it is the food producer's responsibility to identify critical points in the production process that are susceptible to contamination and then develop and follow a written plan that addresses and effectively controls those risks.

To that end, Section 103 of the FSMA requires food processing, packing, and holding facilities to develop and carry out HACCP plans that (1) identify, in writing, "known or reasonably foreseeable hazards" associated with the facility, including natural toxins (such as *Salmonella* and *E. coli*), (2) identify and implement preventative controls, including at critical control points, to significantly minimize or prevent the identified hazards, and (3) take corrective actions if the preventative controls are not properly implemented or are found to be ineffective. The statute also imposes detailed monitoring, plan re-verification, and recordkeeping requirements.

Exemption for small producers: After intense lobbying by small farm and local food advocates, the Senate passed the Tester-Hagen Amendment to the FSMA as a compromise to minimize the financial impact of compliance with many of the new statute's provisions. Specifically, Congress exempted small farms (less than \$500,000 in total sales) engaged in direct-farm marketing (so long as 50% of total farm sales were in direct sales to consumers or restaurants in the same state or within a 275-mile radius). Congress included a similar exemption for these entities from the HACCP requirements.

What the changes in the law mean for direct farm business producers: The FDA authority to impose on-farm safety measures is limited to fresh fruit and vegetable production, not grains or oilseeds. The HACCP requirements apply to food processing facilities. The definition of a facility specifically exempts farms, unless the farm engages in some type of processing, such as milling of wheat for flour.¹²³ However, farms processing harvested goods for use on the same farm (e.g., milling own wheat for personal use) are exempted from the definition of a "facility." Therefore, unless the farm is creating a value added product (e.g., engaging in some form of processing) and delivering this product off the premises, the farm is not a facility and thus not subject to the HACCP rules. Food processing facilities, on the other hand, should carefully monitor the development of implementing regulations as several elements of the FMSA may apply and require operational changing and documentation of food safety procedures.

That being said, many direct farm business producers will fall within the small farm exemption to the law and therefore will not need to comply with the new rules. FDA produce safety is currently a moving area of law, and producers who are unsure of their status should contact an attorney for specific guidance.

¹²³ Specifically, current law defines a "facility" as "any factory, warehouse, or establishment (including a factory, warehouse, or establishment of an importer) that manufactures, processes, packs, or holds food. Such term does not include farms; restaurants; other retail food establishments; nonprofit food establishments in which food is prepared for or served directly to the consumer; or fishing vessels...." 21 U.S.C. § 350d(b)(1).

State Law Requirements

Under the IL-FDCA, a raw agricultural commodity is adulterated if it “bears or contains a pesticide chemical which is unsafe within the meaning of Section 408(a) of the Federal [Food Drug and Cosmetic] Act” (410 ILCS 620/10(a)(2)(B)). Under Section 408 of the Federal Food, Drug, and Cosmetic Act (F-FDCA) (21 U.S.C. § 346a), the federal Environmental Protection Agency (EPA) sets tolerance levels for pesticides on and in foods. Using notice and comment rulemaking, the EPA establishes the tolerance level for each pesticide based on the potential risks to human health posed by that pesticide. EPA lists tolerance levels for more than 1,000 pesticides, so it is impossible for this Guide to cover all the standards. However, there are several ways farmers can determine the tolerance levels for pesticides they are using. One method is to look up the pesticide in the Code of Federal Regulations (CFR) (40 C.F.R. Part 180). EPA maintains a **website**¹²⁴ that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**¹²⁵ contains general information on pesticides by family, commodity type, and crop type. The site also has a database to look up tolerance levels for particular pesticides, which users can search using the common names of pesticides.



If a food consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food, it is “adulterated” under the IL-FDCA (410 ILCS 620/10(a)(3)). This legal distinction, in general terms, means food should not be rotten or contaminated with animal feces. As many direct farm businesses build their customer base through delivery of superior products and rely on reputation, common business sense would eliminate many of these potential violations. Nonetheless, it merits mentioning because this legal standard applies to both raw and processed foods.

Mushrooms

There are no regulations for selling mushrooms, but IDPH Technical Information Bulletin # 26 provides guidance for selling mushrooms to the public. The technical bulletin only allows the

¹²⁴ <http://www.epa.gov/opp00001/food/viewtols.htm>

¹²⁵ <http://www.epa.gov/opp00001/regulating/part-180.html>

sale of domesticated button, portobello, and crimini mushrooms (cultivated *Agaricus species*), oyster mushrooms (Hiratake) (*Pleurotus species*), straw mushrooms (*Volvariella volvacea*), wood ears (*Auricularia auricular*), enokis (*Flammulina velutipes*), shiitakes (*Lentinus edodes*), morels (*Morchella species*), and hen of the woods (*Grifola frondos*). To sell cultivated mushrooms, IDPH must regulate the growing, harvesting and processing operation, but the technical bulletin does not provide any guidance on what constitutes acceptable growing, harvesting and processing operations.

The technical bulletin generally prohibits the sale of wild mushrooms that occur naturally on land. However, morels (*Morchella species*) may be sold if they show no sign of spoilage and have not been cut, cooked, processed or soaked in any liquids. Retailers must also provide a clear and conspicuous consumer advisory, which can be a sign or on a label, that states at a minimum:

NOTICE

These mushrooms have been picked in the wild and have not been approved as safe to eat by any expert or regulatory agency. Persons who suspect they have mushroom poisoning should seek medical care immediately if any of the following symptoms occur after consuming wild mushrooms: gastrointestinal irritation, abdominal pain, vomiting, diarrhea, sweating, dizziness, weakness, or hallucinations.

It is strongly recommended to thoroughly cook these mushrooms prior to consumption.

II. PROCESSED FRUITS AND VEGETABLES

As discussed above, the difference between raw and processed food can sometimes be slight. Beyond washing and packing, there are several popular processing methods a direct farm business may use to create “value-added” products, such as drying, canning, jarring, and pressing into a juice or other beverage. IDPH strictly regulates these activities for safety. Although the federal Food and Drug Administration provides some guidance, IDPH at the state level does not have written documents available to processors that clearly delineate what constitutes “safe.” As a result, individual regulators make independent “judgment calls” during the permitting process. Therefore, “safe practice” could mean different things between different regulators and different regions. Moreover, standards - and therefore processing requirements - could change as regulators come and go. The bottom line is that direct farm businesses should cooperate with local public health inspectors during the approval process to ensure that no violations occur.

In addition to inspection and permitting, many processed foods must have labels containing particular information. For instance, processed foods must conform to their standards of identity (if any) and bear labels giving the common name of the food. Product labels must also

list all ingredients (410 ILCS 620/11(g) and (h)). Packaged foods must have labels that identify the manufacturer, packer or distributor and that contain an accurate accounting of the quantity of the contents (21 U.S.C. § 343(e); 410 ILCS 620/11(e)). In addition, federal regulations require foods processed with sulfites to disclose the presence of a sulfating agent (21 C.F.R. § 130.9). IDPH inspectors should advise food processors of any labeling requirements or restrictions that apply to their particular product.

Dried Fruit

Drying fruit may be the simplest means of processing produce into a value-added product. Before a direct farm business may dry fruits and mix them into value-added products such as trail mix, IDPH must inspect and permit the processing facility. IDPH does not have to pre-approve the recipe or process, but labels or signs must disclose additives and ingredients. IDPH also may check products to ensure they are safe and do not contain undisclosed or deleterious substances.

Some fruit drying processes may use products such as sulfites or FD&C Yellow # 5, which are defined as food and color additives under the IL-FDCA (410 ILCS 620/2.19, 620/2.20). The Act deems these additives to be unsafe unless there is a regulation specifying the permissible quantity of the added substance and its use (410 ILCS 620/13(a)); it also adopts the federal regulations of food and color additives (410 ILCS 620/21(d)). If a product requires a processing agent, the simplest approach is to consult a local regulator to determine use restrictions and residue limits. Alternatively, information on allowable food additives is available through FDA's "Everything Added to Food Database," which is available **online**.¹²⁶ Lists of FDA approved color additives are available in 21 C.F.R. Parts 73 and 74.

Canning, Jarring, Pickling

Jellies, jams, fruit butters, pickles and salsas are all popular value-added fruit and vegetable products. However, the methods used to create them – primarily canning, jarring, and pickling – can create anaerobic conditions conducive to the growth of dangerous microbes such as botulism and therefore represent a significant public health concern. As a result, IDPH exercises strict oversight of these goods. To make any of these products, a producer will need, at minimum, a certified commercial kitchen and IDPH pre-approval of recipes and production processes. IDPH may also require on-going product testing.

Illinois' regulations require processing under conditions that minimize the potential for undesirable bacterial or other microbiological growth, toxin formation, or deterioration or contamination of the processed product or ingredients (77 IAC 730.7060). The regulation states: "This may require careful monitoring of such physical factors as time, temperature, humidity,

¹²⁶ <http://www.accessdata.fda.gov/scripts/fcn/fcnNavigation.cfm?rpt=eafusListing>

pressure, flow-rate and such processing operations as freezing, dehydration, heat processing, and refrigeration to assure that mechanical break-downs, time delays, temperature fluctuations, and other factors do not contribute to the decomposition or contamination of the processed products” (*id.*). However, IDPH has not published technical guidance documents to clarify when these processes may be necessary. Because the IL-FDCA incorporates federal standards of identity and quality for foods sold in Illinois (410 ILCS 620/9), FDA’s guidance regarding standards of identity, which specify production methods for certain foods, provides at least some relevant information for food processors.¹²⁷

Juice and Cider

Like all foods, juice and cider processing facilities must undergo inspection and approval by IDPH. However, rather than undergoing IDPH pre-approval of production processes, juice processors must instead comply with federally-mandated Hazard Analysis and Critical Control Point (HACCP, pronounced “ha-sip”) procedures, even if they are only selling the product intrastate (21 C.F.R. Part 120).¹²⁸ The HACCP rules require producers to develop a written analysis that identifies points in the production process where microbial, toxic, chemical, physical or other hazards may contaminate the juice, as well as a written plan for preventing hazards reasonably likely to occur (21 C.F.R. §§ 120.7 and 120.8). The developer of the written analysis and plan must have specialized HACCP training (21 C.F.R. § 120.13). For more information on the juice HACCP, the FDA has issued *Guidance for Industry: Juice HACCP; Small Industry Compliance Guide*, which is available **online**.¹²⁹

Processors who sell their own produce directly to consumers as juice do not have to comply with the HACCP rule, so long as they store, prepare, package, serve, and vend their product exclusively and directly to consumers (21 C.F.R. § 120.3(j)). They must comply with HACCP, however, if they sell to other retailers or if anyone else stores, prepares or packages their juice. If a processor is exempt from HACCP, they must still comply with FDA’s other rules, including standards of identity proscribing minimum contents and allowable ingredients for canned fruit juices and vegetable juices (21 C.F.R. Parts 146 and 156). Additionally, FDA’s labeling rule (21 C.F.R. § 101.17(g)) requires a warning label for juices that have not been pasteurized or otherwise treated to kill pathogens. The statement must read:

¹²⁷ FDA regulations for canning and jarring are in various parts of Title 21 of the Code of Federal Regulations, including Part 113 (thermally processed low-acid foods packaged in hermetically sealed containers), Part 114 (acidified food), Part 145 (canned fruits), Part 150 (fruit butters, jellies, preserves, and related products), Part 152 (Fruit pies), and Part 155 (canned vegetables).

¹²⁸ The FDA’s authority over food is generally limited to foods shipped in interstate commerce (21 U.S.C. § 331). However, FDA asserts authority to enforce the HACCP rules under the Public Health Services Act (21 U.S.C. §§ 241, 242l, 254) because juice is a vehicle for transmitting food borne illnesses (see 66 Fed. Reg. 6137, 6148, 6158-6160 (Jan. 19, 2001)).

¹²⁹

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Juice/ucm072637.htm>

WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems.

Wine, Beer and Spirits

Once an operation begins pressing juice, it may be a natural progression to ferment wine, beer or spirits. Like all other foods, these products fall under the jurisdiction of the IDPH, which must inspect and permit their operation. However, these operations also are subject to oversight by the Federal Alcohol and Tobacco Trade and Tax Bureau (TTB) (27 U.S.C. §§ 201 *et seq.*; C.F.R. Title 27) and state and local liquor control commissions (235 ILCS 5; 11 IAC Part 100). The Illinois Board of Tourism's **website**,¹³⁰ which has a library of guides and marketing tools for wineries, is a valuable resource for individuals interested in producing and selling alcoholic beverages. Although the Board of Tourism focuses on wine, many of their resources provide information that may be useful to producers of beer and liquors as well.

