Notes on Migrant and Seasonal Agricultural Worker Protection Act

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Despite technological advances, agriculture remains a heavily labor-dependent industry. A significant amount of the work that is required as part of a farming operation still has to be done by hand. The workers who perform this labor continue to be recognized as one of the most socially disadvantaged groups of workers in the United States. Many of these workers are migrant or seasonal workers whose temporary status makes them particularly vulnerable to employment abuse.

While federal law exempts agricultural workers from many of the protections afforded to their urban counterparts, Congress has made several attempts to enact legislation that provides specific protections for migrant and seasonal agricultural workers. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), signed into law in 1983, is the current federal statute that regulates the legal relationship between migrant and seasonal farm workers and their employers. Despite the fact that this statute has been in force for a number of years, many farmers erroneously believe that either they or their workers are exempt from its provisions. In fact, many Arkansas farmers are


2 The first attempt to provide federal protection for migrant agricultural workers was the Farm Labor Contractor Registration Act of 1963 (FLCRA). Pub. L. No. 88-852, 78 Stat. 920 (1964). This law attempted to protect workers primarily through the regulation of farm laborer contractors. Although FLCRA was substantially amended in 1974, it maintained its focus on farm labor contractor duties. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1656 (1974). The Migrant and Seasonal Agricultural Worker Protection Act repealed FLCRA.

subject to the requirements of the MSPA.

This article summarizes the applicability of the MSPA as well as the substantive standards it sets for agricultural employment.

The Applicability of the MSPA

Workers Covered Under the MSPA. The MSPA provides basic employment protections for migrant and seasonal farm workers who are employed in agriculture. The statute defines a migrant agricultural worker as someone 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.” A seasonal worker is defined as

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—

(i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

(ii) 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.

Excluded from both definitions are workers who are either the immediate family member of an agricultural employer or a farm labor contractor or alien workers brought in under the “H-2A program.” The requirements of the MSPA do not apply to these employees. Note that while H-2A workers are excluded from MSPA protection, all other alien workers, including illegal workers, are covered.

Employers Covered Under the MSPA.

“Agribusiness employers,” “agricultural associations,” and “farm labor contractors” are subject to the MSPA requirements unless specifically exempted. An “agricultural employer” is a person who “owns or operates a farm, ranch, processing establishment, cannery; gin, packing shed or nursery; or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.”

An “agricultural association” is defined as “any nonprofit or cooperative association of farmers,

4 The MSPA defines the term “agricultural employment” as “employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of Title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802(3) (1994).


6 29 U.S.C. § 1802(10)(A) (1994). The statute further provides that a seasonal worker (i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (ii) 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.

7 The H-2A program is a specific immigration program that authorizes a temporary nonimmigrant alien to work in agricultural employment when a specific labor shortage is shown. 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 1184(c) (1994).

growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.”

“Farm labor contractors” (FLCs) are defined as persons who perform any farm labor contracting activity for consideration.10 “Farm labor contracting activity” is defined as “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.”

Exemptions to the MSPA Requirements

The MSPA provides for several important exemptions. Individuals who qualify under either the “family business exemption” or the “small business exemption” are not subject to the MSPA requirements.12

The Family Business Exemption. This exemption applies to farming operations in which only the farmer or a member of the farmer’s immediate family performs the farm labor contracting activities.13 If someone other than a member of the immediate family recruits a farm worker in any way or performs any other activity that falls within the broad definition of “farm labor contracting,”14 the exemption is lost for that business.15

The Small Business Exemption. This exemption applies to farm operations that fall within the “five hundred man-days” exemption set forth in the Fair Labor Standards Act.16 It is intended to exempt farming operations that do not use a significant amount of non-family labor. It applies if the employer “did not use more than five hundred man-days of agricultural labor” during any calendar quarter during the preceding year.17 A “man-day” is defined as a day in which an employee performs any agricultural labor for an hour or more.18

The MSPA also lists a variety of other, more narrow exemptions. It provides exemptions to common carriers that transport workers,19 labor organizations,20 and educational institutions.21 Any person who engages in any farm labor contracting activity solely within a twenty-five mile

