

Action Plan for a Farm Internship Program

By: Rachel Armstrong
Executive Director and Attorney, Farm Commons
Rachel@farmcommons.org
www.farmcommons.org

And

A. Bryan Endres
Professor of Agricultural Law, Department of Agricultural Economics,
University of Illinois
bendres@illinois.edu
www.directfarmbusiness.org



Do you have questions or thoughts on how to improve this document? Please contact Rachel Armstrong at rachel@farmcommons.org or 608 616 5319. Or, fill out our survey on our website.

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Action Plan for a Farm Internship Program

Congratulations! Tackling the legal aspects of an intern program is no small feat and farmers deserve congratulations for wading into this subject. Internships have historically been a part of Community Supported Agriculture, and we appreciate your commitment to helping us all preserve these valuable opportunities by addressing our shared legal responsibilities.

How to use this resource:

This document only applies to interns NOT affiliated with a college or university from whom they receive academic credit for work performed on your farm. It also only applies to interns for a FOR-PROFIT business rather than a non-profit organization.

You may have several potential obligations and each should be investigated separately. If your intern is classified as a volunteer under minimum wage law, he or she may still be an employee under workers' comp law. Read each section even if you think it does not apply to your program.

This document incorporates the flowcharts on the following page. The text should help you understand the basic outlines of the subject, and the flowcharts should help you move forward in resolving the issue.

Potential Legal Obligations for Internship Programs

1. Minimum Wage

Interns may need to be paid minimum wage under state or federal minimum wage law. Minimum wage law usually applies to all individuals who do work for your farm. However, some internship programs with a strong educational aspect may not receive minimum wage. The precise answer to whether or not an individual farm should pay minimum wage to interns is complex, and a farm must consult with a qualified attorney to get a solid answer.

Many farms may not have a qualified attorney. In that case, a farm may start with Fact Sheet #71, issued by the U.S. Department of Labor. This document is included at the end of this resource. If a farm's internship program does not meet the six criteria detailed on the fact sheet, the farmer should assume that minimum wage is owed. Individual jurisdictions and state laws may not follow the Department of Labor's six criteria exactly as described in the fact sheet, but without the assistance of an attorney, farmers should assume the six criteria do apply.

If the farm's internship program does not meet the six criteria, or the farm would like to play it safe and assume minimum wage is owed, farmers should follow the "Minimum Wage Flowchart" to move forward with their internship program.

Please note that state and federal minimum wage laws and rates are separate. You may owe one but not the other. If both apply, you must pay the higher rate of pay. Also, if the exemption is based on a number of employees or wages paid to employees, you likely need to include interns in that calculation. If you are uncertain whether you meet an exception, the safest route is to pay interns minimum wage.

2. Workers Compensation

Even though your interns may have an exception from minimum wage, (for example, because they are trainees that meet the 6 criteria, because they are earning academic credit, or because your farm qualifies for an exception to federal and state minimum wages) you may still be required to carry workers compensation. Do not assume that if your intern is exempt from minimum wage that workers' compensation is not required. Different laws may define "employee" in different ways.

Further, some states may require that all volunteers be covered by workers' compensation in addition to employees. You must investigate the workers' compensation laws of your state.

Not only might workers compensation be required, it's a good idea for any farm. Workers' compensation is an insurance program that compensates workers for injuries they suffer during the course of the job. What many farmers do not realize is that workers' compensation also protects the farm. If a farm intern is injured and workers' compensation is not available, that individual (or more likely, his or her health insurance company) can sue the farmer if he or she negligently caused the injury. However, if the intern is covered by workers' compensation, the farmer cannot be sued for negligence. The intern must accept workers' compensation.

Follow our flow chart to see where you stand. If you have any doubts about whether you qualify for an exception to workers' compensation, the safest route is to buy the insurance. The penalties for not carrying workers' compensation when it is required are very high and may include felony charges and a fine equal to triple the premium.

3. Paying Wages In The Form Of Food and Housing: Payroll Taxes

Paying wages in the form of food and housing is one way to make taking on help more affordable for a farm. However, paying in food and housing does not mean taxes or employment laws no longer apply.

You may be required to pay the employer's share of federal or state payroll taxes on your interns even if you pay them entirely in food or housing. The value of the wages paid in food and housing may be exempt from Social Security, Medicare, and federal unemployment taxes as a commodity wage but you need to consult with a qualified agricultural attorney licensed in your state to determine if this exception applies to the unique circumstances of many direct-to-consumer farms. If you cannot meet with an attorney, play it safe and pay the required taxes on all cash and noncash payments to your interns.