At the federal level, TTB requires producers to obtain several permits prior to commencing operations and submit annual forms and taxes. Forms are available through TTB's **website**¹³¹ or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**¹³² tailored to particular manufacturers.

Local and county liquor control commissions vary in their permit requirements. Manufacturers and retailers generally must obtain local permits before obtaining the state level permit (235 ILCS 5/4). At the state level, the Illinois Liquor Control Commission (ILCC) issues additional required permits for manufacturing, retailing and other activities related to alcoholic beverages, such as off-site tastings (235 ILC 5/3-12). Permit applications are available on the **ILCC website**.¹³³ The ILCC also provides guidance to licensees on complying with Illinois' liquor laws, which is available as a packet or in **individual pamphlets online**.¹³⁴ Many of the ILCC permits require proof of insurance and bonds, proof of local permits, and proof of federal permits.

Illinois' alcohol distribution system complicates sales and distribution. Generally, Illinois has what is known as a three-tier distribution system that requires manufacturers to contract with distributors, who in turn contract with retailers, who may sell the product to the end consumer. However, there are some exceptions that allow producers to sell directly to consumers in specific instances.

¹³⁰ <http://www.illinoiswine.com/index.html>

¹³¹ <http://www.ttb.gov/forms/index.shtml>

¹³² <http://www.ttb.gov/applications/index.shtml#Manufacturers>

¹³³ <http://www.state.il.us/lcc/>

¹³⁴ <http://www.state.il.us/lcc/IEmaterials.asp>

Wineries generally must sell their wine through licensed distributors (235 ILCS 5/5-1(a)). Small wineries that produce less than 25,000 gallons may distribute some of their wine to retailers directly (235 ILCS 5/3-12(a)(17)). To do so, they must obtain a self distribution exemption and may not sell more than 5,000 gallons to retail licensees per year. Winemakers may also sell wine directly to consumers at the winery or show rooms by obtaining a wine maker's premises license (235 ILCS 5/5-1(i)). Illinois law also allows wineries to ship up to 12 cases directly to a consumer, but the winery must obtain an Illinois Winery Shipper's license (235 ILCS 5/5-1(r)). The cost of licenses varies according to production size and intended sales methods. Producers should contact the ILCC or their local liquor control office for assistance in identifying which permits to apply for.

Like wineries, beer breweries generally sell through distributors. However, breweries may also act as their own distributors by obtaining distributors licenses (235 ILCS 5/5-2(a)). These permits limit sales of beer for off-premises consumption to 50,000 gallons per year. Brewers may also sell directly to consumers on the premises if they obtain a brew pub license (235 ILCS 5/5-1(n)). If a brewer chooses to contract with a distributor to deliver to retailers, they must comply with the Illinois Beer Industry Fair Dealing Act (815 ILCS 720). The Act severely limits the circumstances under which a brewery can terminate or refuse to renew a contract with a distributor (815 ILCS 720/3 and 720/4). It also limits a brewery's right to prevent the distributor from selling their distribution rights to another company (815 ILCS 720/6).

Other Considerations for Fruits and Vegetables

Other sections of this Guide cover several additional issues that might arise when a direct farm business chooses to grow and sell fruits and vegetables. First, producers may wish to make certain health or nutrient claims when marketing their goods. These statements are regulated by the FDA and are discussed further in the "Marketing and Managing" chapter. Second, organic production and marketing must follow additional rules, which are outlined in the "Organic Marketing" chapter. Finally, the "Weights & Measures" section of the "Marketing and Managing" chapter covers additional marketing rules applicable to direct farm businesses.

III. CHECKLIST

- Have you determined what the residue limits are for any pesticides on the product
- If you are intending to raise or gather mushrooms, have you consulted with IDPH?
- If you are processing raw fruits and vegetables, have you obtained an IDPH inspection and permit for your processing facility? Do you need pre-approval of recipes or processes?
- Are you pressing juice? If so, you need to undergo HACCP training and develop a written HACCP plan or hire a trained professional to do so for you.
- Thinking about selling alcohol? Look into the all the permits you need to get from federal, state and local agencies, be aware of the order in which they must be completed, and investigate how much they will cost (some can run into the thousands). Also be aware of whether you can sell directly or will need to contract with a distributor.

KEY CONTACT INFORMATION

U.S. Environmental Protection Agency's National Pesticide Information Center

Ph: 1-800-858-7378

U.S. Food and Drug Administration

Guidance on fruits, vegetables, and juices:

<http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/default.htm>

Illinois Division of Public Health, Division of Foods, Drugs, and Dairies

Ph: 217-785-2439 (main)

Regional office contact search: <http://www.idph.state.il.us/local/map.htm>

U.S. Dept. of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB)

Ph: 877-882-3277 (general info)

Illinois Liquor Control Commission

Chicago Office: 312-814-2206

Springfield Office: 217-782-2136

Email: ilcc_info@mail.state.il.us

CHAPTER 4- GRAINS, CEREALS, AND OILSEEDS

Marketing grain is a complex business requiring decisions on when to sell, what type of contract to use, proper storage, and many other factors. Although selling directly means the business may not be selling on the volatile open market that most grain growers are accustomed to, many of these decisions are still pertinent to the business. Additional considerations for a direct farm business include whether and where to have the grain milled, as well as how and where to store the grain.



Although there are extensive resources for assisting conventional farmers in marketing their grain, there is limited information available for direct-to-consumer marketers. Most producers who are not selling through the traditional commodities markets have made their business planning choices using their personal judgment and experience and little else. An important marketing resource is **MarketMaker**,¹³⁵ which allows producers to list their businesses in a searchable database as well as search for processors and potential institutional customers.

Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's *Grain Processing: Adding Value to Farm Products*.¹³⁶ The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. Another potentially useful resource is the Illinois Department of Agriculture's (IDOA) **website**,¹³⁷ which allows farmers to list their hay and straw for livestock and horses. Finally, although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.¹³⁸

I. GRAIN INSPECTION STANDARDS

The federal Grain Standards Act (7 U.S.C. § 71 et seq.) authorizes the Department of Agriculture to establish standards and procedures for the inspection of grain shipped in interstate commerce

¹³⁵ <http://www.marketmaker.uiuc.edu/>

¹³⁶ <http://www.attra.org/attra-pub/summaries/grainpro.html>

¹³⁷ <http://www.agr.state.il.us/markets/hay/>

¹³⁸ <http://www.tritrainingcenter.org/course/>

and out of the country (7 U.S.C. §§ 76, 77). The Grain Standards Act is administered by USDA's Grain Inspection, Packers & Stockyards Administration (GIPSA). Inspection of grain shipped

Additional Resources: Grain Inspection

GIPSA maintains general information about grain and rice inspection on its website:

<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=grpi&topic=landing>

A list of official service providers that inspect or weigh grain is available on GIPSA's website:

<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&>

domestically (within the United States) is voluntary, and performed upon request by GIPSA-authorized state agencies and private firms (7 U.S.C. § 79(b)). The regulations concerning inspection procedures and establishing standards are in 7 C.F.R. Parts 800, 801, 802 and 810. Very generally, inspectors rate grains on their moisture content, levels of contaminants such as insects or gravel, toxins caused by mildews or pesticide residues, and amount of crushed or broken grains.

II. LICENSING OF WAREHOUSES

The United States Warehouse Act

The United States Warehouse Act (USWA) (7 U.S.C. §§ 241-273) authorizes the USDA to license warehouse operators that meet the standards established by the USWA and its regulations (7 U.S.C. § 242(j), 7 C.F.R. Part 735). Being federally licensed is voluntary, but licensees must post

bonds (or other financial assurance) (7 U.S.C. § 245) and comply with record keeping, contracting, and inspection requirements (7 U.S.C. § 246, 7 C.F.R. Part 735).

The Illinois Grain Code

The Illinois Grain Code (240 ILCS 40) and implementing regulations (8 IAC Part 281) is the primary Illinois law relating to the marketing and storage of grain. The law, which is administered by the Illinois Department of Agriculture, requires grain dealers and warehouses to be licensed by IDOA or by the USDA under the USWA (240 ILCS 40/5-5). It also establishes the Illinois Grain Insurance Fund to protect producers in the event of the failure of a licensed dealer or warehouse operator.

The federal and state licensing programs serve the same purpose: protect producers by requiring warehouses and dealers to have enough financial security to pay the producers and authorize inspections to ensure that bad management practices do not damage products. To this end, IDOA licensees must maintain sufficient insurance to cover losses (240 ILCS 40/10-4(a)) and enough capital to pay producers on demand (240 ILCS 40/10-5(c)). Persons purchasing grain for their own use as seed or feed (i.e., not for resale) or for resale as only seed are exempt from the licensing requirement (240 ILCS 40/5-5(e)).

Generally, IDOA-licensed warehouses must accept grain tendered to them (240 ILCS 40/10-20(a)). However, they may refuse to accept grain if the producer requires separation for preservation of the grain's identity (240 ILCS 40/10-20(g)). Since a key element of selling directly to consumers is preserving the grain's identity, many warehouses may be unwilling to accept the grain. If they do accept grain, the evidence of storage must state on its face both the location of the grain and the fact that it is stored with its identity preserved (*id.*). USWA does not contain a similar requirement. For a direct farm business, this may mean that IDOA-licensed warehouses are preferable because they are subject to regulations for keeping the direct farm business's grain distinct.

The Illinois Grain Code also establishes a Grain Insurance Fund, which reimburses producers if, despite complying with all Code requirements, a warehouse or dealer becomes defunct and cannot pay the producer. The Code requires dealers and warehouses licensed in Illinois to pay yearly contributions to the fund (240 ILCS 40/30-10), and permits federally licensed operations to do so. The fund will only pay a producer if the warehouse where they stored their grain was contributing to the fund (240 ILCS 40/30-5(b)(8)). For this reason, a direct farm business may wish to seek out a warehouse that is participating in the Illinois Grain Insurance Fund. More information on the grain insurance fund is available at IDOA's **website**.¹³⁹ Don Uchtmann and Bryan Endres have also written a useful summary of how the Grain Insurance Fund works, which is available **online**.¹⁴⁰

The Grain Storage Warning Act

The Grain Storage Warning Act (240 ILCS 20) requires farmers who store their own grain to affix warning signs on structures that can store 1,000 bushels or more of grain. The signs must be affixed to or printed on the structure near the door or loading area and shall be substantially as follows:

"DANGER

Inspect storage area for unauthorized persons before removing grain."

The Act does not apply to structures used exclusively for ear corn (240 ILCS 20/3). Failure to comply with the Act is a petty offense and the fine can be \$50 (240 ILCS 20/2).

III. SELLING GRAINS

Unprocessed grains, nuts and seeds sold in the same condition as harvested do not need to come from an IDPH inspected and licensed facility. However, if the producer processes the

¹³⁹ <http://www.agr.state.il.us/warehouses/graincode.html>

¹⁴⁰ http://www.farmdoc.illinois.edu/legal/articles/ALTBs/ALTB_08-05/ALTB_08-05.pdf

grain by bagging, packaging or grinding, they must do so in an approved facility (77 IAC § 760.100, 750.100). Processing also includes blending, roasting, sprouting, grinding, or any other process that changes the condition of the grain.