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12 29 U.S.C. § 1803 (1994). Section 1803 provides simply that these exempted persons are not subject to the MSPA.
14 29 U.S.C. § 1802(6) (1994). Farm labor contracting activities are “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” Id.
15 See, e.g., Flores v. Rios, 36 F.3d 507 (6th Cir. 1994) (farm operation was ineligible for family farm exemption because agricultural worker recruited another worker).
intrastate radius of that person's permanent place of residence and for not more than thirteen weeks per year is also exempt. Custom combine, hay harvesting, and sheep shearing operations are exempt, as are custom poultry harvesting, breeding, debeaking, desexing, and animal health service operations, provided that the employees are not regularly required to be away from their permanent place of residence other than during their normal working hours. There are also limited exemptions that apply to the employment of students doing corn detasseling and certain tobacco work.

Basic Requirements Included in the MSPA

The MSPA sets forth a number of specific standards for agricultural employment. These standards are in addition to those that may be imposed by any other state or federal law.

Registration Requirements. The MSPA requires that those who work as "farm labor contractors" (FLCs) must register with the Department of Labor. An FLC is defined as a person who performs any farm labor contracting activity for consideration. "Farm labor contracting activity" is defined as "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker."

The MSPA requires agricultural employers that use an FLC to verify the registration status of the FLC. The Wage & Hour Division of the Department of Labor provides a toll free telephone number for verification purposes and provides an Internet listing of FLCs that have been deemed ineligible because of past MSPA violations.

Terms of Employment. The MSPA provides that each person that employs an agricultural worker must pay all wages that are due. This requirement incorporates employment conditions that may be mandated by other statutes. For example, if an employer is obligated to pay a worker the federal minimum wage under the Fair Labor Standards Act, the failure to do so would violate that Act as well as violate the MSPA requirement to pay all wages that are due.

The MSPA prohibits the practice of requiring a worker to purchase goods or services from the employer or the farm labor contractor. Such sales can be made, but only on a voluntary basis.

The MSPA also requires compliance with the

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27 29 U.S.C. § 1802(g) (1994). Agricultural employers, agricultural associations, and their employees are exempted from this definition.
28 The Department of Labor, Wage & Hour Division FLC verification telephone number is 1-800-800-0235.
29 The Department of Labor, Wage & Hour Division FLC Ineligibility List can be found at http://www.dol.gov/esa/public/regs/statutes/wd/mspa_debar.html (last visited May 28, 2001).
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terms of any working arrangement agreed upon. Specifically, it provides that no FLC, agricultural employer, or agricultural association shall violate the terms of the employment arrangement “without justification.”

*Disclosure and Informational Requirements.* The MSPA contains several informational requirements that are intended to promote agricultural workers’ understanding of the nature of their employment and their legal rights. Disclosure of the terms and conditions of employment must be made at the time that worker is recruited for the job. A Department of Labor poster describing workers’ MSPA rights and protections must be displayed in a conspicuous place. If housing is provided, a poster explaining the terms and conditions of occupancy must also be displayed. Written disclosures are to be provided in English, or “as necessary and reasonable” in the language of the workers who are not fluent or literate in English.

Specific employment records for each employee must be made, kept, and preserved for three years. These records must include the basis on which wages are paid, the number of hours worked, the total pay period earnings, the amounts withheld, and the net pay earned. Each worker must be provided with an itemized written statement setting forth this information each pay period.

In addition to these affirmative requirements, the MSPA specifically prohibits any FLC, agricultural employer, or agricultural association from knowingly providing false information to any worker regarding the terms, conditions, or existence of agricultural employment.

*Housing Requirements.* Each person who "owns or controls" property that is used as housing for migrant workers is responsible for ensuring that the housing complies with substantive federal and state safety and health standards. There is also a requirement that the housing be inspected and certified to be in compliance. Persons who provide housing on a commercial basis to the general public are exempted from these requirements.

