

FARM & FOOD LAW: A GUIDE FOR LAWYERS IN THE LEGAL FOOD HUB



AUTHORS

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- For more information about Conservation Law Foundation, visit www.clf.org.

DISCLAIMER

This guide provides general legal information for educational purposes only. It is not meant to substitute, and should not be relied upon, for legal advice. Each business is unique and the information contained in this guide is specific to the time of publication. Accordingly, for legal advice, please consult an attorney licensed in your state.

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INTRODUCTION

AGRICULTURE IN VERMONT AND THROUGHOUT THE UNITED STATES IS AT A CROSSROADS. As a result of growing concerns about the environmental, economic, and health impacts of our food system, consumers are increasingly interested in purchasing from local producers. A diverse group of farmers and food entrepreneurs, including many young and beginning farmers, are meeting the demand for fresh, local, and sustainably produced food.¹ However, farmers and food producers face a variety of complex laws, regulations, and business challenges to navigate. Many new, and primarily small-scale, farmers and food entrepreneurs often have trouble affording legal services to assist them with these challenges.

In response, members of the legal community have expressed interest in providing much-needed counsel and pro or low bono rates to small-scale farmers and food entrepreneurs, and to the nonprofit organizations and community groups that work with them. For some of these interested attorneys, serving farm and food clients may be a new endeavor. They may be unfamiliar with agriculture and food-specific laws, as well as the cultural and business realities of farm life. Although farm and food clients share much in common with other clients seeking business and legal advice, their distinctive characteristics present new challenges and opportunities to the legal community. By familiarizing themselves with this nuanced industry, attorneys who do not specialize in food and agriculture law will be better equipped to effectively advise, assist, or advocate for small-scale farmers and food entrepreneurs.

Similarly, many small-scale farmers and food entrepreneurs are unfamiliar with attorneys and the practice of law. Even when transactional legal counseling could significantly benefit farmers and their businesses, they often do not seek out legal services. Farmers may not believe that attorneys adequately understand their unique legal issues to be of service to them, or to be worth the investment both in time and resources.² This sentiment illustrates the disconnect that currently exists between the food and agricultural sector and the legal sector.

1 Vt. NEW FARMER NETWORK, RESOURCE GUIDE FOR VERMONT'S NEW AND ASPIRING FARMERS 3 (3rd ed. 2007), <http://www.uvm.edu/newfarmer/resourceguide71107.pdf>.

2 See Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. L & POL'Y (Nov. 20, 2013), <http://vimeo.com/80411482>.



The potentially high cost of legal services and the thin profit margins associated with farming compounds this problem. In Vermont, the 2017 annual average net cash income of farms was \$26,215 (this includes all farms operating at a loss as well as those earning a profit).³ Agriculture is also an economically risky industry, with farmers making substantial financial investments and netting returns that are dependent on factors outside of their control, such as weather, natural disasters, and fluctuating local and global markets. This inherent vulnerability can have direct and often adverse effects on the income of small-scale farmers and food entrepreneurs. As a result, many farmers with businesses of the size and scale commonly found in Vermont are often unable to afford legal assistance.⁴

ABOUT THE LEGAL FOOD HUB

Because of the lack of legal services accessible to small-scale farmers and food entrepreneurs who participate in local and regional food systems, Conservation Law Foundation (CLF) created the Legal Food Hub (Hub). The Hub brings together attorneys in participating states who want to provide pro bono legal assistance to farmers, food entrepreneurs, food and farm nonprofits, and food justice-oriented community organizations. The Hub not only serves to connect attorneys to clients but also, through this guide and other resources, seeks to supply resources for attorneys as they provide legal counsel to this potential new group of clients. For more information about the Legal Food Hub in other states, visit <http://www.legalfoodhub.org>.

In Vermont, the Legal Food Hub operates as a joint initiative between CLF and Vermont Law School's Center for Agriculture and Food Systems (CAFS). Unlike the Hubs in other states, CAFS serves as the primary administrator of the Vermont Hub and operates the Vermont Hub out of Vermont Law School, with CLF providing advisory support. Together, the organizations are building a network of participating attorneys, conducting outreach to potential food and farm clients, and developing and providing educational resources for participants and food system stakeholders on a variety of food and agriculture law topics.

ABOUT THE CENTER FOR AGRICULTURE AND FOOD SYSTEMS

CAFS trains law and policy students to develop real-world solutions for a more sustainable and just food system. To do this, CAFS educates students through a comprehensive array of residential, online, and experiential courses. Students can pursue a degree or certificate in food and agriculture law as a Master's, JD, or LLM student. CAFS' diverse course offerings, Food and Agriculture Clinic, and varied degree options give students the opportunity to explore food and agriculture law from a variety of perspectives and experiences.

CAFS is also a center for research and advocacy. As a clinician in the Food and Agriculture Clinic or as a Research Assistant, students can work with local, regional, national, and international partners and engage in law and policy work geared toward addressing food systems challenges related to the environment, public health, the economy, food security, and animal welfare. Working with project partners, students can develop legal tools and policy recommendations for stakeholders across the food system, including farmers, food

3 USDA, NAT'L AGRIC. STATISTICS SERV., CHAPTER 1, TABLE 5 - NET CASH FARM INCOME OF THE OPERATIONS AND PRODUCERS (last visited Nov. 10, 2019), https://www.nass.usda.gov/Quick_Stats/CDQT/chapter/1/table/5/state/VT.

4 See Rachel Armstrong, *supra* note 2.



producers, entrepreneurs, distributors, consumers, legislators, and administrators. To learn more about CAFS, visit <http://www.vermontlaw.edu/cafs>.

In its role as administrator of the Vermont Hub, CAFS prescreens applicants for issue and income eligibility and works with the attorney network to find an appropriate placement. For more information about how the Vermont Hub operates, please contact us to schedule time to meet or request a copy of our informational packet for participating attorneys by emailing LegalHub@vermontlaw.edu.

ABOUT CONSERVATION LAW FOUNDATION

CLF is a nonprofit environmental advocacy group based in New England. CLF believes that a thriving New England means a thriving local food system, as the region's communities, environment, and economy depend on it. CLF's Farm and Food Initiative is building on CLF's long track record of successful policy reform in New England by developing and advancing local, state, regional, and national policy reforms that better support farm and food enterprises and reduce legal hurdles for sustainable agricultural production in New England. CLF works with farmers, food entrepreneurs, consumers, and other stakeholders to provide the legal and policy scaffolding to construct a robust regional food system. To learn more about CLF, visit <http://www.clf.org>.

ABOUT THIS GUIDE

CAFS, in partnership with CLF, created the Vermont Edition of Farm & Food Law: A Guide for Lawyers in the Legal Services Food Hub Network (hereinafter "the Guide") to provide background information on topics that will help attorneys build successful relationships with small-scale farmers, food entrepreneurs, and other related nonprofit and community organizations in Vermont. The Vermont Edition of the Guide builds on earlier editions, particularly the Connecticut Edition, drafted by the Ludwig Center for Community and Economic Development at Yale Law School. These Guides provide a shared vocabulary across state Hubs, as well as a working knowledge of common legal issues encountered by participants in our regional food economy.

The Guide focuses primarily on the legal needs of farmers, although it also provides information on the unique needs of food entrepreneurs and organizations. In the future, the Guide may be updated and expanded to respond to the needs of Hub attorneys and clients.

Using the Guide The Guide is intended to serve as a reference for attorneys. Although the Guide can be read in its entirety, each chapter is meant to exist as a stand-alone document. Where appropriate, the Guide directs the reader to other relevant chapters or resources for more information.

What's Inside? The Vermont Guide includes eight chapters. Each chapter aims to describe small-scale farming and food business practices in Vermont, identify relevant food and agriculture laws, and list references for more in-depth information. It contains the following chapters:

■ **CHAPTER I: Vermont Farming and Local Food Economy**

This chapter helps attorneys understand the agricultural context within which they are working, and includes demographic information about farmers and agriculture from the United States Department of Agriculture's Census of Agriculture.

■ **CHAPTER II: Business Structure**

This chapter gives an overview of different types of business structures and evaluates them from the perspective of a small-scale farm or food business.

■ **CHAPTER III: Labor and Employment**

This chapter outlines state and federal laws and regulations related to labor and employment in the agricultural sector.

■ **CHAPTER IV: Food Safety**

This chapter provides an overview of the main food safety laws and standards governing the production and handling of food in Vermont and the United States.

■ **CHAPTER V: Intellectual Property**

This chapter provides an overview of key issues in intellectual property for farm and food businesses and organizations.

■ **CHAPTER VI: Farm Transitions**

This chapter discusses the farm transition process, common concerns among farmers during the process, and solutions to address those concerns.

■ **CHAPTER VII: Farmland Acquisition**

This chapter outlines important factors to consider when acquiring farmland.

■ **CHAPTER VIII: Land Regulations**

This chapter discusses Act 250, Act 142, Required Agricultural Practices (RAPs), Act 148, and hemp—all important Vermont laws and regulations with potential impacts on Vermont farmers and farmland uses.

While broad in scope, the Guide cannot anticipate all the legal issues that may arise for a farm or food client. We have endeavored to identify common legal issues that arise for small-scale farmers and food entrepreneurs, provide context and outline key considerations for attorneys that practice in these areas, and provide additional resources on selected topics. We intend to expand upon these topics in additional resources and future editions of the Guide, to include such topics as labeling and marketing for food producers and bankruptcy for farm businesses. If you have feedback on other topics to include, content to expand or modify, or additional resources to highlight, please contact us at LegalHub@vermontlaw.edu.





| CHAPTER I

VERMONT FARMING AND LOCAL FOOD ECONOMY

Chapter Overview

An understanding of the unique characteristics of Vermont farming and the local food economy is necessary in order to effectively advise or advocate for small-scale farmers, food entrepreneurs, and related organizations. This chapter provides background information on the geographic distribution, size, and organization of Vermont farms; the main agricultural products and various farming techniques employed across the state; and common marketing and sales strategies for small-scale farmers and food entrepreneurs.

- 1. Geographic and Social Characteristics:** This section provides a general overview of farms in Vermont: where they are located, their size and demographics, and how they are organized.
- 2. Agricultural Products and Farming Practices:** This section provides a general overview of the scope and variety of common agricultural products and farming practices in Vermont.
- 3. Marketing and Selling Agricultural Products:** This section provides an overview of the marketing and sales strategies that farmers and food entrepreneurs in Vermont use to connect their products with consumers.

GEOGRAPHIC AND SOCIAL CHARACTERISTICS

Every five years, the United States Department of Agriculture (USDA) releases the Census of Agriculture, which captures the total amount of farmland and ownership information in the U.S., as well as data on farm operators, farm income and expenditures, and production practices.¹ This Guide relies heavily on the most recent Census data, known as the 2017 Census of Agriculture, released in April 2019.²

The USDA defines a farm as a place that produced and sold at least \$1,000 worth of agricultural products during a given year.³ According to the USDA Census of Agriculture, there were 6,808 farms in Vermont in 2017, down from 7,338 farms in 2012 and 6,984 in 2007.⁴ These 6,808 farms cover 1,193,437 acres, or approximately 20 percent of the state's total landmass.⁵

The USDA Census of Agriculture defines a producer as “someone involved in making decisions for the farm” and allows farms to include up to four producers per farm.⁶ According to the 2017 Census, there are 12,309 farm producers in Vermont; 58 percent are male and 42 percent are female.⁷ Most producers in Vermont work off-farm jobs in addition to farming, with 54 percent reporting a non-farming primary occupation.⁸

The vast majority (99 percent) of producers on farms in Vermont are white⁹ and the average age is 55.9 years old.¹⁰ Most of these farmers (70 percent) have more than 10 years of farming experience.¹¹ However, a growing number of farmers in Vermont are classified by the USDA as “beginning” farmers, meaning they have operated a farm for 10 years

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- 1 USDA NAT'L AGRIC. STATISTICS SERV. (NASS), 2017 CENSUS OF AGRICULTURE: U.S. NATIONAL LEVEL DATA, vol. 1, ch. 1, https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/ [hereinafter USDA CENSUS].
 - 2 *Id.*
 - 3 USDA ERS, FARM STRUCTURE, <https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure/> (last updated Aug. 20, 2019) (noting that by contrast, a small farm in Vermont is defined as an operation with an annual gross income from the sale of agricultural products of at least \$2,000. This is defined under the compliance regulations of the Required Agricultural Practices (RAPs)); VT. AGENCY OF AGRIC., FOOD & MKTS. (VAAF), SMALL FARM OPERATIONS, <https://agriculture.vermont.gov/sfo> (last visited Nov. 10, 2019).
 - 4 USDA NASS, HISTORICAL HIGHLIGHTS: 2017 AND EARLIER CENSUS YEARS 7, 7-8 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0001_0001.pdf (last visited Nov. 10, 2019) (hereinafter HISTORICAL HIGHLIGHTS).
 - 5 *Id.*
 - 6 See USDA NASS, 2017 CENSUS OF AGRICULTURE HIGHLIGHTS, FARM PRODUCERS 1, 1-2 (Apr. 2019), https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_Farm_Producers.pdf (last visited Nov. 10, 2019) (stating that the 2017 Census allowed farmers and ranchers to designate multiple people per farm as principals instead of just asking for one “principal operator” as in previous years) [hereinafter FARM PRODUCERS].
 - 7 USDA NASS, SELECTED OPERATION AND PRODUCER CHARACTERISTICS, ch. 2, tbl.45 (2017), https://www.nass.usda.gov/Quick_Stats/CDQT/chapter/2/table/45/state/Vt (last visited Nov. 10, 2019) (beginning in 2017, the Census identifies a producer “as someone involved in making decisions for the farm” which “led to more people identifying as producers.”); FARM PRODUCERS, *supra* note 6; USDA NASS, 2017 CENSUS OF AGRICULTURE STATE PROFILES: VT. 1, 1 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Vermont/cp99050.pdf [hereinafter Vt. CENSUS].
 - 8 USDA NASS, INVOLVEMENT IN DECISIONMAKING BY SELECTED PRODUCER CHARACTERISTICS: 2017, tbl.54 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0054_0054.pdf (last visited Nov. 10, 2019) [hereinafter DECISIONMAKING BY SELECTED PRODUCER CHARACTERISTICS].
 - 9 Vt. CENSUS, *supra* note 7.
 - 10 USDA NASS, 2017 CENSUS OF AGRICULTURE DATA RELEASE: VT. 1, 22 (2017), <https://agriculture.vermont.gov/sites/agriculture/files/documents/CENSUS%20State%2050%20Census%20Briefing%20Updated%20-%202017.pdf> [hereinafter Vt. AGRICULTURE DATA RELEASE].
 - 11 *Id.* at 24



or less either as a sole operator, or with others who have operated a farm for 10 years or less.¹² In Vermont, the beginning farmer population increased by 130 percent since the last Census of Agriculture, from 1,634 in 2012 to 3,754 in 2017.¹³ The ability of beginning farmers to find farmland and establish viable businesses is critical to sustaining the agricultural industry in Vermont and the New England region given the number of farmers nearing retirement.¹⁴

Most Vermont farms (81 percent) operate as sole proprietorships owned by a family or an individual.¹⁵ A small proportion of farms are organized as corporations (7 percent) or partnerships (10 percent), and a very small number (2 percent) operate as either estates, trusts, or grazing associations. Chapter II of the Guide discusses business structures in more detail.

SIZE

The average Vermont farm is 175 acres, a two percent increase from the 2012 Census,¹⁶ but still significantly smaller than the national average of 441 acres.¹⁷ As illustrated in Figure 1 below, the distribution of farms by size in Vermont mirrors national trends for the smallest farms, with around 13 percent of farms under 10 acres and 28 percent of farms between 10 and 49 acres.¹⁸ Vermont has more farms between 50 and 499 acres (52 percent) compared with national trends (42 percent) and fewer farms over 500 acres (8 percent, compared with 14 percent nationally).

The USDA defines a family farm as “any farm organized as a sole proprietorship, partnership, or family corporation” and excludes from the definition farms “organized as nonfamily corporations or cooperatives, as well as farms with hired managers.”¹⁹ The Census divides family farms into very large family farms, large family farms, and small family farms based on gross annual sales.²⁰ Small family farms are those with gross annual sales under \$250,000.²¹ According to the 2017 Census of Agriculture, there are 1,925,799 small family farms nationwide.²² In Vermont, approximately 90 percent of farms (6,100) meet the USDA definition of small, and the vast majority of these (5,485) are family farms.²³

12 USDA ERS, BEGINNING FARMER (2009), <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib53.aspx#.U48IgvldWSo>.

13 Vt. AGRICULTURE DATA RELEASE, *supra* note 7, at 24.

14 JOHN PIOTTI, AM. FARMLAND TR., A New Census of Agriculture Shows Decline in Number of America's Farms, Farmers, and Farmland, FARMLAND.ORG (Apr. 20, 2019), <https://farmland.org/new-census-of-agriculture-shows-decline-in-number-of-americas-farms-farmers-and-farmland/> (last visited Jan. 7, 2020).

15 USDA NASS, 2017 CENSUS OF AGRICULTURE COUNTY DATA: Vt. 358, 358-69, tbl.1 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/Vermont/st50_2_0045_0045.pdf [hereinafter Vt. COUNTY DATA].

16 HISTORICAL HIGHLIGHTS, *supra* note 4.

17 *Id.*

18 *Id.*

19 USDA, NATIONAL INSTITUTE OF FOOD & AGRICULTURE (NIFA), FAMILY FARMS, <https://nifa.usda.gov/family-farms>.

20 *Id.*

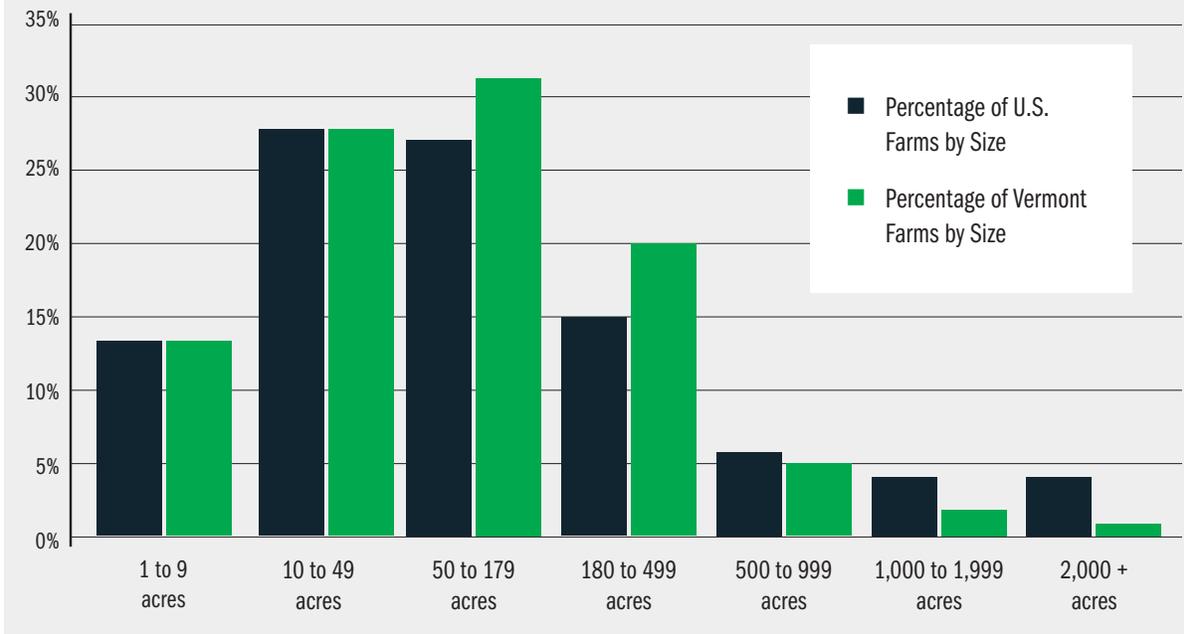
21 *Id.*

22 *Id.*

23 HISTORICAL HIGHLIGHTS, *supra* note 4.



Figure 1. Farms by Acreage, 2017²⁴



FARM SALES AND INCOME

Of Vermont’s 6,808 farms, 72 percent bring in less than \$25,000 in average annual sales, 12 percent have between \$25,000 and \$99,999 in sales, and 16 percent bring in \$100,000 or more in sales.²⁵ The average net cash farm income in Vermont is \$26,215.²⁶ This number has increased modestly since 2012 when the average net cash farm income was \$20,772.²⁷ However, it remains well below the national average of \$43,053 in 2017.²⁸

To be eligible for pro bono legal services through the Legal Food Hub (the Hub), a farmer or food entrepreneur must meet all of the income criteria shown at right.

LEGAL FOOD HUB ELIGIBILITY CRITERIA

1. The farm or food enterprise must have annual revenue of at least \$5,000 in the prior tax year or have started operating within the last three years; and
2. The farm or food enterprise’s net annual sales must not exceed \$30,000; and
3. The farmer or food entrepreneur’s annual household income must not exceed 400 percent of federal poverty guidelines.

24 USDA NASS, MAP OF VERMONT COUNTIES 1, 1 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/vtrefmap.pdf.

25 *Id.*

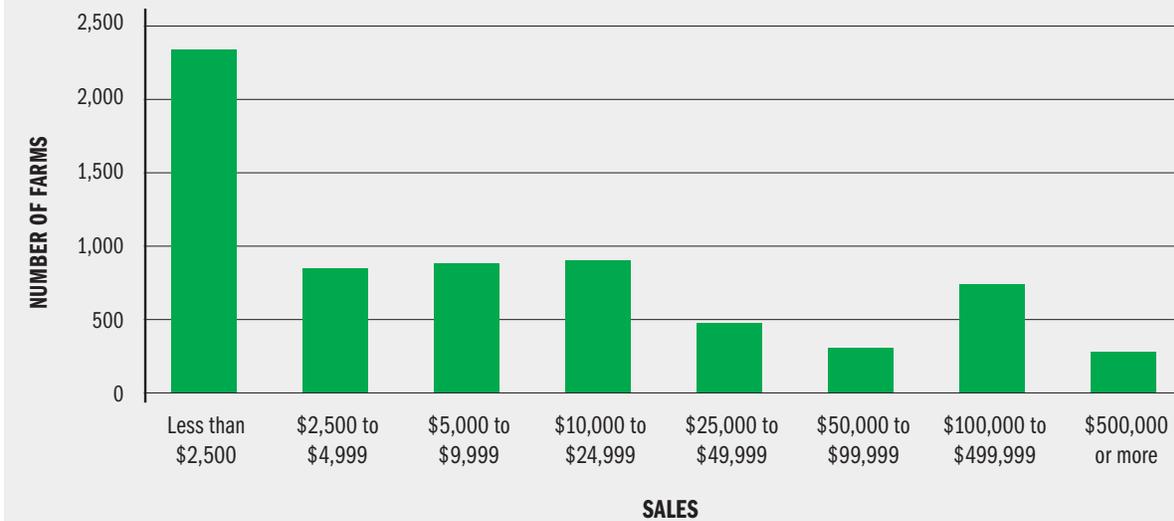
26 USDA NASS, NET CASH INCOME OF THE OPERATIONS AND PRODUCERS: 2017 & 2012 16, 16, tbl.5 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0005_0006.pdf.

27 *Id.*

28 *Id.*



Figure 2. Vermont Farms by Value of Sales, 2017²⁹



GEOGRAPHIC DISTRIBUTION

Farms in Vermont are distributed across all counties in the state. The greatest number of farms are located in Franklin (729) and Addison (720) Counties, and the lowest number in Grand Isle (119) and Essex (106) Counties.³⁰ While Essex County has the least amount of farms in the state, it also has some of the largest with an average of 404 acres, much closer to the national average (441 acres) than the average in Vermont (175 acres).³¹

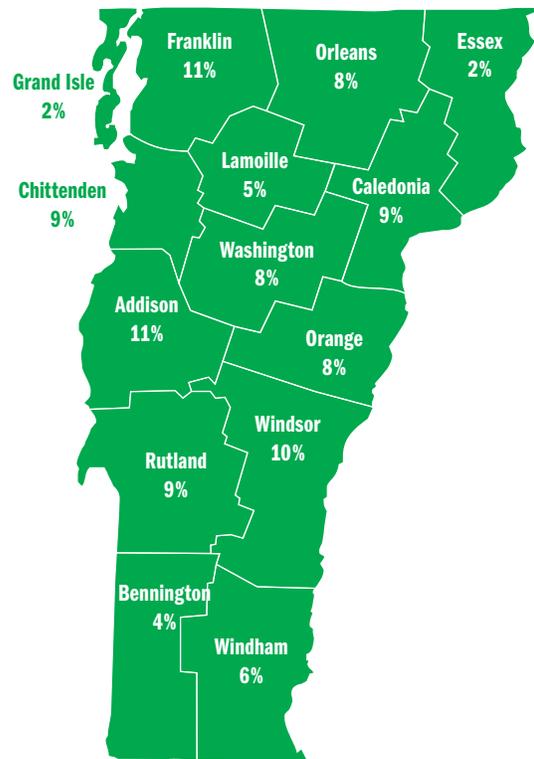


Figure 3. Percentage of Agricultural Land by County³²

²⁹ *Id.*

³⁰ Vt. COUNTY LEVEL DATA, *supra* note 15.

³¹ *Id.*, at tbl.1.

³² Vt. MAP COLLECTION, <https://geology.com/state-map/vermont.shtml> (last visited Jan. 2, 2020); USDA, Vt. COUNTY SUMMARY HIGHLIGHTS: 2017 223, 223-28, tbl.1, https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/Vermont/st50_2_0001_0001.pdf (noting that these numbers are rounded up).

LAND VALUE

The average real estate value of Vermont farmland was \$3,360 per acre in 2017, which is comparable to the national average of \$3,080 per acre but falls significantly below the regional average of \$7,576 per acre.³³ Despite the relatively low average value of farmland in Vermont, farmers still struggle to access affordable land. In a 2017 survey of over 3,500 young farmers across the country, land access was identified as the number one barrier to entry into farming.³⁴ There is an acute need for sound farm transfer planning in order to preserve agricultural production on farmland. Chapter VII of this Guide discusses farmland acquisition in greater depth.

AGRICULTURAL PRODUCTS AND FARMING PRACTICES

Product diversity is a defining characteristic of Vermont agriculture. Farms and food entrepreneurs grow and sell a variety of products through a variety of market channels. Of all Vermont farmland (1,193,437 acres), 40 percent is cropland, 44 percent is woodland, 9 percent is permanent pasture, and 6 percent is infrastructure such as farmsteads, buildings, livestock facilities, ponds, roads, and wasteland.³⁵ The top five crops, based on total acreage, are forage (hay/haylage), corn for silage or greenchop, corn for grain, soybeans for beans, and cultivated Christmas trees.³⁶ Hay is grown on many Vermont farms, over 300,000 acres statewide, making it the most commonly grown crop in the state.³⁷ Because it has a number of uses on the farm, it requires significantly more acreage than “other crops” (crops other than the top five listed above). However, the market value of “other crops and hay” accounted for only 13 percent of the total market value of agricultural products sold in 2017.³⁸

The total market value of Vermont agricultural products sold in 2017 exceeded \$780 million, 76 percent of which was livestock, poultry, and meat products, and 24 percent of which was crops, including nursery and greenhouse crops.³⁹ Fruits and vegetables made up less than one-quarter (23 percent) of total crop sales.⁴⁰

33 USDA NASS, LAND VALUES 1, 8 (2017), <https://www.usda.gov/nass/PUBS/TODAYRPT/land0817.pdf>.

34 Sophie Ackoff, et al., Nat'l Young Farmers Coal., *Building a Future with Farmers II*, YOUNG FARMERS (Nov. 23, 2017), <https://www.youngfarmers.org/resource/building-a-future-with-farmers-ii/>.

35 USDA, Vt. SUMMARY BY OPERATING ARRANGEMENTS, 1, 5, tbl.77 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0077_0077.pdf.

36 Vt. CENSUS OF AGRICULTURE, *supra* note 7.

37 *See id.*; HISTORICAL HIGHLIGHTS, *supra* note 4.

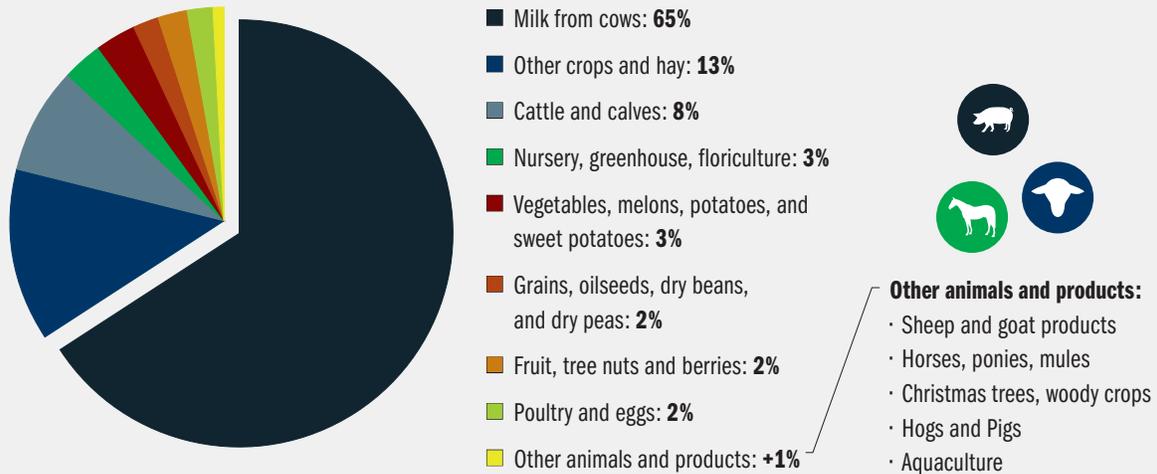
38 *Id.*; Vt. CENSUS OF AGRICULTURE, *supra* note 7.

39 *Id.*

40 *Id.*



Figure 4: Share of Agricultural Products Sold in Vermont by Market Value⁴¹



Milk generates more sales than any other Vermont agricultural product at \$505,426,000 in 2017 alone.⁴² However, even though the dairy industry generates the most sales, it is facing significant challenges largely due to depressed milk prices. In turn, the number of dairy farms dropped from 1,100 in 2008 to 705 in October 2018.⁴³ See Figure 4 for a breakdown of the sales of other agricultural products.

Of note, Vermont ranks first in the nation for maple syrup production and produces close to half of the nation's maple. In 2018, Vermont produced nearly 2 million gallons of syrup, or over 46 percent of total syrup production, valued at over \$53 million.⁴⁴

ORGANIC

Vermont has a thriving organic sector with organic sales more than doubling over the last five years from \$62,634,000 in 2012 to \$118,216,000 in 2017.⁴⁵ There are 615 USDA-certified organic farms, 64 that qualify as organic but are exempt from certification, and 40 transitioning acres to organic production.⁴⁶ Of note, women make up 39 percent of producers for farms with certified or exempt organic production in Vermont.⁴⁷

41 USDA NASS, MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING SHARE, FOOD MARKETING PRACTICES, AND VALUE-ADDED PRODUCTS: 2017 & 2012 9, 9-10, tbl.2 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0002_0002.pdf [hereinafter MARKET VALUE OF AGRIC. PRODUCTS SOLD].

42 *Id.*

43 4 Vermont Agency of Agriculture, Food, and Markets, 2018; Vermont Dairy Data – October 23, 2018.

44 USDA NASS, MAPLE SYRUP PRODUCTION 1, 1-2 (2018), https://www.nass.usda.gov/Statistics_by_State/New_England_includes/Publications/Current_News_Release/2018/Maple%20Syrup%202018.pdf.

45 USDA, VT. ORGANIC AGRICULTURE: 2017 & 2012 43, 43, tbl.51 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0051_0051.pdf.

46 *Id.*

47 *Id.*

The vast majority (over 90 percent) of Vermont organic farms are certified organic under the USDA National Organic Program (NOP).⁴⁸ The NOP works to ensure the integrity of organic products in the United States and throughout the world.⁴⁹ The term “organic” describes production methods that “integrate cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”⁵⁰ This includes practices—such as composting, spreading manure, and utilizing cover crops—that emphasize retaining and building farm fertility. The organic certification and inspection process also ensures that participating farms do not use particular chemical treatments.⁵¹

Some farmers perceive that it may be too costly and time consuming to certify their operations to meet USDA standards.⁵² As such, some farmers may use organic growing methods but choose not to get USDA certified. However, farms are not permitted to claim they are organic without being certified, unless the farm’s gross annual sales are below \$5,000.⁵³ To encourage certification, USDA offers a cost-share program for organic certification that pays 75 percent of the certification fee up to \$750 per operation.⁵⁴ The Vermont Agency of Agriculture, Food and Markets (VAAF) administers the cost-share program in Vermont.