Also important are the federal standards of identity for grains and grain products (21 CFR Part 137), which the IL FDCA incorporates for goods sold in intrastate commerce (410 ILCS 620/9). Grains labeled as a food that has a standard of identification must comply with the standard's content and production requirements, or they are misbranded (410 ILCS 620/11). FDA Defect Action Levels, which are maximum allowable levels of natural or unavoidable defects in foods for human use that present no health hazard (21 C.F.R. § 110.110), are another important area the producer must monitor. Common defects with specific action levels include molds, insect parts, and excrements. More guidance on the action levels is available on the FDA's **website**.¹⁴¹

Baked Goods

Another step in the processing of grains for sale may be to produce baked goods. IDPH requires bakers to use commercially-approved kitchens (77 IAC §§ 760.100, 750.100) and package the baked goods to protect them from contamination (77 IAC §§ 730.7080, 760.120). Prepackaged foods must, at minimum, identify (1) the common name of the product, (2) the name, address and zip code of the packer, processor, or manufacturer, (3) the net contents, (4) a list of ingredients in descending order of predominance by weight, and (5) a list of any artificial color, artificial flavor or preservatives used (410 ILCS 620/11(e)). At farmers' markets, the information may be on a label on the package or container or on a sign or placard or as a recipe available to the consumer. *The Hearth Baked Breads Act* (410 ILCS 640) is an exception to packaging requirements. The Act allows the sale of "foreign-type, hearth baked breads" in open ended packages. These are the breads that are often thought of as having hard crusts, such as Italian and French breads, whose crusts would soften if placed in a sealed package (IDPH TIB # 24). However, the package must still protect the loaf from contamination by extending beyond the end of the bread (*id.*).

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<http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/sanitation/ucm056174.htm#intro>

IV. CHECKLIST

Have you:

- Come up with a marketing and business plan? What type of growth do you envision and when? Given the rarity of direct marketing grain, this may be a particularly difficult step that is especially important for establishing a successful business.
- Do you want to have your grain inspected and graded?
- Will you need to use a warehouse, or do you have storage capacity on the farm? If so, have you identified a warehouse that will take your grain?
- Will you be processing your grain, or selling it in its natural, post-harvest state? If you are processing, do you have the necessary facilities and permits, or do you need to access a commercial, certified kitchen?

KEY CONTACT INFORMATION

U.S. Grain Inspection, Packers & Stockyards Administration

Ph: (202) 720-0219 (main)

For a list of official GIPSA service providers, visit
<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&topic=fsp>

Illinois Department of Agriculture, Bureau of Warehouses (IL Grain Code enforcement)

Ph: 1-800-654-0882 or 217-782-2895

CHAPTER 5- HONEY AND MAPLE SYRUP

This chapter summarizes the basics of Illinois laws for beekeepers involved in honey production. This section concludes with a brief discussion of rules for maple syrup production, which are similar to those for honey.

I. BEE KEEPING

This section discusses state, but not local, regulations on beekeeping. Some counties and municipalities may limit where, how, or how many bees can be raised in an area. Therefore, beekeepers should contact their local authorities. For more information on technical aspects of beekeeping, the Illinois State Beekeepers Association maintains a helpful **website**.¹⁴² The organization is open to both commercial beekeepers and hobbyists/enthusiasts.

Domesticated honeybees play an integral role in agricultural sectors needing pollinators, and diseases and pests affecting honeybees can cause significant economic damage. Therefore, the *Illinois Bees and Apiaries Act* (510 ILCS 20) and implementing regulations (8 IAC Part 60) establish registration and inspection requirements to facilitate protection of the health of Illinois bee colonies.

All new beekeepers must register with the Illinois Department of Agriculture within ten days of acquiring the bees and must re-register in November of each year (510 ILCS 20/2; 8 IAC 60.20). The owner receives a certificate with a number that must be placed on the front of each hive. There are no fees to register and the form is available on IDOA's **webpage**.¹⁴³

The Department may enter the premises to inspect the bees, colony, equipment or apiary during reasonable business hours (510 ILCS 20/2-4). IDOA may declare as a nuisance, and possibly order destroyed, any unregistered beekeeping operation or colonies that are diseased or contaminated with pests or exotic strains (510 ILCS 20/2-1). The apiary inspector should provide advice on any treatments a colony may need. However, IDOA will order destruction of the colony if certain diseases, such as American foulbrood disease, are present (8 IAC 60.50). Although the owner is responsible for the costs of the destruction, the Department may reimburse owners of registered colonies \$25 for each colony destroyed, if funds are available (510 ILCS 20/2-2). The law requires a permit, based on an inspection certificate, to transport bees between counties or bring into the state any bees and equipment used by bees (510 ILCS §§ 20/2a; 20/2b; 20/2b-1; 8 IAC 60.60).

¹⁴² <http://www.isba.us/>

¹⁴³ <http://www.agr.state.il.us/programs/bees/beekeep.pdf>

The Department of Agriculture maintains a **website**¹⁴⁴ for its beekeeping program. In addition to the registration and inspection program, the Department is attempting to establish a communication program between beekeepers and pesticide applicators in order to limit exposure of bees to pesticides. At this time, the program allows pesticide applicators to access a database of all registered apiaries in the state. Applicators are encouraged to contact nearby beekeepers so that the beekeepers can take necessary measures to protect their bees. Although the program currently is voluntary, participation does provide some measure of protection for beekeepers.

II. SELLING HONEY

A. *Raw Honey*

Honey and food labeled as “imitation honey” sold in Illinois must be 100% pure honey or it is misbranded under the Illinois Food Drug and Cosmetic Act (410 ILCS 620/11(p)). The Illinois Department of Public Health (IDPH) defines honey as “a sweet substance produced by honey bees from the nectar of the blossoms or from secretion of or on living parts of plants, which they collect, transform and combine with specific substances, and store in honeycombs.”¹⁴⁵



Like all foods sold at retail, if producers process their honey, they must do so at a plant and in a manner approved by IDPH (77 IAC § 760.100; 77 IAC § 750.200). Because comb honey is a raw product that consumers expect to contain some contaminants, IDPH does not consider honey sold in its original comb to be “processed” even if it is cut and placed in a box for sale. Therefore, IDPH does not require honeycomb to comply with the processing rules and regulations. Honey sold

not in its original honeycomb, however, is processed, and must comply with IDPH regulations.

Honey processing occurs in a honey house (IDPH Technical Release # 22, II.1). In addition to the general construction requirements for all food processing facilities (see Sections IV and V of the Introduction section), there are some specific requirements unique to honey. Honey containers must be made of stainless steel, glass or food grade plastic which is smooth, easily cleanable and non-absorbent, and should not be made of galvanized metal (the low pH of honey can leach heavy metals out of it)(Technical Release # 22, II.8; 77 IAC §§ 730.4010-.4050;

¹⁴⁴ <http://www.agr.state.il.us/programs/bees/index.html>

¹⁴⁵ This definition is not found anywhere in the regulations, but rather is contained in IDPH Technical Release # 22: Guidelines for Sanitary Manufacture, Processing, Packaging or Holding of Honey. This technical release is available online at http://www.isba.us/index.processing_files/downloads/Honey_Process_Guidelines.pdf

6030). Processors must thoroughly wash, rinse, sanitize and air dry synthetic strainers at regular intervals, and must discard cheese cloth strainers after each use (*id.*).

On July 13, 2010, the Illinois General Assembly passed legislation that amends the FDCA to define raw, unadulterated honey (whether in the comb or extracted) as a raw agricultural commodity. As a result, IDPH does not have authority to regulate comb honey or unadulterated honey extracted from the comb (410 ILCS 620/27). Further, the legislation amends the Sanitary Food Preparation Act to prohibit IDPH from inspecting honey houses of producers who sell less than 500 gallons of honey per year (410 ILCS 650/7(b)). The Act defines a honey house as “any stationary or portable building or any room or place with a building that is used for the purpose of extracting, processing, or other handling of honey” (410 ILCS 650/7(a)). The effect of the amended legislation is to make it easier for beekeepers to sell their products to retailers and farmers’ markets. The ISBA **website**¹⁴⁶ has additional information about the changes to the law.

Pasteurizing honey makes the product free flowing, destroys osmophilic yeast (i.e., prevents molding) and delays crystallization. IDPH does not require pasteurization of honey because its high sugar content makes honey naturally anti-microbial. Therefore, a beekeeper in Illinois may produce and sell unpasteurized “raw honey.” Some consumers seek out local raw honey because they believe it helps alleviate allergies. Due to U.S. Food and Drug Administration regulation of health claims, producers should not include this claim on their labels or in their advertising. FDA must specifically approve all health claims prior to use (21 C.F.R. § 101.14),¹⁴⁷ but it has never approved the claim linking honey and allergies (21 C.F.R. §§ 101.70-.83). Therefore, labels and advertisements *should not* include any health claims connecting raw honey to allergy relief.

B. Organic Honey

To market honey as organic, the bees and processing plant must be certified organic according to USDA’s National Organic Program. Although the regulatory definition of livestock specifically excludes bees (7 C.F.R. § 205.2), **USDA guidance documents**¹⁴⁸ direct certifiers to use the livestock standards for certification of bees. The livestock regulations generally require the producer to handle the livestock organically from the day of birth, use 100% organic feed, avoid most synthetic chemicals, and refrain from use of antibiotics and certain other medical treatments. For bees, this may mean locating the hive so as to prevent foraging at non-organic flowers, building the hive out of particular materials, or treating hive diseases in a manner that

¹⁴⁶ <http://www.isba.us/index.news.htm>

¹⁴⁷ The Nutrition Education and Labeling Act of 1990 prohibits states from establishing any labeling requirements for food in interstate commerce that are not identical to FDA labeling regulations (21 USC § 343-1). Consequently, Illinois has not promulgated regulations on labeling. It is unclear whether FDA’s labeling requirements apply to purely intrastate food, but it is likely they do.

¹⁴⁸ Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5069312&acct=AQSS>

would comply with standards set out by the certifier. The “Organic Marketing” chapter of this Guide covers the livestock regulations in more detail, as well as information on the certification process, record keeping requirements, labeling rules, and processing of organic foods. Given the special nature of bees, it may be best to contact an accredited organic certifying agent that certifies bees to discuss specific requirements. Refer to the “Organic Marketing” chapter of this Guide for more general information on the organic certification process.

C. Maple Syrup

Much like honey, maple sap is a naturally occurring product extracted by producers. However, to make it into a saleable commodity, sugar makers must boil the sap down into syrup. IDPH considers this processing. Therefore, maple syrup production must be done at a facility inspected and licensed by IDPH. IDPH does not have specific guidance for maple syrup production, but like all other food processing facilities, the maple syrup facility must be clean and sanitary, have the adequate and appropriate supplies, and be capable of keeping vermin, insects, and other contaminants away from the food.

III. CHECKLIST

Have you...?

- Registered your bee colony with the Illinois Department of Agriculture and obtained any necessary permits? Checked with local authorities for other restrictions?
- Had the Illinois Department of Public Health inspect and permit your honey house (if you plan to sell more than 500 gallons per year of adulterated honey that has been removed from the comb)?
- If you intend to market your honey as organic, read the chapter on Organics and contacted an accredited certifying agent that has experience certifying honey?

KEY CONTACT INFORMATION

Illinois Department of Agriculture, Bees & Apiaries Program

Ph: 217-782-6297

CHAPTER 6 – LIVESTOCK AND POULTRY

In the recent past, most farm operations included at least minimal animal production. However, declining livestock auction markets and vertical integration in the livestock and poultry industries has limited marketing opportunities for small scale livestock and poultry farmers. Selling directly to consumers is one means of retaining a presence in this potentially lucrative and rewarding business. Ongoing consumer concerns regarding food safety and the increasing interest in animal welfare should increase demand for direct farm sales of meat and poultry products. Moreover, in a 2004 study of restaurant and commercial food buyers, the most important factor in selecting a new supplier was obtaining the highest quality food available--a characteristic that provides an opportunity for local, direct market farm operations.

In order to participate in this market, however, producers must navigate a series of state and federal regulations relating to the production, slaughter and processing of meat and poultry products. This chapter will address raising, slaughtering and processing requirements. The facility may also be subject to the Livestock Facilities Management Act, the EPA's water permitting regulations, or the National Animal Identification System, discussed in Chapter 2 – Setting Up the Direct Farm Business.

I. RAISING AND CARING FOR ANIMALS

A. Animal Welfare Laws

The Humane Care for Animals Act (510 ILCS 70) requires that owners of animals provide:

- sufficient quantities of good quality, wholesome food and water
- adequate protection and shelter from the weather
- veterinary care when needed to prevent suffering
- humane care and treatment

(510 ILCS 70/3). The Act prohibits beating, cruelly treating, tormenting, starving, overworking or otherwise abusing any animal (510 ILCS 70/3.01).

However, nothing in the Act is intended to affect "normal, good husbandry practices utilized by any person for the production of food. . . ." (510 ILCS 70/13). The regulations implementing the Act generally focus on the care and upkeep of companion animals. The Act largely should not



be a concern for livestock and poultry operations as long as the care provided meets the minimum standards that are common practice in the industry.