If the farm provides food or housing not as wages, but as a perk of employment with the farm, then different rules apply. Whether or not the value of the food and housing provided need to be included on the worker's W2, and whether the employer owes payroll taxes on its value, is a separate question. Consult the Intern Revenue Service's Publication 15b: Employer's Tax Guide to Fringe Benefits for more information.

4. Paying Wages In The Form Of Food and Housing: Documentation

If a farm is obligated to pay minimum wage to interns and the farm meets that wage by including the value of food or housing provided to the intern, additional documentation requirements apply. Farmers should consult an attorney for the specifics. In the minimum, farmers should keep detailed records of the value of the items provided, how that value was calculated, and its deduction from the intern's pay on a weekly basis. Please note that we do NOT claim that these are the only documentation requirements; state and federal laws may require additional documentation.

Your state may have laws that specifically apply to paying wages in the form of food and/or housing. For example, many states require that the worker sign a detailed agreement regarding the value of the non-cash wages and the substitution for cash wages. Other states set an upper limit in terms of what proportion may be substituted or the total allowable value for meals or lodging. You may be required to specifically include the value of the in-kind wages on each pay stub. If the proper paperwork is not in place to document noncash wages, the court may not honor the contribution as wages.

Regardless of whether an employee agreement or documentation on the pay stub is required by law, it is a smart choice for every farm. Clear communication with interns is essential to provide a happy, beneficial experience for everyone.

Minimum Wage Flowchart

This flowchart is designed to assist farmers who have decided to treat their interns as employees in determining if those workers should be paid minimum wage.

If a farmer already knows that they need to pay regular employees minimum wage, this flowchart is not useful. If you already need to pay minimum wage and are treating interns as employees, they need minimum wage as well.

Because of the agricultural exemptions present in federal and state minimum wage laws, a farm may not be required to pay minimum wage even though other employers must. If you are not certain whether regular employees would be owed minimum wage, this flowchart will help you ask the right questions and understand how federal and state minimum wage laws intersect. You will need to talk with your state's department of labor, your agricultural extension office, or an attorney as well.

There may be other non-agriculture related circumstances that would exempt a farm from paying minimum wage to certain employees; this chart does not address those circumstances.

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Does your state have a minimum wage exemption for agricultural employers? Call your state workforce department or agricultural extension office for help investigating this question.

YES

NO

If it does, look into the exception. Pay careful attention to whether the exemption defines a "farm" or "agricultural labor" and make sure you meet those requirements as well as any hour or dollar threshold. Do you qualify for the exemption?

If your state has no agricultural exemption, you probably owe state minimum wage. (There may be a small business exemption unaddressed here). However, you still need to look into federal minimum wage, which is \$7.25 per hour. Is the state minimum wage equal to or higher than \$7.25?

YES

NO

YES

NO

If you meet the state exemption, your job is not done yet. You need to look into federal minimum wage as well.

If you don't meet the state exemption is the state minimum wage less than \$7.25 per hour? If not, then you probably owe the state minimum wage.

Then you don't need to worry about the federal minimum wage. You probably owe the state minimum wage rate.

Determine if you need to pay the higher federal minimum wage rate.

If the state rate is less than the federal, you need to see if you owe the federal rate.

Federal law exempts "small farms" from paying minimum wage to agricultural laborers. Small farms are those that use less than 500 "man-days" of labor in a calendar quarter. A man-day is any day in which a single employee shows up for at least one hour of work. If two employees show up for two hours of work, you have 2 "man-days." For assistance understanding this exception and tracking your man-days, see the online publication by Farmers' Legal Action Group titled "Farmers Guide to Farm Employees." Did your farm exceed the 500 man-day threshold last year?

If you meet the federal exemption as well, you are not obligated to pay minimum wage to interns and worker shares.

If you meet the federal exemption you owe the lesser state minimum wage.

If you don't meet the federal exemption, you owe the higher federal minimum wage.