MARKETING AND SELLING AGRICULTURAL PRODUCTS

DIRECT TO CONSUMER

Vermont farmers sell many farm products directly to consumers through farmers markets, farm stands, community supported agriculture (CSA) operations, and agritourism. Direct-to-consumer food marketing is a defining characteristic of agriculture in Vermont and across New England, and small-scale farmers and food entrepreneurs have experienced success with these ventures. In 2017, 27 percent of Vermont farms (1,833) sold nearly \$50 million in agricultural products directly to consumers, representing 6.4 percent of total agricultural market value in the state.⁵⁵

Numerous communities in Vermont have implemented programs that work directly with community members to support local farming. For example, there are a number of CSAs and farmers markets throughout Vermont that promote sustainable farming practices and access to local food, as well as engaging youth in food production and processing.⁵⁶

48 *Id.*

49 USDA AMS, NAT’L ORGANIC PROGRAM, <http://www.ams.usda.gov/AMSV1.0/nop> (last visited Apr. 16, 2019.)

50 USDA AMS, *Consumer Information*, NAT’L ORGANIC PROGRAM, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateC&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPConsumers&description=Consumers&acct=nopgeninfo> (last visited Apr. 16, 2019).

51 7 C.F.R. §§ 205.206, 205.272 (2014).

52 See USDA AMS, FAQ: BECOMING A CERTIFIED OPERATION, <https://www.ams.usda.gov/services/organic-certification/becoming-certified> (last visited Apr. 16, 2019).

53 USDA AMS, WHAT FARMS AND BUSINESSES ARE EXEMPT FROM ORGANIC CERTIFICATION? 1, 1, <https://www.ams.usda.gov/sites/default/files/media/2%20Exempt%20Producers%20FINAL%20ORGK%20V2.pdf>.

54 USDA AMS, *Organic Certification Cost Share Programs*, SERVICES (last viewed Jan. 7, 2020).

55 MARKET VALUE OF AGRIC. PRODUCTS SOLD, *supra* note 41, at 2.

56 NE ORGANIC FARMING ASS’N OF VT. (NOFA-Vt.), CSAs, <https://nofavt.org/find-organic-local-food/csas> (last visited Jan. 7, 2020).



Community Supported Agriculture

Community Supported Agriculture, or CSA, operations give the public an opportunity to invest in local agriculture by making a financial commitment to a farm in exchange for a share of the farm's products.⁵⁷ Typically, a farmer sells a share to a consumer before the season begins. In return, the consumer receives a portion of the harvest each week. These shares, depending on the agreement, may contain fresh produce, bread products, meat, cheese, or other value-added products sourced from the farm or other farms.⁵⁸ CSAs provide farmers with a form of risk management in addition to necessary up-front capital and a more reliable market, and consumers get the satisfaction of supporting a local business and receiving fresh food.

The content of the shares varies based on what the farm harvests that week, and the structure of the CSA may vary. Some CSAs deliver boxes while others have on-site pickup, which may include some pick-your-own produce. Others allow customers to deduct from their balance throughout the season, giving them flexibility to choose the items they want to purchase each week. Additionally, CSAs may include volunteer opportunities or even offer a work exchange for a reduced-rate share. These options allow consumers to provide in-kind farm help, but can also potentially increase the farmer's liability if, for example, a consumer is injured or causes another's injury while providing such help. There are approximately 90 CSAs in Vermont.⁵⁹

Farmers Markets

Vermont defines "farmers market" as "an event or series of events at which two or more vendors of agricultural products gather for purposes of offering for sale to the public their agricultural products."⁶⁰ Farmers markets are central sites for farmers to sell directly to the public and are often set up to be community hubs. They operate under different business structures (sole proprietorships, partnerships, LLCs, for-profit corporations, nonprofits, and cooperatives) or they may operate as part of an umbrella organization.⁶¹ Farmers markets provide communities with access to fresh and locally grown produce, meats, milk, honey, maple syrup, and eggs, and, depending on the market rules, may also offer processed foods, such as jams, breads, or salsa, and even nonagricultural products like crafts and cooking equipment.⁶² Farmers market managers wishing to formalize the legal status of their markets could be eligible to participate in the Hub.⁶³ There are at least 70 farmers markets in Vermont.⁶⁴

Farm Stands

Farm stands are on-farm or near-farm sale sites typically located along roads that border the farm. Nearby farmers may combine efforts in one farm stand, but generally each stand

57 SUSAN DEMUTH, USDA NAT'L AGRIC. LIB., DEFINING COMMUNITY SUPPORTED AGRICULTURE (1993), <http://www.nal.usda.gov/afsic/pubs/csa/csadef.shtml> (last visited Jan. 7, 2020); see generally ME. ORGANIC FARMERS & GARDENERS ASS'N, www.mofga.org (last visited Jan. 7, 2020) (providing more information).

58 NOFA-Vt., *supra* note 58.

59 *Id.*

60 6 V.S.A. 216 § 5001.

61 CTR. FOR AGRIC. & FOOD SYS. (CAFS), FARMERS MARKET LEGAL TOOLKIT, <https://farmersmarketlegaltoolkit.org/business-structures/>.

62 See generally NOFA-Vt., *supra* note 58.

63 CAFS, *supra* note 63.

64 NOFA-Vt., FARMERS MARKETS, <https://nofavt.org/find-organic-local-food/farmers-markets> (last visited Jan. 7, 2020).



sells the products of a single farm. There are approximately 60 farm stands in Vermont.⁶⁵

Like farmers markets and CSAs, sales through a farm stand reduce distribution costs and give farmers an opportunity for higher profits.⁶⁶ However, selling directly to consumers can cost farmers valuable time away from the farm and has limited growth potential. As a result, farmers may look to diversify their revenues streams and the markets where they sell beyond just direct-to-consumer markets.

AGRITOURISM

Agritourism provides another opportunity for farms to diversify their revenue. The Census of Agriculture considers agritourism to include on-farm recreational activities and services, such as farm tours, hay rides, and even hunting or fishing.⁶⁷ Vermont has several hundred farm attractions open to the public.⁶⁸ Some of the more popular agritourism activities in Vermont include pick-your-own Christmas tree farms, maple syrup sugarhouse tours, on-farm meals and music events, pick-your-own fruit and vegetable farms, and corn mazes.⁶⁹ According to the Census of Agriculture, the value of the Vermont agritourism industry in 2017 was \$1.7 million: 186 Vermont farms took part in agritourism and recreational services, with annual sales from these activities averaging \$9,187 per farm.⁷⁰

In 2018, the state legislature enacted Act 143 to prevent local zoning laws from restricting agritourism.⁷¹ However, agritourism businesses are still subject to applicable state and federal regulations such as food safety.⁷² Additionally, many farms may wish to consider a liability insurance policy for their on-farm business that is separate from the policy for the farm itself to minimize any potential losses.⁷³ Chapter VIII, Land Regulations, discusses agritourism and Act 143 in more detail.

WHOLESALE AND INSTITUTIONAL MARKETS

The vast majority of agricultural products in the state of Vermont are sold through wholesale channels without local or regional branding. In 2017, 6.4 percent of agricultural producers were sold directly to consumers and another 6.9 percent were sold wholesale with local or regional branding; the remaining percentage was sold wholesale without any local branding or source-identifying information. For farmers who have only sold directly

65 NOFA-Vt., FARM STANDS, <https://nofavt.org/find-organic-local-food/farm-stands> (last visited Jan. 7, 2020).

66 VAAFM, FARM STANDS, CSAs & FARMERS MARKETS, <https://agriculture.vermont.gov/farm-stands-csas-farmers-markets> (last visited Jan. 7, 2020).

67 See USDA NASS, B-24, app. B-1 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf (noting this income includes income from recreational services such as hunting, fishing, farm or wine tours, hay rides, etc.).

68 Vt. OUTDOOR GUIDE ASS'N, VERMONT FARM TOURS AND VACATIONS, http://www.voga.org/farm_tours_and_services.htm

69 *Id.*

70 USDA NASS, Vt. INCOME FROM FARM-RELATED SOURCES: 2017 AND 2012 1, 17, tbl.7 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0007_0008.pdf [hereinafter Vt. INCOME FROM FARM-RELATED SOURCES]

71 Act 143, 24 V.S.A. § 4412, <https://legislature.vermont.gov/bill/status/2018/H.663>; see also Jess Phelps, Agricultural Exceptionalism in Vermont Land Use Law 1, 24; VAAFM, Agritourism, <https://agriculture.vermont.gov/businessdevelopment/agritourism> (last visited Jan. 3, 2020).

72 UNIV. OF Vt., AGRITOURISM BEST PRACTICES: SAFETY AND RISK MANAGEMENT 1, 4, <https://www.uvm.edu/vtagritourism/files/agritourism-guide/best-practices-safety-risk-management.pdf>; see *generally* FARM-BASED EDUC. NETWORK, A GUIDE TO SUCCESSFUL AGRITOURISM ENTERPRISES 1, 1-48 (2018), https://www.uvm.edu/sites/default/files/Vermont-Agritourism-Collaborative/2019_BestPracticesAgritourism-FINALDRAFT-lores.pdf.

73 *Id.* at 8.



to consumers, scaling up to sell into wholesale markets (such as selling to distributors, food hubs, institutions, or other wholesalers) presents an opportunity to expand their businesses. In 2017, 11 percent of Vermont farms sold locally or regionally branded products directly to retail markets, institutions, and food hubs with \$54,134,000 in total sales.⁷⁴

However, farmers entering into wholesale markets for the first time may face legal hurdles such as negotiating and drafting contracts, understanding labeling requirements, and complying with food safety measures. The Vermont Legal Food Hub hopes to connect these farmers to attorneys skilled in these areas. For example, wholesale or institutional purchasers may require new certifications or practices, such as Good Agricultural Practices or Good Handling Practices, and the increase in production often necessary for wholesale markets may introduce new compliance obligations under state law or the Food Safety Modernization Act, from which farms may have previously been exempt. Chapter IV discusses food safety regulations in more detail.

CONCLUSION

Agriculture in Vermont is diverse, and no two farms, or farm operators, are exactly alike. An understanding of the recent trends in farming can give an attorney who is unfamiliar with the world of agriculture a foundation to better advise and advocate for farmers and food entrepreneurs. By connecting attorneys to food and farming clients and by providing the resources necessary to build effective and sustainable relationships, the Hub seeks to enhance the growth of local food economies and communities through the provision of legal services.

74 MARKET VALUE OF AGRIC. PRODUCTS SOLD, *supra* note 41.



CHAPTER II

BUSINESS STRUCTURES

Chapter Overview

Farmers can benefit from counseling discussions with an attorney about which business structure may best meet their needs and goals. Depending on which business structure they choose, farmers may be able to limit their liability, reduce their tax burden, transfer the business to the next generation more easily, or increase their ability to access larger markets through cooperative practices. This chapter will assist attorneys advising farmers on the business formation of their farms by providing an overview of different types of business structures and evaluating them from the perspective of a small-scale farm business.

- 1. Business Structure Overview** This section introduces the attorney to some of the main issues farmers face when forming their businesses. It also explains how certain issues farmers face are different from those faced by clients in other industries.
- 2. Common Farm Business Structures in Vermont and the United States** This section provides an overview of the prevalence of various farm business structures in Vermont and the United States.
- 3. Getting Context: Initial Questions to Ask the Farmer** This section highlights some questions an attorney should ask a farmer to understand the farmer's operation and to identify issues that could be addressed by the choice of a specific business structure.
- 4. Major Factors in Evaluating Different Business Structures** This section lists factors attorneys can use to evaluate various business structures, including ease of formation and management, limitation of liability, taxation, ease of transfer, life of entity, and ability to raise capital.
- 5. Choosing a Business Structure** This section discusses the main business structures that farmers use, including sole proprietorships, partnerships, limited liability companies, corporations, and others. Each business structure is evaluated for its usefulness for farmers.



BUSINESS STRUCTURE OVERVIEW

Attorneys often act as business advisors for their clients, counseling on, and assisting in, the formation of legal business structures that help those businesses thrive. Attorneys can play that same role for farmers. Advising the farm business client is best practiced as a team sport. A farm business planner and an accountant familiar with agricultural business taxation are essential members of the team. Vermont is fortunate to have a cadre of farm business planners supported by the Farm & Forest Viability Project of the Vermont Housing and Conservation Board.¹

Farmers face issues similar to those faced by an attorney's more traditional business clients, including raising and accessing capital, limiting liability, and finding ways to facilitate business transfers. However, some farm issues differ from traditional business clients' concerns.

For example, attorneys may be accustomed to working for clients whose income is entirely derived from their businesses. In contrast, many farmers use non-farm income to support their farms and households. In 2017, a majority (roughly 60 percent) of principal farm operators nationwide worked at least one day off the farm per year, and nearly 40 percent of principal operators worked 200 days or more off the farm per year.² In Vermont, the primary occupation of 57 percent of principal farm operators is something other than farming.³ Even for those Vermont farm operators who reported their primary occupations as farming, 11 percent worked at least one day off-farm and 48 percent worked more than 200 days off-farm.⁴

Additionally, the economic profile of farmers in the Vermont Legal Food Hub (Hub) may not mirror an attorney's traditional clients.⁵ The Hub limits pro bono placement to farms with net income below \$30,000 and household income not exceeding 400 percent of the federal poverty guidelines. In 2017, the average annual net cash income for Vermont farms was \$26,215 and only 28 percent of Vermont farms had annual sales above \$25,000.⁶ Therefore, the risks and costs of various business structures may carry different weight for many Vermont farmers.

1 Vt. HOUS. & CONSERVATION Bd. (VHCB), FARM & FOREST VIABILITY PROGRAM, <https://vhcb.org/viability> (last visited Dec. 19, 2019).

2 USDA NASS, Vt. SELECTED PRODUCER CHARACTERISTICS: 2017 & 2012 1, 62, tbl.52 (2017) https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0052_0052.pdf [hereinafter Vt. SELECTED PRODUCER CHARACTERISTICS].

3 *Id.*

4 *Id.*

5 The Hub limits pro bono eligibility to farms with (a) annual revenue of at least \$5,000 in the prior tax year OR operations that started within the last three years; AND (b) net annual income of \$30,000 or less; AND (c) household income not exceeding 400% of the federal poverty guidelines.

6 USDA NASS, Vt. MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING FOOD MARKETING PRACTICES AND VALUE-ADDED PRODUCTS: 2017 & 2012 1, 1, TBL.2 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/Vermont/st50_2_0002_0002.pdf (hereinafter Vt. MARKET VALUE OF AGRICULTURAL PRODUCTS).



Finally, certain personal assets of farmers may be more protected from business creditors than those of other clients. Farmers might have fewer assets solely for personal use because a farmer's assets, such as vehicles and homes, may also be used in the operation of the farm. To satisfy a farmer's creditors, a bankruptcy judge may avoid seizing those assets that the farmer needs to make a living.⁷

DUAL LEGAL STRUCTURE

As a threshold matter, likely one of the most important aspects of limiting a farmer's liability is the necessity to utilize a dual legal structure that places the farming operation in one entity and the land in another, or to have one entity for the farm operation and to keep the land in a sole proprietorship. Because the farmland is most often the farmer's most valuable asset, forming a business entity that includes just the farming operation—livestock, equipment, and other chattels—will shield the farmland from liability. The dual structure encapsulates the business risk in the farm operation entity, and therefore limits liability to the farm operation's assets. Another reason to avoid placing the farmland in the entity is that doing so can cause problems down the road with regard to estate planning and farm transfer, requiring a lease between the landowners and the farm operation entity. Chapter VI discusses farmland transfer issues in more detail.

GENERAL BENEFITS

Farmers have many reasons to formalize their businesses. Formalized structures can help farmers transfer the farm to the next generation. For example, the business may be structured to allow for multiple farm operators (such as the owner and their adult children), which helps transfer knowledge and assets between generations. Farm transfer is most often a two-step process with the first step being transfer of the farming operation's assets. Once equity has been earned and management skills obtained, the second generation will be in a better position to manage and potentially purchase the farmland. A formalized business structure can also help order decision-making, compensation, and dissolution for farms with multiple operators.

Farmers participating in multi-farm endeavors may wish to segregate various farms' assets. Likewise, farmers may use a variety of business structures to segregate assets within a single operation. For instance, and as discussed above, farmers may wish to hold land independently from the rest of the business.

Formalizing a legal structure with family members may also enable the farmer to access healthcare because assets owned jointly and contributions to multiple livelihoods will less likely be considered an available resource by Medicaid. Farmers with off-farm resources such as retirement or brokerage accounts from a previous career should also consider the liability shield protections provided by placing farming operation assets into an entity with a limited liability shield. Married partners may wish to formalize asset and income distribution to ensure proper recognition for their contributions. For example, both should

7 See U.S. COURTS, CHAPTER 12 - BANKRUPTCY BASICS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-12-bankruptcy-basics> (last visited Jan. 2, 2020); see also SUSAN A. SCHNEIDER, AN INTRODUCTION TO CHAPTER 12 BANKRUPTCY: RESTRUCTURING THE FAMILY FARM 1, 1-6 (2005), <http://www.flaginc.org/wp-content/uploads/2013/07/J01-Intro-to-Chap-12-Bkrcy-Restructuring-Family-Farm-SAS-2005.pdf>. This edition of the guide does not address bankruptcy in detail; however, we are planning to develop resources related to Chapter 12 bankruptcy given its utility as a tool for farmers facing financial hardship.



contribute to social security. A formalized structure will also protect both parties in the event of divorce.

Finally, farmers may engage in non-production activities, such as agritourism or value-added processing, and may want to structure those higher-risk activities as separate businesses to limit tort and other potential liabilities.

COMMON FARM BUSINESS STRUCTURES IN VERMONT AND THE UNITED STATES

In Vermont, the most common farm business structure by far is the sole proprietorship; over 80 percent of farms operate as sole proprietorships.⁸ Ten percent of farms are structured as partnerships and eight percent as corporations.⁹ The remaining two percent are categorized as “other,” which includes estates or trusts, prison farms, grazing associations, and American Indian Reserves.¹⁰ Nationally, the data paints a similar picture: eighty-six percent of farms operate as sole proprietorships, seven percent as partnerships, five percent as corporations, and two percent as “other.”¹¹

GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE FARMER

The attorney’s first task when serving farmers will often be to identify the most useful business structures that meet the unique needs of a farm business. To provide informed advice, an attorney must understand the current business operation, including its goals, challenges, and liabilities. Farmers’ priorities may vary. For instance, is the farmer’s goal to limit the farm’s potential liability? Does the farmer want to reduce taxes? Or, would the farmer like to expand their farm operation by selling to grocery stores or through a community supported agriculture (CSA) operation? The attorney’s questions and farmer’s answers can serve two purposes. First, they increase the attorney’s understanding. Second, they help the farmer identify and organize their operational priorities.

Attorneys may find it helpful to ask farmers questions about the following topics. These questions do not always directly relate to entity formation, but they do provide opportunities for an attorney to learn about the farm’s risks and opportunities, which will help inform the attorney’s guidance. In addition to these questions, the sections below on specific business entities also identify questions and considerations for farmers relevant to each choice of entity.

- **Ownership and/or Management:** Who will be participating in the management of the farm operation? Who owns the farm business? How are management decisions currently made? Who might gain or lose farm ownership or control in the future?
- **Income:** How will the income of the business be allocated?
- **Contributions:** What contributions of personal property, real property, labor, and cash are various partners or members making, and under what circumstances can partners add new capital or withdraw capital? (It is highly recommend that the attorney obtain a balance sheet and discuss with the farmer what specific assets are to be transferred to the entity.)

8 USDA NASS, HISTORICAL HIGHLIGHTS: 2017 & EARLIER CENSUS YEARS 7, 7-8, tbl.1 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0001_0001.pdf (hereinafter HISTORICAL HIGHLIGHTS).

9 *Id.*

10 *Id.*

11 *Id.*



- **Financing:** How does the farmer fund the farm? Does the farmer intend to seek outside investors to finance the business or an expansion? Has the farmer received any grants or loans? Is the farmer interested in modifying or finding additional grants or loans?
- **Land:** Who owns the land? Are there any mortgages or liens on the land? Does anyone lease the land? What are the terms of the leases or mortgages? Does the farmer hope to purchase land in the future? Are there any easements or other preservation restrictions on the land?
- **Employees:** Does the farmer have any employees? How many? Are the employees family members of the farmer? Does the farmer consider any of the people working on the farm to be interns, volunteers, or independent contractors?
- **Collaborative Practices:** Does the farmer collaborate with other farmers? For example, does the farmer store other farmers' produce on their farm? Does the farmer share equipment with other farmers?
- **Roadside Markets and Farm Stands:** Does the farmer have, or hope to have, a roadside market or farm stand? Is the roadside market or farm stand located on property owned or controlled by the farmer? Is the farmer selling any goods they did not produce?
- **Wholesale Markets:** Does the farmer sell, or hope to sell, to wholesalers?
- **Value-Added Products:** Will the farmer sell products other than raw agricultural commodities (i.e., will they process them in some way)?
- **Farmers Markets:** Does the farmer sell, or want to sell, at a farmers market? What requirements does the market set? For instance, does the farmers market require particular insurance or food safety standards and practices?
- **Community Supported Agriculture (CSA):** Does the farmer have, or want to have, a CSA? If so, will members of the CSA pick up their shares on the farm or at another location? Will CSA members ever come on the farm for a tour, a gathering, or to work on the farm?
- **Direct Sales to Restaurants and Other Institutions:** Does the farmer sell, or want to sell, directly to restaurants or other institutions? Does the restaurant or institution require a certain level of insurance? Does the restaurant or institution request or require compliance with food safety standards? Does the farmer do any processing (minimal or otherwise) to the product they sell to the restaurant or institution?
- **Agritourism and Other Forms of On-Farm Recreation:** Does the farmer engage in, or want to engage in, agritourism activities or other forms of on-farm recreation?
- **Pick-Your-Own:** Does the farmer have, or want to have, a pick-your-own operation; i.e., does the public come on to the farmer's land to engage in agricultural activities?
- **Permits, Licenses, and Certifications:** What permits, licenses, or certifications, if any, does the farm operation have or require?
- **Food Donations:** Does the farmer donate or intend to donate produce or other surplus products to food banks or other organizations?
- **Insurance:** What kind of insurance policy, if any, does the farmer hold? Do any insurance policies explicitly cover or exclude any activities that the farmer conducts (e.g., allowing members of the public to enter the farm for gleaning or recreational activities).
- **Other Professionals:** Does the farmer consult with any other business professionals, such as an accountant or tax preparer?



MAJOR FACTORS IN EVALUATING DIFFERENT BUSINESS STRUCTURES

Once the attorney has a sense of the goals and needs of the farmer, the attorney will be better able to assist the farmer in choosing the best business structure for the operation. When helping farmers decide which structure to choose, it is important to protect the farmer and their assets from unpredictable emergencies and unforeseen hardships.¹² This section will familiarize the attorney with some factors that might motivate farmers to choose one business structure over another.

Initially, the attorney must be very careful to determine who the client is (e.g., the farmer? a partner? the partnership? a corporation? an investor? a limited partner?) and then must be very clear with the client at the outset and in all further dealings in order to avoid conflicts of interest. This is a common problem that can have significant consequences, particularly when working with relatives (e.g., senior and junior generations, siblings). If there are two unrelated individuals, or if the partners are married, then joint representation may not be appropriate. Attorneys should consult Vermont Rule of Professional Conduct 1.7 and Vermont's Bar Counsel with questions, and should ensure client engagement letters clarify this issue.¹³

Once the client has been clearly identified, the attorney and the client should consider the **ease of formation and management** of the organization. Farming can be very time intensive, especially for diversified and small-scale operations common in Vermont. Farmers have different preferences for management and administration. Some farmers may have flexible schedules or business training and, therefore, lower administration costs. In other cases, management costs may make formation and upkeep of a formal business structure too expensive. Some structures require fewer state and federal filings; others require organizational documents, registration, and ongoing recordkeeping. The attorney and farmer should discuss administrative requirements, and highlight which requirements are ongoing as opposed to one time. The primary formality a farmer in a limited liability entity must follow is to keep personal and business income and other assets separate. This separation may require new checking accounts and perhaps a new bookkeeping system. Clients should discuss this issue with their accountant as well.

Next, the attorney should consider how the entity will be **taxed**. Businesses can create or limit tax liability. A "pass-through" entity, such as a partnership or S corporation, is not itself subject to taxation. Instead, the entity's owners are taxed on their share of the business income.¹⁴ In contrast, "double-taxation" entities, mostly C corporations, must pay taxes on the business' profits which, if distributed to owners, are taxed as personal income.¹⁵ There are benefits to a C corporation that may justify using it. This calls for bringing in a good tax advisor, CPA, or tax attorney to assess the relevant information and determine which format makes the best sense.

As a next step, attorneys should help the farmer consider how to **limit liability**. Certain business structures limit the liability of some or all of the business' owners, while others provide no protection. Limited liability structures limit liability for the unsecured debts

12 U.S. EPA, NATURAL EVENTS & DISASTERS, <http://www.epa.gov/oecaagct/tned.html> (last visited Feb. 16, 2015).

13 See V.R.P.C 1.7, <https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf>.

14 ANNETTE M. HIGBY, ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 1, 3 (Univ. of Vt. Extension ed. 2006), <http://www.uvm.edu/farm-transfer/LegalGuide.pdf>.

15 *Id.*



and some torts to the business entity's assets. Personal assets cannot be reached to satisfy these claims. As with any business, there are many ways a farmer can incur liability: an employee or visitor could be injured on the farm, pollution or hazardous materials could run off the farm, the farmer could default on a loan, or a business partner could incur a debt tied to the farm business. It is important to note that secured creditors will generally require personal liability and sometimes non-farm assets as collateral. Some feed suppliers may also ask a farmer to sign a mortgage or provide a personal guarantee. A liability shield is primarily useful in the context of unsecured debts and some torts, as a farmer cannot shield themselves from liability for their own negligence. The attorney should identify potential liabilities and assess whether to suggest a limited liability business structure to minimize the risk. Other risk management tools, such as insurance, may address the farmer's potential liabilities more affordably.

Next, attorneys should consider **ease of transfer** when discussing business structure options with the farmer. An entity that provides for fractional transfer of the farming operation's assets to the next generation is a good first step in the transfer process. Farmers may wish to keep the farm within the family or maintain ownership until much later in life. The farmland may be their retirement plan. Farmers often do not decide the ultimate disposition of the land until after the first death. Others may decide to transfer sooner, or transfer to persons outside of the family. Customizable business structures can smooth complicated transfers and carry out a farmer's unique wishes. The business plan, any buy-sell agreement, and the estate plan must be consistent.

Similarly, the **life of the entity** is an important factor to consider when selecting a business structure. The attorney and farmer should discuss whether the farm business will terminate once they retire, or whether the farm operation will continue beyond the farmer's term. Chapter VI of this Guide has more detail about farm transitions.

Finally, the attorney should help assess the importance of **outside investment**. Certain business structures will better facilitate investment. If the farmer hopes to have non-operators financially support the farm, they might consider a business structure that allows for outside investment without turning over control. Historically, outside investors have preferred the corporate structure over the limited liability company structure, but this is changing.

After considering these factors with the farmer, the attorney will have a better understanding of the farmer's needs to advise the farmer in choosing a business structure.



CHOOSING A BUSINESS STRUCTURE

A farmer may choose from many structures when formalizing their business operation. This section discusses the primary business structures available under Vermont law.¹⁶

SOLE PROPRIETORSHIPS

A sole proprietorship is the most common form of business ownership. It is an unincorporated business owned and run by one individual with no distinction between the business and the owner. The owner is entitled to all profits and is responsible for all the business' debts, losses, and liabilities.¹⁷ Most Vermont farms are sole proprietorships. Forming a sole proprietorship does not require any legal filing or registration with the state.

However, a farmer may be required to obtain state, city, or town permits or licenses to operate a business.¹⁸ Even if the farmer wishes to avoid formal organization, an attorney should still advise the client to choose a name for the business and register the farm business name with the Vermont Secretary of State.¹⁹ This allows the farmer to ensure that the name is not already in use by another business and prevents other businesses from using the farm's name in the future.²⁰ If a farmer decides to operate as a sole proprietor under a trade name, they must file with the secretary of state.²¹

Pros for Farmers

- **Ease of Formation and Management:** Any individual person who starts a farming business without organizing or filing will be considered a sole proprietor.²² In Vermont, one can establish a sole proprietorship without filing any legal documents (except for registering the business name if different from the farmer's name, as noted above), and there are no yearly filings or fee requirements.²³ The formality of a sole proprietorship requires very little time or effort from the farmer. Farmers may find this appealing because it allows them to focus on farming rather than business formalities.
- **Taxation:** The owner of a sole proprietorship is personally taxed for all income and expenses of the business.²⁴ Because Hub farmers must have a household income less than 400 percent of federal poverty guidelines to be eligible for free legal services, their tax rates will likely be low.

16 See Vt. Uniform Partnership Act, Vt. Stat. Ann. tit. 14 § 3401 *et seq.*; Vt. Uniform Limited Partnership Act, Vt. Stat. Ann. tit. 11, §§ 3401 *et seq.*, 3226 *et seq.*; Vt. Limited Liability Partnership Act, Vt. Stat. Ann. tit. 11, § 4001 *et seq.*; Vt. Business Corporation Act, Vt. Stat. Ann. tit. 11, § 816 *et seq.*; Vt. Nonprofit Corporation Act, Vt. Stat. Ann. tit. 11, § 1.01 *et seq.*; Cooperatives, Vt. Stat. Ann. tit. 11, § 991 *et seq.*

17 SBA, SOLE PROPRIETORSHIP, <http://www.sba.gov/content/sole-proprietorship-0> (last visited Apr. 22, 2015).

18 Vt. SEC'Y OF STATE, BUSINESS START-UP GUIDE, <https://www.sec.state.vt.us/corporationsbusiness-services/resources/business-start-up-guide.aspx>.

19 *Id.*

20 SBA, HOW TO NAME A BUSINESS, <http://www.sba.gov/content/how-name-business> (last visited March 6, 2019).

21 11 V.S.A. § 1621.

22 CTR. FOR AGRIC. & FOOD Sys. (CAFS), FARMERS MARKET LEGAL TOOLKIT, <https://farmersmarketlegaltoolkit.org/business-structures/sole-proprietorships/#topic-liability> (last visited Jan. 5, 2020).

23 *Id.*

24 Vt. DEP'T OF TAXES, BUSINESS CENTER, <https://tax.vermont.gov/business-and-corp/taxes-and-your-business>.



Cons for Farmers

- **Limiting Liability:** A sole proprietorship is not distinct from its owner, so this business structure does not limit the owner's liability. Generally, a creditor of the business can force the owner to sell personal assets in order to pay the debts and obligations of the business.²⁵ However, because the farmer's personal assets and the farm assets may be the same, those shared-use assets may be unavailable to satisfy creditors during bankruptcy proceedings, as previously noted. Although this may appear to benefit the farmer, it can limit creditors' willingness to loan capital. However, if there is adequate security, creditors may still loan in spite of bankruptcy exemptions.
- **Life of Entity:** A sole proprietorship terminates when the owner passes away or sells the business assets.²⁶ Therefore, sole proprietorships may be undesirable for a farmer who wishes to keep the farm business intact after they pass away, especially if the farmer has multiple heirs or complex succession needs.
- **Outside Investment:** Sole proprietorships do not allow the business owner to raise capital by selling equity interests in the business.²⁷ Therefore, if the farmer is interested in obtaining outside investments, a sole proprietorship may not be the best option.
- **Ease of Transfer:** Because sole proprietors have total control over their farming operation, they possess full rights to transfer assets to another party.²⁸ However, because a sole proprietorship has no legal identity separate from its owner, it cannot be transferred as a business. Instead, each part of the farm business—such as land, structures, and equipment—must be conveyed. Transferring the business in this manner may increase transaction costs.

PARTNERSHIPS

A partnership is an association of two or more persons that carry on as co-owners of a business for profit.²⁹ A partner's contribution may consist of money, property, labor, credit, or skill. In return for the contribution to the business, each partner shares in the profits and losses of the business.³⁰ About 10 percent of farms in Vermont (695) are organized as partnerships.³¹ Around 10 percent of those farms (80) are registered under Vermont law as limited partnerships/limited liability partnerships.³² The remainder are unregistered general partnerships.

JOINT VENTURES

There may times when farms enter into short-term arrangements with each other, for example, providing certain items to include in another farm's CSA box, combining products from both farms in a final processed product, or jointly purchasing machinery or equipment. Joint ventures are not formal legal entities and do not provide limited liability. However, joint venture agreements can be between two limited liability companies and could include insurance requirements to address liability concerns.

25 STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 3:2 (2014).

26 HARRY J. HAYNSWORTH, SELECTING THE FORM OF A SMALL BUSINESS ENTITY 1, 3 (1985).

27 SOLE PROPRIETORSHIP, *supra* note 17.

28 SBA, TRANSFER OWNERSHIP, <http://www.sba.gov/content/transfer-ownership> (last visited Jan. 7, 2020).

29 11 V.S.A. § 3201.