*Vehicle Safety Requirements.* The MSPA also sets forth requirements for the transportation of migrant and seasonal workers. Vehicles used must conform to Department of Labor safety regulations as well as other applicable federal and state

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safety standards. Agricultural employers, associations and FLCs must ensure that each person driving has a valid driver's license, as provided by state law. An insurance policy or liability bond must be in effect. These transportation requirements do not apply in situations where a migrant or seasonal agricultural worker is using a "tractor, combine, harvester, picker, or other similar machinery and equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry." 

Discrimination. The MSPA also contains an express prohibition of any action taken to "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker" because of actions taken to enforce the protections set forth in the MSPA.

Enforcement

The MSPA provides for enforcement through the Wage & Hour Division of the Department of Labor, and also creates a private cause of action for any person "aggrieved by a violation." Criminal sanctions, judicial injunctions, administrative sanctions, and damages awards are all authorized.

Any person who "willfully and knowingly" violates a requirement under the MSPA can be fined "not more than $1,000 or sentenced to prison for a term not to exceed one year, or both." A subsequent violation can result in a $10,000 fine and/or a three year prison term. The Secretary of Labor can seek and obtain temporary or permanent injunctive relief to remedy violations of the statute. Civil monetary penalties of not more than $1,000 per violation can be assessed.

Any person aggrieved by a violation of the MSPA may bring an action under the statute in any federal district court having jurisdiction over the parties. If the court finds intentional violations of the MSPA or any regulation promulgated thereunder, it may award damages "up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief." Multiple infractions of a single statutory or regulatory provision will only constitute one violation for purposes of determining the amount of statutory

54 Id.
57 29 U.S.C. § 1854(a) (1994). Federal jurisdiction is provided without regard to diversity of citizenship or amount in controversy. Exhaustion of any alternative administrative remedies is not required. Id.
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damages. Class action awards are limited to the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief. Special provisions are set forth for limiting damages in certain cases in which workers' compensation benefits are available.

The Employment Relationship: Independent Contracting and Joint Employment

Many farmers attempt to avoid the difficulties associated with hired labor by working with an FLC. At least in theory, the FLC can be hired as an independent contractor. The independent contractor then hires the agricultural employees and assumes the responsibilities associated with the MSPA. Neither the parties' characterizations nor the parties' intentions will control the legal determination of the relationship between the farmer and the agricultural laborer, however.

The courts have attempted to articulate a standard for determining whether an independent contractor relationship exists, keeping in mind that there has been substantial abuse among employers seeking to use this characterization as a means for avoiding labor laws. The test for independent contractor status is based on the "economic reality" of the relationship, that is, "whether there is economic dependence" upon the farmer. The true nature of this relationship will be determined based upon the "economic reality" of the situation.

Proving the independent contractor status of the farm labor contractor may not end the analysis, however. Under the doctrine of "joint employment," the farmer may still be liable as an agricultural employer. Under the MSPA regulations, "joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time." Of particular importance is the determination of whether the workers are economically dependent upon both the farmer and the FLC. Similar to the independent contractor analysis, the regulations provide that "the ultimate question to be determined is the economic reality—whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee." The regulations provide a listing of factors to be used as "analytical tools" in determining economic dependency, although this listing is not a "checklist" and no one factor is dispositive. How the factors are to be weighed depends on the facts and circumstances of each case. The factors set forth in the regulations are listed as follows:

58 29 U.S.C. § 1854(c) (1994). This section also authorizes the court to consider "whether an attempt was made to resolve the issues in dispute before the resort to litigation." Id.
62 Id.
63 Id.
64 Id.
(A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);

(B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);

(C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

(D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

(E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

(F) Whether the work is performed on the agricultural employer/association’s premises, rather than on premises owned or controlled by another business entity; and

(G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers’ compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job, taking into account the amount of the investment. 63

Conclusion

While farmers may focus their attention on the needs of their crops, where agricultural laborers attend to these needs, careful consideration should also be focused on the legal requirements surrounding the relationship between the farmer and the workers.

63 Id.