The Illinois Brand Act

The Illinois Brand Act (510 ILCS 40) explicitly authorizes branding of livestock. Brands must first be registered with the Department of Agriculture by submitting a form and paying the \$15 fee (510 ILCS 40/5; 40/8). Brands must be at least three inches in diameter, although IDOA may approve smaller brands for smaller animals such as goats and sheep (510 ILCS 40/2.05). Farmers are not required to brand their animals, but branding serves as *prima facie*¹⁴⁹ evidence of ownership if there is ever a title dispute or criminal proceedings (e.g. livestock theft) (510 ILCS 40/9).

The Feeding Garbage to Animals Act

The Feeding Garbage to Animals Act (720 ILCS 610) prohibits feeding garbage to swine, poultry or any animals on a farm (720 ILCS 610/2). The Act defines garbage as “putrescible vegetable waste, animal, poultry, or fish carcasses or parts thereof resulting from the handling, preparation, cooking, or consumption of food, but does not include the contents of the bovine digestive tract. ‘Garbage’ also means the bodies or parts of bodies of animals, poultry or fish” (720 ILCS 610/1). These practices, particularly feeding meat scraps and dead animals to swine, can lead to the spread of difficult-to-control diseases such as hoof-and-mouth disease or Bovine Spongiform Encephalitis (BSE). Therefore, IDOA watches for violations and enforces this law rigorously.

B. Diseased Animals and Dead Animal Disposal

The Diseased Animal Act

The Diseased Animal Act (510 ILCS 50) directs the Department of Agriculture to implement programs for the suppression, prevention, and extirpation of contamination or infectious and contagious diseases of animals in Illinois. The regulations implementing the law establish general requirements for reporting, quarantining, and controlling diseases as well as specific programs for particularly problematic diseases (8 IAC 85). In addition to the general Act, there are specific laws and regulations for bovine brucellosis (510 ILCS 30; 8 IAC 75), swine brucellosis (510 ILCS 95; 8 IAC 100), other swine diseases (510 ILCS 100; 8 IAC 105), bovidae and cervidae tuberculosis (510 ILCS 35; 8 IAC 80), control of pseudorabies (510 ILCS 90; 8 IAC 115), and equine infection anemia (510 ILCS 65; 8 IAC 116). These diseases raise concerns because they compromise animal health and productivity, and may pose public health risks due to potential transfer to humans during slaughter or through consumption. Some diseases have

¹⁴⁹ “Prima facie” means the court will presume the animal belongs to the owner of the brand, although the opposing party may enter evidence to try to prove the animal belongs to someone else.

been eradicated in Illinois (brucellosis, pseudorabies, and tuberculosis), so transport restrictions are particularly important for preventing the reintroduction of the diseases. A farmer must therefore obtain a permit from IDOA to bring an animal into Illinois from out-of-state (8 IAC 85.150).

Anyone who suspects an animal has a reportable disease, including but not limited to avian influenza, bovine tuberculosis, pseudorabies, and Johne's disease, must report the case to IDOA immediately at 217-782-4944 (8 IAC 85.10). Anyone having knowledge of the disease or responsible for its spread may be liable for fines and penalties (*id.*).¹⁵⁰ The full list of "contagious or infectious diseases" is online at **8 IAC 85.12**.¹⁵¹ IDOA has authority to issue quarantines if the department suspects that animals are infected with or have been exposed to ¹⁵²dangerous diseases (510 ILCS 50/3). IDOA prohibits the sale of animals subject to a quarantine unless IDOA specifically approves the sale (8 IAC 85.25). IDOA may destroy animals with contagious or infectious diseases and any potentially infected property (510 ILCS 50/4).

Farmers purchasing, selling or exhibiting animals should be aware of risk management and herd certification programs that pertain to particular diseases and/or species (8 IAC 85). Program details depend on the disease and animal type; however, they are capable of some generalizations. Herds that have never tested positive for particular diseases are eligible for certification programs, while herds that have had one or more infected animals are subject to risk management programs. Risk management programs restrict movement through quarantines or impose standards on modes of transporting the herd. IDOA may lift the restrictions after the farmer proves there is no longer an infection. For instance, the farmer may destroy or cure the diseased animals and regularly test the rest of the herd for a certain period of time.

The Animals Intended for Food Act

The Animals Intended for Food Act (410 ILCS 605/1) authorizes IDOA to inspect animals intended for food in order to prevent unsound, unhealthful, unwholesome or otherwise unfit food from entering the food supply. The Act also authorizes quarantining or destruction of animals that have a disease that makes them unfit for human consumption (410 ILCS 605/2; 605/2.1). The provisions of this Act replicate the Diseased Animal Act (discussed above) and

¹⁵⁰ See 510 ILCS 50/19-24.1 for information on fines and penalties for non-compliance.

¹⁵¹ <http://www.ilga.gov/commission/jcar/admincode/008/008000850000120R.html>

¹⁵² "Exposed to" means an animal that has come in contact with another animal or an environment that is capable of transmitting a contagious, infectious or reportable disease. An animal will no longer be considered "exposed to" when it is beyond the standard incubation time for the disease and has been tested negative for the specific disease or there is no evidence that the animal is contagious, except for animals exposed to Johne's disease. Animals originating from a herd where Johne's disease has been diagnosed only will be considered no longer "exposed to" with a negative test (8 IAC 85.5).

the meat and poultry inspection programs (discussed below); therefore, IDOA has not issued specific regulations or rules for administering this Act.

The Dead Animal Disposal Act

The Dead Animal Disposal Act (225 ILCS 610) requires proper disposal of the bodies or parts of dead animals within 24 hours after death (225 ILCS 610/17 (a)). Farmers may contract to have licensed collection centers or rendering facilities¹⁵³ dispose of the animal, or farmers may dispose of the bodies of dead animals themselves either by disposal on the site where the death of the animal occurred or by transporting them to a licensed landfill willing to accept animals. Animal body parts may be transported to a licensed landfill only in the case of on-site slaughter or an on-site necropsy performed to determine the cause of the animal's death (225 ILCS 610/17(b)).

There are strict guidelines for self-disposal of animals. The owner (or owner's agent) must also use the most direct route possible, use a truck with a bed that prevents leaking, and cover the animal during transport (8 IAC 90.105). Methods of on-the-farm disposal include (a) incineration, (b) burying in a manner that prevents the spread of disease and contamination of water supplies and (c)-(g) composting according to specific guidelines for each type of animal (poultry, fish, swine, or cattle, sheep and goats) (8 IAC 90.110).

II. SLAUGHTERING AND PROCESSING

A. Humane Slaughter

Although most farmers do not slaughter their own animals, the laws pertaining to the humane slaughter of animals are worth noting. For one thing, if part of the retail marketing of the meat entails advertising humane treatment, slaughtering methods matter as much as raising and care. The laws are also relevant because a slaughterhouse that fails to comply with these rules may also fail to comply with other rules pertaining to food safety, which could damage a producer's reputation and increase exposure to legal liability.

The Federal Humane Slaughter Act

The Federal Humane Slaughter Act (7 USC § 1901) requires that animals be slaughtered humanely. Approved humane methods either render the animal unconscious quickly or comply with Jewish or other religious methods that quickly cause unconsciousness due to anemia from a cut to the carotid artery (7 USC § 1902).

¹⁵³ Licensing and transport requirement for these entities are established in the beginning of the Act at 225 ILCS 610/2 through 610/13).

The Illinois Humane Slaughter of Livestock Act

The Illinois Humane Slaughter of Livestock Act (510 ILCS 75) and regulations (8 IAC 50) similarly prohibits slaughterers and packers from slaughtering animals in an inhumane manner (510 ILCS 75/3). A slaughterer is a person regularly engaged in commercial slaughtering (510 ILCS 75/2(3)). A packer is a person in the business of slaughtering, manufacturing meat, or otherwise preparing meat for sale (510 ILCS 75/3(5)). Humane method means the animal is

rendered senseless of pain (e.g., a gunshot or other quick method) before being shackled, hoisted, thrown, cast or cut, or any method in accordance with Jewish or other faiths where the animal loses consciousness from anemia to the brain from a cut to the carotid artery (510 ILCS 75/2(6)). The Act prohibits using bludgeoning devices (e.g., hammers) to render the animal unconscious or hoisting the animal before it is unconscious (510 ILCS 75/3).

ADDITIONAL INFORMATION: Animal Processing Licenses

More information on obtaining federal animal processing licenses is available on the FSIS website:

http://www.fsis.usda.gov/regulations_policies/Grant_of_Inspection_Guideline/index.asp

The USDA recently launched a toll-free help desk for small meat and poultry processing plants. Staff specialists can answer questions or direct callers to appropriate assistance. Contact:

1-877-FSISHelp (1-877-374-7435)

infosource@fsis.usda.gov

More information about obtaining a state license is available on the IDOA website:

<http://www.agr.state.il.us/AnimalHW/MP/License.html>

B. Processing Meat and Poultry Products

Meat and poultry processors are subject to federal or state laws and regulations regarding licensure and inspection. The USDA's Food Safety and Inspection Service (FSIS) oversees federally licensed and inspected facilities. The Illinois Department of Agriculture enforces Illinois laws and regulations applicable to Illinois registered facilities. Whether a direct farm meat or poultry producer contracts with a state or federally licensed slaughterhouse will depend on a number of factors, including whether the producer is shipping across state lines and whether potential customers (such as restaurants) require that meat originate from a federally licensed facility.

As a general rule, each facility engaging in processing must have an inspection and license from either the USDA or IDOA. For instance, in sausage production, the facility that slaughters the animal must have a permit and the facility that processes the sausage, if it is a separate facility, also must have a permit. In rare circumstances, a producer can slaughter and process its own poultry. Although most slaughtering and processing is

done at slaughterhouses, mobile processing units, which are often more accommodating of small producers, may be available in certain areas.¹⁵⁴

Meat

As noted above, in order to sell across state lines, farmers must take their animals to a federally licensed facility for slaughtering and processing (21 U.S.C. §§ 601; 603). The Federal Meat Inspection Act (21 U.S.C. §§ 601-695) and accompanying regulations (9 C.F.R. Parts 300-599) govern facilities that slaughter or process meat. Some customers, such as restaurants (who have insurance companies imposing requirements on them), may demand that meat originate from a federally inspected facility even if not sold across state lines. If a producer intends to sell meat only within Illinois (i.e., not in interstate commerce), the meat may come from a facility inspected according to the Illinois Meat and Poultry Inspection Act (225 ILCS 650) and regulations (8 IAC 125), which incorporate the federal rules.