30 SBA, PARTNERSHIP, <http://www.sba.gov/content/partnership> (last visited Jan. 7, 2020).

31 USDA NASS, VT. SELECTED OPERATION AND PRODUCER CHARACTERISTICS: 2017 358, 358-69, tbl.45 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/Vermont/st50_2_0045_0045.pdf.

32 *Id.*



A **general partnership** is the default business structure for two or more persons who operate a business together. Typically, general partnerships are structured equally in terms of profit, liability, and control as related to each partner's capital contribution. Partnerships, and LLCs that choose to be taxed as partnerships, offer a great deal of flexibility in terms of income allocation. Where one partner with a small capital interest provides most of the day-to-day labor and management, that partner may receive a larger share of the income distributions as long as the distribution makes economic sense. Management control (voting rights) may also diverge from capital.

In Vermont, there are no formation or filing requirements for a general partnership. Each partnership is governed by its partnership agreement.³³ If there is no agreement regarding a specific aspect of the partnership, the partnership statute supplies the default rules for the relationship between the partners in the event of a dispute.³⁴ Because of the informality of some arrangements, farmers may be unknowingly operating their business as a partnership and doing so without having negotiated a comprehensive partnership agreement.

Farmers operating their business as a general partnership should draft a partnership agreement.³⁵ Agreements can set forth the specific terms that the parties want to govern the partnership. Some terms of a partnership agreement should not vary.³⁶ For example, no one in the partnership should “unreasonably” restrict access to records or other important business documents.³⁷

The agreement should contain, at a minimum, the following:

- **Interest:** Each partner's ownership interest, including the value of specific property and cash contributed by each;
- **Shared Profits:** How profits and losses are shared;
- **Distributions:** When distributions will be made;
- **Capital:** Any obligations or rights to contribute additional capital; rights to withdraw capital;
- **Decision-Making:** How management and control is shared among the partners and how decisions are made;
- **Authority:** The extent of each partner's authority to incur debt or liabilities for the partnership;
- **Restrictions:** Any limitations or prohibitions on transferring partnership interests;
- **Involuntary Transfer:** The rights of those acceding to interest by involuntary transfer;
- **Partners:** How to accept new partners and how current partners can withdraw from the partnership;
- **Buy-Sell Agreement:** A plan in the event of death, disability, or withdrawal of a partner;
- **Termination:** How, and under what circumstances, the partnership will terminate; and
- **Dissolution:** How assets will be distributed in the event of termination.

33 11 V.S.A. § 3401

34 *Id.*

35 STEPHEN C. ALBERTY, *supra* note 25, at § 5.7.

36 11 V.S.A. § 3401.

37 See *id.* at § 3203 (b)(2) (providing a complete list of terms).



These items should also be included in the operating agreement of an LLC that chooses to be taxed as a partnership.

In addition to addressing the distribution of profits, when drawing up a partnership agreement, the attorney should focus attention on the contributions of each partner to the partnership, the authority of the partners to act on behalf of the partnership, the division of management duties, and the resolution process for disputes. It is also advisable for the attorney to address some of the finer details, such as the process for a partner to withdraw from the partnership and the process required to dissolve the partnership, including how a withdrawing member's interest will be valued and the terms of its payment. It is important to structure these terms in ways that ensure the continued viability of the farm.

If there is no written partnership agreement, an agreement could still be inferred from the words, conduct, customs, and practices of the partners, particularly if the partners are sharing net income. An unintentional partnership can expose one partner to the liabilities engendered by the other partner. In addition, if agreement on a specific term is neither explicit nor inferable, Vermont's Partnership Act will supply the terms for the operation of the partnership and the relations of the partners, and ownership of the land will be controlled by the recorded deeds. Without a comprehensive written partnership agreement, it will be more difficult to wind down and terminate the partnership.

GENTLEMAN'S AGREEMENTS Sometimes farmers enter into "gentleman's agreements" with neighbors or relatives to share the profits from crops or to share some of the labor. Make sure to talk with the farmer about any gentleman's agreements the farmer may have to see if the farmer has unintentionally formed a partnership. It is important to explain to the farmer that any unwritten agreements pertaining to land ownership (leases over one year or fee ownership) are likely unenforceable due to the statute of frauds. So, any agreement pertaining to land should be reduced to writing, and most such agreements will need to be recorded.

Pros for Farmers

- **Ease of Formation and Management:** If there are two farmers operating one farm, any form of agreement to jointly operate the farm for profit will create a general partnership. The ease of formation and maintenance of the business structure can be a benefit for farmers.
- **Taxation:** Like a sole proprietorship, partnerships receive "pass-through" tax treatment, where partners pay income tax on any profits earned by the partnership, while the partnership itself is not taxed.³⁸ Partnerships may elect not to distribute excess cash to the partners and instead reinvest those profits in the business. Most often a transfer of property to an entity is not a taxable transfer. The primary exception is the debt in excess of basis rule.
- **Raising Capital:** General partnerships allow for outside investments because there is no limit on the number of partners. USDA's Farm Service Agency and the Vermont Economic Development Authority, however, will insist that the entity be primarily farmer owned. If the outside investor is not a farmer, it may preclude certain lenders from lending to the operation.

38 Vt. DEP'T OF TAXES, BUSINESS ENTITY INCOME TAX, <https://tax.vermont.gov/business-and-corp/corp-and-business-income-taxes/business-income> (last visited Jan. 7, 2020).



- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time. (However, absent a written partnership agreement addressing dissolution, the partners may disassociate at any time, leaving the remaining partner with an economic burden to buy out the departing partner.³⁹) When an LLC with two members chooses to be taxed as a partnership and one member decides to leave, the LLC continues as a single-member LLC. However, when one member leaves a two-member partnership, the entity terminates, which can cause some unintended tax consequences for the remaining member.

Cons for Farmers

- **Liability:** General partnerships expose partners to both upside and downside risk. In other words, partners share in all business profits and losses, and are also exposed individually to liability for business losses. All general partners are jointly and severally liable for all business obligations.⁴⁰ This means that creditors, and others, may sue any or all partners and recover debts from their personal assets.⁴¹
- **Ease of Transfer:** In Vermont, a partnership generally continues after dissolution, but only for the purposes of closing the business.⁴² Absent a provision in the partnership agreement to the contrary, or without the consent of the other partners, partners can grant only an interest in their share of the profits to an assignee, not the right to participate in the management and conduct of the partnership.⁴³ Therefore, if the farmer plans to transfer control of the farm to relatives or another party, the farmer should either ensure that the partnership agreement clearly provides for transfer of control or choose a different business structure.
- **Raising Capital:** Joint and several liability of general partners may deter outside investment because all investors who become partners will be exposed to the business' risks.⁴⁴ Or, a farmer may not wish to use a general partnership to raise funds when outside investors or partners would gain the right to influence farm management.
- **Partner Relationships:** While partnerships can provide many benefits, going into business with other individuals can complicate relationships, and disagreement among partners may consume resources, cause unnecessary stress, and adversely impact the business. Seeking out new partners can also be costly and uncertain.

LIMITED PARTNERSHIPS

A **limited partnership** (LP) is similar to a general partnership in that it requires at least two owners, but it differs in that the partners do not have equal obligations.⁴⁵ Under an LP, some partners are deemed “limited partners” who invest and are entitled to profits but do not have all of the rights or obligations of “general partners.”⁴⁶ The general partners control

39 11 V.S.A. § 3262.

40 *Id.* at § 3226.

41 *Id.* at § 3227.

42 *Id.* at § 3273.

43 *Id.* at § 3277.

44 ANNETTE M. HIGBY, ET AL., *supra* note 14, at 8.

45 11 V.S.A. § 3464(b).

46 *Id.* at § 3434.



business management and operations and remain liable for all business obligations.⁴⁷ The limited partners, on the other hand, enjoy a limitation of liability and have limited duties.⁴⁸ An LP must file a Certificate of Limited Partnership with the secretary of state.⁴⁹ Farmers in an LP should draft a partnership agreement addressing at least the issues discussed above regarding a general partnership.

Pros for Farmers

- **Taxation:** Like a sole proprietorship, partnerships receive “pass-through” tax treatment.⁵⁰ Partners pay income tax on any profits earned by the limited partnership, while the LP itself is not taxed. Partnerships may elect not to distribute excess cash to the partners and instead reinvest those profits in the business.
- **Limited Liability:** LPs protect limited partners’ personal assets from business liabilities and so can encourage investors.⁵¹ This could be a benefit for a farmer who wants multiple investors but wants to retain management and control of the farm. It may also be useful in distributing interests in the farm to children or other family members without subjecting them to potential liability for the obligations of the LP.
- **Ease of Transfer:** Unless otherwise provided in the partnership agreement, an LP can be consolidated or merged with another business entity as long as all general and limited partners approve.⁵² Additionally, individual partnership interests may be transferred if all partners consent to the transfer or the partnership agreement so provides.⁵³ (Note, however, that without a partnership agreement, transfers can be complicated.)
- **Life of Entity:** Farmers can have substantial control over the LP’s end by including termination conditions in the partnership agreement.⁵⁴
- **Raising Capital:** Unlike general partnerships, investors can provide capital without incurring any liability by becoming limited partners.⁵⁵ This provides a benefit for investors who do not wish to manage the farm and desire limited liability.

Cons for Farmers

- **Liability:** General partners in an LP remain personally liable for any actions the partnership takes.⁵⁶ The LP can elect in its Certificate of Limited Partnership to be a limited liability limited partnership (LLLP).⁵⁷ This election frees a general partner from any personal liability for an obligation of the LLLP arising “in contract, tort or otherwise.”⁵⁸

47 *Id.* at § 3433.

48 *Id.* at § 3423 et. seq.

49 *Id.* at § 3416.

50 Vt. DEP’T OF TAXES, *supra* note 38.

51 11 V.S.A. § 3423(a).

52 *Id.* at § 3423(b).

53 *Id.* at § 3403(b).

54 *Id.* at § 3432(7).

55 *Id.* at § 3423 et. seq.

56 *Id.* at § 3423(a).

57 *Id.* at § 3484 (3).

58 *Id.* at § 3423.



- **Partner Relationships:** While partnerships can provide many benefits, going into business with other individuals can complicate relationships, and disagreement among partners may consume resources, cause unnecessary stress, and adversely impact the business. Seeking out new partners can also be costly and uncertain.

LIMITED LIABILITY PARTNERSHIPS

A **limited liability partnership** (LLP) is a general partnership that has adopted limited liability status.⁵⁹ The LLP limits the personal liability of all the entity's partners, which minimizes the risks to partners' personal assets.⁶⁰ To form an LLP, the partners must choose a business name⁶¹ and register it with the secretary of state,⁶² along with a Certificate of Limited Liability Partnership.⁶³ A registered limited liability partnership must maintain a registered agent in the state.⁶⁴

Pros for Farmers

- **Taxation:** Like all partnerships, limited liability partnerships may receive “pass-through” tax treatment.⁶⁵ Partners pay income tax on any profits earned by the limited liability partnership, while the partnership itself is not taxed.⁶⁶ However, partnerships may elect not to distribute excess cash to the partners and instead reinvest those profits in the business.
- **Limited Liability:** All of the partners in an LLP are protected from its liabilities, except in the case of a partner's own negligence.⁶⁷ This protection extends to all partners, even those involved in farm management.
- **Raising Capital:** LLPs may accept investments from outside investors. Because an LLP is a general partnership with limited liability status, all persons jointly carrying on a business for profit will be considered partners. In an LLP, partnership status carries with it power over the management of the business. The LLP could be attractive to investors interested in farm management who want limited liability.
- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time.

Cons for Farmers

- **Ease of Formation and Management:** There are more formal steps and fees required to form and maintain an LLP, which may deter a farmer from choosing to form one.
- **Partner Relationships:** While partnerships can provide many benefits, going into business

59 ANNETTE M. HIGBY, ET AL., *supra* note 14, at 8.

60 11 V.S.A. §3226(c).

61 *Id.* at § 3292(a) (noting the name of a limited liability partnership must end with one of the following phrases or abbreviations: Registered Limited Liability Partnership (RLLP) or Limited Liability Partnership (LLP)).

62 VT. SEC'Y OF STATE, LIMITED LIABILITY PARTNERSHIPS (LLP), <https://www.sec.state.vt.us/corporationsbusiness-services/business-nonprofit-services/start-a-vermont-business/limited-liability-partnership-llp.aspx#reg> (last visited Jan. 5, 2020).

63 11 V.S.A. § 3291.

64 *Id.* at § 3404(2).

65 VT. DEP'T OF TAXES, *supra* note 38.

66 *Id.*

67 VT. SMALL BUS. DEV. CTR., I'M STARTING A BUSINESS WORKSHOP, <https://www.vtsbdc.org/new-business/> (last visited Jan. 7, 2020).



with other individuals can complicate relationships, and disagreement among partners may consume resources, cause unnecessary stress, and adversely impact the business. Seeking out new partners can also be costly and uncertain.

- **Ease of Transfer:** LLPs can face transfer difficulties similar to the general partnership.

LIMITED LIABILITY COMPANIES

A **limited liability company** (LLC) is a hybrid legal structure that provides the limited liability features of a corporation and the operational flexibility of a partnership.⁶⁸ LLCs have become the legal structure of choice for most farming operations choosing to form an entity. LLCs are popular business structures among farmers because LLCs do not demand as many formal requirements as other business entities and can be very flexible.⁶⁹ By default, LLCs are owned by members; members may also act as managers of the LLC.⁷⁰ LLC members are able to determine the roles of its members and how they want the company to operate.⁷¹ LLCs can be member managed, with each member having the authority to conduct the day-to-day business and to bind the entity. The LLC may also be manager managed, with one or two managers designated as having the authority to conduct the day-to-day operations and the other members having voting rights on larger questions affecting the operation. The latter can work well if some members are non-farmers. Generally, the operating agreement outlines the structure and role of the LLC members.⁷²

Pros for Farmers

- **Ease of Formation and Management:** Although there are some steps a farmer must take to maintain an LLC, they are less onerous than other business structure filing requirements, notably those for corporations. To form an LLC, the farmer must file a certificate of formation with the secretary of state.⁷³ The members should also create an operating agreement, which details how the LLC is to be governed and provides other organizational details.⁷⁴
- **Taxation:** LLCs can choose to be taxed as a partnership or as an S corp or a C corp. Single-member LLCs are taxed as sole proprietorships.⁷⁵ Multi-member farming operations generally choose to be taxed as partnerships. LLCs that choose to be taxed as partnerships can take advantage of all the flexibility available in the partnership structure; for example, income, management, and other economic interests need not flow from capital share.⁷⁶ For LLCs that choose to be taxed as S corps, the operating agreement must reflect the statutory requirements for S corp election, the most important being that all members must be treated equally and that capital share will dictate income share.

68 SBA, LIMITED LIABILITY COMPANY, <http://www.sba.gov/content/limited-liability-company-llc> (last visited March 11, 2019).

69 STEPHEN C. ALBERTY, *supra* note 25, at § 7:1.

70 ANNETTE M. HIGBY, ET AL., *supra* note 14, at 11.

71 11 V.S.A. § 4003.

72 *Id.* at § 4003(f).

73 *Id.* at § 4026.

74 *Id.* at § 4011(e).

75 STEPHEN C. ALBERTY, *supra* note 25, at § 7:5.

76 *Id.* at § 7:35.



- **Limited Liability:** Provided that the separateness and formalities of the LLC are maintained, LLCs provide a limitation on liability for all members with respect to the debts and liabilities of the LLC.⁷⁷ This can be attractive to farmers who want to be able to exercise control over the management of the farm and protect themselves from personal liability. Members must not mingle personal and business funds.
- **Ease of Transfer:** LLCs allow for the controlled transfer of interests in the LLC to other members, including the assignment of a member's interests to another party, as expressly provided in the operating agreement.⁷⁸ LLCs are good for farmers who want to transfer the farm business between generations or between owners, because LLCs allow for flexible operating agreements to accommodate various transfer situations.
- **Raising Capital:** LLCs can be a beneficial type of business entity if the farmer is interested in obtaining outside investments because there can be several different classes of members or managers.⁷⁹ By using an LLC rather than a corporation, a farm business can more flexibly structure investor relationships.⁸⁰
- **Other:**
 - ▶ *Multiple Business Ventures:* An LLC is good for farmers forming a multi-farm CSA because it allows multiple members to share CSA management and limit their liability. Similarly, an LLC may be a good option for farmers who have different business ventures and want to keep them separate. For example, if the farmer hosts a fall festival that includes hayrides or other such events, the farmer may want to use an LLC for the agricultural operation and a separate LLC for the festival operation, protecting the assets of the farming venture from the potential liabilities of the festival operation. However, putting each enterprise into its own LLC can add too much complexity, especially where one enterprise is providing goods and services to another enterprise. When the enterprises are integral to one another, it generally makes more sense to put them all in one farm operating entity, as discussed in the Dual Legal Structures section above.
 - ▶ *Higher-Risk Activities:* Farms that engage in higher-risk activities, such as fermenting, value-added operations, and agritourism, can create separate LLCs for those operations to protect the rest of the operation.
 - ▶ *Weighted Voting:* LLCs allow farmers to assign different weight to votes on different topics. For example, a farmer can use the “one member, one vote” model for operational decisions, or a higher voting threshold for major votes. The farmer can creatively allocate power by use of categories, classes, or voting rights. For example, certain day-to-day decisions can be made by any member, but major decisions can require a majority or super-majority vote. The LLC can also issue voting and non-voting units. A lawyer advising a farmer should discuss types of decisions, voting thresholds, and how to allocate control, then draft accordingly.

77 *Id.* at § 7:15.

78 11 V.S.A. § 4072 (c).

79 *Id.* at § 4059(1)(2).

80 LINNELL, CHOATE, & WEBBER, L.L.P., *STARTING YOUR OWN COMPANY: KNOW THE BASICS*, <http://lcwlaw.com/2012/03/starting-ourown-company-know-the-basics/> (last visited Jan. 7, 2020).



Cons for Farmers

■ Other:

- ▶ **Fees:** Annual state filing fees may be problematic for farmers with low gross income.
- ▶ **Paperwork:** An LLC also may not be a good option for farmers seeking limited paperwork or reporting burdens.
- ▶ **Personal Guarantee:** Some creditors may require farmers to personally guarantee their debts, regardless of the structure of their business, nullifying the usual protection from liability provided by the LLC structure (though this may also be true for other limited liability entities).

LOW-PROFIT LIMITED LIABILITY COMPANY (L3C)

The L3C is a relatively new legal form that combines aspects of a nonprofit and an LLC. Vermont was the first state to enact L3C legislation in 2008.⁸¹ Like a nonprofit, an L3C's primary mission is educational or charitable. Like an LLC, an L3C retains the ability to generate and to distribute limited profits to its members. However, a business may qualify as an L3C only if it “does not have a significant purpose of producing income or appreciating property” and “does not exist to accomplish one or more political or legislative purposes,” in addition to not having been formed “except for the company's relationship to the charitable or educational purposes.”⁸² An L3C can make a profit, but that cannot be a “significant” reason for formation.⁸³

The filing fees and process are the same as for an LLC, except that the organization must specify its mission and that it intends to be an L3C. One of the major driving forces behind the creation of L3Cs was to help socially minded organizations raise funds,⁸⁴ but it is not yet clear that the structure provides enough benefit to justify the restrictions. L3Cs are meant to attract “Program Related Investments” (PRIs). A PRI is a loan, investment, or other financial backing from a charitable foundation, except it must be made primarily to further the L3C's social mission, with profit being only a secondary goal. Because L3Cs have a social mission written into their bylaws, the hope was that private foundations would more readily support them through PRIs. To date, foundations do not seem to be making many PRIs to L3Cs. A lawyer may wish to consult with an expert in L3Cs if the client wishes to explore this option.

An L3C can also raise money in all of the traditional ways, such as attracting investors or taking out loans. Note that, unlike nonprofits, L3Cs are not eligible for IRS § 501(c) tax exempt status, and donations to an L3C are not tax deductible.

81 J. WILLIAM CALLISON & ALLAN W. VESTAL, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 Vt. L. Rev. 273, 275 (2010).

82 Vt. SEC'Y OF STATE, LOW-PROFIT LLC, <https://www.sec.state.vt.us/corporationsbusiness-services/business-nonprofit-services/start-a-vermont-business/limited-liability-company/low-profit-llc.aspx>.

83 *Id.*

84 J. WILLIAM CALLISON & ALLAN W. VESTAL, *supra* note 81, at 275.



Pros for Farmers

- **Limited Liability:** L3Cs enjoy the same limited liability as LLCs.
- **Raising Capital:** L3Cs can raise capital like for-profit companies but may also have access to funding sources traditionally associated with nonprofits (at least in theory).
- **Other:** Farmers can run a business with the potential to garner outside investment while prioritizing a social mission (if desired) above maximizing profitability.

Cons for Farmers

- **Taxation:** L3Cs are not eligible for tax-exempt treatment.⁸⁵
- **Purpose and Oversight:** Because L3Cs must “significantly further the accomplishment of one or more charitable or educational purposes” and cannot have a “significant purpose” to produce income, they may not fit with the farmer’s personal profit mission.

CORPORATIONS

A corporation is an independent legal entity owned by shareholders. The corporation itself, not the shareholders that own it, is legally responsible for the actions of the business and debts it incurs.⁸⁶ In Vermont, 486 farms are corporations, and 84 percent of these are family held.⁸⁷ For purposes of federal income tax treatment, a farm can organize as a C corporation or as a Subchapter S corporation. Smaller businesses, such as those likely to participate in the Hub, may wish to elect S corporation status with the IRS because of its tax advantages, i.e., the availability of pass-through taxation. If a corporation is larger and desires more flexibility in structuring its classes of shares, or plans to make a public offering of shares, it will likely prefer C corporation status, which taxes the corporation as a separate entity. This section provides a basic overview of both forms.

C Corporations

A corporation’s designation as “C” or “S” is determined in the company’s dealings with the IRS. To form any kind of corporation in Vermont, a farmer must prepare and file articles of incorporation.⁸⁸ These Articles of Incorporation include the name of the corporation, the number of shares the corporation is permitted to issue, the clerk of the corporation (who primarily handles the administrative functions of the corporation), and the incorporators, or people forming the corporation.⁸⁹ The corporation also needs bylaws,⁹⁰ directors,⁹¹ officers,⁹² and a good recordkeeping system.⁹³ Finally, the corporation needs to file annual reports with the secretary of state.⁹⁴

85 Vt. SEC’Y OF STATE, *supra* note 82.

86 11A V.S.A. § 7.32(f).

87 USDA NASS, Vt. SUMMARY BY SIZE OF FARM: 2012 54, 54-79, tbl.64 (2012), https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_064_064.pdf.

88 11A V.S.A. § 2.02.

89 *Id.* at § 2.02.

90 *Id.* at § 2.06(a).

91 *Id.* at § 8.02.

92 *Id.* at § 8.40.

93 *Id.* at § 16.01.

94 *Id.* at § 16.22.



Pros for Farmers

- **Limited Liability:** Shareholders are protected from the liabilities and debts of the corporation,⁹⁵ so long as the corporation maintains business formalities such as periodic meetings of the board of directors and careful recordkeeping.⁹⁶
- **Ease of Transfer:** Shareholders can sell their stock to a willing buyer unless prohibited by the rules of the corporation itself.⁹⁷ The entire corporation can be merged with other corporations. This is quite complex and may require an expert attorney.⁹⁸
- **Life of Entity:** Corporations can survive beyond the life of the shareholders—the stock passes to heirs or devisees. Dissolving a corporation in Vermont can be accomplished in various ways.⁹⁹
- **Raising Capital:** Corporations are useful tools for raising funds because of their ability to sell equity (shares) in the corporation, which is often easier and more familiar than selling partnership interests or LLC interests. A C corporation may offer different classes of shares, providing greater financing flexibility.

Cons for Farmers

Ease of Formation and Management: There are numerous formalities required to form a corporation. For example, the corporation must have a board of directors,¹⁰⁰ and hold at least one annual shareholder meeting.¹⁰¹ Other restrictions apply to corporations, including detailed recordkeeping requirements. These corporate formalities may differ from the farmer's current practices, and the costs of compliance will differ based on the farmer's needs, preferences, and business administration skills. Under the law, a corporation is a separate and legally distinct "person."

Taxation: C corporations are subject to federal and state corporate income tax, so income earned by a C corporation is subject to double taxation.¹⁰²

S Corporations

Farmers may use S corporations more often than C corporations.¹⁰³ In Vermont, a corporation becomes an S corporation only when, with the consent of all shareholders, it seeks special tax treatment by filing with the IRS.¹⁰⁴ In an S corporation, all shareholders must be natural persons, citizens, or resident aliens of the United States. Additionally, the corporation may not have more than 100 shareholders and not more than one class of stock.¹⁰⁵

95 *Id.* at § 7.32(f).

96 *Id.* at §§ 7.01-7.07, 16.01 *et seq.*

97 *Id.* at § 6.27(a).

98 *Id.* at § 11.08.

99 *Id.* at §§ 14.01-14.40.

100 *Id.* at § 6.02.

101 *Id.* at § 7.01.

102 LAWINC, FORM A VERMONT CORPORATION, <https://www.lawinc.com/learning-center/vermont-incorporation> (last visited Jan. 7, 2020).

103 CAFS, CORPORATIONS, <https://farmersmarketlegaltoolkit.org/business-structures/corporations/> (last visited Jan. 7, 2020).

104 DRM, A GUIDE TO DOING BUSINESS IN VERMONT: A LEGAL GUIDE FOR OUT-OF-STATE AND FOREIGN BUSINESSES 1, 28 (2017), https://www.drm.com/uploads/1269/doc/Guide_to_Doing_Business_in_Vermont.pdf.

105 *Id.*



Pros for Farmers

- **Limited Liability:** Shareholders are protected from the liabilities and debts of the corporation, so long as the corporation maintains business formalities such as periodic meetings of the board of directors and careful recordkeeping.¹⁰⁶
- **Ease of Transfer:** With the restrictions mentioned above concerning S corporation shareholders, stock can be transferred to other owners if not prohibited by the Articles or bylaws.¹⁰⁷ (However, this is not necessarily an easy or straightforward task.)
- **Life of Entity:** Corporations can survive beyond the life of the shareholders. A corporation is dissolved by shareholder vote or judicial action.¹⁰⁸ Dissolving a corporation in Vermont is complex—a farmer should consult an expert for assistance.
- **Taxation:** An S corporation is taxed similarly to a partnership, where the income and losses are passed through to the shareholders based on their ownership interests.¹⁰⁹

Cons for Farmers

- **Ease of Formation and Management:** Similar to the C corporation, there are numerous formalities required to form a corporation.
- **Raising Capital:** The S corporation's ability to raise capital may be closer to that of a partnership or sole proprietorship. S corporations are limited to one class of stock and 100 shareholders, who must be U.S. citizens or resident aliens.

Nonprofit Corporation

The Vermont Nonprofit Corporation Act governs nonprofit formation in Vermont.¹¹⁰ Nonprofit corporations are not organized to earn profits, so no part of its income may be distributed to members, directors, or officers. Nonprofits can be a mutual benefit corporation or public benefit corporation. Under either option, the organization is governed by a board of directors.

In Vermont, a public benefit corporation may be: (1) designated as a public benefit corporation by statute; (2) tax exempt under section 501(c)(3) of the Internal Revenue Code; or (3) organized for a public or charitable purpose and required to distribute assets to a similar tax-exempt organization upon dissolution.¹¹¹ An existing corporation may elect to become a nonprofit corporation by amending the corporation's Articles of Organization.¹¹² Nonprofit corporations must maintain complete and accurate records and books evidencing the proceedings of its members and directors, file an annual report with the secretary of state, and pay an annual filing fee.¹¹³ There may be little reason to form a nonprofit under Vermont law unless the operation is also going to obtain federal 501(c)(3) tax-exempt status.

106 SBA, CHOOSE A BUSINESS STRUCTURE, <https://www.sba.gov/business-guide/launch-your-business/choose-business-structure> (last visited Jan. 3, 2020); SBA, S-CORPORATION, <http://www.sba.gov/content/s-corporation> (last visited Apr. 22, 2015).

107 ANNETTE M. HIGBY, ET AL., *supra* note 14, at 9-10.

108 11A V.S.A. § 14.02.

109 DRM, *supra* note 104, at 28.

110 11B V.S.A. ch. 1.

111 *Id.* at § 17.05.

112 *Id.* at §§ 10.01-10.31.

113 *Id.* at § 16.01-16.22.



Pros for Farmers

- **Taxation:** A 501(c)(3) nonprofit corporation is exempt from federal income taxes and is also exempt from paying Vermont corporation taxes.
- **Limited Liability:** The members of a nonprofit corporation, if any, are generally not personally liable for the corporation's debts and liabilities.
- **Ease of Transfer:** Nonprofit assets belong to the public and any transfer must be made to another nonprofit. Any two or more nonprofit corporations in Vermont may merge or consolidate by adopting a plan of merger or consolidation contingent upon approval by the entities' members or directors and filing articles of merger with the state.
- **Life of Entity:** A nonprofit corporation can survive beyond the life of the members; a nonprofit corporation is terminated by member vote or judicial action.

Cons for Farmers

- **Ease of Formation and Management:** As with other corporate structures, this structure may impose high costs on the farmer. There are numerous filings and administrative requirements associated with nonprofit corporation status. Managing a nonprofit board, for example, can be very time consuming and a board's vision for the farm may differ significantly from that of the farmer.
- **Raising Capital:** Although nonprofit corporations are not prohibited from raising money, the directors of a nonprofit are obligated to focus primary attention on the promotion of the social mission of the corporation rather than the production of income. However, nonprofits do have access to grants and awards that might be unavailable to for-profit businesses.

There are times when a nonprofit tax-exempt corporation may make good sense, but an expert should be consulted before going too far down the road. Forming and maintaining nonprofit status can be very technical and prone to pitfalls.

COOPERATIVES

A cooperative is a business conducted for profit and owned by its members.¹¹⁴ Cooperatives are managed on a "one member, one vote" model. Profits are distributed in the form of distributions to members, which are proportional to a member's patronage with the cooperative. In the agricultural sector, cooperative members can be producers, purchasers, or workers. A producer cooperative might use the cooperative to collectively market and distribute the members' products. For example, a cooperative might help aggregate products from several smaller farms who want to sell to larger institutions but cannot meet the buyer's demand alone.

Similarly, dairy cooperatives help farmers share often prohibitively expensive equipment, marketing, and distribution costs. This kind of cooperative allows farmers to purchase supplies or equipment together, which can lead to bulk discounts or useful sharing.

In a worker cooperative, employees own and govern the business together. This might be

114 NEW ENG. FARMERS UNION, GROWING A FOOD SYSTEM FOR THE FUTURE: A MANUAL FOR CO-OPERATIVE ENTERPRISE DEVELOPMENT 1, 1 (2014), http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf.



a good option for a farmer who wants to give their employees an incentive to continue working on that particular farm, retaining their skills and experience over time.

Producer and purchasing cooperatives are similar to one another in formation and structure. Worker cooperatives operate under a distinct set of laws. For this reason, the rest of the section is divided into two subparts addressing the two categories of cooperatives.

Note that although some of the benefits of cooperatives can be achieved through other business structures, such as LLCs or nonprofits, cooperatives are unique structures. If a client calls the organization a cooperative, it must follow the cooperative statute.¹¹⁵ As interest in cooperatives has grown, there is more focus on protecting the term “cooperative” and ensuring that only cooperatives organized as such use the name.¹¹⁶

Marketing and Distribution Cooperatives

Under Vermont law, agricultural cooperatives (horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products)¹¹⁷ are organized under their own statutory sections,¹¹⁸ although each require articles of incorporation be filed with the secretary of state.¹¹⁹ Vermont’s general corporation law is also applicable to cooperatives.¹²⁰

Five or more persons, a majority of whom are residents of Vermont, are required to form a cooperative.¹²¹ Generally, cooperative members purchase common stock to raise capital.¹²² Cooperatives may also borrow or issue preferred stock.

The business of the association must be managed by a board of no fewer than five directors.¹²³ The members of the cooperative must adopt bylaws by a majority of the members.¹²⁴ The agricultural cooperative’s bylaws must specify how voting will occur. Usually cooperatives give each member one vote, though voting can be allocated in other ways in the articles of incorporation, such as based on patronage.¹²⁵ The bylaws may also determine the timeframe for which the association may distribute earnings and profits to its members.¹²⁶

115 11 V.S.A. § 981.

116 LEGAL FOOD HUB, FARM & FOOD LAW: A GUIDE FOR LAWYERS IN THE LEGAL SERVICES FOOD HUB NETWORK (ME) 1, 36 (2015), https://www.legalfoodhub.org/wp-content/uploads/2015/09/Farm-and-Food-Law-Guide-Maine_May-2015.pdf.

117 11 V.S.A. § 991.