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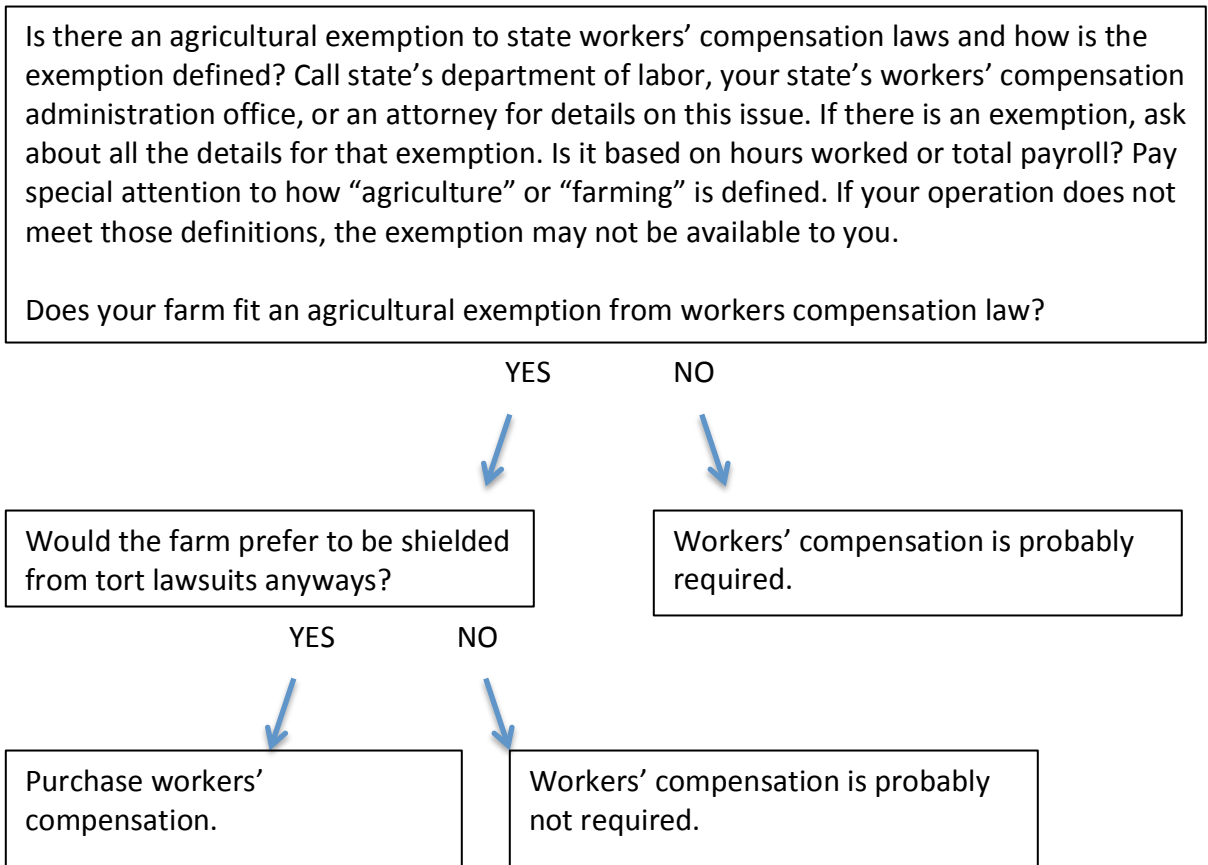
Workers' Compensation Flowchart

This flowchart is designed to assist farmers in determining if they should purchase workers' compensation for worker shares.

If a farmer already knows that they need workers' compensation for regular employees, this flowchart is not necessarily helpful. If you already have workers' compensation, adding coverage for worker shares will probably not add much to the premium. Talk with your agent for more information. If your insurance agent is not helpful, ask other farmers for a reference to an agent who is helpful. Insurance companies vary in their willingness to accommodate unconventional work situations.

Because of the agricultural exemptions present in many state workers' compensation laws, a farm may not be required to provide the insurance. If you are not certain whether regular employees would need workers' compensation, this flowchart will help you ask the right questions. You will need to talk with your state's department of labor, your state's workers' compensation administration office, or an attorney to get a complete answer.

There may be other non-agriculture related circumstances that would exempt a farm from providing workers' compensation such as a volunteer exception; this chart does not address those circumstances.



Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act

This fact sheet provides general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to “for-profit” private sector employers.

Background

The Fair Labor Standards Act (FLSA) defines the term “employ” very broadly as including to “suffer or permit to work.” Covered and non-exempt individuals who are “suffered or permitted” to work must be compensated under the law for the services they perform for an employer. Internships in the “for-profit” private sector will most often be viewed as employment, unless the test described below relating to trainees is met. Interns in the “for-profit” private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.*

The Test For Unpaid Interns

There are some circumstances under which individuals who participate in “for-profit” private sector internships or training programs may do so without compensation. The Supreme Court has held that the term “suffer or permit to work” cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA’s definition of “employ” is very broad. Some of the most commonly discussed factors for “for-profit” private sector internship programs are considered below.

Similar To An Education Environment And The Primary Beneficiary Of The Activity

In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

Displacement And Supervision Issues

If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

Job Entitlement

The internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

Where to Obtain Additional Information

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
[Contact Us](#)

* The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.