The USDA places an “inspected and passed” stamp on federally inspected meat, using food-grade ink (21 U.S.C. § 606). The mark is put on carcasses and major cuts, but might not appear on retail cuts such as roasts and steaks. Producers can also request that USDA grade their meat (7 C.F.R. Parts 53 and 54). Whereas an inspection qualifies the meat for sale to consumers, grading certifies that the meat is of a particular quality. Mandatory USDA inspections are free of charge, but producers must pay for grading services (7 C.F.R. §§ 53.18, 54.28). For more information on how inspections and grading differ, visit the **FSIS website**.¹⁵⁵ To transport meat across state lines, the packer must affix a federally pre-approved label (9 C.F.R. 317.1). More information on the approval process for labels is available on the **FSIS website**.¹⁵⁶

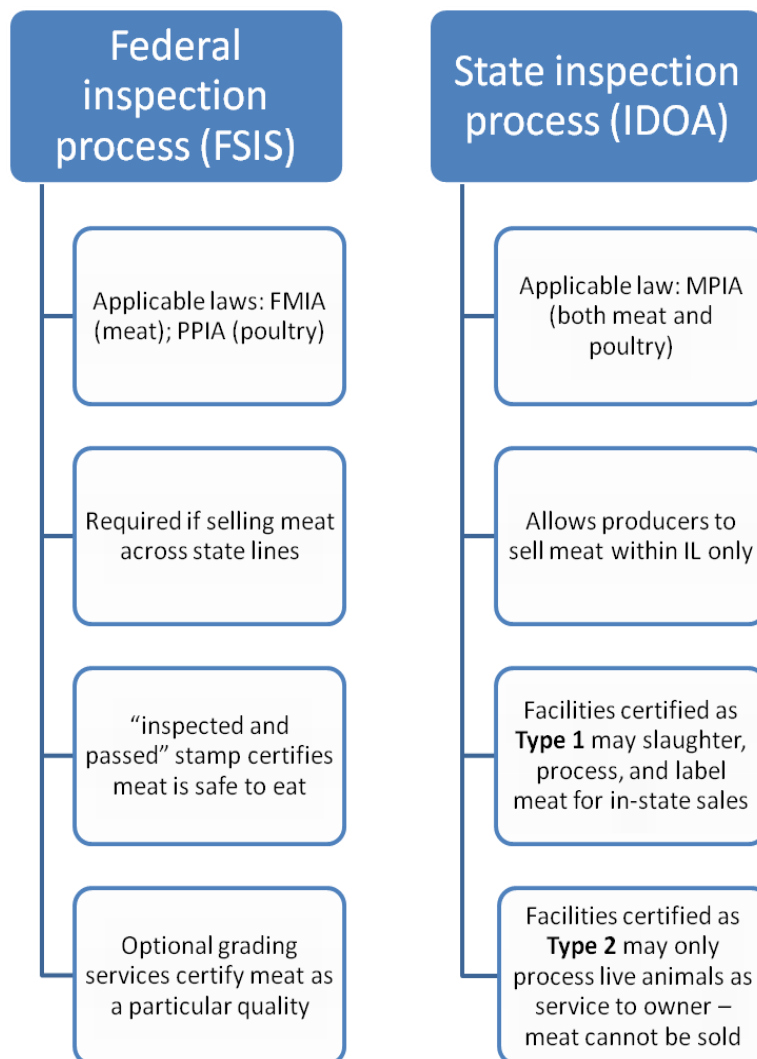
Illinois inspected facilities, from which meat may only be sold intrastate, fall into two categories. IDOA authorizes Type I facilities to receive live animals for slaughter and processing, and may package and label the product for intrastate sales (225 ILCS 650/5.1). Type II facilities, however, may only slaughter and process live animals as a service to the specific animal’s owner (225 ILCS 650/5.2). Type II facilities must conspicuously label the meat they process as “NOT FOR SALE – NOT INSPECTED” (*id.*). Inspections and certifications of both types of facilities are according to the federal standards (225 ILCS 650/16).

The following graphic provides an overview of the federal and state meat inspection and licensing process:

¹⁵⁴ These units are still relatively uncommon, but USDA is stepping up efforts to disseminate information and increase their availability. For instance, in January and February 2010, the agency held a series of webinars to educate producers on special issues relating to mobile processing units. For more information, visit http://origin-www.fsis.usda.gov/News_&_Events/Regulatory_Web_Seminars/index.asp

¹⁵⁵ http://www.fsis.usda.gov/factsheets/inspection_&_grading/index.asp

¹⁵⁶ http://www.fsis.usda.gov/regulations_&_policies/Labeling_Procedures/index.asp



A good source for guidance on marketing meat is *How to Direct Market Your Beef*.¹⁵⁷ The guide is written by Jan Holder, a rancher who successfully direct markets beef with a "grass-fed" claim, and discusses Holder's experience in complying with laws governing the slaughter, processing, and marketing of beef.

On a final note, the *Horse Meat Act* (225 ILCS 635) outlaws processing horse meat for human consumption in Illinois. However, zoos may use horse meat to feed exotic animals, and animal feed producers may include it to produce exotic animal feed. Recent attempts to repeal this Act have failed.

Poultry

¹⁵⁷ <http://www.sare.org/publications/beef/beef.pdf>

As a general rule, poultry products that move in interstate commerce are subject to the federal Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R. Part 381), which require poultry slaughter and/or processing of poultry products to undergo mandatory inspection. Some operations, however, are exempt from federal inspection. Even if the operation is exempt from federal inspection, state inspection requirements may apply unless the operation qualifies for a state level exemption.

Federal Inspection Exceptions for Poultry

Direct farm businesses meeting certain criteria listed below may sell poultry products directly to consumers without securing PPIA's otherwise mandatory inspection requirements (21 U.S.C.

§ 464; 9 C.F.R. § 381.10). In general, all exempt facilities must slaughter healthy chickens in a sanitary manner, and ensure that they handle the birds properly (*id.*). On a basic level, slaughtering is exempt when it is done by:

- the producer for personal use;
- a slaughterer who provides a service to an owner of live chickens and *is not* selling poultry to any consumers;
- a producer-grower who slaughters and sells

the poultry they themselves have raised (1,000 bird limit, or 20,000 limit as long as only distributed intrastate);

- producer-growers that sell direct to consumers;
- slaughterers who purchased live poultry specifically to sell direct to consumers;
- small businesses that process fewer than 20,000 birds annually *and* the processing only goes as far as cutting up the birds; and
- a retail business that is merely cutting up birds for the store.

The intricacies of whether a producer or slaughterer qualifies for the exemption, and which sales are exempt, are more complex and nuanced than the above list. Therefore, producers should contact an FSIS district office for an individualized analysis before proceeding without obtaining an inspection and license. FSIS has published *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry Products Inspection Act*, which is available **online**.¹⁵⁸ The guidance document contains a helpful

¹⁵⁸ http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf



decision flowchart (page 5) and a table (page 21) to help determine whether the operation is exempt from the PPIA.

Regardless of the exemption, processors are never exempt from the PPIA's prohibitions against misbranding and adulteration (injurious to health, or held, packed or produced under unsanitary conditions). Attachment 2 to the *Guidance for Determining Whether...Exempt* (linked above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416), and the *FSIS Sanitation Performance Compliance Guide*, which is available on the **FSIS website**.¹⁵⁹

State Inspection Exceptions for Poultry

The Meat and Poultry Inspection Act (225 ILCS 650) and regulations (8 IAC §§ 125.310 - .410) apply to the slaughter, processing, and marketing of poultry and poultry products. Poultry producers who wish to slaughter and process their own poultry are exempt from the Act if they meet all of the following criteria:

- raise poultry on their own farms or premises;
- slaughter, eviscerate, or further process not more than 5,000 birds per calendar year;
- slaughter, prepare, sell or deliver to the consumer on or from the premises where the exemption is given;
- slaughter and/or prepare poultry or poultry products in sanitary facilities, under sanitary conditions, and subject the facility to periodic inspection by IDOA personnel;
- submit a written request for exemption to IDOA (valid for two years); and
- do not sell or buy poultry products other than those produced from poultry raised on the farm.

(225 ILCS § 650/5). The exemption is effective only upon written confirmation of receipt from IDOA (*id.*). Producers must keep adequate records to establish that they did not slaughter or process more than the number of exempted poultry in the calendar year (*id.*). Producers must maintain records for one year after the two-year exemption terminates (*id.*).

In addition, the regulations incorporate the federal prohibition against misbranding and adulteration, regardless of the inspection exemption (9 IAC § 125.110). It is important to note that the law specifically requires the seller to note in any advertisement that the poultry is exempt from inspection under the Act (225 ILCS 650/5).

¹⁵⁹ http://www.fsis.usda.gov/Regulations_&Policies/SanitationPerformanceStandards/index.asp

For a helpful summary of processing options and a chart on what kind of sales those options enable, see Richard Schell's *Guide to Meat Regulations in Illinois*.¹⁶⁰

III. MARKETING MEAT AND POULTRY PRODUCTS

A. Labeling and Storing Meat and Poultry Products

The federal Food Safety and Inspection Service (FSIS) regulates meat and poultry product labeling under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA). These laws explicitly preempt any state law that adds to or is different than these federal laws (21 U.S.C. § 678; 21 U.S.C. § 467(e)). The FDA also establishes labeling requirements for “food products” under the Federal Food, Drug and Cosmetic Act. Depending on the product, the agencies’ jurisdictions may overlap or become very unclear. To resolve this potential for jurisdictional overlap, USDA exempts foods containing less than certain specified quantities of poultry or poultry products from the PPIA (although they must still be inspected) so long as the producer does not represent the item as a poultry product (9 C.F.R. § 381.15). The standards are:

- 3 percent or less raw meat or less than 2 percent cooked meat; or
- Less than 2 percent cooked poultry meat and less than 10 percent cooked poultry skins, gible, or fat when measured separately; and less than 10 percent cooked poultry skins, giblets, fat and meat when measured in combination
- Bouillon cubes, poultry broths, gravies, sauces, seasonings, and flavorings

USDA does not have a comparable regulation for meat, but has applied the same standards for several decades. It matters which agency is exercising jurisdiction, because FDA requirements differ from FSIS requirements in some respects. For example, the FSIS requires pre-market label approval for meat and poultry (9 C.F.R. §§ 317.4 (meat), 381.132 (poultry)), while the FDA does not.¹⁶¹

A producer can obtain pre-market approval by submitting a sketch for premarket approval (9 C.F.R. §§ 317.4, 381.132) or by using a pre-approved generic label (9 C.F.R. §§ 317.5, 381.133). Generically approved labels cannot contain special claims, including quality claims, nutrient content or health claims, negative claims, geographical claims, or guarantees (*id.*). These restrictions limit the usefulness of general labels for most direct-to-consumer producers.

¹⁶⁰ <http://web.extension.illinois.edu/iidea/PDF/meatregulations.pdf>

¹⁶¹ Point of purchase materials (such as signs displayed near the product and stickers on the shelves) do not require pre-approval, but if the point of purchase materials ship with the meat, they must have pre-market approval (*id.*). FSIS also requires preapproval of labels or stickers applied at the point of purchase that make animal production claims (e.g., grass fed).

Labels must appear directly on the immediate packaging (9 C.F.R. §§ 317.1, 381.116), unless the packaging meets special circumstances. For instance, poultry packages destined for institutional customers can have the label on the outside package (rather than each immediate package) as long as the label states “for institutional use” and as long as the customer is not offering the unlabeled product in the container for retail sale (9 C.F.R. §§ 381.115). FSIS also requires the principal display label to contain the name of the product, net quantity of contents, the official inspection legend, number of the official establishment, and, if necessary, a handling statement (9 C.F.R. §§ 317.2(d), 381.116(b)). Information panels (generally defined as the first surface to the right of the principal display panel) may contain an ingredients statement, the name and address of the manufacturer or distributor, and nutrition labeling, if required (9 C.F.R. §§ 317.2(m), 381.116(c)). Safe handling instructions may be placed anywhere on the label (*id.*). Further regulations dictate product names, the prominence of the statement of identity, country of origin labeling, net quantity, and many other provisions. USDA’s *Guide to Federal Food Labeling Requirements for Meat and Poultry Products*¹⁶² provides more detailed information on these labeling requirements.

Nutrition Content Labeling

In 2010, the USDA enacted regulations that require major cuts of meat and poultry, as well as ground meat and poultry products, to carry nutrition labels. Beginning in 2012, the USDA will require producers of a final, packaged meat product to place nutrition content labels on 40 of the most popular meat and poultry products. Under the rule, packages of ground meat and poultry will be required to carry a nutrition label. Whole, raw cuts of meat will be required to carry a nutrition *either* on the package *or* on a sign at the point of consumer purchase. The labels must carry the number of calories and the grams of total fat and saturated fat that the meat or poultry product contains. In addition, any product that contains a “percentage lean” statement on its label (e.g., “80% lean”) must also list the corresponding fat percentage.

The new rules include a number of exemptions relevant to direct farm producers. First, the labeling rules exempt products intended for further processing, so long as these products bear no nutritional claims or nutrition information. This means that, for example, a farmer who sells a side of beef to a butcher for processing into major cuts would not have to provide nutrition content information for the side of beef to the butcher (though the butcher would have to provide nutritional content information if it sold the cuts of meat to consumers). Second, the rules exempt products that are not for sale to consumers, so long as these products do not bear nutrition claims or nutritional information.

Third, ground or chopped meat or poultry products produced by small businesses do not have to comply with the new nutritional labeling requirements. The USDA defines a “small business” for purposes of this exception as a facility that employs 500 or fewer people and

¹⁶² Available online at http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf

produces no more than 100,000 pounds of meat per year. This exception holds even if small producers use “percent fat” and “percent lean” labels on their ground meat and poultry products, so long as they include no other nutritional claims or nutritional information on their labels. However, unlike for ground products, the nutritional labeling rules for major whole cuts of meat or poultry do NOT exempt small producers. This means that direct farm businesses that sell cuts of meat or poultry to consumers – either on-premises or at a farmers’ market – *must* provide nutritional content information, either on a packaging label or on a placard at the point of sale. However, this requirement should not be overly burdensome, because USDA plans to make point-of-purchase labeling materials available over the Internet, free of charge.