118 *Id.* at § 992.

119 *Id.* at § 995 (11).

120 *Id.* at § 981.

121 *Id.* at § 993.

122 11 V.S.A. §§ 981, 1030; ANNETTE M. HIGBY, ET AL., *supra* note 14, at 19.

123 11 V.S.A. § 1006.

124 *Id.* at § 1000(b) (noting that member includes any agricultural producer, either corporate or individual, with whom the association shall do business, either directly or through a member cooperative association, amounting to at least \$100 during any fiscal year, and may, by the bylaws, include “employees”).

125 ANNETTE M. HIGBY, ET AL., *supra* note 14, at 19.

126 11 V.S.A. § 1001.



Pros for Farmers

- **Control of Own Operation:** Farmers that are members of agriculture cooperatives retain ownership over their own operations while also serving as members of the cooperative. Most agricultural cooperatives are likely made up of sole proprietorships.¹²⁷
- **Access to Services and Reduced Risk:** Cooperatives allow members to access business services at cost without assuming all the risks and expenses themselves. For example, a dairy-processing cooperative might allow members to spread the costs of expensive cheese-making equipment.
- **Increased Competitiveness:** By pooling resources and production, farmers benefit from economies of scale while retaining their small size and local control.

Cons for Farmers

- **Coordination Challenges:** Coordination challenges and potential collective action problems could be substantial. Each member has one vote, which can sometimes make it difficult to reach a collective decision.

Worker Cooperatives

Like the producer and purchasing cooperatives, worker cooperatives are organized under state corporation law.¹²⁸ Vermont's Worker Cooperative Corporations Act, sets out specific requirements for worker cooperatives.¹²⁹ In a worker cooperative, all members must be employed by the cooperative.¹³⁰ Each member must own exactly one voting share, called a membership share.¹³¹

The Worker Cooperative Corporations Act gives workers significant authority. For example, only members can vote to amend or repeal the cooperative's bylaws.¹³² Any earnings from the worker cooperative are distributed according to the amount of work each individual contributed to the cooperative.¹³³ Worker cooperatives may merge only with other worker cooperatives.¹³⁴

Pros for Farmers

- **Limited Liability:** Because worker cooperatives are organized under Vermont corporation laws, members are protected from liability as they would be under a traditional corporation structure.
- **Shared Ownership:** Farmers that want to operate a business collaboratively with other farmers could benefit from a worker cooperative. Worker cooperatives allow farmers to share ownership and control over a business, as well as the operation's risks.
- **Ease of Transfer:** A worker cooperative's Articles of Organization or bylaws determine the

127 LEGAL FOOD HUB, *supra* note 116, at 39.

128 11 V.S.A. § 1083.

129 *Id.* at § 1086.

130 *Id.* at § 1086(a).

131 *Id.* at § 1086(b).

132 *Id.* at 1087(b).

133 *Id.* at § 1088.

134 *Id.* at § 1092(b).



process for accepting and terminating members.¹³⁵ Depending on how these documents are worded, worker cooperatives can make changes in membership easy or difficult. Transitioning to a worker cooperative could enable the business to give ownership to employees over time.

Cons for Farmers

- **Control of Own Operation:** Because workers in a worker cooperative are also the owners of the business, a worker cooperative might not be ideal for farmers that want to retain sole ownership and control.
- **Withdrawal and Redemption of Equity:** It may be difficult to take any equity out of the cooperative upon exit. A farmer should carefully review the cooperative bylaws on withdrawal and redemption of equity.

CONCLUSION

An attorney can offer a farmer considerable business advice. In order to provide this advice, it is important to thoroughly understand the farmer's unique situation and needs. This chapter introduces some of these unique considerations to guide attorneys who work with farmers as they consider choice of business structure. While this chapter is focused on farms, the information it contains may also apply to food entrepreneurs and other related organizations seeking guidance on the pros and cons of various legal entities.



Resources



United States Department of Agriculture Economic Research Service

- <https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/>

Center for Agriculture and Food Systems Farmers Market Legal Toolkit

- <https://farmersmarketlegaltoolkit.org/business-structures/>

Annette M. Higby, A Legal Guide to the Business of Farming in Vermont

- <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>

Farm Commons

- <https://farmcommons.org/business-structures>

Legal Food Hub

- <https://www.legalfoodhub.org/resource-library/start-ing-running-a-business/>

135 *Id.* at § 1086.





CHAPTER III

LABOR AND EMPLOYMENT

Chapter Overview

Attorneys often assist business owners in their capacity as employers. Principal farm operators, as employers, face issues similar to those faced by an attorney's more traditional business clients, such as becoming a registered employer with the IRS, establishing worker classifications, navigating regulatory labor compliance, and establishing employment best practices. While similar, farm employers must also consider distinct exceptions and requirements. This chapter is meant to assist attorneys advising farmers with labor and employment issues. Several federal and Vermont laws address labor and employment issues, in general, and in the agricultural context, specifically. This chapter provides an overview of fair labor standards, migrant and seasonal worker protections, occupational health and safety on farms, and general employment best practices.

- 1. Becoming an Employer** The chapter begins with the preliminary steps an individual or business must take to become an employer. This section addresses how to structure a farm operation to be prepared for the onboarding of new workers or employees.
- 2. Worker Classification** The chapter progresses into a background on worker classification, exploring the more common classifications, such as an employee versus an independent contractor. It then focuses on the distinctions relevant to farm operators and discusses the differences between agricultural and nonagricultural workers as well as intricacies in using volunteers, interns, apprentices, and crew leaders.
- 3. Federal Employment Provisions** This section discusses how these classifications and accompanying federal provisions interact with employer requirements and labor compliance. This section focuses on federal standards that require fair labor practices, protections for certain classifications of employees or workers, and health and safety obligations that employers must meet.



4. **Vermont Employment Provisions** This section discusses Vermont-specific requirements and how such requirements may affect farm operators and their workers and other employees.
5. **Labor & Employment Best Practices** The chapter concludes by exploring best practices and common industry procedures that help farmers navigate employer responsibilities.



BECOMING AN EMPLOYER

To become an employer, a farm operator must apply for a Federal Employer Identification Number (EIN) with the Internal Revenue Service (IRS).¹

Farmers must then register with the Vermont Department of Labor (VDOL) to be able to withhold taxes from employees.² Employers then establish a payroll system to calculate and administer paychecks and withholdings.³ Next, employers must create personnel files to keep records of necessary documents, such as the Federal Tax Form 941,⁴ W-4,⁵ the I-9 form documenting work status,⁶ VT Form WHT-436,⁷ or VT Form WHT-434,⁸ as well as job descriptions, job applications, and related documents.⁹ As discussed below, employers may also wish to establish best practices, such as compiling and providing an employee handbook or administering a sign-up for employee benefits.¹⁰

- 1 See INTERNAL REVENUE SERV. (IRS), APPLY FOR AN EMPLOYER IDENTIFICATION NUMBER (EIN) ONLINE, <http://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online> (last updated Nov. 21, 2017) (noting that a farmer may have already been assigned an EIN if the farmer has formed a partnership, LLC, or corporation; the farmer may have this number on hand or retrieve it from the farm's accountant or directly from the IRS).
- 2 VT. DEP'T OF LABOR, HIRING EMPLOYEES, <https://tax.vermont.gov/business-and-corp/hire-employees/> (last visited Dec. 20, 2019).
- 3 VT. DEP'T OF TAXES, 2019 INCOME TAX WITHHOLDING INSTRUCTIONS, TABLES, AND CHARTS 1, 2 (2020), <https://tax.vermont.gov/sites/tax/files/documents/WithholdingInstructions.pdf>.
- 4 IRS, FORM 941 FOR 2019: EMPLOYER'S QUARTERLY FEDERAL TAX RETURN, <https://www.irs.gov/pub/irs-pdf/f941.pdf>.
- 5 IRS, FORM W-4 (2019), <https://www.irs.gov/pub/irs-pdf/fw4.pdf>.
- 6 U.S. CITIZENSHIP AND IMMIGR. SERV. (USCIS), I-9, EMPLOYMENT ELIGIBILITY VERIFICATION, <https://www.uscis.gov/i-9> (last updated Nov. 27, 2019).
- 7 VT. FORM HC-1, <https://tax.vermont.gov/sites/tax/files/documents/WHT-436.pdf>.
- 8 VT. FORM WHT-434, <https://tax.vermont.gov/sites/tax/files/documents/WHT-434.pdf>.
- 9 ANNETTE HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 1, 93-93 (2006), <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.
- 10 *Id.* at 111.



WORKER CLASSIFICATION

Workers are paid and have access to benefits according to their classification status. However, the classification of a worker depends on the facts of the employment relationship, not what the parties agree to call it.¹¹ As in other areas of business, the classification of a farmworker as an independent contractor or as an employee may result in varying administrative burdens (e.g., human resource management) or financial burdens to the employer (e.g., taxes). An employee misclassification may result in claims from workers and government agencies, a requirement to pay back certain expenses, or a requirement to offer certain benefits.¹²

All employers should be aware of the differences in classification of a worker as a volunteer, intern, or apprentice.¹³ Farm employers and their attorneys must also be aware of the distinction between agricultural employees and nonagricultural employees and the federal and state requirements and exemptions that apply depending on this status.¹⁴ Finally, farmers and lawyers should be aware of rules regarding the hiring of distinct types of agricultural workers: migrant and seasonal workers, immigrant workers, crew leaders, and Farm Labor Contractors, which will be discussed in the federal regulations section below.

DISTINGUISHING WORKERS Onboarding a worker as an independent contractor could reduce administrative and operational costs because the employer would not be required to withhold income taxes, pay taxes such as Social Security and Medicare, or provide other, sometimes costly, employee benefits (e.g., insurance, 401K matching, etc.). Also, many state and federal employment laws do not apply to independent contractors. Categorizing a worker as an employee would mean subjecting the employer to such employment laws and taxation requirements. Beware, however, of misclassification.

INDEPENDENT CONTRACTORS AND EMPLOYEES

Small businesses, including many farms in Vermont, may prefer to contractually classify workers as “independent contractors.” However, as mentioned above, contractually classifying someone as a contractor does not necessarily make them one. If a labor, tax, or judicial authority determines that the person has been misclassified, the business may be required to pay back payroll taxes, unemployment taxes, or other related expenses.¹⁵ These authorities will base their determinations on many different factors, none of which is controlling and all of which are weighed according to the particular circumstances of each case.¹⁶ As such, employers should be aware of both federal and state regulatory

11 IRS, INDEPENDENT CONTRACTOR (SELF-EMPLOYED) OR EMPLOYEE?, <http://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited Jan. 2, 2020).

12 See U.S. DEP'T OF LABOR, WAGE & HOUR DIV. (WHD), MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, <http://www.dol.gov/whd/workers/misclassification>.

13 ERIN HANNUM & RACHEL ARMSTRONG, FARM COMMONS, MANAGING RISKS OF FARM INTERNS AND VOLUNTEERS 1, 3-31 (2016), http://farmersmarketlegaltoolkit.org/wp-content/uploads/2017/11/FC_Interns-and-Volunteers-Guide-Federal.pdf (last updated Oct. 21, 2016).

14 29 U.S.C. §§201-219; 21 V.S.A. §§ 301-453; see also ANNETTE HIGBY ET AL., *supra* note 9, at 92-93.

15 29 U.S.C. §§201-219; 21 V.S.A. §§ 301-453; see also *id.* at 96-7.

16 29 U.S.C. §§201-219; 21 V.S.A. §§ 301-453; see also *id.*



requirements for worker classification, as well as the common law requirements¹⁷ that authorities use to establish the appropriate status of a person as either an employee or a contractor. An overview of these factors is provided below.¹⁸

- **Common Law and the IRS 20-Factor Test:** A worker is an employee when the employer for whom services are performed has the right to “direct and control” the worker who performs those services.¹⁹ The IRS has identified 20 factors that it considers to determine the extent of the “right to control”; these factors are not exhaustive, but help guide worker classifications.²⁰
- **The “ABC Test”:** Under Vermont law, to be appropriately classified as an independent contractor, the independent contractor must:
 - A. Continue to be free from control and direction by the employer;
 - B. Perform a service outside the employer’s ordinary course of business or away from all of the employer’s places of business; and
 - C. Be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.²¹

All three of these factors must apply to meet the test.

However, even when a farmer hires someone as an independent contractor, their relationship with the worker may still be classified as “employer-employee” under the common law “right to control” analysis. This is particularly true as principal farm operators may wish to instruct, train, and set the hours of workers. For example, if a dairy farm hires someone to milk cows, that person would be an employee because the principal farm operator may instruct, train, and set the hours of work. However, if the dairy farm hires a custom manure spreader, the person operating it is likely considered an independent contractor because the principal farm operator likely would not instruct, train, or set their hours. To avoid some of this uncertainty, farmers may hire “crew bosses” or “crew leaders” who then subcontract a staff of workers under their supervision, rather than under the direct supervision of the principal farm operator.

A crew leader is a person who furnishes and pays workers to do farm work for the principal farm operator. Crew leaders are employers of farmworkers. If there is no written agreement between the principal farm operator and an individual overseeing other workers, and if the individual (not the principal farm operator) pays other workers under them directly, then that individual will likely be considered a crew leader.²² Some states have ruled that

17 *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) (“[T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles.”).

18 See JOINT COMMITTEE ON TAXATION, PRESENT LAW & BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 3 (May 7, 2007), <http://www.irs.gov/pub/irs-utl/x-26-07.pdf> (noting these factors are by no means exhaustive, and the factors are meant to be broad sweeping, “[t]he degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed; factors other than the listed 20 factors may also be relevant.”).

19 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); IRS, FORM 1099-MISC & INDEPENDENT CONTRACTORS 1 (2017).

20 IRS, EMPLOYEE (COMMON-LAW EMPLOYEE), <https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee>.

21 VT. DEP’T OF LABOR, WHO IS AN EMPLOYEE VS. INDEPENDENT CONTRACTOR?, https://labor.vermont.gov/sites/labor/files/doc_library/Who%20is%20an%20Employee%20vs.%20Independent%20Contractor.pdf.

22 IRS, PUBLICATION 51, AGRICULTURAL EMPLOYER’S TAX GUIDE (2017), <http://www.irs.gov/publications/p51/ar02.html> (last updated Sept. 11, 2017), [hereinafter PUBLICATION 51].



farm supervisors (or “crew leaders”), while holding a managerial role, may be considered independent contractors under the “right to control” analysis, and the IRS has made this distinction as well.²³ Attorneys should note that crew leaders may be different from Farm Labor Contractors, described below.

AGRICULTURAL EMPLOYEES AND NONAGRICULTURAL EMPLOYEES

Attorneys representing farmers should be aware of the distinction between agricultural employees and nonagricultural employees (or, farm work and non-farm work). These distinctions play an important role in the areas of employment tax, worker compensation, and worker exemptions.²⁴

According to the IRS, a farmer’s employees are farmworkers if they:

- Raise or harvest agricultural or horticultural products on the farm (including the raising and feeding of livestock);
- Work in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment, if the major part of such service is performed on the farm;
- Provide services relating to salvaging timber or clearing land of brush and other debris left by a hurricane (also known as hurricane labor), if the major part of such service is performed on the farm;
- Handle, process, or package any agricultural or horticultural commodity in its unmanufactured state, if the farm produced over half of the commodity (or, for a group of up to 20 unincorporated operators, all of the commodity); or
- Do work for the farm related to cotton ginning, turpentine, gum resin products, or the operation and maintenance of irrigation facilities.²⁵

Under the Fair Labor Standards Act (FLSA), agricultural work is “farming in all its branches,” including harvesting, milking cows, growing crops, raising livestock or poultry, forestry and lumber practices, and other activities “incident to or in conjunction with” such activities, including storage and delivery to market.²⁶ When engaged in agricultural work, certain farms may be exempt from overtime and minimum wage requirements. For example, employees on “small farms” (those operating under “500 man-days”) are not entitled to federal minimum wage or overtime pay.²⁷ A man-day is any day in which an employee performs agricultural work for at least one hour; 500 man-days equates to approximately seven full-time workers.²⁸ If a farm’s labor falls below that 500 man-day threshold, then the employees are exempt from federal wage and hour laws, most notably overtime and minimum wage requirements. An employee that performs any hours of work falling outside of “agricultural work” must be paid according to Vermont’s overtime and

23 *Id.*; See *Palma v. Georgia Farm Bureau Ins. Co.*, 270 Ga.App. 333, 336 (2004) (“Based on the undisputed facts of this case, Stanley Farms does not control the time, manner, and execution of Oscar Cruz’s work to an extent that he could be considered an employee, rather than an independent contractor. Oscar Cruz hires his own workers, provides all tools to his workers, and sets his own hours.”).

24 IRS, (CIRCULAR A), AGRICULTURAL EMPLOYER’S TAX GUIDE 1, 1-28, note 20 (2019), <https://www.irs.gov/pub/irs-pdf/p51.pdf> (last visited Jan. 3, 2020).

25 IRS, FARMER’S TAX GUIDE 1, 79 (2018), <https://www.irs.gov/pub/irs-pdf/p225.pdf>.

26 29 U.S.C. § 203(f).

27 *Id.* at § 213(a)(6).

28 *Id.* at § 203(u).



minimum wage laws.²⁹ Farms may wish to avoid overtime requirements by putting workers on salary. However, farms should note the managerial requirements³⁰ and the new salary thresholds³¹ that apply in such situations.

The IRS defines farm work as a business where one “cultivate[s], operate[s], or manage[s] a farm for profit, either as owner or tenant.”³² “Farm-work does not include reselling activities that do not involve any substantial activity of raising agricultural or horticultural commodities, such as a retail store or a greenhouse used primarily for display or storage.”³³ Additionally, farm work does not include “processing services that change a commodity from its raw or natural state, or services performed after a commodity has been changed from its raw or natural state.”³⁴ Farm work does include work that is incidental to or done in conjunction with the farming operation. Packing and delivering one’s own product is agriculture. However, packing and delivering others’ products is not considered agriculture. Likewise, working a farm stand or farmers market is agriculture if the worker is only selling their own products.

VOLUNTEERS, INTERNS, AND APPRENTICES

New England farms are experiencing two different but related trends: (1) agritourism is on the rise, and (2) a new generation of farmers is learning the trade. Agritourism has become a popular segment of the agricultural industry, raising awareness of farm preservation, farm sustainability, and the value of farms in providing a nutritious diet.³⁵ Agritourism has led to an increase in volunteering on farms, which can implicate state and federal labor laws. Additionally, the need for current farm operators to train the next generation of farmers, coupled with the desire of the next generation to work with and learn from experienced farmers, has created some confusion around how to classify volunteers, interns, and apprentices.³⁶ Lawyers counseling farmers should be aware of the intricacies of each of these classifications to properly advise on matters of labor and employment compliance.

Volunteers

A volunteer “is someone who, without compensation or expectation of compensation, performs services at the direction of a nonprofit employer.”³⁷ Volunteers usually do so on a part-time basis and solely for their own pleasure.³⁸ Under the FLSA, for-profit, private-

29 21 V.S.A. § 383(2)(a) (excepting any individual employed in agriculture from the definition of an employee).

30 29 C.F.R. § 541.100.

31 U.S. DEP’T OF LABOR, WHD, DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, OUTSIDE SALES AND COMPUTER EMPLOYEES, 84 Fed. Reg. 51230, 51238 (Sept. 27, 2019) (codified at 29 C.F.R. 541), <https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20353.pdf>.

32 FARMER’S TAX GUIDE, *supra* note 25, at 27.

33 PUBLICATION 51, *supra* note 22.

34 *Id.*

35 NAT’L AGRIC. L. CTR., AGRITOURISM - AN OVERVIEW, <http://nationalaglawcenter.org/overview/agritourism>; see also UNIV. OF VT., VTRC, TOURISM IN VERMONT, <http://www.uvm.edu/tourismresearch/?Page=agritourism-resources.html> (last visited Jan. 3, 2020).

36 AM. FARMLAND TR., CONSERVATION L. FOUND., & NE SUSTAINABLE AGRIC. WORKING GRP, NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 37 (Mar. 2014), http://www.clf.org/wpcontent/uploads/2014/03/1.New_England_Food_Policy_FULL.pdf; SUZY KONECKY, NOFA, UNDERSTANDING LABOR LAWS FOR BEGINNING AND MENTOR FARMS (2013), <https://www.printfriendly.com/p/g/juMhpY>.

37 LAW. ALL. FOR N.Y., THE VOLUNTEER WORKFORCE: LEGAL ISSUES AND BEST PRACTICES FOR NONPROFITS 1, 7 (2007).

38 U.S. DEP’T OF LABOR, FAIR LABOR STANDARDS ACT ADVISOR, <http://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> (last visited Jan. 3, 2020).



sector employers may not have volunteers.³⁹ However, for-profit farms are able to have unpaid internships, subject to the details and limitations detailed in the following section.⁴⁰ Nonprofit farms may have volunteers with one major exclusion: they may not allow their employees to volunteer additional time (without compensation) for the same work they are employed to do.⁴¹

Volunteering on farms has grown into an international effort, as demonstrated by the popular volunteer program Worldwide Opportunities on Organic Farms (WWOOF).⁴² Particularly for small, nonprofit farms, recruiting volunteers is a way to lower costs for farmers and provide a learning experience to those interested in the farming process. Other similar work-exchange programs include HelpX, Workaway, and Global Help Swap.⁴³ Farmers should be aware of the types of duties that they are delegating to volunteers, keeping responsibilities to non-critical functions of the business.⁴⁴ Employers should also be aware that even partial compensation of a volunteer may trigger other obligations under employment and wage laws.⁴⁵ Only public agencies are allowed to compensate volunteers by payment of reasonable fees or stipends; nonprofits may provide supplies related to the volunteer's work or reimburse volunteers for their out-of-pocket expenses.⁴⁶

Interns

Interns do not fall in the volunteer category.⁴⁷ Internships, like volunteer opportunities, are traditionally used to educate those looking to enter a particular industry by providing hands-on experience and oversight. Internships can be paid or unpaid, and certain requirements apply.⁴⁸ The Wage and Hour division of the U.S. Department of Labor (DOL) has specifically stated that internships must:

- Be similar to training which would be given in an educational environment;
- Be for the primary benefit of the intern;
- Not displace regular employees, and provide for supervision by existing staff;
- Not provide the employer with an immediate advantage from the activities of the intern;
- Not necessarily entitle the intern to a job at the conclusion of the internship; and
- Include an understanding that the intern is not entitled to wages for the time spent in the internship (if unpaid).⁴⁹

39 *Id.*

40 *Id.*

41 *Id.*

42 WWOOF, ABOUT WWOOF, <http://wwof.net/#wwof> (last visited Jan. 3, 2020); see also Will Coldwell, *Work on a Farm – and See the World for Free*, THE GUARDIAN (Nov. 26, 2013), <https://www.theguardian.com/travel/2013/nov/26/working-farm-holidays-around-the-world>.

43 Christina Hegele, *Volunteer Abroad: WWOOFing and Other Options*, SANDAL ROAD (Oct. 18, 2018), <http://sandalroad.com/travel-tips/wwof/volunteer-abroad-wwoofing-and-other-options>.

44 LAW. ALL. FOR N.Y., *supra* note 37, at 29.

45 KAINEN, ESCALERA, & McHALE, P.C., ARE VOLUNTEERS A LEGAL LIABILITY FOR YOUR BUSINESS?, (Aug. 21, 2015), <http://www.kemlaw.com/are-volunteers-a-legal-liability-for-your-business>.

46 LAW. ALL. FOR N.Y., *supra* note 44, at 29 (citing 29 C.F.R. § 553.106).

47 FARMERS' LEGAL ACTION GRP., INC., FARMERS' GUIDE TO FARM INTERNSHIPS: FEDERAL AND MINNESOTA LABOR AND EMPLOYMENT LAW 2, 2 (Feb. 2013), <http://www.flaginc.org/wp-content/uploads/2013/05/Farm-Intern-Guide-FINAL-wcovers.pdf>.

48 U.S. DEP'T OF LABOR, WHD, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1, 1-2 (Jan. 2018), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

49 *Id.*



Because farmers will traditionally obtain an immediate advantage from farm-work employees, these employees typically cannot be considered interns and would need to be paid. Nonagricultural employees, however, may be classified as interns if they meet the above criteria. It is worth noting that, under Vermont law, any “aggrieved” person can bring a complaint for workplace discrimination or harassment, which would likely extend to interns, whether paid or unpaid.⁵⁰

Student Workers

Student workers are those who are enrolled in school full-time and employed part-time. Student workers may be referred to as interns, but must be paid.⁵¹ These workers may be paid below minimum wage if the appropriate steps are taken by the employer to apply for and obtain a certificate from the DOL.⁵² However, the DOL will not authorize the payment of less than minimum wage to student workers unless the employer meets several requirements, including: (1) the employment of student workers “will not create a substantial probability of reducing the full-time employment opportunities” of other workers; and (2) “[t]he occupational needs of the community or industry warrant the training of student-learners.”⁵³

Apprentices

An apprentice is a “worker, at least sixteen years of age unless a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade through a registered apprenticeship program. Training is provided through structured on-the-job training combined with supplemental related theoretical and technical instruction.”⁵⁴ In other words, an apprentice is recognized under the law as an employee. Apprentices are generally hired through registered apprentice programs with the federal or state government.⁵⁵ “Apprentice” can be a job title, but is not a legally recognized farmworker classification in Vermont.⁵⁶ It is possible, however, for farm employees to be classified as apprentices under federal law. Should farmers choose to apply for the federal classification of its new hires as “apprentices,” or alternatively as “learners,”⁵⁷ they must register

50 21 V.S.A. § 495b(b), <https://legislature.vermont.gov/statutes/section/21/005/00495b>; ERIN HANNUM & RACHEL ARMSTRONG, *supra* note 13, at 5.

51 See 29 U.S.C. § 214; 29 C.F.R. §§ 520.200-508; U.S. DEP’T OF LABOR, WHD, FACT SHEET #12: AGRICULTURAL EMPLOYERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1, 1-2 (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture> (hereinafter FACT SHEET #12).

52 U.S. DEP’T OF LABOR, WHD, FACT SHEET #32: YOUTH MINIMUM WAGE – FAIR LABOR STANDARDS ACT 1, 1-3 (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs32.pdf>; U.S. DEP’T OF LABOR, WHD, SUBMINIMUM WAGE, <http://www.dol.gov/general/topic/wages/subminimumwage>; U.S. DEP’T OF LABOR, WHD, INSTRUCTIONS FOR FORM WH-205: APPLICATION TO EMPLOY STUDENT-LEARNERS AT SUBMINIMUM WAGES, http://www.dol.gov/whd/forms/fts_wh205.htm; U.S. DEP’T OF LABOR, WHD, SPECIAL EMPLOYMENT, <http://www.dol.gov/whd/specialemloyment>.

53 See 29 U.S.C. § 214(b); 29 C.F.R. § 520.503.

54 *Id.* at § 520.300.

55 See UNIV. OF VT., EXTENSION, MEET THE VERMONT DAIRY GRAZING APPRENTICESHIP PROGRAM, <https://www.uvm.edu/extension/sustainableagriculture/news/meet-vermont-dairy-grazing-apprenticeship-program> (providing an example in Vermont) (hereinafter UVM Dairy Apprenticeship Program).

56 NOFA-Vt., LEGAL FAQ FOR FARM APPRENTICESHIPS, <https://nofavt.org/legal-faq-farm-apprenticeships>.

57 See 29 C.F.R. § 520.300 (“Learner means a worker who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgment must be learned and who, when initially employed produces little or nothing of value. Except in extraordinary circumstances, an employee cannot be considered a “learner” once he/she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility[ies] during the past three years. An individual qualifying as a “learner” may only be trained in two qualifying occupations.”).

with the DOL, and this may not substantively add value or affect employee expenses.⁵⁸ Importantly, as discussed below, because of the 500 man-day exemption, many small farms are already exempt from the federal minimum wage requirement and thus may not realize a large benefit from apprentice registration.

FEDERAL EMPLOYMENT PROVISIONS

Several other federal provisions impact farm labor and employment. Agencies such as the DOL, IRS, Equal Employment Opportunity Commission (EEOC), and Occupational Safety and Health Administration (OSHA) administer many of these federal provisions to ensure worker safety and fair labor practices. These provisions typically cover farm operators and their employees because they produce goods for interstate commerce.⁵⁹ Farmers in their capacity as employers are offered some exemptions from these provisions for farmworkers, such as minimum wage, overtime pay, recordkeeping, and child labor.⁶⁰

FEDERAL STANDARDS

Several federal provisions address the employment of migrant and immigrant workers as well as employee health and safety. Below is an overview of how these laws may affect farmers and their workers. It is important to keep in mind that, while these provisions set certain federal standards, they represent a minimum bar, meaning the state can set higher standards, which employers must follow. Two federal requirements that include absolute standards address equal employment and federal tax.

- Equal Employment Opportunity laws prohibit employers from discriminating against employees, potential employees, or previous employees based on an employee's protected class (e.g., age, race, sex, religion, etc.).⁶¹ Discriminatory practices include hiring and firing, classification, testing, and compensation, among others.⁶² EEOC requirements for farmers do not differ from requirements in other industries.
 - ▶ Prohibiting Retaliation: Moreover, as addressed in both section 15(a)(3) of the Federal Labor Standards Act (FLSA) and section 505(a) of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), employers are prohibited from retaliating against an employee who has filed a complaint against or cooperated in an investigation of the employer.⁶³

58 See U.S. DEP'T OF LABOR, WHAT IS A REGISTERED APPRENTICESHIP PROGRAM?, <https://www.apprenticeship.gov/registered-apprenticeship-program> (last visited Jan. 9, 2020) (increasing schedule of wages to be paid to the apprentice consistent with the skill acquired and noting that the entry wage must not be less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement); C.F.R. pt. 29.5A.

59 See FACT SHEET #12, *supra* note 51.

60 UNIV. OF VT., VERMONT FARM WORKER WAGE, HOUR AND HOUSING FACT SHEET 1, 4-5, <https://www.uvm.edu/vtvegandberry/VermontFarmLaborWageAndHousingFactSheet.pdf> (last visited Jan. 3, 2020).

61 EEOC, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION QUESTION AND ANSWERS, <http://www.eeoc.gov/facts/qanda.html> (last visited Jan. 3, 2020).

62 *Id.*

63 U.S. DEP'T OF LABOR, WHD, FACT SHEET #77A: PROHIBITING RETALIATION UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1, 1-2 (Dec. 2011), <http://www.dol.gov/whd/regs/compliance/whdfs77a.pdf>; U.S. DEP'T OF LABOR, WHD, FACT SHEET #77C: PROHIBITING RETALIATION UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) 1, 1-2 (Dec. 2011), <http://www.dol.gov/whd/regs/compliance/whdfs77c.pdf>.



- The Federal Unemployment Tax Act (FUTA) provides unemployment compensation to workers who have lost their jobs.⁶⁴ A farm employer pays FUTA tax if the farmer:
 - ▶ Paid cash wages of \$20,000 or more to farmworkers in any calendar quarter during the previous or current year;⁶⁵ or
 - ▶ Employed 10 or more farmworkers during at least some part of a day during any 20 or more different weeks during the previous or current year.⁶⁶
 - ▶ Crew leaders are considered employees of the farm operator for purposes of FUTA, unless:
 - ▶ The crew leader is registered under the Migrant and Seasonal Agricultural Worker Protection Act (discussed below); or
 - ▶ Substantially all of the workers supplied by the crew leader operate or maintain farm machinery provided by the crew leader.⁶⁷

FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is the federal statute that sets minimum wage, overtime, recordkeeping, and child labor standards. The Wage and Hour Division of the DOL enforces the Act.⁶⁸ The FLSA allows employers to pay their employees either in the form of cash wages or in the form of non-cash benefits, also known as in-kind benefits.⁶⁹ In-kind benefits are goods or services that an employer provides to an employee, such as food, housing, or other services.⁷⁰ The FLSA applies to any agricultural employee, as the term is defined under the Act;⁷¹ however, the FLSA creates exemptions from minimum wage, overtime, and child labor protections that can apply to farm operations.

- **Minimum Wage and Overtime:** The FLSA institutes a “500 man-day” rule, which exempts employers from paying a minimum wage if they have fewer than 500 man-days.⁷² A man-day is “any day during which an employee performs agricultural labor for not less than 1 hour.”⁷³ Also, under the FLSA, employees who are employed in agriculture are

64 PUBLICATION 51, *supra* note 22.

65 *Id.* (“To determine whether you meet either test above, you must count wages paid to aliens admitted on a temporary basis to the United States to perform farmwork, also known as “H-2A” visa workers. However, wages paid to “H-2A” visa workers aren’t subject to the FUTA tax.”).

66 *Id.*

67 21 V.S.A. § 1301.

68 FACT SHEET #12, *supra* note 51.

69 29 C.F.R. § 531.2(a); *see also* 29 U.S.C. 203(m); Walter M. Luers, *Workfare Wages Under the Fair Labor Standards Act*, 67 *FORD-HAM L. REV.* 203 (1998), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3502&context=flr>.

70 *Id.*; 29 C.F.R. § 531.2(a); *see also* 29 U.S.C. 203(m).

71 *Id.* at § 780.103(b) (“Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market).

72 The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2012); THE NAT’L AGRIC. LIBR., *FEDERAL AND STATE LAWS APPLYING TO AGRICULTURAL WORKERS* 1, 11-12, https://www.nal.usda.gov/sites/default/files/white_paper_web_new_7_30_2018.pdf.

73 29 C.F.R. § 780.305; *see* PA. STATE L., *AGRICULTURAL LABOR LAWS 101: UNDERSTANDING FEDERAL GOVERNANCE*, *presented at* NAT’L AGRIC. & FOOD L. CONSORTIUM 1, 17 (June 15, 2016), <http://nationalaglawcenter.org/wp-content/uploads/2016/06/Labor-Webinar-Read-Only-Compatibility-Mode.pdf>.



exempt from overtime pay provisions, meaning employees do not have to be paid time-and-one-half their regular rates of pay for hours worked more than 40 per week.

- **Child Labor Standards:** Numerous restrictions impact the employment of minors less than 16 years of age, particularly in occupations declared hazardous. However, under the FLSA, a farmer could allow an individual 14 years of age or older to work on the farm if certain conditions were met, such as ensuring that the working hours do not conflict with school hours and that the job is in a non-hazardous environment.⁷⁴ There are also exemptions for children related to the farmer.⁷⁵
- **Recordkeeping:** Employers must disclose the terms and conditions under which they are hiring, including the kind of work to be conducted, the amount workers will be paid, the number of hours the workers will work, and what type of housing the employer will provide (if any).⁷⁶ The employer must also keep records of certain information, such as identifying information of employees, and keep track of payroll data, such as whether employees are paid hourly, fixed, or piece-rate (i.e., paid by the number of units the employee harvests).⁷⁷ Lawyers representing farmers should be aware of the nuances of these provisions. For example, farmers must include the time waiting for a truck to arrive to pick up workers and the time workers spend waiting for a field to dry.⁷⁸ Other detailed provisions also stipulate what notices or posters must be presented and the language requirements of these disclosures.⁷⁹
 - ▶ Like all other employers, farm employers are required to display an official poster outlining the requirements of the FLSA.⁸⁰ As a precautionary measure, employers may want to consider keeping more than one set of records; paper and electronic, for example. Some of the major retention requirements for employers include the following:
 - *Three-Year Records:* Employers must preserve records of payroll, collective bargaining agreements, employment contracts, and sales and purchase records for three years.⁸¹
 - *Two-Year Records:* Employers must preserve supplementary basic records for two years.⁸² This includes basic employment and earnings records; wage-rate tables; order, shipping, and billing records; additions to or deductions from wages paid; and any records used by the employer to determine the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs are involved in the additions or deductions from wages paid.⁸³

74 29 U.S.C. § 213(c); see also <https://www.osha.gov/SLTC/youth/agriculture/other.html>.

75 U.S. DEP'T OF LABOR, WHD, FACT SHEET #40: OVERVIEW OF YOUTH EMPLOYMENT (CHILD LABOR) PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA) FOR AGRICULTURAL OCCUPATIONS (Dec. 2016), <http://www.dol.gov/whd/regs/compliance/whdfs40.pdf>; U.S. DEP'T OF LABOR, WHD, FACT SHEET #32: YOUTH MINIMUM WAGE – FAIR LABOR STANDARDS ACT (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs32.pdf>.

76 29 U.S.C. § 1821(a).

77 IRS, RECORDKEEPING, <http://www.irs.gov/businesses/small-businessesself-employed/recordkeeping> (last updated Nov. 27, 2019).

78 U.S. DEP'T OF LABOR, *Cultivating Compliance – An Agricultural Guide to Federal Labor Law*, YouTube (Sept. 3, 2015), <http://www.youtube.com/watch?v=tjYEFvsUeq0&feature=youtu.be>.

79 29 U.S.C. §§ 1821(b), (g).

80 U.S. DEP'T OF LABOR, WHD, COMPLIANCE ASSISTANCE – WAGES AND THE FAIR LABOR STANDARDS ACT (FLSA) (2017), <https://www.dol.gov/whd/flsa>.

81 29 C.F.R. § 516.5.

82 *Id.*

83 *Id.*



The FLSA also includes recordkeeping requirements specific to agricultural employers, which include maintaining records of an employee's:⁸⁴

- Full name
- Social security number
- Home address
- Birth date
- Gender
- Occupation
- Time and day of the week employee's workweek begins
- Hours worked each day and total hours worked each workweek
- Basis of employee's wages (for example, "\$12 per hour," "\$475 per week," or "piecework")
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to and deductions from the employee's wages and the purpose of each deduction
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment⁸⁵

These recordkeeping requirements are essential for compliance with the standards and exemptions set by the FLSA. They are also important to comply with other DOL-administered statutes such as the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).⁸⁶

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

Certain seasons require an influx of farmworkers. These workers are often referred to as migrant⁸⁷ or seasonal⁸⁸ workers. The MSPA establishes particular labor requirements for these workers. Like the FLSA, the MSPA establishes employment standards related to wages and recordkeeping.⁸⁹ Because many migrant or seasonal employees are transient and often from immigrant communities, the MSPA also establishes provisions pertaining to housing, transportation, and labor disclosures.⁹⁰

- **Transportation:** Farm employers must meet specific health and safety requirements. For example, if an employer provides transportation to workers, the method of transportation must be safe and meet certain requirements, such as a separate seat for each passenger, properly attached doors, adequate ventilation, and several others.⁹¹

84 *Id.* at §§ 516.1-34.

85 U.S. DEP'T OF LABOR, CULTIVATING COMPLIANCE: AN AGRICULTURAL GUIDE TO FEDERAL LABOR LAW 1, 12 <https://www.dol.gov/whd/FLSAEmployeeCard/AgGuideEnglish.pdf>.

86 Migrant and Seasonal Agricultural Worker Act, Pub. L. 97-470, 96 Stat. 2583 (1983), <http://www.gpo.gov/fdsys/pkg/STATUTE-96/pdf/STATUTE-96-Pg2583.pdf>.

87 29 U.S.C. § 1802(8) (noting the term "migrant agricultural worker" is "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").

88 *Id.* at § 1802(10) (noting the term "seasonal agricultural worker" is "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).

89 U.S. DEP'T OF LABOR, WHD, MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) (2017), <http://www.dol.gov/whd/mspa/index.htm>.

90 *Id.*

91 See 29 U.S.C. § 1841; 29 C.F.R. § 500.104; CULTIVATING COMPLIANCE, *supra* note 85, at 14-19.



- **Housing:** Similarly, if employers offer housing, it must be safe and sanitary, meeting such requirements as having a bed for each person, providing access to hot and cold running water, having first aid kits available, and other like standards.⁹²
- **In the Field:** The MSPA also addresses standards in the field, including drinking water, toilets, and handwashing facilities.⁹³ Employers who contract for these services must use only Farm Labor Contractors authorized by the DOL.⁹⁴
- **Farm Labor Contractor Registration:** Farm Labor Contractors are individuals who, for compensation, perform any farm labor contracting activity (this is different from crew leaders, mentioned above).⁹⁵ To legally operate as Farm Labor Contractors, individuals and companies must register with the DOL.⁹⁶ The DOL maintains a list of registered Farm Labor Contractors and a list of Farm Labor Contractors whose authorization to operate has been revoked. If an employer wishes to use a Farm Labor Contractor, they must first verify the contractor’s registration status.
- **Joint Employer Liability:** Under both the FLSA and the MSPA, the DOL may determine that an agricultural employer who uses the services of a Farm Labor Contractor is a “joint employer” of the workers furnished by the contractor.⁹⁷ In joint employment situations, the agricultural employer is equally responsible with the party furnishing the workers for compliance with employment-related FLSA and MSPA obligations (e.g., proper payment of wages, disclosures, and recordkeeping).⁹⁸ Courts will often consider the “joint employment” status of labor contractors and farm owners based on the “economic reality” of the relationship.⁹⁹ An example of factors a court might consider are whether the farm owner:
 - ▶ Controls the number of workers on the farm and the specific hours of work;
 - ▶ Has a significant degree of supervision and intervention in the work process;
 - ▶ Is involved in payroll practices; and
 - ▶ Has responsibility for investment and/or ownership of equipment used by the workers.¹⁰⁰

92 See 29 U.S.C. § 1823; 29 C.F.R. §§ 500.130-135; *CULTIVATING COMPLIANCE*, *supra* note 85, at 20-25.

93 See 29 U.S.C. § 1823; 29 C.F.R. §§ 500.130-135; *CULTIVATING COMPLIANCE*, *supra* note 85, at 28-29.

94 See 29 U.S.C. § 1823; 29 C.F.R. §§ 500.130-135; *CULTIVATING COMPLIANCE*, *supra* note 85, at 18 (noting that employers are encouraged to verify the “Farm Labor Contractor Certificate of Registration” card).

95 29 U.S.C. § 1802(6) (“[F]arm labor contracting activity” means “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.”).

96 U.S. DEP’T OF LABOR, WHD, INSTRUCTIONS FOR FORM WH-530: APPLICATION FOR A FARM LABOR CONTRACTOR OR FARM LABOR CONTRACTOR EMPLOYEE CERTIFICATE OF REGISTRATION, http://www.dol.gov/whd/forms/fts_wh530.htm (noting there are special registration requirements for Farm Labor Contractors who intend to house, transport, or drive a migrant or seasonal agricultural worker).

97 U.S. DEP’T OF LABOR, WHD, FACT SHEET #35: JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT (FLSA) AND MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) 1, 1-3 (Jan. 2016), <http://www.dol.gov/whd/regs/compliance/whdfs35.pdf>.

98 U.S. DEP’T OF LABOR, WAGES AND HOURS WORKED: WORKER PROTECTIONS IN AGRICULTURE (Dec. 2016), <http://www.dol.gov/compliance/guide/mspa.htm> (last visited Jan. 4, 2020) (hereinafter *WAGES & HOURS WORKED*).

99 See 29 C.F.R. § 791.2(a) (“A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of [FLSA] depends upon all the facts in the particular case.”); see also *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

100 *WAGES & HOURS WORKED*, *supra* note 98.

See 29 C.F.R. § 791.2(a); see also *Antenor*, 88 F.3d at 933-38; see also *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir. 2016).



H-2A VISA PROGRAM

Through the Immigration and Nationality Act, the DOL also oversees employer compliance requirements for immigrant workers. The H-2A visa is a special visa for “guest workers,” or workers who come into the United States specifically to perform temporary agricultural labor.¹⁰¹ The program is designed to ensure farmers have enough labor to cultivate their farms while protecting job opportunities for U.S. workers.¹⁰²

These workers may be hired through an application process with the DOL’s Employment and Training Administration.¹⁰³ In the application, the employer must state that (1) there is not a sufficient number of U.S. workers able, willing, and qualified to perform the requested services, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. Lawyers should be aware of the nuances in recordkeeping, reporting, and disclosures that are required if farmers employ H-2A workers.¹⁰⁴

H-2A VISA PROGRAM TOPLINE REQUIREMENTS

1. H-2A workers and domestic workers in like employment must be paid special rates of pay that vary by locality;
2. Must be provided housing and transportation from that housing to the job site if their employment requires them to be away from their residence overnight; and
3. Must be guaranteed an offer of employment for a total number of hours equal to at least 75 percent of the work period specified in the contract.

OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act (OSHA) also applies to farm operators as it regulates the health and safety of farmers and farmworkers.¹⁰⁵ OSHA implements a general duty on employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees,” and requires compliance with occupational safety and health standards promulgated under the Act.¹⁰⁶

101 U.S. DEP’T OF LABOR, WHD, FACT SHEET #26: SECTION H-2A OF THE IMMIGRATION AND NATIONALITY ACT (INA) 1, 1-4 (Feb. 2010) <http://www.dol.gov/whd/regs/compliance/whdfs26.pdf>.

102 JASPER WOMACH, CONG. RES. SERV. LIBR. OF CONG., AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS, AND LAWS 1, 133 (2005), http://digital.library.unt.edu/ark:/67531/metacrs7246/m1/1/high_res_d/97-905_2005Jun16.pdf.

103 USDA, H-2A VISA PROGRAM, <https://www.farmers.gov/manage/h2a> (providing information on the H-2A visa process for farm employers); see also U.S. DEP’T OF LABOR, WORK AUTHORIZATION FOR NON-U.S. CITIZENS: TEMPORARY AGRICULTURAL WORKERS (H-2A VISAS), <https://webapps.dol.gov/elaws/elg/taw.htm>.

104 See, e.g., CULTIVATING COMPLIANCE, *supra* note 85, at 32–37.

105 WOMACH, *supra* note 99, at 189 (noting that the Occupational Safety and Health Administration, the department that oversees OSHA, describes farming as “the nation’s most hazardous occupation.” OSHA defines a “farming operation” as “any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.”); DOROTHY DOUGHERTY, POLICY CLARIFICATION ON OSHA’S ENFORCEMENT AUTHORITY AT SMALL FARMS (July 29, 2014), https://www.osha.gov/dep/enforcement/policy_clarification_small_farms.html.

106 29 U.S.C. § 654(a).



OSHA specifically addresses hazards and controls that agricultural employers should be aware of, including but not limited to vehicle hazards, heat, ladders and falls, and musculoskeletal injuries.¹⁰⁷ These provisions also provide guidelines for other matters, like accident prevention signage, machinery guarding, and workers' compensation insurance.¹⁰⁸ Some businesses have some exemptions under OSHA, including farmers who employ 10 or fewer employees.¹⁰⁹

VERMONT EMPLOYMENT PROVISIONS

As mentioned above, some states have analogous laws to the federal laws identified above, and may set higher standards for farm employers.¹¹⁰ Aside from the Vermont Occupational Safety and Health Administration (VOSHA), Vermont also has standards to enforce the misclassification of workers¹¹¹ and provisions that set standards for minors in agricultural employment, which address minimum wage exemptions and exemptions to overtime pay.¹¹² For example, as of January 2020, the Vermont minimum wage for non-exempt agricultural employees is \$10.96,¹¹³ whereas the federal minimum wage is \$7.25.¹¹⁴

Additional relevant state agencies and laws include:

- **Vermont Department of Labor (VDOL):** The VDOL's rules align with and differ from the federal DOL's rules in particular ways.¹¹⁵ Lawyers counseling farmers should be prepared to address these differences with their clients and should be well versed in sections providing for exemptions. These standards can often be left open for interpretation and can vary based on individual circumstance. For example, the VDOL allows farmers to make deductions from wages "for the actual cost of housing and food," but such deductions must be confirmed in writing.¹¹⁶
- **Vermont Agency of Agriculture, Food and Markets (VAAF):** The Vermont Agency of Agriculture, Food and Markets administers, licenses, and permits specific agricultural operations, such as dairy, livestock, poultry, domestic pet-related, agricultural commodity, and seafood.¹¹⁷ VAAF also conducts inspections and enforces the laws regulating these operations.¹¹⁸

107 OSHA, AGRICULTURAL OPERATIONS: HAZARDS & CONTROLS, http://www.osha.gov/dsg/topics/agriculturaloperations/hazards_controls.html; U.S. DEP'T OF LABOR, WHD, FACT SHEET #51: FIELD SANITATION STANDARDS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT 1, 1-2 (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs51.pdf>.

108 See, e.g., OSHA, HAZARD PREVENTION & CONTROL, <https://www.osha.gov/shpguidelines/hazard-prevention.html>.

109 OSHA, SMALL BUSINESS, <http://www.osha.gov/dcsp/smallbusiness/index.html>; Jeff Caldwell, *OSHA Clarifies Small Farm Regulation: Does it Apply to Your Farm?*, SUCCESSFUL FARMING (Aug. 6, 2014), http://www.agriculture.com/news/business/osha-clarifies-small-farmregulation_5-ar44607.

110 NOFA-VT, FAQ: LABOR REGULATIONS FOR FARMERS, <https://nofavt.org/faq-labor-regulations-farmers>.

111 ANNETTE HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 1, 106 (2006) <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

112 CTR. FOR AGRIC. & FOOD SYS. (CAFS), LEGAL RESOURCE: FEDERAL AND STATE LAWS APPLYING TO AGRICULTURAL WORKERS 1, 12 (2018), https://www.nal.usda.gov/sites/default/files/white_paper_web_new_7_30_2018.pdf.

113 EMPLOYMENT LAW HANDBOOK, VERMONT MINIMUM WAGE LAWS, <https://www.employmentlawhandbook.com/wage-and-hour-laws/state-wage-and-hour-laws/vermont/minimum-wage/#1>.

114 U.S. DEP'T OF LABOR, WHD, CONSOLIDATED MINIMUM WAGE TABLE, <https://www.dol.gov/whd/minwage/mw-consolidated.htm>.

115 LEGAL RESOURCE: FEDERAL AND STATE LAWS APPLYING TO AGRICULTURAL WORKERS, *supra* note 112, at 26.

116 CAFS, HOUSING AND EMPLOYMENT RIGHT FOR VERMONT DAIRY WORKERS 1, 45 (2019), https://www.vermontlaw.edu/sites/default/files/2019-01/Migrant_Book_Citations_WEB.pdf.

117 VAAF, REGISTRATIONS AND LICENSING, <https://agriculture.vermont.gov/animal-health-0/registrations-and-licensing>.

118 VAAF, FOOD SAFETY & CONSUMER PROTECTION, <https://agriculture.vermont.gov/food-safety-consumer-protection>.



- **Vermont Workers' Compensation Act:** The main purpose of the Vermont Workers' Compensation Act is to provide wage replacement and other benefits (e.g., medical treatment) for those employees who have been injured, disabled, or killed while performing their jobs.¹¹⁹ Farms with an aggregate payroll below \$10,000 per year are exempt from workers' compensation requirements, though they may choose to elect coverage.¹²⁰
- **Unemployment Insurance:** Farms with less than \$20,000 in gross wages or that employ fewer than 10 workers are exempt.¹²¹
- **Family Leave:** Does not apply to small businesses (including farms) with fewer than 15 employees who work an average of 30 hours each week.¹²²
- **Parental Leave:** Does not apply to small businesses (including farms) with fewer than 10 workers who work an average of 30 hours each week.¹²³
- **Recordkeeping:** Vermont law specifically states that employers must furnish certain information in writing at the time of hiring a new worker.¹²⁴ This requirement includes the rate of pay, the hours of employment, and the wage payment schedule.¹²⁵

LABOR AND EMPLOYMENT BEST PRACTICES

Attorneys should be able to advise farm operators in a quasi-legal capacity, as well, helping farmers address issues that may not be strictly legal, but will help farmers oversee a smooth and successful workforce. The topics below explore a few farm and food industry best practices geared toward improving the management of labor and employment matters, as well as increasing access to industry-specific agency benefits.

DISCLOSURES

Farm operators can utilize disclosures to foster a positive and safe place of employment. There are some disclosures regarding employment that farmers are required to display, such as posters regarding responsibilities and wages. Farmers may also wish to display posters that are not required but will assist employees in their day-to-day efforts. Such posters may include safety best practices, wayfaring signs to help farmers navigate the land, or workers' rights posters. Farmers should also be sure to confirm employees are aware of these disclosures through routine communication with their workers.

119 HOUSING AND EMPLOYMENT RIGHT FOR VERMONT DAIRY WORKERS, *supra* note 116, at 36.

120 21 V.S.A. § 14(c) (exempting individuals engaged in agriculture where the employer's aggregate payroll is "less than \$10,000 in a calendar year, unless the employer notifies the [Department] that the employer wishes to be included within the provisions of [the Workers Compensation] chapter; the existence of a contract of insurance shall be considered sufficient notice.")

121 VT. DEP'T OF LABOR, EMPLOYER RESPONSIBILITY FOR UNEMPLOYMENT COVERAGE 1, 1-2, https://labor.vermont.gov/sites/labor/files/doc_library/UNEMPLOYMENT%20COVERAGE%202019.pdf.

122 21 V.S.A. § 471(3).

123 21 V.S.A. § 471(4).

124 Vt. Dep't of Labor, New Hire Reporting and Verification Systems, <https://labor.vermont.gov/unemployment-insurance/unemployment-information-employers/employer-online-services/new-hire-0> (last visited Jan. 4, 2020).

125 *Id.*



EMPLOYEE HANDBOOKS

Employers should also consider the need to create and maintain a positive farm culture through employee handbooks, which farmers should require employees to read at the beginning of their work relationship. These handbooks should address farm employment practices, and farmers should consider a separate section or an entirely separate handbook dedicated to farm safety. For accessibility, these handbooks should be in English, Spanish, and any other languages pertinent to the farmworkers.

RECORDKEEPING

Recordkeeping is vital to the success of any agricultural employer. As a best practice, employers should maintain a personnel file for each employee. Personnel files should contain data related to employment. Personnel files should not contain medical information and certain other types of sensitive information. Medical information should be stored in separate and confidential medical files.¹²⁶ Employers should also keep applicant records for non-hires, such as resumes, application forms, interview notes, and skill inventories.¹²⁷ Although laws do not require it, electronic retention should be considered because employers may be required to promptly retrieve and produce legible copies of records.¹²⁸

NONTRADITIONAL BENEFITS

Employers can help retain employees by offering a number of nontraditional benefits, such as allowing social service agencies to conduct outreach on the farm, letting employees take home food from the farm, or providing no-interest loans to employees that can be paid back through payroll deductions, among many other benefits.¹²⁹

EMPLOYMENT OF FAMILY MEMBERS

There are a number of exemptions that apply when family members are workers at a farm. Attorneys should be aware that minimum wage, overtime, labor disclosure, and recordkeeping requirements, among others, do not apply to immediate family members working on a farm, though this type of employment relationship may bring other challenges, particularly upon a blurring of the relationship between business and family.¹³⁰

126 HR SOLUTIONS BLOG TEAM, ADP, RECORDKEEPING FAQs: RETENTION, ACCESS & MORE (Aug. 10, 2015), <http://sbshrs.adpinfo.com/blog/recordkeeping-faqs-retention-access-and-more>.

127 HR SOLUTIONS BLOG TEAM, ADP, NEW HIRE PAPERWORK AND OTHER RECORDKEEPING REQUIREMENTS (Aug. 24, 2015), <http://sbshrs.adpinfo.com/blog/new-hire-paperwork-and-other-recordkeeping-requirements>.

128 *Id.* (noting electronic records may make searching records easier as well).

129 CAL. INST. FOR RURAL STUDIES ET AL., POSITIVE PRACTICES IN FARM LABOR MANAGEMENT—KEEPING YOUR EMPLOYEES HAPPY AND YOUR PRODUCTION PROFITABLE 1, 9 (2008), <http://attra.ncat.org/attra-pub/download.php?id=278>.

130 See, e.g., 29 C.F.R. § 570.70 (Excepting from FLSA-youth below the age of sixteen who are employed by their parents); see also FACT SHEET #12, *supra* note 51.



PAID SICK LEAVE

The state of Vermont requires employers to provide paid sick leave if an employee works an average of at least 18 hours a week and more than 20 weeks per year.¹³¹ The employer's sick time policy may differ from the legal requirements as long as they meet the minimum requirements.¹³²

CONCLUSION

Becoming and remaining a compliant employer requires clear communication and structure, as well as rigorous attention to detail, safety, and healthy working conditions. Formal structures will help employers define employee and worker relationships and keep a system in place for managing the complexities of payroll, benefits, seasonal hiring, and labor reporting. Safety is advanced through both communication and formal structures, but farmers should always be cognizant of their surroundings and working conditions. Through these steps, attorneys can effectively work with farmers to create clear relationships that are compliant with federal and state regulations. In this way, attorneys can help farmers continue to steward the land and build thriving businesses.



Resources



Center for Agriculture and Food Systems: Federal and State Laws Applying to Agricultural Workers

- https://www.nal.usda.gov/sites/default/files/white_paper_web_new_7_30_2018.pdf

United States Department of Labor: Cultivating Compliance – An Agricultural Guide to Federal Labor Law Handbook

- <http://www.dol.gov/whd/FLSAEmployeeCard/AgGuideEnglish.pdf>

Occupational Safety and Health Administration: Agricultural Safety Fact Sheet – Emergency Preparedness for Farmworkers

- <http://www.osha.gov/Publications/OSHA3870.pdf>

Northeast Organic Farming Association of Vermont: FAQ: Labor Regulations for Farmers

- <https://nofavt.org/faq-labor-regulations-farmers>

University of Vermont

- Vermont Farm Worker Wage, Hour and Housing Fact Sheet <https://www.uvm.edu/vtvegandberry/Vermont-FarmLaborWageAndHousingFactSheet.pdf>

Vermont Agricultural Business Management Guide

- https://www.uvm.edu/extension/agriculture/agriculture_business_management

Migrant Justice

- <https://migrantjustice.net/resources>

131 21 V.S.A. §§ 481(1)-(5), 482, 483(a), 484(a) (2017); see Vt. DEP'T OF LABOR, VERMONT EARNED SICK TIME LAW FAQs 1, 1-8, https://labor.vermont.gov/sites/labor/files/doc_library/Earned%20Sick%20Time%20FAQ%20modified.pdf.

132 Vt. DEP'T OF LABOR, VERMONT'S EARNED SICK TIME ACT FACT SHEET, https://labor.vermont.gov/sites/labor/files/doc_library/Earned%20Sick%20time%20new%20platform%202019.pdf.





CHAPTER IV

FOOD SAFETY

Chapter Overview

Food safety is a critical concern for farmers, food entrepreneurs, retail establishments, restaurants, and consumers. The federal government recently expanded its regulation of food safety practices on farms and in food processing facilities, in addition to state regulations that may apply to food entrepreneurs, including value-added on-farm businesses. Moreover, there are market-based food safety standards that farmers and food entrepreneurs may need to comply with in order to sell their products to grocery stores or institutions. As a result, many small-scale farmers and food entrepreneurs in Vermont are likely to encounter food safety requirements in some manner. And although many Hub participants are likely to be exempt from some of these requirements, attorneys assisting these clients will need to be prepared to discuss food safety issues with them. This chapter provides an overview of food safety regulation in the United States: it describes the federal Food Safety Modernization Act, relevant state law governing food safety, and some voluntary certifications available to farmers and food entrepreneurs.

- 1. Food Safety Overview** This section introduces the federal and state food safety regulatory framework and the key players involved in its oversight and implementation.
- 2. The Food Safety Modernization Act** This section describes the Food Safety Modernization Act (FSMA), focusing on the Produce Safety Rule (PSR) and Preventive Controls Rule (PCR), and the kinds of farm businesses impacted by these regulations. In Vermont, many small-scale farmers and food entrepreneurs are acutely aware of, and concerned about, FSMA and its new requirements.
- 3. Other Food Safety Regimes** This section discusses additional food safety standards that small-scale farmers and food entrepreneurs participating in the Hub may encounter, including voluntary food safety certifications like Good Agricultural Practices and Good Handling Practices, Vermont Department of Health regulations for “cottage” or in-home food production, and the food safety frameworks for dairy, livestock, and poultry.



FOOD SAFETY OVERVIEW

Food safety is a hot topic among farmers, food entrepreneurs, and the public at large. Recent nationwide foodborne illness outbreaks have been linked to foods that had rarely been implicated in prior outbreaks—for example, peppers, spinach, tomatoes, peanut butter, cookie dough, cantaloupes, and organic frozen berries.¹ Further, the United States food safety system has faced increasing criticism that its organizational complexity is an impediment to ensuring food safety in light of recent trends, such as increased consumption of imported foods and food adulteration.² In response to these outbreaks and criticisms, Congress passed the Food Safety Modernization Act (FSMA) in 2010, a sweeping act that incorporates produce safety into the country’s federal food safety framework for the first time.

Federal, state, local, and private authorities share responsibility for ensuring the safety of the U.S. food supply. At the federal level, responsibility is primarily split between the United States Department of Agriculture’s (USDA) Food Safety and Inspection Service (FSIS), which is charged with regulating the safety of most meat, most poultry, and some egg products, and the Food and Drug Administration (FDA), which historically regulated the safety of most other food products, such as prepared foods, seafood, and most imported products.³ An estimated 15 additional federal agencies exercise a lesser degree of control and oversight over various aspects of food safety, administering at least 30 relevant laws.⁴

FSIS and the FDA both ensure compliance with their respective requirements through inspections. For meat and poultry products sold within Vermont, an independent state program that FSIS monitors inspects processing facilities to ensure federal compliance.⁵ Any meat or poultry product sold across state lines must come from a USDA-inspected facility. The FDA primarily contracts with state agencies to perform inspections, including inspections related to the new FSMA requirements.⁶

Prior to FSMA, food safety standards for produce operations were mostly voluntary, and many farms went largely unregulated by the federal government and nearly all states. As discussed in the FSMA section below, farms not otherwise exempted that grow certain raw produce or process food, and other small-scale food entrepreneurs, may now be subject to standards similar to FSIS’s Hazard Analysis and Critical Control Point (HACCP) requirements.⁷

The Vermont Agency of Agriculture, Food and Markets (VAAFAM) and the Vermont Department of Health (VDH) are the two agencies responsible for enforcing food safety regulations in Vermont.⁸ VAAFAM is charged with ensuring farms and food facilities comply with certain federal and state laws, regulations, and licensing regarding food quality, safety, sales, and marketing.⁹ VAAFAM is also primarily responsible for food safety and food quality

1 CDC, CDC & FOOD SAFETY (Nov. 2018), <http://www.cdc.gov/foodborneburden/PDFs/CDC-and-Food-Safety.pdf> (listing new and different contaminated foods” as one of the current challenges to food safety).

2 RENÉE JOHNSON, CONG. RES. SERV., THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1, 1 (2016), <https://www.fas.org/sgp/crs/misc/RS22600.pdf>.

3 *Id.*

4 *Id.*

5 *Id.*; see also VAAFAM, VERMONT MEAT & POULTRY INSPECTION, <https://agriculture.vermont.gov/food-safety/vermont-meat-poultry-inspection>.

6 JOHNSON, *supra* note 2, at 2.

7 AM. FARMLAND TR., CONSERVATION L. FOUND. & NE SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 1, 70 (2014).

8 UNIV. OF VT., FOOD SAFETY REGULATIONS, https://www.uvm.edu/extension/food_safety_regulations (last visited Jan. 4, 2020).

9 VAAFAM, FOOD SAFETY, <https://agriculture.vermont.gov/food-safety> (last visited Jan. 4, 2020).



laws affecting production, aggregation, and sale of agricultural products in the state.¹⁰ VDH ensures retailers (restaurants, caterers, grocery stores, co-ops, etc.), farmers markets, and any other entities that prepare and serve food to the public comply with federal and state laws, regulations, and licensing.¹¹

Finally, the private sector may also mandate that suppliers comply with voluntary food safety audit schemes, such as the USDA's Good Agricultural Practices (GAP) or Good Handling Practices (GHP) audit program, or by imposing its own food safety and best practice standards.¹²

THE FOOD SAFETY MODERNIZATION ACT (FSMA)

FSMA, signed into law in January 2011, is the largest overhaul of the nation's food safety system in over 70 years.¹³ Among other changes, this extensive legislation gave the FDA new authority to issue mandatory recalls of food,¹⁴ broadened the FDA's authority to withdraw a food facility's registration (registration is required to introduce goods into commerce),¹⁵ and directed the FDA to establish new food safety requirements for food facilities and farms.¹⁶ Although the FDA regulated food facilities prior to FSMA's enactment, it had never regulated farms directly.

FSMA instructed the FDA to promulgate various rules to fill in the details of this new food safety regime. While there are still components of some of the rules that remain unresolved, the FDA has now finalized the following rules (listed by their commonly known names) to implement FSMA:

- Produce Safety Rule (PSR)¹⁷
- Preventive Controls Rule for Human Food (PCR)¹⁸
- Third-Party Accreditation Rule¹⁹
- Foreign Supplier Verification Programs Rule (FSVP)²⁰
- Preventive Controls Rule for Animal Feed (PCR-A)²¹

10 VAAFM, PRODUCE SAFETY RESOURCES, <https://agriculture.vermont.gov/produceprogram/produce-safety-resources> (last visited Jan. 4, 2020).

11 FOOD SAFETY REGULATIONS, *supra* note 8.

12 NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM, *supra* note 7, at 71.

13 Food Safety Modernization Act (FSMA), Pub. L. No. 111-353 (2011); Molly Peterson, *U.S. Senate Approves Biggest Food-Safety Overhaul in 70 Years*, BLOOMBERG (Nov. 30, 2010), <http://www.bloomberg.com/news/2010-11-30/broadest-food-safety-overhaul-in-70-years-approved-by-senate-in-73-25-vote.html> (last visited March 12, 2019).