Additionally, producers that fall outside of the small business exemption for ground meat or poultry will need to label their products with nutrition information. The USDA has resources available to aid producers in calculating nutrition information for these products. Specifically, the agency has a **national nutrient database**¹⁶³ that contains nutrient values for ground beef, pork, chicken, and turkey products at specific percent fat levels. The agency also has a **nutrient value calculator**¹⁶⁴ for ground beef that will determine the precise nutrient content information for a specified level of fat or lean in a particular ground beef product.

Whether the direct farm business itself must provide a label depends both on the product being produced and to whom the direct farm business is selling. On the issue of who has the burden to comply with the new rules, USDA guidance states:

Normally, the packer is considered the producer because the packer produces the final product. For ground or chopped product, the producer of the final packaged product is required to provide nutrition labels on the product, unless an exemption applies. The producer of the final packaged product may be a Federal establishment or retail facility. Retailers are required to provide point-of-purchase materials or nutrition labels for major cuts, unless an exemption applies.¹⁶⁵

Therefore, with regard to ground meat, producers of the final packaged product of ground meat need to provide the labels. So if a farmer sold a side of beef to a slaughterhouse, which ground it and packaged it for sale, then the slaughterhouse would have to provide nutrition info labeling to the retailer, because it is the “producer of the final packaged product.” If a farmer slaughtered his own poultry (permissible under certain circumstances in Illinois), turned it into ground chicken and sold it to a grocery store, the farmer is now the “producer of the final packaged product” and would therefore have to label it with nutrition information *unless* he met the requirements of the small business exception for ground products, mentioned above. The same rule would apply if the farmer sold the chicken himself at a farmers’ market.

¹⁶³ http://www.ars.usda.gov/main/site_main.htm?modecode=12-35-45-00

¹⁶⁴ <http://www.ars.usda.gov/Services/docs.htm?docid=13933>

¹⁶⁵ http://www.fsis.usda.gov/PDF/Nutrition_labeling_Q&A_0211.pdf

With regard to whole cuts of meat or poultry, the law places the burden of labeling on the person who provides it for retail sale. So if a farmer kills his own chickens, turns them into chicken breasts and sells them at a farmers' market, then the farmer would be required to label the chicken breasts with nutrient content information – either on the package or on a sign at his stand. The same would be true of cuts of meat processed by a slaughterhouse but sold directly to consumers by the farmer. If the farmer sold the cuts of meat or poultry to a retail grocery store, the retailer technically has to provide the nutrition labels. However, because retailers have the power to demand certain concessions from the person wanting to sell at that retailer, the retailer could, if it wanted, shift the burden of labeling to the producer as a condition of sale.

Because these labeling rules vary in applicability, depending on the product and the buyer and seller, producers should consider contacting an attorney for additional guidance before commencing meat and poultry sale operations. For more information on the USDA's new nutrient labeling requirements for meat and poultry, visit the **FSIS nutrition labeling website**.¹⁶⁶

Specific Terms Used in Meat and Poultry Labeling

USDA regulates many terms that direct producers may wish to use on their products. Their **website**¹⁶⁷ explains what USDA requires of specialty product labels. As noted above, many of these labels require pre-approval and many involve inspections and certification fees. Separate agency regulations outline the specific requirements for each claim. Some, but not all, of the terms are

- “Natural”: A product containing no artificial ingredient or added color and is only minimally processed.
- “Organic”: The product was raised in compliance with USDA's National Organics Program standards.
- “Antibiotic free”: allowed on red meat and poultry if supported by sufficient documentation.
- “Hormone free”: The claim “no hormones added” may be approved for labeling beef products if the producer provides sufficient documentation to the USDA showing that no hormones have been used in raising the cattle. The claim “no hormones added” cannot be used on pork or poultry products unless it is followed by a statement that says “Federal regulations prohibit the use of hormones.”

¹⁶⁶ http://www.fsis.usda.gov/Regulations_&Policies/Nutrition_Labeling/index.asp

¹⁶⁷ http://www.fsis.usda.gov/Fact_Sheets/Meat_&Poultry_Labeling_Terms/index.asp

- “Grass fed”: Grass and forage must be the feed for the lifetime of the animal, with the exception of milk consumed prior to weaning. The diet must be derived solely from forage consisting of grass (annual and perennial), forbs (e.g., legumes, *Brassica*), browse, or cereal grain crops in the vegetative (pre-grain) state. Animals cannot be fed grain or grain byproducts and must have continuous access to pasture during the growing season.
- “Free range”: allowed if producer can demonstrate to USDA that the poultry has had access to the outdoors.
- “Fresh”: Poultry may be labeled as “fresh” if its internal temperature has never been below 26° Fahrenheit.

Storage

Unless customers buy meat fresh - that is, directly from the slaughterhouse - meat products will most likely need to be stored in a refrigerated warehouse. Under the *Illinois Refrigerated Warehouse Act* (240 ILCS 35/1), refrigerated warehouses that store food for more than 30 days must obtain a license from IDOA (240 ILCS 35/2). An application form is available on the Illinois Department of Agriculture’s **website**.¹⁶⁸ After submitting the written application, IDOA will inspect the warehouse to ensure it is sanitary and has proper equipment (240 ILCS 35/2). Once in operation, the Act authorizes IDOA to conduct ongoing inspections (240 ILCS 35/5). Operators must keep track of the dates of food deliveries (240 ILCS 35/7) and may not store food that is unfit for human consumption (240 ILCS 35/6). If food has been in storage for more than 30 days, the retailer cannot advertise the food as fresh (240 ILCS 35/9). Furthermore, producers, warehouses, and retailers may not keep food for a combined total of more than 24 months (240 ILCS 35/8).

B. Specialty Products

Organic Meat

The USDA Agricultural Marketing Service administers organic production and labeling standards through the National Organic Program (NOP) (7 C.F.R. Part 205). Generally, NOP requires that animals receive all organic feed and minimum access to the outdoors and prohibits use of hormones to promote growth or antibiotics for any reason. To label the meat or poultry as organic, an accredited organization must certify the production and processing practices, in which case the product can bear the USDA Organic logo. For more information on organic standards, see the “Organic Marketing” chapter of this Guide.

Kosher

¹⁶⁸ <http://www.agr.state.il.us/AnimalHW/MP/MI-45refrigwarehouse.pdf>

Marketing meat as kosher is another way to distinguish products and access a niche market. “Kosher” is the term for foods that comply with Jewish dietary laws. A simplified explanation of kosher is that it prohibits the consuming of certain animals, most notably pork and shellfish, and requires the meticulous separation of meat and dairy production and consumption. The dietary laws are notoriously complex, and as a result, certified kosher products can sell at a premium price.

FSIS’s policy book¹⁶⁹ requires rabbinical supervision of meat processing before meat can be sold as kosher. FSIS does not certify as to the kosher preparation of products, but instead accepts the statements and markings of the rabbinical authority. Producers must provide the identity of the rabbinical authority upon request from the agency. The FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable rabbinical supervision. Certification requires meticulous standards of health for the animals when presented for slaughter and entails ritual cleaning of all equipment, ritual slaughter by a sochet in a humane fashion, removal of all blood, and restrictions on which parts can be sold as kosher.

Other marketing issues related to kosher foods are important to consider. First, according to one kosher certification agency, the kosher poultry market is largely saturated. Second, although some cattle cooperatives have successfully established kosher slaughterhouses in order to market directly to consumers, doing so requires consistently processing enough cattle to justify the cost of certification and operation. There are kosher slaughterhouses in Illinois, but they largely process meat from industrial cattle yards and may be unwilling to separate meat for the direct farm business. As of this writing (2010), given that the market for pasture fed and organic meats is not fully saturated, it may not be worth the cost and extra effort to move into the kosher niche market, even if there is some demand.

Halal

“Halal” is the term in Islam for something that is lawful or acceptable. Although it most commonly refers to foods, it in fact means anything permitted under Islamic law. Halal meat can only come from certain animals (pork is banned), must be raised according to certain standards (humanely and vegetarian, most notably) and slaughtered according to the ritual Zibaha (humane, swift cut to the throat of a healthy animal by a Muslim as he/she states a prayer over the animal, which must be facing Mecca).

Like kosher meat, halal meat commands a premium price. Moreover, some consumers will seek out halal meat because of concerns over mad cow disease (bovine spongiform encephalopathy – BSE). However, although there are similarities between halal and kosher meat, they *are not*

¹⁶⁹ <http://www.fsis.usda.gov/oppde/larc/Policies/PolicyBook.pdf>

interchangeable because the religions impose different requirements. For instance, both Judaism and Islam require the meat to be slaughtered by someone of their religion. And Islam prohibits the use of any alcohol to clean the carcass, whereas Judaism permits alcohol and kosher wine.

Federal policy on halal labeling is identical to the policy for kosher labeling. The same policy book used for kosher foods requires handling according to Islamic law and oversight by an appropriate authority. FSIS does not certify as to halal preparation of products, but rather accepts the statements and markings of the Islamic authority. The producer must provide the identity of the Islamic authority upon request from agency official. The FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision.

Illinois has detailed requirements for processing and selling foods as halal. The *Halal Food Act* (410 ILCS 637) and *Consumer Fraud and Deceptive Business Act* (Fraud Act) (8 IAC § 190) address the meaning of halal and establish standards for producing, advertising and selling halal foods. “Halal” means “prepared under and maintained in strict compliance with the laws and customs of the Islamic religion including but not limited to those laws and customs of zabiha/zabeeha (slaughtered according to appropriate Islamic codes), and as expressed by reliable recognized Islamic entities and scholars” (410 ILCS 637/5; 815 ILCS 505/2LL(a); 8 IAC § 190.10). A dealer (anyone who raises animals as halal or sells or distributes food represented as halal (815 ILCS 505/2LL(A)) must register with the Department of Agriculture before selling the animal or meat (815 ILCS 505/2LL(f); 8 IAC § 190.20). Registration forms are available through IDOA’s **website**.¹⁷⁰

Dealers must disclose the basis for their representation that their animals or food is halal (815 ILCS 505/2LL(b)). The disclosure forms (8 IAC Section 190, appendixes A through E) ask for information on the animals’ feed (does not contain any animal by-products, such as 100% vegetarian feed, organic feed, or Amish feed), health (no diseases, raised without hormones), and absence of antibiotics in their systems at time of slaughter. The forms require disclosure of contact information for the halal-certifying entity and disclosure of details about the slaughter method.

If the slaughterhouse processes pigs in the same facility (which many certifying entities prohibit completely), the slaughterhouse must take steps to ensure they are kept separate from the halal meat, such as using different equipment, cleaning (to a level acceptable to the certifying entity), slaughtering on a separate day, and storing and processing in separate rooms. Halal rules require the slaughterer or processor to completely drain the carcass of its blood, prohibit cleaning or processing with alcohol or any other intoxicating food, and prohibit processing or contamination with any non-halal food.

¹⁷⁰ http://www.agr.state.il.us/pdf/Halal_Registration_Form.pdf

Food sold or distributed as halal must have a halal label (8 IAC § 190.30). If a dealer sells unpackaged non-halal food and unpackaged halal food, they must disclose to customers that they sell halal and non-halal foods (*id.*). Retailers and dealers must keep the IDOA disclosures on the premises where the food is sold and make them available to customers (8 IAC § 190.40). Finally, dealers must keep records of all animals and foods sold for two years after sales, and maintain copies of disclosure forms for two years (8 IAC § 190.50).

IV. CHECKLIST

Have you...?

- Confirmed that you have the time, resources and facilities to provide the standard of care required for your animals? If they become ill, do you have the resources to address the disease? If they die, do you have a disposal plan?
- Obtained any necessary permits for transporting your animals?
- Chosen a slaughterhouse that meets your needs? Is it adequately licensed?
- Do you need to have your labels approved? Have you done so?
- Developed a marketing strategy that realistically assesses what you can produce and what demand is? If meat will need to be stored, do you have a plan for where, how long, and what it will cost you?
- For niche markets, have you researched the market demand for your product and assessed your ability and willingness to undertake the work necessary to meet that demand?
- Read the chapter on setting up a direct farm business and done research on any additional siting, construction or environmental permits you might need?