14 Food Safety Modernization Act, Pub. L. No. 111-353, § 206 (2011).

15 *Id.* at § 102.

16 *Id.* at §§ 103, 105 (2011).

17 Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 82 Fed. Reg. 42963 (Nov. 27, 2015) (codified at 21 C.F.R. § 112) (hereinafter Final PSR).

18 Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 83 Fed. Reg. 46104 (Sept. 17, 2015) (codified at 21 C.F.R. § 117) (hereinafter Final PCR).

19 Accreditation of Third-Party Auditors to Conduct Food Safety Audits and to Issue Certifications, 81 Fed. Reg. 90186 (Nov. 27, 2015) (codified at 21 C.F.R. pt. 1) (hereinafter TPAR).

20 Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, 80 Fed. Reg. 74225 (Nov. 27, 2015) (codified at 21 C.F.R. pts. 1, 11, 111) (hereinafter Final FSVR).

21 Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Food for Animals, 80 Fed. Reg. 56169 (Sept. 17, 2015) (codified at 21 C.F.R. pts. 11, 16, 117, 500, 507, & 579) (hereinafter Final PCRA).



- Focused Mitigation Strategies to Protect Against Intentional Adulteration Rule (Food Defense)²²
- Sanitary Transportation of Human and Animal Food Rule²³

The PSR and the PCR are two of the most significant rules for farmers and food entrepreneurs and are the focus of this section. However, the Sanitary Transportation Rule—which sets standards for human and animal food shippers, loaders, carriers, and receivers—and the Preventive Controls Rule for Animal Feed—which establishes standards for animal food facilities—may also apply to local food businesses in Vermont.

The PCR went into effect November 16, 2015, and the PSR went into effect January 26, 2016.²⁴ Compliance dates for each rule are staggered. As of September 2018, all entities subject to the PCR must be in compliance;²⁵ all farms subject to the PSR must be in compliance by January 2020.²⁶ However, compliance with several PSR standards has been either postponed (standards related to agricultural water²⁷) or deferred (standards related to raw manure application²⁸). The FDA has also indicated that they will revisit the “farm” definition, which—as discussed below—bears significantly on whether produce packers or aggregators must comply with the PSR or the PCR. Due to these areas of regulatory uncertainty, the FDA delayed PSR inspections by one year (until spring 2019),²⁹ and established an enforcement discretion policy for certain entities that fall into the farm definition’s gray area.³⁰

PRODUCE SAFETY RULE (PSR)

The PSR establishes on-farm food safety requirements for farms that are growing, harvesting, packing, or holding “covered” produce, which are mainly fruits and vegetables generally consumed raw and not grown for personal use.³¹ If a produce operation meets the FDA’s definition of a “farm,” which includes operating as either a “primary production farm” or a “secondary activities farm,”³² then the operation would be subject to the PSR. If, however, the operation does more than is permitted under the “farm” definition (e.g., makes jam from berries grown on the farm), the operation may have to register as a food facility and follow the PCR, unless another exemption applies. However, in that situation,

22 Mitigation Strategies To Protect Food Against Intentional Adulteration, 81 Fed. Reg. 34165 (May 27, 2016) (codified as 21 C.F.R. pts. 11 & 121) (requiring registered domestic and foreign food facilities to identify and implement focused mitigation strategies to significantly minimize or prevent significant vulnerabilities identified at actionable process steps in a food operation in an effort to protect food from intentional adulteration of food caused by acts of terrorism).

23 Sanitary Transportation of Human and Animal Food, 81 Fed. Reg. 20091 (April 6, 2016) (to be codified 21 C.F.R. pt. 1 & 11) (establishes requirements for “shippers, carriers by motor vehicle and rail vehicle, and receivers engaged in the transportation of food, including food for animals, to use sanitary transportation practices to ensure the safety of the food they transport”).

24 See FDA, FSMA FINAL RULES: KEY DATES, <https://www.fda.gov/media/106390/download>.

25 FDA, FSMA Compliance Dates, <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-compliance-dates> (last visited Jan. 4, 2020).

26 *Id.*

27 Standards for the Growing, Harvesting, Packaging of Produce for Human Consumption, 84 Fed. Reg. 9706 (March 18, 2019).

28 FDA, RAW MANURE UNDER THE FSMA FINAL RULE ON PRODUCE SAFETY, <https://www.fda.gov/food/food-safety-modernization-act-fsma/raw-manure-under-fsma-final-rule-produce-safety> (last visited Jan. 4, 2020).

29 FDA, SPEECH TO THE 2017 NASDA ANNUAL MEETING (Sept. 12, 2017), <https://www.fda.gov/news-events/speeches-fda-officials/speech-2017-nasda-annual-meeting-09122017> (current as of Mar. 12, 2019).

30 FDA, Enforcement Discretion for Certain FSMA Provisions 1, 1-6, <https://www.fda.gov/media/110052/download> (last visited Jan. 4, 2020).

31 21 C.F.R. §§ 112.1-112.2.

32 *Id.* at § 112.3(c).



the farm would be considered a “farm mixed-type facility” because some of its activities (e.g., processing) fall under the PCR and other activities (e.g., growing produce) fall under the PSR.

Coverage under the PSR breaks down into four categories:

Farms That Are Not Covered:

Non-produce Farms: Farms that do not grow produce or only grow produce rarely consumed raw.³³

Excluded Farms: Farms whose annual average produce sales do not exceed \$25,000, adjusted for inflation.³⁴ This is also known as the “de minimis” exclusion.³⁵

Farms That Are Covered but Subject to Modified Requirements:

Produce That Is Further Processed: Farms whose covered produce undergoes further processing (e.g., a kill step) that “adequately reduces the presence of microorganisms of public health significance.”³⁶

Requirements: A farm that is subject to modified requirements must still comply with recordkeeping requirements under the PSR.³⁷

Farms That Are Covered but Subject to a Qualified Exemption:

Local and Regional Market Participants: Farms that are a certain size and sell primarily directly to consumers and retailers are eligible for a “qualified exemption” also called the direct-marketing exemption.³⁸

- To qualify, farms must have annual average food sales less than \$500,000, adjusted for inflation, and sell over half of their product to “qualified end users.”³⁹
- Sales to qualified end users include sales directly to consumers (e.g., in person at a farm stand, farmers market, or CSA, or online) and to restaurants and retail food establishments located within the same state or 275 miles from the farm selling the produce.⁴⁰

Requirements: A farm subject to a qualified exemption must comply with the following modified requirements:

- maintain annual sales records and an annual calculation justifying eligibility for the qualified exemption;⁴¹

33 *Id.* at §§ 112.2(a)(1), 112.3(c) (noting that food grains are not covered, including barley, dent- or flint-corn, sorghum, oats, rice, rye, wheat, amaranth, quinoa, buckwheat, and oilseeds (e.g. cotton seed, flax seed, rapeseed, soybean, and sunflower seed)).

34 *Id.* at § 112.4(a); see also FDA, FSMA INFLATION ADJUSTED CUT OFFS, <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-inflation-adjusted-cut-offs> (current as of May 20, 2019).

35 NAT'L SUSTAINABLE AGRIC. COAL., UNDERSTANDING FDA'S FSMA RULE FOR PRODUCE FARMS 1, 1-29 (Aug. 2016), <http://sustainableagriculture.net/wp-content/uploads/2008/08/FSMA-PRODUCE-RULE-FINAL.pdf>.

36 21 C.F.R. § 112.2(b)(1).

37 *Id.* at § 112.6(2), 112.7(a)-(b).

38 *Id.* at § 112.5

39 *Id.* at § 112.5(a)-(b); see also FDA, FSMA INFLATION ADJUSTED CUT OFFS, *supra* note 34.

40 21 C.F.R. § 112.3(c).

41 *Id.* at § 112.7(b).



- display name and complete business address on food package labels or at point of purchase;⁴² and,
- adhere to exemption withdrawal proceedings, if applicable.⁴³ If the FDA withdraws a farm’s qualified exemption, and an appeal is unsuccessful, the farm must come into compliance with all provisions of the PSR within 120 days of the withdrawal order, or before the next growing season if operations have ceased.⁴⁴ A farm whose exemption has been withdrawn may have it reinstated when certain circumstances are present and a farm follows the required procedures.⁴⁵

Farms That Are Covered and No Exemptions Apply:

If a farm has over \$25,000 in produce sales and does not otherwise qualify for an exemption or qualified exemption, then the farm must fully comply with the PSR.

Requirements: A covered farm must comply with requirements (including record-keeping) in the following categories, some of which are discussed briefly below:

- worker training and health and hygiene;⁴⁶
- agricultural water;⁴⁷
- biological soil amendments;⁴⁸
- treatment of wild and domesticated animals;⁴⁹ and
- equipment, tools, and buildings.⁵⁰

The PSR represents the first time the federal government has regulated on-farm practices regarding produce safety. The increased role of government in the daily practices of farms is a big shift for many farmers and may impose significant costs and burdens.

Because the qualified exemption is based on sales of “all food” produced on a farm and not just produce sales, some farms are considering forming separate business entities for their produce and non-produce (e.g., beef or dairy) operations. Some farms may even consider this strategy to fall below the de minimis exemption (e.g., splitting their farm into separate entities by produce type). Under the qualified exemption, if a farm had \$450,000 in dairy sales and \$75,000 in produce sold at a farmers market, that farm would be subject to the full requirements of the PSR. Many farms in Vermont are diversified, growing dozens of vegetable varieties, and many are also integrated with animal production. Others are venturing into value-added processing by turning their farm-grown produce into pies and jellies and other products. It is important for an attorney to talk through the full range of activities that a farm conducts in order to understand the range of compliance scenarios applicable to that farm.

42 *Id.* at § 112.6(b).

43 *Id.* at § 112.6(a)(4).

44 *Id.* at § 112.204(a).

45 *Id.* at § 112.213.

46 *See, e.g., id.* at §§ 112.21, 112.22, 112.31-33 (providing training requirements for personnel who handle covered produce & minimum training requirements and outlining health and hygiene measures for personnel and visitors).

47 *Id.* at § 112.41-50.

48 *Id.* at § 112.51-60.

49 *Id.* at § 112.81-84.

50 *Id.* at § 112.121-140.



Forming multiple legal business entities within a farming operation may be a useful business strategy for a range of reasons (e.g., estate or succession planning, taxes, liability). For FSMA purposes, the FDA has stated that, to determine sales, the relevant entity is the “farm business,” not the owner or operator of the farm.⁵¹ This seems to imply that establishing separate LLCs (for example) for the dairy and produce components of a farm means the farm could fall below the sales threshold. However, the FDA has stated in draft guidance that the determination of whether a farm meets the “operation under one management” criteria will be made on a case-by-case basis.⁵² Therefore, it is important to consider whether the formation of separate legal entities would result in multiple entities still within a single “operation under one management,” **and to consider business entity formation within the context of all aspects of the law, not just FSMA compliance.** Chapter II discusses business structure in more detail.

Although many farms in Vermont will fall under the de minimis or qualified exemption and, therefore, will not be subject to the full PSR requirements, food safety is still a critical component of any food or farm business. Moreover, many buyers (particularly wholesale, but increasingly institutions and retail grocers) are requiring evidence of food safety compliance, whether based on a FSMA inspection or a voluntary third-party audit. For farms that are considering scaling up or selling to wholesale or institutional markets (e.g., schools), FSMA will likely come into play regardless of their status as exempt or qualified exempt.

VAAFM will enforce the PSR in Vermont pursuant to a cooperative agreement with the FDA and authority from the Vermont legislature.⁵³ As part of PSR implementation, VAAFM has developed a Produce Safety Improvement Grant program available to farms to make food safety upgrades to their infrastructure (e.g., wash stations) and practices.⁵⁴ VAAFM’s Produce Safety Program also provides significant educational resources for farms, including a voluntary on-farm readiness review, which is an educational pre-compliance visit to ascertain a farm’s readiness to comply with FSMA.⁵⁵

PREVENTIVE CONTROLS RULE (PCR)

The PCR establishes food safety requirements for food facilities that manufacture, process, pack, or hold food for consumption in the United States.⁵⁶ The PCR is more relevant for food entrepreneur clients, whether processors or aggregators (e.g., food hubs), but, as mentioned above, certain farm operations may be subject to both the PSR and the PCR.

Prior to FSMA, all facilities were required to comply with current good manufacturing practices (cGMPs). In addition, certain higher-risk facilities (e.g., juice and seafood facilities) were required to create food safety plans called Hazard Analysis and Critical Control Point (HACCP) plans.⁵⁷ Post-FSMA, facilities must comply with updated cGMPs and

51 Final PSR, *supra* note 27.

52 FDA, CLASSIFICATION OF ACTIVITIES AS HARVESTING, PACKING, HOLDING, OR MANUFACTURING/ PROCESSING FOR FARMS AND FACILITIES: GUIDANCE FOR INDUSTRY (DRAFT GUIDANCE) 1, 1-40 (Aug. 2016), <https://www.fda.gov/media/99911/download>.

53 6 V.S.A. ch. 66 § 852; see VAAFM, 2017 ANNUAL REPORT 1, 11 (2017), <https://agriculture.vermont.gov/sites/agriculture/files/AgencyImages/2017%20Annual%20Report%20Final%20EDITED%20pdf.pdf>.

54 VAAFM, VERMONT PRODUCE SAFETY IMPROVEMENT GRANTS, <https://agriculture.vermont.gov/ProduceSafetyGrants> (last visited Jan. 4, 2020).

55 VAAFM, ON-FARM READINESS REVIEWS, <https://agriculture.vermont.gov/produceprogram/OFRR> (last visited Jan. 4, 2020).

56 21 C.F.R. § 117.3 (providing the definition of a facility).

57 *Id.* at § 123 (relating to seafood products); 21 C.F.R. § 120 (relating to juice products).



must now create food safety plans based on a Hazard Analysis and Risk-Based Preventive Controls (HARPC) framework.⁵⁸

Coverage under the PCR breaks down into four categories as well:

Facilities That Are Exempt from Food Facility Registration and the PCR:

Farms: Operations that satisfy the FDA’s definition of a “farm,” which includes either a “primary production farm” or a “secondary activities farm,” are exempt from registering with the FDA as a food facility, and therefore are not subject to the PCR.⁵⁹

Retail Food Establishments: Prior to FSMA, retail food establishments, such as grocery stores and restaurants that sell the majority of their food directly to consumers, did not have to register as facilities with the FDA.⁶⁰ FSMA clarified that this category of businesses includes roadside stands, CSAs, and other direct-to-consumer operations that sell the majority of their food directly to consumers.⁶¹ As such, they do not have to register with the FDA or comply with the PCR (though state or local health laws may apply to such businesses).

Facilities That Are Exempt from the HARPC Requirements:

Small and Very Small Farm Mixed-Type Facilities That Conduct Certain Activities On-Farm: FSMA required the FDA to exempt certain low-risk activities from the bulk of the regulations when conducted on small-scale farms.⁶² A farm mixed-type facility must be a small or very small business⁶³ and must conduct only low-risk activities.⁶⁴ These low-risk activities are listed in the PCR and include activities like chopping nuts, milling flour and baking breads or cookies, and making maple syrup.⁶⁵ These operations must register with FDA as a food facility and follow cGMPs.

Facilities That Are Subject to a Qualified Exemption (Qualified Facilities):⁶⁶

Local and Regional Market Participants: The facility must have less than \$500,000 in average annual sales of food over the past three years and more than half of those sales must be to qualified end users (i.e., the same definition as the PSR, as included in FSMA’s statutory text).⁶⁷

Very Small Businesses: In addition to the statutory exemption for local and regional marketing, the PCR considers any business that meets the regulatory definition of a “very small business” to be a qualified facility and eligible for modified requirements.⁶⁸ A very small business is one with less than \$1 million in annual sales, based on average sales over the past three years and adjusted for inflation.⁶⁹

58 *Id.* at § 117

59 *Id.* at § 1.226(b) (explaining that farms are exempt from registering with FDA as a food facility).

60 *Id.* at § 1.226(c).

61 *Id.* at § 1.227.

62 See Pub. Law 111-353; 124 Stat. 3885, 3897.

63 21 C.F.R. § 117.3.

64 *Id.*

65 *Id.* at § 117.5(g)(3).

66 *Id.* at § 117.5(a)

67 *Id.* at § 117.5

68 *Id.* at 117.3

69 *Id.*; see FSMA INFLATION ADJUSTED CUT OFFS, *supra* note 34.

Requirements: Qualified facilities must comply with the following requirements:

- register with the FDA as food facilities;
- follow updated cGMPs;⁷⁰
- submit two attestations to the FDA, one attesting to status as a qualified facility, and the other attesting that the facility is either identifying potential hazards and implementing and monitoring preventive controls for those hazards, or is in compliance with any applicable non-federal (e.g., state or county) food safety law.⁷¹ Attestations can be submitted online or by mail, and the PCR does not require a business to send in records of sales or compliance, but does require it to maintain such records;⁷² and
- adhere to exemption withdrawal proceedings, if applicable. The FDA can withdraw this qualified exemption, but must follow certain procedures for doing so.⁷³ If this happens, and an appeal is unsuccessful, the facility must come into compliance with all applicable provisions of the PCR within 120 days of the withdrawal order.⁷⁴

Facilities That Are Covered:

Facilities: Establishments that manufacture, process, pack, or hold food for consumption in the United States, where no exemption applies.

Farm Mixed-Type Facilities: Farm mixed-type facilities are farms that conduct facility activities, such as manufacturing or processing food beyond the exempted activities cited above. The PCR covers only the facility activities of a farm mixed-type facility, not the farm activities (e.g., growing produce or raising livestock).⁷⁵

Requirements: Covered facilities are required to comply with the following requirements:

- register as a food facility with the FDA;
- follow updated cGMPs;⁷⁶ and
- follow HARPC standards, which include (in addition to recordkeeping) identifying manufacturing and processing activities that might pose a food safety risk, creating a food safety plan to prevent those risks, monitoring the processes, fixing any problems, keeping records of manufacturing and processing activities, establishing a risk-based supplier verification program for raw materials and ingredients identified as a significant hazard when controlled by the supplier, identifying corrective actions a facility will take in the event controls are inadequate or fail, and performing various verification measures.⁷⁷

Unlike the PSR, the PCR does not contain a de minimis exemption for facilities with low sales figures. This means that, unless another exemption applies, if a farm conducts

70 21 CFR § 117.5(a)

71 *Id.* at § 117.201(a); see FDA, QUALIFIED FACILITY ATTESTATION, <https://www.fda.gov/food/registration-food-facilities/qualified-facility-attestation>.

72 *Id.*

73 21 C.F.R. § 117.251-117.287.

74 *Id.* at § 117.260.

75 *Id.* at § 117.5(k)(1)(iv) (exempting the activities of a farm mixed-type facility that fall within the “farm” definition from the PCR).

76 *Id.* at § 117.10-117.110

77 *Id.* at § 117.126-117.190 (denoting subpart C); *id.* at § 117.405-117.475 (denoting the supply chain program).



activities that make it a mixed-type facility, it will have to comply with the PCR no matter its size.

Most of the farmers and food entrepreneurs that attorneys will encounter through the Hub will fall under an exemption or qualified exemption from either or both rules. However, the FDA can withdraw many of the exemptions under the PSR and PCR under certain circumstances. As such, attorneys should become familiar with the basic coverage provisions and requirements of the rules. And, as noted above, even though several aspects of the rules and their implementation are not fully resolved, the food industry is already beginning to shift market-based food safety requirements based on the new federal food safety regime. By learning the basics of FSMA, attorneys will be able to speak with clients about possible business implications of the two rules, and help clients make decisions not only about their immediate compliance needs, but also about future growth opportunities and challenges.

OTHER FOOD SAFETY REGIMES

In addition to federal regulations, farmers and food entrepreneurs may participate in or wish to understand other food safety standards, such as voluntary produce safety certifications, state requirements for in-home food businesses (or “cottage” food laws), or the food safety requirements for dairy, meat, and poultry production. This section provides basic information for each of those topics.

GAP, GHP, AND CAPS

Many farms, including those that are exempt from FSMA, may participate in or wish to understand other food safety standards and certifications in part because such certifications are a means of accessing new and larger markets.

The USDA created the Good Agricultural Practices (GAP) and Good Handling Practices (GHP) quality certification programs to offer farmers a voluntary method of demonstrating compliance with standard food safety practices for farm production and harvesting (GAP) and packing, storage, and distribution of crops (GHP).⁷⁸ Neither GAP nor GHP certification is a legal requirement, although they are preferred or required by many larger or institutional purchasers, such as grocery stores or schools. The programs provide verification that certified farmers are following generally recognized industry best practices to reduce the risk of contamination. In Vermont, a GAP or GHP audit requires that someone from the USDA visit the farm to assess its practices.

In 2011, the USDA incorporated the industry Produce GAP Harmonized Food Safety Standard into its GAP and GHP audit programs and, in 2018, worked with the FDA to align Harmonized GAP (HGAP) with the requirements of the FSMA PSR.⁷⁹ The goal of HGAP is “one audit by any credible third party, acceptable to all buyers.”⁸⁰ HGAP sets standards and audit checklists for pre- and post-harvest operations for all fresh produce commodities, all

78 USDA AMS, FRESH FRUIT AND VEGETABLE AUDIT PROGRAMS, <http://www.ams.usda.gov/AMSV1.0/gapghp> (last visited March 13, 2019).

79 USDA AMS, USDA ALIGNS HARMONIZED GAP PROGRAM WITH FDA FOOD SAFETY RULE, <https://www.ams.usda.gov/sites/default/files/media/FAQsUS-DAGAPFSMAProduceSafetyRuleAlignment.pdf>.

80 UNITED FRESH PRODUCE ASS'N, GAP HARMONIZATION INITIATIVE, <https://www.unitedfresh.org/food-safety/gap-harmonization-initiative/> (last visited Mar. 13, 2019).



sizes of on-farm operations, and all regions in the United States. The alignment between HGAP and the PSR is intended to provide growers with some assurance (though not a guarantee) that if they pass an HGAP audit, they will also be prepared to pass a FSMA inspection. The FDA has also said it may inspect farms that have successfully passed a third-party food safety audit less frequently under the PSR.⁸¹

The primary challenge with using GAP or GHP certification is that, depending on the size of the farm and the potential sales earnings, the certification process may be quite expensive. Certification may require growers make costly upgrades to their farms, such as constructing fences around the perimeter to keep out livestock and wildlife, or building restrooms for employees.⁸² In addition to these changes, the certification must be renewed annually (or multiple times per year if different crops are grown in different seasons). Paying a USDA certifier to come to the farm for each of these certifications is costly. However, under the GroupGAP program, multiple farms can work together to achieve food safety certification, which can alleviate some of the burden associated with getting food safety certified.

FOOD SAFETY FUNDING OPPORTUNITIES There are some grant programs to reduce the costs of compliance and certification, such as the VAAFM Produce Safety Improvement Grants program noted above.⁸³ Additionally, the Local Agriculture Market Program (LAMP) created in the 2018 Farm Bill streamlines two grant opportunities (Farmers Market and Local Food Promotion Program (FMLFPP) and Value-Added Producers Grant Program (VAPG)) to provide mandatory funding to support local and regional food systems.⁸⁴ LAMP aims to “support the development, coordination, and expansion of direct producer-to-consumer marketing, local and regional food markets and enterprises and value-added agricultural products”⁸⁵ and offers up to \$6,500 per applicant to share the cost of food safety certification and infrastructure upgrades necessary to become food safety certified.⁸⁶

In addition to the USDA food safety audit programs, there are a number of nongovernmental and private food safety certifications that farmers may be encouraged or required to obtain depending on their buyers. One program that is unique to Vermont is Community Accreditation for Produce Safety (CAPS), a program of the Vermont Vegetable and Berry Growers Association.⁸⁷ CAPS is less expensive than a USDA audit and may be a particularly good option for produce farms that are exempt or qualified exempt from the PSR, but still need to demonstrate compliance with food safety practices for regional market access. The CAPS Plus certificate is accepted by some regional retailers and distributors in lieu of GAP certification.⁸⁸

81 80 Fed. Reg. 74353, 74521 (“[t]hird-party audits are an important part of our overall compliance strategy”).

82 DEREK L. BARBER, UNIV. OF FLA. INST. OF FOOD & AGRIC. EXTENSION, ESTIMATED LIVESTOCK FENCING COSTS FOR THE SMALL-FARM OWNER (2012), <http://edis.ifas.ufl.edu/an258> (according to GlobalIndustrial.com, a porta john costs approximately \$630 plus shipping and set-up. University of Florida researchers found that the average cost of materials for constructing 14 miles of field fence was approximately \$1250 (including materials)).

83 VAAFM, VERMONT PRODUCE SAFETY IMPROVEMENT GRANTS, <https://agriculture.vermont.gov/producesafetygrants> (last visited Jan. 4, 2020).

84 21 U.S.C. § 1627(c); see NAT'L SUSTAINABLE AGRIC. COAL., A CLOSER LOOK AT THE 2018 FARM BILL: LOCAL AGRICULTURE MARKET PROGRAM (Jan. 22, 2019), <http://sustainableagriculture.net/blog/2018-farm-bill-local-agriculture-market-program/>.

85 USDA, LOCAL FOOD PROMOTION PROGRAM 1, 1-35 (Apr. 18, 2019), <https://www.ams.usda/sites/default/files/media/2019LFPPRFA.pdf>.

86 7 U.S.C. § 1627c(d)(2)(J).

87 UNIV. OF VT. EXTENSION, COMMUNITY ACCREDITATION FOR PRODUCE SAFETY (CAPS), <https://practicalproducesafetyvt.wordpress.com>.

88 UNIV. OF VT. EXTENSION, CAPS-PLUS CERTIFICATE, <https://practicalproducesafetyvt.wordpress.com>.



COTTAGE FOOD LAWS

Cottage food laws “aim to recognize that foods such as baked goods, jams, dry mixes, and candies are not potentially hazardous and pose a low risk of food contamination.”⁸⁹ These laws serve to strengthen local economies, support local producers and farmers, and encourage business development by exempting in-home businesses from inspections or other fees that are required for other retail food establishments.⁹⁰ For farmers and food processors, these laws provide the opportunity to expand their markets by enabling them to process and sell their products from home without having to accrue expensive processing equipment and commercial space.

The USDA Census of Agriculture only recently began tracking sales from farms engaging in value-added or processing activities. Products within this category come “from crop or livestock commodities produced on the operation. Through further manufacturing or processing, these items are transformed into products worth more than the originally produced commodity.”⁹¹ In 2017, there were 33,523 farms nationwide selling over \$4 billion in value-added agricultural products.⁹² Of those farms, 828 were located in Vermont, totaling \$49,487,000 in value-added sales.⁹³

Many value-added farm businesses get their start in the home kitchen. Nearly every state has some form of a “cottage food” law, which set safety standards for in-home food processing.⁹⁴ In Vermont, the VDH Food and Lodging Program oversees in-home food businesses. Anyone operating a “food manufacturing facility, retail food establishment, or other place in which food is prepared and served” must have a license from VDH.⁹⁵ However, there are some exemptions from licensing and inspection for certain in-home businesses depending on what they produce, how much, and to whom they sell.⁹⁶

The three main categories of home-based processors include home caterers, home bakers, and home processors.⁹⁷ Home caterers must purchase a license (\$155/ year) and pass an inspection.⁹⁸ They are not permitted to have their pets in the kitchen while preparing

89 PEGGY KIRK HALL, NAT’L AGRIC. L. CTR., “COTTAGE FOOD” LAWS, <https://nationalaglawcenter.org/state-compilations/cottagefood/> (providing a compilation of “cottage food” laws in the United States).

90 FOOD L. & POLICY CLINIC AT HARVARD LAW SCHOOL, “COTTAGE FOOD” LAWS IN THE UNITED STATES 1, 4-5 (Aug. 2018), https://www.chlpi.org/wp-content/uploads/2013/12/FLPC_Cottage-Foods-Report_August-2018.pdf.

91 USDA NASS, GENERAL EXPLANATION & CENSUS OF AGRICULTURE REPORT FORM app. B, B-1, https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf.

92 USDA NASS, MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING LANDLORD’S SHARE, FOOD MARKETING PRACTICES, AND VALUE-ADDED PRODUCTS: 2017 & 2012 9, 10 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0002_0002.pdf.

93 USDA NASS, VT. MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING LANDLORD’S SHARE, FOOD MARKETING PRACTICES, AND VALUE-ADDED PRODUCTS: 2017 & 2012 9, 10 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0002_0002.pdf.

94 “COTTAGE FOOD” LAWS, *supra* note 89; see “COTTAGE FOOD” LAWS IN THE UNITED STATES, *supra* note 90, at 1-2.

95 18 V.S.A. § 4351(a).

96 *Id.* at § 4358(b) (exempting in-home bakeries with less than \$125 in weekly sales); see VT. DEP’T OF HEALTH, GUIDE TO OPENING A HOME-BASED FOOD BUSINESS 1, 1-4 (May 2019), https://www.healthvermont.gov/sites/default/files/documents/pdf/ENV_FL_GuidetoOpeningaHome-BasedFoodBusiness.pdf.

97 VT. DEP’T OF HEALTH, GUIDE TO OPENING A FOOD OR LODGING ESTABLISHMENT 1, 2 (May 2019), https://www.healthvermont.gov/sites/default/files/documents/pdf/ENV_FL_GuidetoOperating.pdf.

98 *Id.*



food, and they must contact VAAFV if they intend to sell any meat or poultry products.⁹⁹ Home bakers with sales below \$6,500 annually do not need to have a license, but do need to file a “License Exemption Self Declaration” letter.¹⁰⁰ If they sell their products to any restaurant, they do not qualify for the exemption.¹⁰¹ Lastly, home processors are exempt from the license requirement if they have annual food sales below \$10,000; however, they too will need to file a “License Exemption Self Declaration” letter.¹⁰² Similar to home bakers, processors that sell to restaurants are not eligible for the license exemption.¹⁰³

FOOD SAFETY REGIMES FOR DAIRY

Dairy policy in Vermont, as in other New England and Mid-Atlantic states, is governed by a complicated mix of federal and state laws regarding pricing, risk management tools, farm financial support programs, conservation practices, and farm energy support.¹⁰⁴

The number of Vermont dairies has dwindled significantly since the 1940s, when there were an estimated 11,200 dairies.¹⁰⁵ Between 1997 and 2017, the number of dairies dropped from 1,995 to 841.¹⁰⁶ This trend is reportedly due to a variety of factors, including the impacts of international markets on milk prices and the cost of upkeep on equipment.¹⁰⁷ Despite these trends, milk from cows remains one of Vermont’s top agricultural products, with sales exceeding \$505 million in 2017.¹⁰⁸

Dairy farms, processors, handlers, and distributors are regulated under Vermont state law, which requires licensure and, in some situations, inspections.¹⁰⁹ The manufacture and sale of ice cream and other frozen desserts also requires a license.¹¹⁰

Producers can sell raw milk directly to consumers in Vermont for personal consumption only; it may not be sold in interstate commerce.¹¹¹ However, raw milk production is heavily regulated. Producers must adhere to specific safety standards, including labeling and recordkeeping requirements.¹¹² Moreover, producers selling over 350 quarts of milk per

99 *Id.*

100 *Id.*; Vt. DEP’T OF HEALTH, LICENSE EXEMPTION SELF DECLARATION, https://www.healthvermont.gov/sites/default/files/documents/pdf/ENV_FL_License%20Exemption.pdf.

101 GUIDE TO OPENING A FOOD OR LODGING ESTABLISHMENT, *supra* note 97.

102 *Id.*

103 *Id.*

104 NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM, *supra* note 7, at 76-77 (providing an overview of federal and state programs regulating milk in the food safety context, including the Milk Income Loss Contract Program, Pasteurized Milk Ordinance, state raw milk laws, FDA oversight of dairy processing facilities, and the Milk Marketing Order System).

105 Paul Heintz, *Selling the Herd: A Milk Price Crisis Is Devastating Vermont’s Dairy Farms*, SEVEN DAYS (Apr. 11, 2018), <https://www.sevendaysvt.com/vermont/selling-the-herd-a-milk-price-crisis-is-devastating-vermonts-dairy-farms/Content?oid=14631009>.

106 USDA NASS, Vt. HISTORICAL HIGHLIGHTS: 2017 & EARLIER CENSUS YEARS 7, 7 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0001_0001.pdf.

107 Paul Heintz, *supra* note 105.

108 USDA NASS, 2017 CENSUS OF AGRICULTURE: Vt. 1, 2 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Vermont/cp99050.pdf.

109 6 V.S.A. §§ 2742, 2724, 2723a, & 2721 (providing information on licensing and inspection requirements for dairy farms, distributor licensing, dairy technician licensing, and handler licensing).

110 6 V.S.A. § 2851-2856; see VAAFV, FROZEN DESSERT LICENSES, <https://agriculture.vermont.gov/food-safety-consumer-protection-0/milk-dairy/registrations-licensing/frozen-dessert-licenses> (last visited Jan. 4, 2020).

111 6 V.S.A. § 2775, 7 V.S.A. § 2777(a).

112 *Id.* at (a)-(d).



week, or that wish to deliver raw milk off-farm, must register with the state and undergo an annual inspection.¹¹³ No farm can sell over 350 gallons of raw milk in any week.¹¹⁴

FOOD SAFETY REGIMES FOR MEAT AND POULTRY

Like many of its New England neighbors, Vermont's demand for locally produced and processed meat and poultry is strong, and often exceeds the available supply.¹¹⁵ Farmers and commentators frequently point to the complex set of federal regulations overseen by multiple federal agencies as one significant reason for this predicament.¹¹⁶ In general, all meat and poultry must be slaughtered and processed at a state or federally inspected facility, unless an exemption applies.¹¹⁷ Meat and poultry products sold outside the state must be processed in a federally inspected facility. The Vermont Meat Inspection Program, operating under a cooperative agreement with FSIS, inspects meat and poultry slaughter operations that are selling products intrastate.¹¹⁸

Broadly speaking, the federal government ensures the safety of meat and poultry through two acts: (1) the Federal Meat Inspection Act (FMIA),¹¹⁹ and (2) the Poultry Products Inspection Act (PPIA).¹²⁰ The FMIA establishes inspection requirements for cattle, sheep, swine, and goats, and products thereof.¹²¹ The PPIA establishes inspection requirements for poultry and poultry products.¹²² Both the FMIA and the PPIA have exemptions for personal and custom slaughter (where the product does not enter commerce).¹²³ Humane slaughter requirements also exist at the federal and state level.¹²⁴

Vermont lawmakers have taken several steps to help Vermont producers meet growing consumer demand for local meat.¹²⁵ There are several exemptions from the state inspection requirement for livestock under the personal use exemption, the on-farm personal use exemption, and the custom exemption.¹²⁶ These provisions exempt slaughter activities from the inspection requirement where the slaughter occurs on the farm by the farmer for their own consumption (personal use exemption)¹²⁷ or on the farm by someone who purchased the animal from the farmer (on-farm personal use exemption).¹²⁸ Note that under the latter exemption, the farmer must register with VAAFM and cannot slaughter the animal

113 *Id.* at § 2777(f); see VAAFM, RAW MILK DIRECT TO CONSUMERS, <https://agriculture.vermont.gov/food-safety-consumer-protection-0/milk-dairy/raw-milk-direct-consumers> (last visit Jan. 4, 2020).

114 6 V.S.A. § 2775(g).

115 CRAIG A. MORRIS, USDA, THE PRICE IS RIGHT: LOCAL BEEF REPORTING IN VERMONT (Feb. 21, 2017), <https://www.usda.gov/media/blog/2015/07/22/price-right-local-beef-reporting-vermont>.

116 NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM, *supra* note 7, at 78.

117 6 V.S.A. § 3308(a).

118 Vt. MEAT & POULTRY INSPECTION, *supra* note 5.

119 21 U.S.C. §§ 601 *et seq.* (2014).

120 *Id.* at §§ 451 *et seq.*

121 *Id.* at § 601(j).

122 USDA FSIS, POULTRY PRODUCTS INSPECTION ACT (PPIA), 21 U.S.C. § 455(a)-(c); 6 V.S.A. ch. 201 & 204.

123 See 21 U.S.C. §§ 464 & 623.

124 7 U.S.C. §§ 1901 *et seq.*; 6 V.S.A. § 3131 *et seq.*

125 Lauren Gwin & Arion Thiboumery, *Local Meat Processing: Business Strategies and Policy Angles*, 37 Vt. L. Rev. 987, 1005 (2013).

126 6 V.S.A. § 3311a(c).

127 See VAAFM, PERSONAL USE EXEMPTION, <https://agriculture.vermont.gov/food-safety-consumer-protection-0/vermont-meat-poultry-inspection/livestock-exemptions-inspection-0> (last visited Jan. 4, 2020).

128 See VAAFM, "ON FARM" PERSONAL USE EXEMPTION, <https://agriculture.vermont.gov/food-safety/vermont-meat-poultry-inspection/livestock-exemptions-inspection/farm-personal-use> (last visited Jan. 4, 2020) (explaining that such farms must register with the state).



for the customer.¹²⁹ Custom slaughter, where a licensed facility slaughters an animal for a customer's personal consumption, is also exempt from the inspection requirement.¹³⁰

There are also exemptions from inspection for poultry when slaughtered on-farm in quantities less than 1,000 birds, 5,000 birds, or 20,000 birds per year.¹³¹ For each category, certain requirements apply.¹³² However, these exemptions generally allow the producer to sell whole birds directly to consumers from the farm's premises or at farmers markets, or to restaurants, without undergoing inspection.

These exemptions seek to enable greater direct sales of local meat from small-scale producers through farmers markets, restaurants, farms, and directly to individuals while still protecting consumers. It is important to note that operations that are otherwise exempt from specific state or federal food safety requirements are still subject to federal and state regulations prohibiting adulteration and misbranded products.¹³³

CONCLUSION

Food safety is a critical issue for farmers and food entrepreneurs. Although many farms in Vermont may be exempt or qualified exempt under the new federal regulations, attorneys assisting small-scale farmers and food entrepreneurs will likely face questions about FSMA and how it applies to particular farm or food businesses' operations. Even when the client's operation falls under one of the exemptions, it is critical that the attorney be familiar with the overarching topics and issues that FSMA presents with regard to business entity formation, liability, and market access. Attorneys should be prepared to discuss these concerns with the farmer or food entrepreneur, as well as other relevant state food safety regimes, to consider how food safety issues impact the current and future goals of the food or farm business.

129 See *id.*

130 See VAAF, CUSTOM EXEMPTION, <https://agriculture.vermont.gov/food-safety-consumer-protection-0/vermont-meat-poultry-inspection/live-stock-exemptions-inspection-2> (last visited Jan. 4, 2020).

131 6 V.S.A. § 3312(b)-(d); see VAAF, POULTRY EXEMPTIONS FROM INSPECTION, <https://agriculture.vermont.gov/food-safety/vermont-meat-poultry-inspection/poultry-exemptions-inspection> (last visited Jan. 4, 2020).

132 See VAAF, GUIDANCE FOR SLAUGHTERING & SELLING EXEMPT POULTRY 1, 1-21 (Aug. 2019), https://agriculture.vermont.gov/sites/agriculture/files/documents/Meat_Inspection/Exemption%20Guidancewebversion4%20%208-20-19.pdf.

133 Federal Food, Drug, & Cosmetic Act (FFDCA), 21 C.F.R. § 201.1 (providing the labeling laws promulgated by FDA and addressing the issue of misbranded food); 18 V.S.A. § 4060 (providing the labeling laws for Vermont and addressing misbranded food).





United States Food and Drug Administration Food Safety Modernization Act

- Produce Safety Rule (PSR): <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-produce-safety>
 - Preventive Controls Rule (PCR): <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-preventive-controls-human-food>
-

United States Department of Agriculture: Good Agricultural Practices & Good Handling Practices

- <https://www.ams.usda.gov/services/auditing/gap-ghp>
-

National Sustainable Agriculture Coalition

- Food Safety Modernization Act (FSMA): <http://sustainableagriculture.net/category/food-safety>
 - FSMA Flowchart: http://sustainableagriculture.net/wp-content/uploads/2016/02/2016_2-FSMA-Final-Rule-Flowchart-V3.pdf
-

Legal Food Hub

- <https://www.legalfoodhub.org/resource-library/permits-licenses-regulations/>

Vermont Department of Health Food and Lodging Program

- <https://www.healthvermont.gov/environment/food-lodging>
-

Vermont Agency of Agriculture, Food, and Markets

- Produce Program: <https://agriculture.vermont.gov/produceprogram>
 - Licensing: <https://agriculture.vermont.gov/licensing-registration-library>
-

Vermont Vegetable and Berry Growers Association: Community Accreditation for Produce Safety

- <https://practicalproducesafetyvt.wordpress.com/about-caps/>
-

University of Vermont: Processor Training

- https://www.uvm.edu/extension/food_safety_resources_producers_and_processors
-

Farm Commons

- <https://farmcommons.org/food-safety>



CHAPTER V

INTELLECTUAL PROPERTY

Chapter Overview

This chapter provides an overview of the issues related to intellectual property law that would be of interest to attorneys advising Vermont farmers and food entrepreneurs, primarily focused on how these businesses owners can protect their brand identities as they conduct their farm and food businesses. While much of the intellectual property landscape is federal, relevant Vermont laws are included and highlighted (e.g., state laws on trademarks and trade secrets). For attorneys advising food and farm business clients, trademarks and trade secrets are likely to be the most applicable; however, there may be instances where issues relating to copyrights or patents arise. Therefore, this section provides a brief overview of each category.

- 1. Trademarks** This section discusses both Vermont and federal trademark law with case examples and offers insight as to how attorneys may appropriately advise farmers and food organizations on protecting their trademarks.
- 2. Copyrights** This section provides a brief overview of U.S. copyright law and the ways in which Vermont farmers and food entrepreneurs may confront such issues.
- 3. Patents** This section explores patent law generally, and discusses its relevance to farmers' needs.
- 4. Trade Secrets** This section highlights Vermont's protections of trade secrets and how they protect farmers and food entrepreneurs.



TRADEMARKS

Farmers will likely find that much of their interactions with intellectual property come through trademark law. Given that brand identity and connection to the consumer are integral for local food producers, they may seek to trademark product names and logos to build recognition of their products and brand and to expand their market opportunities. Farmers may wish to trademark their farm logo or farm name, especially if used on packaging for products they sell within the state or across state lines, or as part of their Internet branding, such as on their websites or in social media. Trademarks identify the source of goods and services, and serve to distinguish one good from a competing good. Thus, a farmer's trademark can be vital to ensuring there is no confusion among consumers regarding who produced the products they are buying, and protecting the farmer or food business from unfair competition.¹

Attorneys advising Vermont farmers and food organizations should be familiar with both state and federal trademark laws. Although the two are similar, there are a few differences in the qualifications and protections at the state and federal levels. If a business is selling goods across state lines, it will likely benefit most from registering a federal trademark, which protects the owner from others using their mark anywhere in the United States. A state registration will only protect the owner in Vermont.

The federal and state definitions of “trademark” closely resemble each other and highlight important features of trademarks.² Importantly, trademarks can include words, symbols, icons, and logos.³ An important distinction between federal and state trademark laws is that federal law allows one to register a trademark before it has actually been used (i.e., before goods have been sold), so long as the registrant has “a bona fide intention to use” the trademark in interstate commerce.⁴ In contrast, Vermont law does not have an “intent to use” clause, and only provides for the registration of trademarks actually in use.⁵ In either case, trademark rights accrue upon use of the mark. In other words, as soon as the farmer or food producer begins to sell the product they have common law trademark rights in the mark. Registration is not necessary to obtain trademark rights, but it is helpful to own a registration in order to enforce one's rights against others.

FEDERAL TRADEMARK DEFINITION	VERMONT TRADEMARK DEFINITION
<p>The term “trademark” includes any word, name, symbol, or device, or any combination thereof—</p> <ol style="list-style-type: none">1. used by a person, or2. which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. <p>15 U.S.C. § 1127</p>	<p>The term “trademark” includes any word, name, symbol or device, or any combination thereof adopted and used:</p> <ol style="list-style-type: none">1. by a manufacturer or merchant to identify his or her goods and distinguish them from those manufactured, or sold by others, or2. by another person on goods produced by his or her labor. <p>9 V.S.A. § 2521</p>

1 ANNE GILSON LALONDE, 1-1 GILSON ON TRADEMARKS §§ 1.02-1.03 (Matthew Bender ed. 2017).

2 15 U.S.C. § 1127; 9 V.S.A. § 2521.

3 *Id.*

4 15 U.S.C. § 1127(2).

5 9 V.S.A. § 2521.



Trademark rights, either common law or statutory, may be asserted by farmers and food organizations in suits for trademark infringement against competitors with confusingly similar marks or who are using the identical mark, for the same or related goods or services, without permission.

Common law trademark rights accrue through actual use of the mark in commerce. Courts generally construe this to require such use be “sufficiently open” so that the public could reasonably associate the mark with the user’s good or service.⁶ Common law trademark rights protect the mark user’s exclusive right to sell a good or service under that mark, though only in a specific geographic area (e.g., a state).⁷ Common law rights may even prevent a competing use of a trademark by a party who seeks federal registration of the mark, so long as the common law mark-holder was the first to use the trademark in commerce.⁸

Though not required, federal registration of a mark used in interstate commerce is advisable, as it remains “the cornerstone of any program protecting the rights of a trademark owner.”⁹ Registration establishes ownership rights, allows for federal jurisdiction of trademark infringement suits, is “prima facie evidence” of one’s right to use the trademark, and may be incontestable under some conditions.¹⁰ Yet, these are added statutory benefits¹¹ and do not affect the common law rights protecting a farmer or food organization’s right to use a mark in commerce.

FEDERAL TRADEMARK LAW

Almost any word, icon, or symbol may be registered as a federal trademark. However, under the Lanham Act, **a mark that does any of the following may not be registered:**

- Consists of or comprises **immoral, deceptive, or scandalous matter**;¹² or **matter which may disparage or falsely suggest a connection** with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute; a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods;
- Consists of or comprises the **flag or coat of arms or other insignia** of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof;
- Consists of or comprises a **name, portrait, or signature identifying a particular living individual** except by his written consent, or the name, signature, or portrait of a deceased president of the United States during the life of his widow, if any, except by the written consent of the widow;

6 ANNE GILSON LALONDE, *supra* note 1, at § 3.02[2].

7 Jane Haskins, *What are Common Law Trademark Rights?*, LEGALZOOM (Aug. 2016), <http://www.legalzoom.com/articles/what-are-common-law-trademark-rights>.

8 USPTO, PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION 1, 9 (May 2016), <http://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf>.

9 ANNE GILSON LALONDE, 1-4 GILSON ON TRADEMARKS § 4.01 (MATTHEW BENDER ed. 2017).

10 *Id.* (noting also that registering a mark on the principal register constitutes “constructive notice,” and may allow for an exercise of rights against international imports bearing similar marks).

11 See *generally* The Lanham Act, Pub. L. No. 79-489, 60 Stat. 417 (1949) (*codified as amended at 15 U.S.C. § 1051 et seq.*).

12 See *Matal v. Tam*, 137 S. Ct. 1744 (2017) (noting this provision has been recently struck down as unconstitutional).



- Consists of or comprises a mark which so **resembles a mark registered** in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive;
- Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin . . . [or] (3) is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.¹³

A trademark first must be distinctive; it must distinguish the origin of the good or service from other competing goods or services. If a mark is not distinctive, it cannot be registered. A distinctive mark “stands out from the clutter and points the consumer directly to the source of the products.”¹⁴ Generic names and names that were once distinctive but have become common parlance, are not protectable as trademarks.¹⁵ In addition to distinctive words, clients may wish to use bright colors, bold designs, or other stark contrasts from other marks in their industry to ensure their proposed mark is distinctive enough to lead the consumer to their product over others.

Proposed marks fall along a spectrum of distinctiveness: generic, descriptive, suggestive, or arbitrary or fanciful.¹⁶ The category a mark falls in determines the level of protection afforded. Generic and descriptive marks are inherently not distinctive and are not protected.¹⁷ When trademarks are too generic or descriptive, they serve merely to identify what a product is or does. Descriptive terms do not denote the original source or manufacturer of a good, and thus “do not, in their primary meaning, perform the essential trademark function.”¹⁸

Arbitrary or fanciful marks receive the greatest protection, and may be registered, while generic marks receive the least, and can never be registered.¹⁹ Arbitrary marks are those that have a plain meaning different from their meaning in context of the mark.²⁰ For instance, the mark “Apple” is arbitrary when referring to computers, as is “Camel” when referring to cigarettes. Fanciful marks are those created specifically for the brand at issue, and are not words otherwise found in the dictionary.²¹ Examples of fanciful marks include “Kodak” for the imaging and camera company and “Exxon” for the oil corporation. If farmers or food organizations can use one of these two types of marks, they are more likely to receive greater protection under federal law. Generally, however, companies with large marketing budgets are more likely to adopt arbitrary and fanciful marks. Smaller business that are just starting out want their customers to get a sense of the products or services they are offering from their name, so they tend to have marks that are suggestive

13 15 U.S.C. §§ 1052(a)-(e).

14 ANNE GILSON LALONDE, 1-2 GILSON ON TRADEMARKS § 2.01 (Matthew Bender ed. 2017).

15 *Id.* (noting, for example, that aspirin, escalator and zipper were once owned as trademarks, but have become generic).

16 *See id.* at § 2.01, n.22.

17 15 U.S.C. § 1123; 35 U.S.C. pt. 2; 30 Fed. Reg. 13193 (Oct. 16, 1965); *see* USPTO, PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION 1, 1-30 (Aug. 2019), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf>.

18 GILSON ON TRADEMARKS, *supra* note 1, at § 2.03.

19 *Id.* at § 2.01.

20 *Id.* at § 2.04 (illustrating this with the examples of Apple computers, Camel cigarettes, and Amazon online retail).

21 *Id.* (including examples such as Exxon, Google, and Kodak).



of the goods or services being offered. An example of a suggestive mark could be “Happy Bellies” for baby food.

Federal courts have addressed section 1052, and their decisions provide guidance as to what is or is not deceptive, descriptive, or otherwise questionable for trademark registration. For instance, the mark “Danish Maid,” of Danish Maid Cultured Products, was found to be deceptive for giving the false impression to consumers that the goods were made in Denmark.²² The Trademark Trial and Appeal Board found that “Danish Maid” too closely resembled “Danish-made,” and was not likely to evince the desired image of a milkmaid from Denmark.²³ Similarly, the trademark “LOVEE LAMB” for car seat covers was found to be deceptive because the mark gave the impression that the products contained lambskin though the car seat covers were entirely synthetic.²⁴

As described below, federal trademark law resembles Vermont law in many respects. However, federal trademark law includes more criteria for registration. This includes section 1052(c)’s provision against using the likeness of a deceased president without consent of the widow, and section 1054(a)’s provision against geographic indications on wine or other alcoholic products (as this is covered by a WTO treaty).

Applicants for federal trademark registration should begin by searching the federal principal and supplemental registers, which are available online through the USPTO’s website at uspto.gov. The principal register is where the vast majority of trademark registrations reside; the supplemental register contains descriptive marks not registrable on the principal register.²⁵ In addition, applicants should conduct an internet search to ensure no other entity is using the mark for similar goods or services, even if that mark is not registered. It is important to search both the federal trademark registers and the internet, because a proposed trademark may be denied registration if it is “confusingly similar” to a registered mark, and because trademark rights accrue upon use and if someone is already using the mark, they could have prior rights. Thus, Applicants should search the registers and the internet prior to using the mark and/or applying for registration to spot any potential conflicts that might arise.

To apply for federal registration of a trademark, applicants must submit an online application including information about the mark, a description of the goods or services, and a fee.²⁶ Applicants must also demonstrate either actual use of the mark in interstate commerce, or state they have a bona fide intention to use the mark in interstate commerce. This constitutes the applicant’s basis for filing.²⁷ The USPTO has an overview of the entire process on its website and also provides the online application.²⁸ While individuals may proceed through the process by themselves, it is advisable to consult with an attorney familiar with the process and who may have access to additional trademark databases for more comprehensive searches.

22 *In re Danish Maid Cultured Products, Inc.*, 156 U.S.P.Q. (BNA) 430 (1967).

23 *Id.* at 3.

24 *In re Budge Mfg. Co.*, 857 F.2d 773 (Fed. Cir. 1988).

25 15 U.S.C. §§ 1091-1096 (noting that sometimes the Trademark Office will refuse to register a mark on the principal register because it is descriptive. However, if the mark is in use, i.e. goods or services are being sold, it may be possible to register the mark on the supplemental register if even though the mark is inherently descriptive, if it has the potential to identify the source of the goods or services, over time. Registration on the supplemental register affords some protection to the registrant).

26 15 U.S.C. § 1051.

27 USPTO, BASIS FOR FILING, <http://www.uspto.gov/trademarks-getting-started/trademark-basics/basis-filing> (last updated Jan. 13, 2017).

28 USPTO, TRADEMARK PROCESS, <http://www.uspto.gov/trademarks-getting-started/trademark-process> (last updated Oct. 18, 2017).



COPYRIGHTS

Copyright law protects intellectual property rights in “original works of authorship fixed in any tangible medium of expression.”²⁹ This includes, but is not limited to, literary, musical, or dramatic works; pictures and graphic works; and audiovisual and sound works.³⁰ Copyright protects the author’s ability to reproduce, create derivatives of, sell, lease, or preserve the value of the work.³¹

Copyrights are likely most relevant for Hub participants producing copyrightable materials like informational pamphlets, books or manuals, pictures, websites, or videos. Copyright protection attaches only to works actually produced; it does not protect ideas, processes, systems, or discoveries.³² However, some of these ideas or concepts may be protected under patent law.

DEFINITION

For a work to be an “original work of authorship,” it must originate from the author, that is, it must be “independently created rather than copied from other works.”³³ Further, there must be some “minimal degree of creativity” to the work, such that it is new and not merely derivative.³⁴ While the originality requirement may be more lenient than, say, the “new and useful” standard of patent law,³⁵ it is nonetheless important to ensure copyright claimants can substantiate a claim of originality. The constitutional underpinning of the copyright authority “presuppose[s] a degree of originality,” and the standard “remains the touchstone of copyright protection.”³⁶

A work of authorship is an intentionally vague category,³⁷ but it covers eight categories of works as defined by statute,³⁸ as well as scientific and technical developments.³⁹ The standard is broad, but not unlimited, and allows for the expansion of copyright protection as needs require. That a work be fixed in tangible form means copyrightable works must be tangible, perceivable, reproducible, or otherwise communicable.⁴⁰ Thus, ideas, thoughts, and otherwise intangible forms of intellectual property are generally barred from copyright protection. Some courts have considered whether oral conversations may be copyrightable, but there is no broad consensus that they are protectable.⁴¹

29 17 U.S.C. § 102(a) (2012).

30 *Id.* at §§ 102(a)(1)–(8).

31 *Id.* at § 106.

32 *Id.* at § 102(b).

33 MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.01[A] (Matthew Bender, rev. ed. 2017); see also *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

34 *Id.*

35 See, e.g., 1 NIMMER ON COPYRIGHT, *supra* note 5, at § 2.01[B][1] (“[T]his standard does not include requirements of novelty, *ingenuity*, or *esthetic merit*.”).

36 *Feist Publications*, 499 U.S. at 346–47 (citing *The Trade-Mark Cases*, 100 U.S. 82 (1879) & *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)).

37 See, e.g., H. Rep. No. 94-1476, at 51 (1976) (“The phrase “original works of authorship, which is purposely left undefined, is intended to incorporate without change the standard . . . established . . . under [the 1909] copyright statute.”).

38 17 U.S.C. § 102(a) (noting the eight statutory categories are: literary, musical, dramatic, choreographic, pictorial or graphic, audiovisual, sound, and architectural works).

39 *Id.*; see also 1 NIMMER ON COPYRIGHT, *supra* note 5, at § 2.03[A].

40 17 U.S.C. § 102(a) (2012); 1 NIMMER ON COPYRIGHT § 2.03[B].

41 See, e.g., *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250 (N.Y. 1968).



REGISTRATION

A farmer or food entrepreneur wanting to protect a written or other work may wish to register a copyright in the work. While registration is not necessary to protect a work,⁴² it is generally recommended that copyright holders nonetheless register with the copyright office. Doing so provides the ability to obtain important statutory damage remedies if an owner chooses to claim infringement. Registration also serves as a public record of one's copyright.

Registering a copyright is separate from providing notice of a copyright. Copyright holders may provide notice on their protected works through, for example, use of the © symbol. The author's name and the year of first publication should also accompany the © symbol. However, clients should know that providing such notice is not required for registration with the Copyright Office⁴³ and that those who register a copyright may use the ® symbol to denote the registered status.

The Copyright Office oversees the copyright registration process. The various forms, used for different types of work to be registered, are available on its website.⁴⁴ Registrants must submit a completed form, a fee, and a deposit copy of the work being registered to the Copyright Office.⁴⁵ The deposited copies remain on file with the Copyright Office. Registrants can submit their materials online or through the mail.⁴⁶

Under the Copyright Act, authors of copyrighted works must submit two copies of their work to the Copyright Office within three months of first publication.⁴⁷ Failure to do so can result in fines.⁴⁸ However, there are several exemptions to this provision,⁴⁹ and farmers and food organizations may not be required to submit copies of their works. For instance, works exclusively published online, scientific models or diagrams, and catalogs and print advertising materials are exempt from the two-copy deposit requirement.⁵⁰

INFRINGEMENT

Copyright owners are entitled to sue for copyright infringement if anyone violates their exclusive rights to the value of their work.⁵¹ To bring suit, the copyright must be registered.⁵² A copyright holder can produce evidence of registration as “prima facie” evidence of the validity of the copyright.⁵³ Successful claims may result in actual and/or statutory damages, the seizure of the infringing works, and an injunction against the infringing party.⁵⁴

42 CIRCULAR 1: COPYRIGHT BASICS, U.S. COPYRIGHT OFFICE 2 (May 2012), <http://www.copyright.gov/circs/circ01.pdf>.

43 *Id.* (noting however, that this applies only to works produced *after* 1989; pre-1989 works may require notice for statutory protections).

44 U.S. COPYRIGHT OFFICE, FORMS, <http://www.copyright.gov/forms> (last visited Jan. 4, 2020).

45 CIRCULAR 1, *supra* note 14, at 7.

46 *Id.* (noting that you may wish to advise clients that they will only receive confirmation that the Copyright Office has received their application if they use the online process).

47 17 U.S.C. § 407(a).

48 *Id.* at § 407(d) (2012).

49 37 C.F.R. § 202.19(c).

50 *Id.*

51 17 U.S.C. § 501.

52 CIRCULAR 1, *supra* note 14, at 5.

53 17 U.S.C. § 410(c).

54 *Id.* at §§ 502-505.



Additionally, farmers and food organizations must ensure that they are not infringing on the copyrights held by another. For instance, in recent years, there was controversy over whether farmers could repair farm vehicles, such as tractors that had software components.⁵⁵ Under the Digital Millennium Copyright Act (DMCA), manufacturers held copyrights to the software that enabled certain features on, among other things, tractors and farm equipment. When farmers sought to open the hood and repair these machines themselves, the manufacturers claimed infringement.⁵⁶

The Copyright Office approved a new exemption—Class 21—to the DMCA that allows for self-repair of farm equipment containing otherwise protected software.⁵⁷ This allows farmers to circumvent certain copyrighted software of their vehicles or equipment “for purposes of lawful diagnosis and repair, or aftermarket personalization, modification, or other improvement” without incurring any penalties under the DMCA.⁵⁸ While this exemption may limit copyright infringement claims, certain manufacturers incorporate contractual prohibitions to equipment self-repair in their user agreements and put farmers at risk of violating contractual provisions.⁵⁹ Farmers should be aware that the new Class 21 exemption only prevents manufacturers from bringing a DMCA claim against them. If farmers decide to repair their own equipment that contains copyrighted software, they will want to get advice on the contractual implications (i.e., waivers).

FAIR USE

An important exception to copyright protection is the fair use doctrine, which allows people other than the copyright holder to use (and reproduce) copyrighted work for any of the following purposes:

- Criticism
- Comment
- News or reporting
- Teaching (“including multiple copies for classroom use”)
- Research and scholarship⁶⁰

Fair use is “one of the most important and well-established limitations on the exclusive right of copyright owners,”⁶¹ and can be asserted as a defense against infringement claims regarding published and unpublished copyrighted works.⁶² A fair use determination is highly context dependent, and courts consider a number of factors, including the

55 See, e.g., Kyle Wiens, *We Can't Let John Deere Destroy the Very Idea of Ownership*, WIRED (Apr. 21, 2015), <http://www.wired.com/2015/04/dmca-ownership-john-deere>.

56 Kyle Wiens, *Before I Can Fix This Tractor, We Have to Fix Copyright Law*, SLATE: FUTURE TENSE (Jan. 13, 2016), http://www.slate.com/blogs/future_tense/2016/01/13/copyright_law_shouldn_t_keep_me_from_fixing_a_tractor.html.

57 U.S. COPYRIGHT OFFICE, EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES, Docket No. 2014-07 (Oct. 20, 2015), <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf>.

58 37 C.F.R. § 201.40(6) (finalizing the rule on October 28, 2015, per 80 Fed. Reg. 65944).

59 Grant Gerlock, *Farmers Look for Ways to Circumvent Tractor Software Locks*, NPR: ALL TECH CONSIDERED (Apr. 9, 2017), <http://www.npr.org/sections/alltechconsidered/2017/04/09/523024776/farmers-look-for-ways-to-circumvent-tractor-software-locks> (last visited Jan. 4, 2020).

60 17 U.S.C. § 107.

61 H. Rep. No. 94-1476, at 65 (1976).

62 17 U.S.C. § 107.



commercial or noncommercial nature of the use, amount of the work used, and any impact on the market for or value of the copyrighted work.⁶³

Attorneys working with farmers and food entrepreneurs will want to note that fair use can either provide a defense against an infringement claim against a client or prevent clients from bringing suit against someone using or benefitting from their intellectual property.

SECTION 301 AND COMMON LAW COPYRIGHT

Before 1976, creators and authors could assert rights to their intellectual property through either state law (common law copyright) or federal law. However, section 301 of the Copyright Act of 1976 explicitly preempts any state protections that “are equivalent to any of the exclusive rights within the general scope of copyright” under sections 102 and 106 of the Act.⁶⁴ While this preemption covers most copyright claims today—meaning that farmers and food organizations will likely only deal with federal copyright law—certain types of works are still protected by state (common law) copyrights. These would include audio recordings made before 1972 and unpublished works, such as manuscripts.⁶⁵ In general, section 301 brings most copyright claims under federal purview.

PATENTS

Patents grant to inventors of “new and useful” things the right to exclude others from making or using that product or design.⁶⁶ Patents are controlled by federal law and overseen by the U.S. Patent and Trademark Office (USPTO).⁶⁷ Vermont farmers and food entrepreneurs will need to be advised of the protections available under, and limitations imposed by, federal patent law.

The USPTO issues three main types of patents: utility, design, and plant. A utility patent provides rights to the inventor of a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”⁶⁸ Thus, new farm equipment or farming techniques, innovative processes, and new chemical fertilizers⁶⁹ could all be protected with a utility patent. Securing a utility patent is more difficult than securing other forms of patents, but utility patents may also provide greater protection against patent infringement.⁷⁰

Design patents are issued to protect new or novel designs—esthetic, surface

63 *Id.*; see also NIMMER, *supra* note 5, at § 13.05[A][4] (noting that this factor of a fair use defense “looks to adverse impact only by reason of usurpation of the demand for [the copyrighted] work”).

64 17 U.S.C. § 301.

65 PROGRAM ON INFO. JUSTICE AND INTELLECTUAL PROP., PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS 4-5 (Sept. 2009), <http://www.cllr.org/wp-content/uploads/sites/6/pub146.pdf>.

66 USPTO, GENERAL INFORMATION CONCERNING PATENTS (Oct. 2015) <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents>.

67 See, e.g., 35 U.S.C. § 1 *et seq.*

68 *Id.* § 101.

69 USPTO INFO. PRODS. DIV., U.S. PATENT CLASSIFICATION SYSTEM—CHEMISTRY: FERTILIZERS (Oct. 2000), <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/def/071.htm>.

70 WEN ZHOU, HARVARD GRADUATE SCHOOL OF ARTS & SCIENCES, THE PATENT LANDSCAPE OF GENETICALLY MODIFIED ORGANISMS (Aug. 10, 2015), <http://sitn.hms.harvard.edu/flash/2015/the-patent-landscape-of-genetically-modified-organisms> (last visited Jan. 4, 2020).



ornamentations of manufactured articles.⁷¹ These patents only cover the “visual characteristics” of a work.⁷²

Plant patents protect discovery of “distinct and new variet[ies] of plant[s]” when those plants are successfully asexually reproduced.⁷³ Plant patents arise under the Plant Patent Act of 1930⁷⁴ and do not apply to sexually reproduced or tuber-propagated plants (e.g., potatoes).⁷⁵ However, subsequent statutory protections under the Plant Variety Protection Act (PVPA) and amendments have afforded patent-like protection to discoverers and inventors of new types of such plants.⁷⁶ Plant patents and PVPA certificates also protect seeds.

While some farmers and food organizations may discover new plant varieties and seek patents on them, unless they are a plant breeder, the majority of their interaction with patent law will likely come in the form of buying, using, or selling patented seeds.