KEY CONTACT INFORMATION

U.S. Department of Agriculture, Food Safety & Inspection Service

Illinois regional office: (630) 620-7474

Illinois Department of Agriculture, Bureau of Meat & Poultry

Ph: (217) 785-6684

CHAPTER 7 – ORGANIC CERTIFICATION

Organic production is an ecologically oriented process of growing crops or raising animals that encompasses a variety of social, environmental and ethical principles, including soil fertility, biological diversity and minimization of risks to human and animal health and natural resources.” In the early 1970s, farmers started using the term “organic” to attract consumers interested in agriculture that was more environmentally and socially responsible than “conventional” agriculture. As the term caught on, allegations quickly emerged that some producers were selling non-organically produced food under an “organic” claim. As a result, several states (e.g, Oregon, California, Montana, North Dakota, and Virginia) passed organic certification laws.

In 1990, the U.S. Congress passed the Organic Foods Production Act (OFPA) (7 U.S.C. § 6501 to 6522 (1990)) to reconcile inconsistent state standards and prohibit fraudulent labeling. The statute seeks to provide "national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper.”

The USDA's Agricultural Marketing Service (AMS) created the National Organic Program (NOP) to implement the statute (i.e., set the specific requirements for using the "organic" label). The National Organic Standards Board (NOSB) advises the USDA on the development and implementation of the NOP (7 U.S.C. § 6518). The NOSB is a 15-member board comprised of four farmers/growers, two handlers/processors, one retailer, one scientist, three consumer/public interest advocates, three environmentalists, and one USDA accredited certifying agent (*id.*).

The NOP has three components important to direct farm businesses considering marketing their products as organic. First, the rules regulate the use of the term “organic” in labeling and marketing. Generally, producers using the term must obtain certification. Second, the NOP incorporates a comprehensive organic certification process which involves transitioning the farm and undergoing inspections. Finally, the rules require particular production practices for various types of operations and the processing/handling of goods.

I. ORGANIC LABELING AND MARKETING

The most important thing to know about labeling and marketing organic products is that goods cannot be marketed as “organic” unless they have been produced in compliance with USDA’s organic production standards (7 C.F.R. §§ 205.100 and 205.101). Moreover, producers who sell more than \$5,000 in goods must have an accredited certifying agent certify their production practices (*id.*). The certification process is covered in Section 2.

Organic labeling and marketing is relatively straightforward. A producer can label or advertise goods as “100 % organic” if the product consists entirely of organic ingredients (7 C.F.R. § 205.301). Raw fruits and vegetables and meat grown or raised according to USDA’s organic standards satisfy this labeling requirement. The ingredients in processed items, such as jams, jellies and sausages, must be entirely certified organic. Another option is to label food simply as “organic,” in which case at least 95% of the ingredients must be organic, and the remaining 5% of ingredients must be on the list of approved organic processing substances, or, if they are agricultural products, be commercially unavailable in organic form (*id.* and 7 C.F.R. §§ 205.605 and 205.606). Products at both the 100% and 95% level may use the USDA organic seal (7 C.F.R. § 205.311). If a product is made from 70 to 95% organic ingredients, it may be labeled as “made with organic [specified ingredient]” but it may not use the official USDA organic seal (7 C.F.R. §§ 205.301 and 205.311). If a product is less than 70% organic, the ingredient list may identify individual organic ingredients (7 C.F.R. § 205.305).



II. ORGANIC CERTIFICATION PROCESS

Before seeking organic certification, a producer should become as knowledgeable as possible about the benefits and costs of organic production. University of Illinois Extension’s **Illinois Small Farms website**¹⁷¹ contains useful information on the organic certification process, as well as links to other resources. Another excellent resource is the Organic Trade Associations website **HowToGoOrganic.com**,¹⁷² which has an extensive database of materials dedicated to informing producers of how (and why) to transition to organic.

The first step in the certification process is selecting and contacting a certifying agent. University of Illinois Extension’s **Illinois Small Farms website**¹⁷³ provides a list of certifying

¹⁷¹ <http://web.extension.illinois.edu/smallfarm/organic.html>

¹⁷² <http://www.howtogoorganic.com>

¹⁷³ <http://web.extension.illinois.edu/smallfarm/organic.html#certification>

agents who operate in Illinois. IDOA also has a **website**¹⁷⁴ listing agents that producers in Illinois have used in the past. In selecting an agent, farmers should consider the entity's experience certifying the type of operation, willingness to answer questions about the certification program, and stability as a business.

The certification process can take several months. Certifying agencies typically require an application and development and implementation of a farm management plan that complies with NOP, using only approved substances and practices (7 C.F.R. § 205.401). The agency will also inspect records or other documentation proving organic management of the land and animals for the requisite transition time.

After selecting a certifying agent, the second step in the certification process is to begin transitioning land (i.e. production practices) from conventional to organic methods. This process may take at least three years. Producers may not apply prohibited substances¹⁷⁵ for 36 months prior to certification. Eliminating certain conventional inputs often requires implementing new, unfamiliar practices, which is why education before starting the transition is critical. Michigan State University's New Agriculture Network provide **online fact sheets**¹⁷⁶ that cover various aspects of the organic farming process, including pest management, weed control, and soil fertility.

The last step to certification is an on-site inspection to verify compliance with the Organic System Plan (OSP) (7 C.F.R. § 205.403). Only after a successful inspection will the agency grant certification (7 C.F.R. § 205.404).

According to estimates by the Midwest Organic and Sustainable Education Service, certification will likely cost between \$400 and \$1000 per year for non-livestock operations. Livestock operations may cost more. The Illinois Department of Agriculture administers a cost share program to assist in the costs of the certification process. The program currently is reimbursing producers and handlers that obtained certification between October 1, 2009 and September 30, 2010. Whether assistance will be available in the future depends upon renewed federal farm bill funding. The relatively simple cost-share application form is available on the **Illinois DOA website**.¹⁷⁷

III. PRODUCTION REQUIREMENTS

Organic systems plans vary by production activity. This section will provide a brief overview of the major requirements for organic production. For detailed explanations of each component

¹⁷⁴ http://www.agr.state.il.us/marketing/Mkt_Organic_Certifying_Agents.html

¹⁷⁵ The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 601 & 602.

¹⁷⁶ <http://www.new-ag.msu.edu/Factsheets/tabid/64/Default.aspx>

¹⁷⁷ <http://www.agr.state.il.us/marketing/IOCCSPApplication0809.pdf>

of the program, see Harrison Pittman's *Legal Guide to the National Organic Program*, which is available **online**.¹⁷⁸

Regardless of the end product, organic farmers must have an organic system plan (OSP) to submit to their certifying entity (7 C.F.R. § 205.201). The OSP should include written plans concerning all aspects of production, including practices and procedures to be performed, monitoring practices and procedures, record keeping systems, management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation, and any other additional information the certifying agent deems necessary (7 C.F.R. § 205.201).

A. Crops

Organic crop production has several components. The first pertains to how land is managed. The farmer may not apply prohibited substances to the land, and must stop applying these substances three years prior to certification (7 C.F.R. § 205.202). The land must have buffer zones and boundaries to prevent runoff and contamination from neighboring, non-organically managed fields (*id.*). The land must also be managed according to soil fertility and crop nutrient management practice standards, which require producers to “select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of the soil and minimize soil erosion” (7 C.F.R. § 205.203). Management methods include crop rotations, use of cover crops, and application of plant and animal materials. Requirements for the use of plant and animal materials include, but are not limited to, composting of raw animal manure (unless it meets exceptions), use of materials that have a carbon to nitrogen ratio of 25:1 to 40:1, and a prohibition on compost from plants that had prohibited substances applied to them or ash that was produced using burning as a method of disposal for crop residues (*id.*). Many of these practices contribute to another requirement, which is maintaining management practices that control crop pests, weeds, and disease (7 C.F.R. § 205.206). These practices are generally natural, such as mulching to control weeds or developing habitat to support natural enemies of pests. Producers may also use non-synthetic substances, but must ensure they are not on the list of prohibited non-synthetic substances (7 C.F.R. § 205.602). If these do not work, producers may use synthetic substances on the list of allowed synthetic substances. The OSP must detail when and how synthetic substances may be used (7 C.F.R. § 205.206).

The regulations generally require all seeds and planting stock to be organically grown. However, there are five exceptions to this rule (7 C.F.R. § 205.204):

1. When an equivalent organically-produced variety is commercially unavailable, a producer may use non-organically produced, untreated seeds and planting stocks.

¹⁷⁸ http://www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf

2. When organically-produced equivalents and untreated, non-organically produced equivalents are not commercially available, a producer may use a non-organically produced crop that has been treated with a synthetic substance included in the list of permitted substances.
3. A producer may use non-organic annual seedlings if USDA grants a temporary variance.
4. A producer can use non-organic planting stock to produce an organic crop after maintaining the planting stock under a system of organic management for at least one year.
5. When federal or state phytosanitary regulations require application of a prohibited substance, a producer may use treated seeds, annual seedlings, and planting stock.

The NOP defines “commercially available” as “the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling *as determined by the certifying agent* in the course of reviewing the organic plan” (7 C.F.R. § 205.2). Producers who believe a seed or planting stock is commercially unavailable should consult their certifying agent to determine what documentation the agent will require for the producer to prove they diligently sought an organic source and it is truly commercially unavailable.

B. Livestock and Poultry

The NOP rule defines “livestock” as

[a]ny cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products (7 C.F.R. § 205.2).

To market livestock products as organic, they must be under “continuous organic management from the last third of gestation or hatching” through slaughter (7 C.F.R. § 205.236). Farmers may raise poultry as organic from the second day of life. Farmers must organically manage dairy cattle for at least a year prior to marketing milk as organic. They can market the meat from the cows’ calves as organic if they managed the cows organically for the last third of gestation. For future calves to be organic, the cow must remain under continuous organic management. This prevents producers from gaming the system by managing cows as organic only during the last third of gestation, and otherwise caring for them conventionally.

“Organically managed” means feeding animals 100% organic feed for their entire lives (and the last third of their gestation); avoiding prohibited substances such as growth promoters, plastic feed pellets, formulas containing urea or manure, and mammalian or poultry slaughter by-products; and providing living conditions that accommodate health and natural behaviors, such as allowing access to fresh air, outdoors, exercise, clean and dry bedding and access to pasture for ruminants (7 C.F.R. § 205.239). Revisions to this rule, to go into effect June 17, 2011 for currently certified organic farms and June 17, 2010 for operations that obtain certification by June 17, 2010, will require producers to provide year-round access for all animals to the outdoors, recognize pasture as a crop, establish a functioning management plan for pasture, incorporate the pasture management plan into their organic system plan (OSP), provide ruminants with pasture throughout the grazing season for their geographical location, and ensure ruminants derive not less than an average of 30 percent of their dry matter intake requirement from pasture grazed over the course of the grazing season (75 Fed. Reg. 7154 (Feb. 17, 2010), to be codified at 7 C.F.R. §§ 205.102, 205.237, 205.239 and 205.240). If need be, synthetic and non-synthetic substances that are listed on the national list of permitted substances may be used as supplements or additives (7 C.F.R. § 205.237; the list of permitted substances is in 7 C.F.R. § 205.603). It is important to note that the USDA does not issue variances or exemptions when there is an organic feed shortage.

Preventing illness and caring for a sick animal is a point of concern for organic producers (and consumers). Many modern medicines are synthetic, which is contrary to the principles of organics, but allowing animals to suffer in the name of avoiding synthetic chemicals is also contrary to ethical concerns. As much as possible, producers must care for animals in a manner that prevents disease by doing things such as selecting animals appropriate for the environment and the site, providing feed that satisfies nutritional needs, and establishing housing, pasture conditions, and sanitation practices that minimize the spread of disease and reduce stress. However, livestock can be given vaccines to prevent disease and other “veterinary biologics” (products of biological origin) when needed. When these are insufficient, farmers may use synthetic medications that are listed on the national list of allowed substances (7 C.F.R. 205.238). The NOP prohibits all antibiotics, but it also prohibits denying an animal medical treatment with the intention of preserving the animal’s organic status. This is a careful balancing act, as farmers cannot market meat as organic if the animal received any antibiotics. Dairy products, however, can be organic if the farmer manages the cow organically for a year after she received antibiotics.

C. Handling and Processing

In addition to certification of the production process, the NOP requires processing and handling facilities to obtain organic certification (7 C.F.R. § 205.100). Handling means to “sell, process, or package agricultural products” (7 C.F.R. § 205.2). If a facility handles organic and non-organic agricultural products, only the portion that handles the organic product needs organic

certification (7 C.F.R. § 205.100). However, the facility must implement practices to prevent the comingling of organic and non-organic agricultural products (7 C.F.R. § 205.272), including not using storage containers that have been treated with prohibited substances or have held products that were treated with prohibited substances. For a handling facility to receive certification, it must have an organic handling plan (7 C.F.R. § 205.201), only use allowed substances and avoid prohibited substances as listed in sections 205.602 through 205.606 (7 C.F.R. §§ 205.105 and 205.270), and maintain appropriate records (7 C.F.R. § 205.103). As far as actual process methods are concerned, the NOP generally allows any mechanical or biological process, including cooking, curing or fermenting, packaging, canning and jarring (7 C.F.R. § 205.270).

For direct farm businesses seeking to both grow and process organic products, it is critical to work carefully with the certifying agent to design a compliant processing method to maintain the “organic” status of the final product.

Retail food establishments who receive and sell products labeled as organic are usually exempt from certification, but they must nonetheless maintain proper records and comply with the requirements for the prevention of comingling (7 C.F.R. § 205.101).

Further Resources – Organic Marketing

National Organic Program (NOP)

1. For more information on the USDA's organics program, including a list of banned and allowed substances, visit their **website**:

<http://www.ams.usda.gov/AMSV1.0/nop>.

2. The National Sustainable Agriculture Research and Education program (SARE, which is a branch of the USDA) has published a guide, **Transitioning to Organic Production**, which addresses some of the difficulties a farmer can encounter and lists resources for assistance.

<http://www.sare.org/publications/organic/organic.pdf>

State-Level Resources

1. The Illinois Initiative for the Development of Entrepreneurs in Agriculture (IDEA) maintains an **online fact sheet** that contains helpful links to other organic certification websites.

<http://web.extension.illinois.edu/iidea/PDF/organiccertificationsites.pdf>

IV. CHECKLIST

If you want become certified as organic, you will need to:

- Research, study, and learn as much as you can about organic practices. Switching to organic takes time and requires considerable labor investments – you do not want to make a mistake that costs you money, or worse yet, prevents certification.
 - Talk to other producers in your area to learn about your local market and what grows well in your area.
 - Attend conferences, workshops, and training sessions on growing and marketing organic products.
- Develop an Organic System Plan, a record keeping system, and a business and marketing plan. Make sure your plans are consistent with each other.
- Research and choose an organic certifying entity. Make sure the certifier has experience certifying your type of production, then obtain their information on what you need to do.
- Start transitioning crops and animals to organic production practices. Keep good records!
- Contact your chosen certifying agent, obtain certification, and start marketing.

GLOSSARY OF TERMS

Adulterated: The full legal concept of adulteration is complex, but essentially, a food is “adulterated” if it contains any poisonous or added deleterious substance which may render it injurious to health or if it consists of or has been exposed to a diseased, contaminated, filthy, putrid, or decomposed substance during production, preparation, or packaging, or if held under unsanitary conditions.

Agency (agent): A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

Agricultural Enterprise: Agriculturally-related activities performed by any person(s) for a common business purpose. This includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units. This could include a leasing of a department of another establishment.

Agronomic Rate: A specific rate of application that provides the precise amount of water and nutrient loading, which selected grasses/crops require without having any excess water or nutrient percolate beyond the root zone.

Amortization: The paying off of debt in regular installments over time; the deduction of capital expenses over a specific period of time.

Annex: To incorporate territory into the domain of a city, county, or state.

Articles of Incorporation: A document that dictates the management of the affairs of a corporation, including the purpose and duration of the corporation and the number and classes of shares to be issued by the corporation.

Assumed Name: (also known as "doing business as" or "d/b/a"): The name under which a business operates or by which it is commonly known.

Assumption of the Risk: A legal concept in negligence (tort) law wherein an individual knows of or is otherwise aware of a risk posed by a particular activity and nonetheless engages in the activity. The doctrine thus limits that individual's right to hold others liable for injuries incurred as a result of engaging in the activity. Assumption of the risk most commonly arises in the context of employer-employee relationships and agri-tourism.

Business Plan: The business plan helps guide the business owner through the goals, objectives, and marketing and financial strategies of a proposed business. It also may serve as an introduction to potential investors if outside financing is required.

Candling (egg): The use of a bright light source behind the egg to show details of the embryo through the shell.

Case Study: An intensive analysis of an individual unit (such as a person, business, or community) that stresses developmental factors in relation to environment.

Checkoff: A mandatory fee for all producers of a particular commodity that is used to fund commodity-specific research or marketing.

Commercially Available: Under the National Organic Program, the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

Commodity: A tangible item that may be bought or sold; something produced for commerce.

Commodity Agriculture: The agricultural production of commodities with the primary objective of farming being to produce as much food/fiber as possible for the least cost. It is driven by the twin goals of productivity and efficiency.

Common Law: The body of laws and rules that courts create as they issue decisions.

Consideration: A vital element in contract law, consideration is something (i.e., an act, forbearance, or return promise) bargained for and received by a promisor from a promisee. It is typically the underlying purpose for entering into a contract.

Contract: A legally enforceable agreement between two or more persons involving an offer, acceptance, and consideration. It may be oral or written.

Cooperative: A user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage.

Copyright: (1) The right to copy a work, specifically an original work of authorship (including a literary, dramatic or other work) fixed in any tangible meaning of expression, giving the holder exclusive right to reproduce, distribute, perform, or otherwise control the work. (2) The body of law related to such works.

Corporation: a separate legal entity in which the owners (shareholders) are not personally responsible for the liability of business.

- **S corporations** elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation.
- **C corporations** are separate taxpaying entities that conduct business, realize net income or loss, pay taxes, and distribute profits to shareholders.

Cow-Share Program: A program in which consumers sign a contract to purchase a “share” in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives the milk from “their” cow without technically “purchasing” the milk.

De Minimis: something so small that it would be inconvenient and unreasonable to keep an account of; the impact is insubstantial.

Depreciation: A decline in an asset's value due to use, wear, obsolescence, or age.

Double Taxation: The government taxes the corporation on its profits and the owners/shareholders also pay individual income tax on profits distributed as dividends from the same corporation.

Estate Plan: The preparation of a plan to carry out an individual's wishes as to the administration and disposition of his/her property before or after death.

Excise Tax: A tax levied on the purchase of a specific good as opposed to a tax that generally applies to the sale of all goods.

Farm Labor Contractor (FLC): 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 consideration, performs recruiting, soliciting, hiring, employing, furnishing, or transporting of any migrant or seasonal agricultural worker.

Feasibility Study: a process used to analyze an existing business opportunity or new venture. The questions on a feasibility checklist concentrate on areas one must seriously consider to determine if an idea represents a real business opportunity.

Good Faith: Acting honestly, fairly, and with a lawful purpose without malice or any intent to defraud or take unfair advantage. Whether a party has acted in good faith is often an issue that the court or the jury has to decide in a lawsuit.

Grading: USDA certification that a product is of a particular quality.

Grandfather Clause: A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

Gross receipts: All considerations received by the seller, except trades in personal property.

Halal: an Islamic term that refers to something lawful or acceptable.

Hazardous Positions: In the employment context, hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous chemicals.

Health Claim: A health claim describes a relationship between the food (or component of it) and the reduction of the risk of a disease or health-related condition.

Hold Harmless: A provision in an agreement under which one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability.

Injunction (prohibitory): An order of a court commanding a person, corporation, or government entity to stop doing something and/or refrain from doing such actions in the future.

Intellectual Property: Creations of the mind; inventions, literary and artistic works, and symbols, names, images, and designs used in commerce, as well as the body of law (trademark, patent, copyright, trade secret) used to protect such works.

Interstate Commerce: The buying and selling of products and services between people and entities located in different states or territories.

Intrastate Commerce: The buying and selling of products and services within a single state.

Joint and Several Liability: A legal obligation under which a party may be liable for the payment of the total judgment and costs that are associated with that judgment, even if that party is only partially responsible for losses inflicted.

Karst Area: Area(s) where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater

Kosher: The term for foods that comply with Jewish dietary laws.

Livestock Management Facility: Any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area.

Man-day: Any day where an employee performs agricultural labor for at least one hour.

Material Representation: A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion.

Migrant Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

Misbranding: The label, brand, tag or notice under which a product is sold is false or misleading in any particular as to the kind, grade or quality or composition.

Negligence: a tort law concept; the failure to exercise the standard of care that an ordinary, prudent and reasonable person would exercise under the circumstances.

Notice-and-Comment Rulemaking: A rulemaking process by which government agencies provide the public with an opportunity to participate in the interpretation of laws by giving feedback on draft regulations.

Nuisance: A substantial interference, either by act or omission, with a person's right to use and enjoy their property.

- **Public Nuisance:** An interference or invasion that affects a substantial number of people, or an entire neighborhood or community
- **Private Nuisance:** An interference or invasion that affects a single party, or a definite, small number of individuals in the use or enjoyment of private rights.

Nutrient Content Claims: These claims characterize the level of a nutrient in a food; they must be approved by FDA.

Organic: A system of food production that is managed in accordance with the Organic Foods Production Act of 1990 to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that promote biodiversity and ecological balance. Organic certification is managed by the Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture.

Output Contract: A written agreement in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output.

Partnership: A partnership (also known as general partnership) is an association of two or more persons who combine their labor, skill, and/or property to carry on as co-owners of a business for profit.

Patent: a patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years.

Piecework: Work completed and paid for by the piece.

Prima-facie: Latin for "at first sight." In law, an evidentiary standard that presumes particular evidence proves a particular fact; however, the fact may be disproven by providing contradictory evidence.

Processing: The manufacturing, compounding, intermixing, or preparing food products for sale or for customer service.

Procurement Contract: A term that refers to contracts used by governments and institutions to acquire products.

Properly Implemented: An administrative law concept that requires agencies to issue rules according to state or federal administrative procedure.

Qualified Health Claim: A health claim where emerging scientific evidence suggests the claim may be valid, but the evidence is not strong enough to meet the standard necessary to be a health claim; must be pre-approved by FDA.

Raw Agricultural Commodity: Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form before marketing.

Real Property: Land and anything growing on, attached to, or erected upon it, excluding anything that may be severed without injury to the land.

Requirements Contract: A contract in which a buyer promises to buy and a seller promises to supply all the goods or services that a buyer needs during a specified period. The quantity term is measured by the buyer's requirements.

Respondeat Superior: In tort law, the doctrine holding an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

Retailers' Occupation Tax: A tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption.

Sales Tax: A combination of occupation taxes (imposed on a business' receipts from the sale of goods used or consumed) and use taxes (imposed on consumers that purchase items for personal use or consumption from a business).

Seasonal Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence-

1. When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or
2. when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

Setback: The distance a facility must be from property lines or neighboring residences.

Sole Proprietorship: A business owned and operated by one individual.

Statute: a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." Regulations, rulings, opinions, executive orders and proclamations are not statutes.

Tangible Personal Property: A term describing personal property that can be physically relocated. The opposite of real property, in a sense, as real property is immovable.

Technical Bulletins: Non-binding guidance documents published by agencies that facilitate consistent interpretation and application of the regulations issued by the agency.

Three-Tier Distribution System: In the alcohol supply chain, a system that requires manufacturers to sell with distributors, who sell with retailers, who then may sell the product to the end consumer.

Tort: An injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit.

Trade Dress: A design, packaging, or other element of appearance that is both nonfunctional and distinctive.

Trademark: An identification used to distinguish goods and services from those manufactured or sold by others - it is the symbol that customers use to identify a product and equate with goodwill.

Trade Name: A name used to identify a person's business or vocation (see also ASSUMED NAME).

Trade Secret: Information companies make an effort to keep secret in order to give them an economic advantage over their competitors

Use Tax: A privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer.

Veterinary Biologics: Products of biological origin that are used to diagnose and treat animal diseases.