Protection under the PVPA allows the certificate holder to prevent others from selling or marketing, importing or exporting, sexually reproducing (or tuber-propagating), hybridizing, or using the seeds of any protected plant variety.⁷⁷ While this can prove tricky for farmers, there are exemptions that allow for (1) the saving of patented seed and using of saved seed to replant one’s own lands⁷⁸ and (2) research and development and plant breeding involving protected seeds.⁷⁹

Although it is important to understand plant patents and PVPA protections, many plant and seed manufacturers do not obtain plant patents, but instead opt for utility patents.⁸⁰ Utility patents allow for the protection not just of the plant variety, but of particular “uniquely designed” DNA sequencing in the seeds; this allows for the patenting of genetically modified organisms, also called GMOs.⁸¹ Such patents generally prohibit seed saving and replanting, and have been upheld by the Supreme Court.⁸²

Seed and utility patents are relevant to Vermont farmers given the prominence of corn and soybean production in the state. Corn is the second-most produced crop in Vermont by acreage, followed by soybeans,⁸³ two of the crops most often genetically modified.⁸⁴

71 DONALD S. CHISUM, 1-23 CHISUM ON PATENTS § 23.01 (Matthew Bender ed. 2017); see also 35 U.S.C. § 171; USPTO, MANUAL OF PATENT EXAMINING PROCEDURE § 1502 (9th ed. 2015) <http://www.uspto.gov/web/offices/pac/mpep/mpep-1500.pdf>.

72 1-23 CHISUM ON PATENTS, *supra* note 48, at § 23.03.

73 DONALD S. CHISUM, 8-24 CHISUM ON PATENTS § 24.01 (Matthew Bender ed. 2017).

74 Pub. L. No. 71-245, 46 Stat. 376 (May 23, 1930) (as amended and codified at 35 U.S.C. §§ 161 *et seq.* (2012)); see also Plant Patents Amendment Act of 1997, Pub. L. No. 105-289, 112 Stat. 2780.

75 8-24 CHISUM ON PATENTS, *supra* note 50, at § 24.01.

76 Pub. L. No. 91-577, 84 Stat. 1542 (Dec. 24, 1970) (as amended by the Plant Variety Protection Act Amendments of 1994, Pub. L. No. 103-349, 108 Stat. 3136); see also 8 CHISUM ON PATENTS §§ 24.02, 24.03.

77 7 U.S.C. §§ 2541(a) (1)-(10)).

78 *Id.* § 2543.

79 *Id.* § 2544.

80 Zhou, *supra* note 47.

81 *Id.* (noting that this is what was at issue in *Bowman*: Monsanto owned patents on DNA sequencing that gave rise to resistance to particular pesticides).

82 See 133 S. Ct. 1761 (2013).

83 USDA NASS, 2017 CENSUS OF AGRICULTURE: VT. 1, 1-2 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Vermont/cp99050.pdf.

84 FDA, CONSUMER INFO ABOUT FOOD FROM GENETICALLY ENGINEERED PLANTS, <https://www.fda.gov/food/food-new-plant-varieties/consumer-info-about-food-genetically-engineered-plants> (last updated Jan. 4, 2018) (last visited Jan. 4, 2020).

However, given that the top crops in the state by far are hay, forage land, and greenchop, which account for over one-quarter of total acreage,⁸⁵ Vermont farmers may face fewer issues with seed patents than farmers in other states.

TRADE SECRETS

Vermont law also protects intellectual property through laws protecting trade secrets.

Food entrepreneurs in particular can protect their brands and businesses by maintaining trade secrets. A trade secret is broadly defined under Vermont law as any “formula, pattern, compilation, program, device, method, technique, or process” used in a business, unknown to others, which gives the business a competitive advantage.⁸⁶ Key to information being a trade secret and remaining protectable is that it is secret, and the business owner makes it difficult for a competitor to acquire it.⁸⁷

The recipe for Heinz® Tomato Ketchup, and the process for making Thomas’ English Muffins, for example, are kept highly confidential and constitute trade secrets. For Vermont food and farm businesses, recipes and formulas that have unique features that make them stand apart from competitors are most likely to constitute trade secrets. Lawyers for Vermont food and farm businesses should advise clients to keep those recipes and formulas under lock and key, make sure employees are bound by confidentiality agreements, and even keep track of sales numbers for those specific products.

A plaintiff may sue for “actual or threatened misappropriation of a trade secret” and may seek injunctions against unauthorized use.⁸⁸ Successful plaintiffs may receive actual damages for loss sustained⁸⁹ and in some cases may also receive damages to avoid unjust enrichment (if not included in the actual loss computation) as well punitive damages against wrongdoers.⁹⁰ The court may also award reasonable attorney fees.⁹¹

CONCLUSION

Attorneys can assist farmers and food organizations in becoming familiar with the basics of intellectual property protections and how they can support food and farm businesses and organizations. Trademarks and copyrights can help protect brands and publications, securing to farms and organizations rights against others. Attorneys can help navigate registration and application, and they can ensure that clients face as smooth a process as possible to protect their intellectual property. Particularly relevant for food businesses, trade secrets offer an additional way to protect intellectual property against misappropriation or misuse by a competitor.

85 2017 CENSUS OF AGRICULTURE: Vt. 1, 1-2 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Vermont/cp99050.pdf.

86 9 V.S.A. § 4601(3).

87 *Id.* at § 4601(3)(A)-(B).

88 *Id.* at § 4602(a).

89 *Id.* at § 4603(a)(2).

90 *Id.* at § 4602(a)(2), (b).

91 *Id.* at § 4603(a)(4).





Resources



United States Copyright Office

- Compendium of Copyright Office Practices: <https://www.copyright.gov/comp3>
- Forms for Registering a Copyright: <https://www.copyright.gov/forms>

Secretary of State of Vermont

- Form for Registering a Trademark: https://www.sec.state.vt.us/media/915115/mark-1_registration.pdf
- Other Useful Trademark Links: <https://www.sec.state.vt.us/corporationsbusiness-services/trademarks.aspx>

United States Patent and Trademark Office

- Trademark Basics: <https://www.uspto.gov/trademarks-getting-started/trademark-basics>.
- General Information Concerning Patents: <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents>.
- Patent Process Overview: <https://www.uspto.gov/patents-getting-started/patent-process-overview>

Center for Agriculture and Food Systems

A Breed Apart:

- The Plant Breeder's Guide to Preventing Patents through Defensive Publication: <https://www.vermontlaw.edu/sites/default/files/2020-01/Defensive-Publication-Guide.pdf>

Legal Food Hub

- Starting and Running a Business: <https://www.legalfoodhub.org/resource-library/starting-running-a-business/>
- Copyright Law Basics: <https://www.legalfoodhub.org/resource/copyright-basics/>
- Introduction to Trademarks: <https://www.legalfoodhub.org/resource/how-to-use-trade-marks/>
- Protecting Your Intellectual Property: <https://www.legalfoodhub.org/resource/protecting-your-intellectual-property-as-a-food-entrepreneur/>



CHAPTER VI

FARM TRANSITIONS

Chapter Overview

Every farmer faces the complex process of transferring their operation to the next generation, whether to a member of their family or someone else. As a result, many, if not most, Vermont attorneys will need to advise clients on farm transition issues even if this is not the primary focus of their practice. A farm transition is the process through which the current farmer(s) undertakes to transfer a farm from its current ownership and management to new ownership and management. These decisions involve a substantial part of many farm owner's assets, and it is often a complex, emotional, and time-consuming process. Because these lands and businesses are of great personal significance to the farmers grappling with these important decisions, attorneys working on these issues should be sensitive to the many facets involved. To explore these issues, this chapter addresses the follow topics:

- 1. Farm Transition Overview** This section provides a general overview of the farm transition process with some specific attention to the demographics of Vermont's aging farming population.
- 2. Getting Context: Some Initial Questions and Common Concerns** This section provides a general framework for identifying a farmer's overarching goals for the farm transition as well as the potential impacts on a variety of stakeholders.
- 3. Farm Transition Challenges** This section provides an overview of challenges that will likely arise in the farm transition process, including preserving agricultural land and production, transferring management and control of the operation, and protecting the financial and other interests of farmers and their families.
- 4. Mechanisms to Facilitate Farm Transitions** This section provides short descriptions of potential pathways or solutions a farmer may pursue in order to accomplish the farm transition, including sales, trusts, conservation easements, business structures, land-linking programs, and life insurance options.



FARM TRANSITION OVERVIEW

Attorneys play a critical role in the farm transition process. Ideally, attorneys are involved at an early stage to ensure a successful transition and help explore potential options based on the farmer's goals. Farm transfer is a complex process, and farmers need attorneys to help them make decisions that protect their assets, reduce risks that might limit farm productivity, preserve family relationships, and potentially conserve farmland—to name a few of the considerations involved in this process. In the farm transition process, attorneys will likely encounter tensions between business and family decisions. Helping farmers to resolve these tensions is an important part of any successful farm transition. Importantly, while there are commonalities, no farm transition is alike and what works for one farmer may be a poor fit for another farmer's life situation and objectives.

In many ways, transitioning a farm to new ownership is no different from estate planning or business transfers for non-farm clients. The general goal for estate planning is to transfer the client's assets according to their wishes and to minimize tax liability and, for business succession plans, to transfer management and control. When compared to estate planning or business transfers for non-farm clients, farmers often care about issues other than who will receive what property and when; they tend to care deeply about what will be done with the property after it passes to the next generation.¹ In particular, farmers may wish to ensure that their land remains in agricultural production or that certain farming practices are used.²

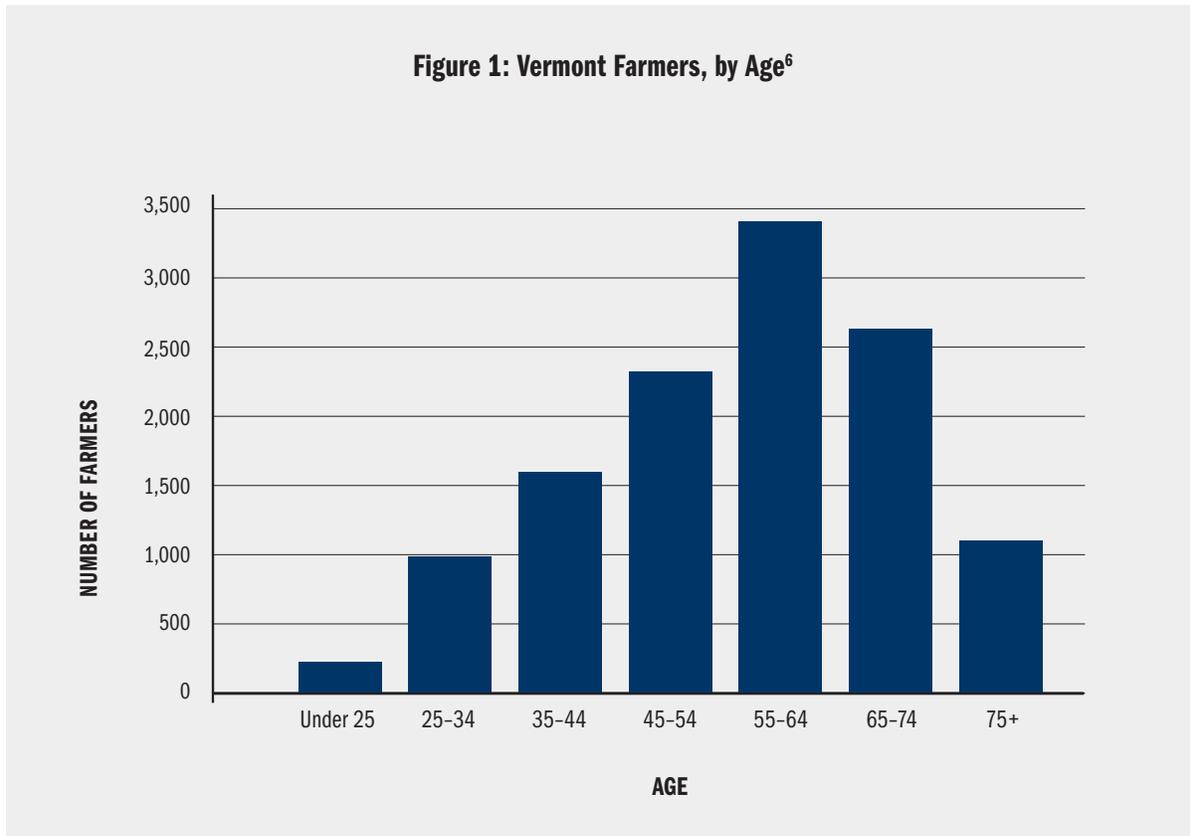
For most farmers, a farm transition concerns both personal and business assets, and the line between these two considerations often blurs. For example, some farm equipment may be owned by a limited liability company while a piece of land may be owned by a farmer in their personal capacity. Land and equipment often comprise a large portion of the farmer's estate. To ensure that a farm business stays viable, control over the farm assets and operation can be gradually transferred to the successor before the farmer's death or retirement, which avoids requiring the new operator to purchase all of the assets at the outset.³ Another common approach involves transferring the equipment and business to the new operator more rapidly than the land, which has the larger valuation.⁴ These types of strategies give successors an opportunity to gain requisite skills and farm management experience while the retiring farmer is still available to guide and support the successor. There are many ways to facilitate this sort of gradual succession, some of which will be explored later in this section.

In Vermont, there is a growing need for attorneys to be involved in farm transition planning. This is due, in part, to the average age of Vermont farmers. In the 2012 Census of Agriculture, the average age of a Vermont farmer was 57.3 years. This average age

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- 1 Jane Primerano, *Land Trust a Way to Get Farmland Preservation*, AMERICANFARM.COM (Mar. 15, 2015), <http://www.americanfarm.com/publications/the-new-jersey-farmer/archives/2228-land-trust-a-way-to-get-farmlandpreservation>.
 - 2 Karen Thimke, *Organic Fact Sheet: Estate Planning and the Sustainable or Organic Farm*, MIDWEST ORGANIC & SUSTAINABLE EDUCATION SERVICE (2013), http://mosesorganic.org/wp-content/uploads/Publications/Fact_Sheets/39EstatePlanning.pdf.
 - 3 AM. FARMLAND TR., FARMLAND TRANSFER WEBINAR, <http://www.farmlandinfo.org/farmland-advisors-farm-transfer-and-estateplanning>; KEVIN SPAFFORD, FARM J. LEGACY PROJECT, HOW TO GROW INTO A LEADER (Dec. 18, 2014), https://www.agweb.com/article/leave_a_legacy_how_to_grow_into_a_leader_NAA_Kevin_Spafford; FIN. PLAN. ASS'N, NINE BUSINESS SUCCESSION-PLANNING MISTAKES TO AVOID (Oct. 2003), http://www.practicalplanner.com/financial_articles/9_Biz_Succession_Mistakes_Avoid.pdf.
 - 4 AM. FARMLAND TR., *supra* note 3; KEVIN SPAFFORD, *supra* note 3; FIN. PLAN ASS'N, *supra* note 3.



decreased slightly in 2017 to 55.9 years,⁵ which suggests not only that older farmers are already aging out of the profession, but also that there are some new farmers entering the Vermont farming population.



Indeed, 28 percent of Vermont farmers are over the age of 65 and collectively own 300,000 acres of land, further supporting the need for farmland transfer assistance as these farmers consider retirement.⁷ As of 2017, the number of farmers over 65 in Vermont increased to 30 percent.⁸

This trend may seem alarming; however, Vermont is also seeing an increasing trend among younger generations looking to become farmers. To qualify as a “beginning farmer,” according to the USDA, the farmer must have operated a farm for 10 consecutive years or fewer.⁹ In 2017, 30 percent of Vermont producers identified as new and beginning farmers.¹⁰ That trend is reflected in farm management and ownership as well, with 29.5

5 USDA NASS, SELECTED PRODUCER CHARACTERISTICS: 2017 & 2012 44, 44 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0052_0052.pdf.

6 *Id.*

7 AM. FARMLAND TR., KEEPING FARMERS ON THE LAND: NEW RESEARCH UNDERSCORES NEED TO ADDRESS FARM TRANSITION IN VERMONT 1, 1-8 (Jan. 2016), <http://landforgood.org/wp-content/uploads/Vermont-Gaining-Insights-AFT-LFG.pdf>.

8 SELECTED PRODUCER CHARACTERISTICS: 2017 & 2012, *supra* note 3.

9 NRCS, SMALL & LIMITED AND BEGINNING FARMERS, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/people/outreach/slbfr/> (last visited Jan. 5, 2020).

10 USDA NASS, 2017 CENSUS OF AGRICULTURE: VT. 1, 1-2 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Vermont/cp99050.pdf.

percent of Vermont farms identifying a beginning farmer as the principal producer.¹¹ This indicates that, although many farmers are likely to retire in the coming years, a growing pool of young farmers may be interested in taking their place, if these transitions can be accommodated. Notably, these transitions are different from many transitions in the past. Historically, many farms were kept in the family (transferred from parent to child). However, farm successors are increasingly coming from outside of farm families, and may have non-farming backgrounds.¹² In 2010, for example, only half of farmland transfers across the United States were intra-family.¹³ All of these data points indicate that there is a growing need for specialists in this area to assist exiting and entering farmers to help keep Vermont's agricultural economy strong and vibrant.

GETTING CONTEXT: SOME INITIAL QUESTIONS AND COMMON CONCERNS

All farm clients should plan for transition. If a farmer waits until a major life event to begin their planning process, this may significantly limit transition choices or rush decision-making. As described above, these are not easy decisions to make.¹⁴ For many, farming is not just a career; it is a way of life. Therefore, ceding ownership, control, and involvement in a farming operation can be challenging. Without a plan in place, the farm business is less likely to remain intact.¹⁵

Farm clients have unique needs. Accordingly, attorneys should take care to gather information specific to the farmer and farm to be able to assess their specific needs. Additionally, attorneys should encourage the farm owner and family members to have open, frequent, and continuing conversations about their transition plans. While these discussions are important, they are not easy, and, as a result, are often avoided. Attorneys should carefully consider their ethical obligations before participating directly in any family discussions and be cautious regarding any joint representation and conflict issues that might arise.¹⁶ It is important that an attorney discuss with their client how to reach consensus about how to proceed.¹⁷ In Vermont, there are strong resources to assist with this discussion and planning, including the Vermont Agricultural Mediation Program,¹⁸ and the whole ecosystem that exists around farm business planning, which includes the Vermont Farm & Forest Viability Program and the many organizations involved in its work.¹⁹

This section provides some suggested preliminary questions for attorneys to consider in discussions with farmer clients regarding farm transitions.

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- 11 USDA NASS, NEW & BEGINNING PRODUCERS-SELECTED FARM CHARACTERISTICS: Vt. 70, tbl.69 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0069_0069.pdf.
 - 12 NAT'L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS 1, 1-85 (Nov. 2017), https://www.youngfarmers.org/wp-content/uploads/2019/03/NYFC-Report-2017_LoRes_Revised.pdf.
 - 13 ROBERT PARSONS ET AL., THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE AND STEWARDSHIP 1, 1-8 (Apr. 2010), <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.
 - 14 AM. FARMLAND TR., *supra* note 3.
 - 15 N.J. FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES 1, 10-11 (2013), http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.
 - 16 See V.R.P.C. 1.7; see also UNIV. OF ME. SCH. OF L., FARM & FOOD LAW: A GUIDE FOR LAWYERS IN THE LEGAL SERVICES FOOD HUB NETWORK 1, 63 (May 2015), https://www.legalfoodhub.org/wp-content/uploads/2015/09/Farm-and-Food-Law-Guide-Maine_May-2015.pdf.
 - 17 KATHY RUHF ET AL., LAND FOR GOOD, FARM SUCCESSION AND TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 1, 16 (2012), <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>.
 - 18 ENVTL. MEDIATION CTR., VERMONT AGRICULTURAL MEDIATION PROGRAM, www.vtamp.org (last visited Jan. 5, 2020).
 - 19 VHCB, VERMONT FARM & FOREST VIABILITY PROGRAM, <https://vhcb.org/viability> (last visited Jan. 5, 2020).



IDENTIFYING INDIVIDUAL GOALS FOR THE TRANSITION

Attorneys should first help farmers identify their personal goals with respect to the farm business.²⁰

Goals for the Transfer

Profits

- Does the farmer want to maximize their profits in the short or long term?
- Does the farmer want to sell the land?
- Does the farmer need to secure funds for retirement?

Public Benefits

- Does the farmer want to conserve the land?
- Does the farmer have other environmental goals that should be considered, such as minimizing the farm's carbon footprint or limiting farm runoff?

Personal Goals

- Does the farmer want the land to stay in the family?
- Does the farmer want to provide financial security for their surviving spouse or children?
- Does the farmer want to minimize tax liability?
- Does the farmer want to transfer as much wealth as possible to someone else?
- Does the farmer want to provide equitable treatment to family members? Does this mean treating all family members equally or equitably?

Speed of Transfer

- What are the farmer's goals for transfer and is their timeline realistic?
- How quickly does the farmer need to receive funds from the transfer, or when are they looking to retire?
- Can the farmer afford to use a long-term or other gradual transfer?²¹

20 Farm J. Legacy Project, *Legacy Workbook*, AgWEB 1, 13 (2013) <https://www.agweb.com/farm-business/succession-planning/legacy-workbook> (noting that there are a number of questionnaires available online for this purpose); LAND FOR GOOD, FARM SUCCESSION & TRANSFER: STRATEGIES FOR THE JUNIOR GENERATION 1, 2 (2012), <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-And-Transfer-Strategies-For-Junior-Generation-Handbook.pdf>; LAND FOR GOOD, TRANSFERRING THE FARM: WHERE DO I START? 1, 4-5 (2012), <http://landforgood.org/wp-content/uploads/LFGTransferring-The-Farm-Guide.pdf>; GARY A. HACHFELD ET AL., PREPARING TO TRANSFER THE FARM BUSINESS (2013), <http://www.cffm.umn.edu/publications/pubs/farmmgttopics/transferringthefarmseries.pdf>.

21 UNIV. OF ME. SCH. OF L., *supra* note 16, at 65.



DISCUSSING THE FUTURE OF THE FARM

Farmers often have very specific ideas for the future uses of their farms as they have lived on and managed their lands for years. If a farmer has not done so already, an attorney should work with them to identify their vision for the future of their farm with respect to land use, management and control, and any additional farm operations that they might want to see in the future.

The Future of the Farm

Vision for the Land

- Should the land continue to be used for agricultural purposes?
- Should the successor use similar farming practices or have the flexibility to farm differently?
- How should the successor maintain the farm's natural resources?
- Should a certain percentage of the land be preserved for habitat or part of a set-aside program like the Conservation Reserve Program (CRP)?²²
- Does the farmer want to continue to live on the land after the transfer?
- Where does the farmer anticipate that the successor will live after the transfer?
- Does the farmer have a specific timeline in mind?

Vision for Management and Control

- Will the farm transfer be within the family or outside the family?
- What is the current ownership structure and will it continue?
- Will the transfer support a beginning farmer or can it be structured to accommodate their needs?
- Is the farmer interested in structuring a mentorship period with their successor so that the successor is fully prepared to take over management and control?
- Will full management and ownership be relinquished immediately or gradually?
- Will the new farmer employ the existing farmer after the transition, whether as an advisor or more informally?

Vision for the Operation

- Should the farm business have an educational mission, such as training the next generation of farmers?
- Should the farm business incorporate a social mission, such as donating produce?
- Should the business engage in activities other than production, such as running a farm stand or inviting tour groups?
- Should the farm business engage in processing or value-added activities?
- Will the anticipated successor generally share the same vision as the farmer?

22 USDA FSA, CONSERVATION RESERVE PROGRAM, <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp> (last visited Jan. 5, 2020) (noting that the Farm Service Agency administers the Conservation Reserve Program ("CRP") in which farmers remove environmentally sensitive land from agricultural production in exchange for a yearly rental payment (typically with a ten year commitment) and the goal of CRP is to improve water quality, prevent soil erosion, and reduce loss of wildlife habitat).



DISCUSSING THE FUTURE OF THE FAMILY AND OTHER STAKEHOLDERS

A farm transition can affect many individuals. Attorneys should work with farmers to identify their visions for the future of their families.²³ They should also consult other stakeholders with respect to ownership, management, wealth, and current relationships.

Future of the Family (Legacy)²⁴

Family Ownership

- Does the farmer own their land, or share ownership with family members? Do any non-family members share ownership of the land? How will all of these interests address/approve the plan?
- Does the family wish to keep some or all of the land that they own?
- If the farmer were to die, retire, or become disabled, would the farmer's family have sufficient financial resources to keep the land together or continue farming?
- What effect might a divorce have upon the ownership of farm assets?

Family Management

- Are any family members involved in day-to-day operations?
- Does a family member wish to manage the farm?
- Which family members, if any, want to have a role in farm management?
- If more than one family member wants to participate in management, how will responsibilities and control be divided?
- Do those family members have the personal and financial capacity as well as the business ability to manage the farm?

Family Financial Security

- What other assets does the family have? Are there insurance policies or other assets that can provide financial protection and resources to off-farm heirs?
- Is the farm mortgaged? What is the debt load on the land and on the equipment?
- Is the land subject to an existing conservation easement? Does this require the farm to be sold at its agricultural value?
- Will the farmer's spouse and family be able to live comfortably after the death or disability of the farmer?
- Does the family have sufficient assets to overcome an unanticipated disaster such as drought or disease?

Family Dynamics

- Has the farmer spoken with the family as a whole about his or her desires?
- Do family members have opinions about the farm transfer process?
- Who should care for the farmer's minor children or aging parents?
- Does a family member expect to take over the family farming business?
- Are family members worried that they will lose their say in the business?

23 LAND FOR GOOD, FARM SUCCESSION ADVISING: AN ATTORNEY TRAINING COMPENDIUM, <http://landforgood.org/resources/toolbox/toolbox-educators-advisors/attorney-training-compedium/>.

24 LAND FOR GOOD, TOOLBOX FOR FARM TRANSFER PLANNING, <http://landforgood.org/resources/toolbox/toolbox-farm-families/>.



Effects of the Transition on Other Stakeholders

Current Dependents

- Whom does the current business support financially?
- Does the current business need to continue to support those people after transition?

Current Customer Base

- Who are the farm's current customers?
- Do the future opinions of current customers matter to the farmer?
- Does the farmer participate in a CSA operation? Will this continue, and if so, how?

Business Relationships/Existing Restrictions

- Does the farm participate in farmers markets or farm stands?
- Does the farm have contracts with other businesses?
- Does the farm have any financial assistance or conservation contracts with the Natural Resources Conservation Service (NRCS) or the state?
- Does the farm's success depend on the viability of a separate business entity?

Employees and Tenants

- Does the farm have employees or tenants?
- What are the terms of employment or tenancy?
- How will the transfer impact farm employees or tenants?

VALUING THE ASSETS AND LIABILITIES OF THE FARM AND THE FARMER

Evaluating assets in the agricultural context can also particularly complex. Often, the farmer's business and personal assets are indistinguishable. Additionally, the value of intangible assets, such as a spot at a local farmers market or a good community reputation, are difficult to value, and there are only a few farm business appraisers in the state. On the other hand, financial liabilities can be significant and affect the feasibility of a farm transfer. Attorneys should work with farmers to identify their potential assets and liabilities and understand when and how they should be transferred.

Evaluating the Farmer's Assets and Liabilities

Viability of the Farm

- Is the farm currently financially viable?
- Are there current threats to the farm's viability?
- Does the farmer own or lease the land? In what proportions? Are there other family members with ownership interests? Is the land owned personally or in a corporate vehicle, such as by a limited liability company?

Multiple Types of Assets/Liabilities

- What are the farmer's land assets/liabilities?
 - ▶ Are there mortgages, other liens, or easements on the land?
 - ▶ What is the quality of the land?
 - ▶ What are the farm's ecological resources (e.g., water, soil, drainage)?

- What are the farmer’s non-land farm assets/liabilities?
 - ▶ Does the farmer have a house on the farm?
 - Are there other buildable or house lots on the property?
 - Can the existing house be subdivided from the rest of the farm, if needed, and at what cost?
 - Does the farmer have a barn or other farm structures used for farming purposes?
 - Does the farmer have any equipment, such as a tractor or tiller?
 - What is the condition of these assets?
 - Who holds the title to the assets?
 - Does the farmer want to transfer those assets as well?

Transferring Assets/Liabilities

- Does the farmer intend to transfer all farm assets to their successor, or will some be retained, sold, or given to others?
- Does the farmer want the successor to assume the farm’s liabilities or do they intend to settle them prior to or as part of the transfer?

COMMON CONCERNS

In the process of planning for a farm transition, there are common concerns that farmers may have, regardless of the size of the business or the method of transfer. Attorneys should be aware of these concerns and encourage farmers to address them head-on.

- Finding a successor
- Treating family fairly and preserving relationships
- Keeping the farm together
- Preserving the land for agriculture instead of development
- Transferring managerial control over the farm, including potential reluctance to relinquish control
- Lacking liquidity to accomplish their goals
- Having adequate resources to retire comfortably

FARM TRANSITION CHALLENGES

This section discusses three challenges attorneys can help farmers address in planning to transfer a farm business.²⁵ First, farm clients may wish to keep their land working as a farm or ensure that particular farming practices continue (Challenge 1: Preserving Agricultural Land and Production). Second, farms face unique management challenges because farmers may not wish to relinquish control or may need time to train successors (Challenge 2: Transferring Management and Control over Operations). Third, farm clients may want to address the interests of a wide range of people in the farm transition process, including the farmer, the family, the farm successor, and other stakeholders (Challenge 3: Protecting People).

25 VHCB, GUIDELINES FOR TRANSFER AND SUCCESSION PLANS 1, 1-10 (May 27, 2014), <http://blog.uvm.edu/farmvia/files/2013/03/Guidelines-for-Transfer-and-Succession-Plans.pdf>.



CHALLENGE 1: PRESERVING AGRICULTURAL LAND AND PRODUCTION

As discussed, farmers often have significant continuing interest in what happens to their farms after they are gone.²⁶ Frequently, farmers care deeply about whether the farmland will continue to be used for agricultural purposes and, if so, what types of farming practices will be used on the land.²⁷ For instance, a farmer who has carefully worked to conserve the soil and improve its health may wish to ensure that their successor uses the same, or better, conservation practices. Historically, farmers protected their farm legacy by passing the farm to family members with shared values. However, today, many farmers transfer their farms outside the family. Whether the transfer is to a family member or not, the farmer's preferences may conflict with those of the successor.²⁸ Legal tools—many of which are discussed below in the fourth section—can help balance the objectives of the entering and existing farmers and assist in a successful farm transition.

Additionally, farms can be vulnerable to development. This is largely because suburban farmland is likely to be much more financially valuable if used for housing or retail rather than for agricultural purposes—providing an incentive to convert it from agricultural use.²⁹

Vermont farmland is not priced quite as high as farmland in other New England states. In 2018, the average value of Vermont farmland was \$3,540 per acre, whereas in other more densely populated New England states (i.e., Rhode Island and Massachusetts), it was as high as \$15,200 per acre.³⁰ Still, Vermont real estate values vary across the state, and, not surprisingly, farmland is more valuable near urban centers, such as in Chittenden County, where agricultural uses compete with development and commercial activities.³¹ In addition to pressure from developers, it may be difficult to keep farmland undivided or intact if the farmer has many heirs—as those heirs may have different goals for the future of the farm. In such cases, on-farm and off-farm heirs may have different objectives: continuing farm operations versus maximizing the transfer value.

Protecting farmland is becoming of greater importance to many farm transitions because of the financial implications. Conveying a conservation easement to a qualified nonprofit organization, such as the Vermont Land Trust³² or Upper Valley Land Trust,³³ may be a way to take advantage of the differential between a farm's fair market value and its agricultural value. Through funding offered by NRCS's Agricultural Conservation Easement Program³⁴ and the Vermont Housing and Conservation Board,³⁵ it may be possible to sell a

26 ROBERT ANDREW BRANAN, *PLANNING THE FUTURE OF YOUR FARM: WORKBOOK ON FARM TRANSFER DECISIONS* 1, 1-112 (2012), http://pubs.ext.vt.edu/446/446-610/446-610_pdf.pdf; JEANNE BERNICK, *FARM J. LEGACY PROJECT, TRUST WORTHY*, (June 30, 2012), http://www.farmjournallegacyproject.com/article/legacy2012_trust_worthy/.

27 RODNEY JONES ET AL., *K-STATE RES. & EXTENSION, TRANSITION PLANNING: 12 STEPS TO KEEP THE FAMILY FARMING* 1, 1-4 (Dec. 1, 2012), <http://www.agmanager.info/farmmgmt/planning/MF3074.pdf>.

28 ADRIENNE LAMBERTI, *TALKING THE TALK: REVOLUTION IN AGRICULTURAL COMMUNICATION* 1, 89 (2007); JEANNE BERNICK, *supra* note 26.

29 MASS. EXEC. OFFICE OF ENERGY AND ENVTL. AFFAIRS, *SMART GROWTH / SMART ENERGY TOOLKIT MODULES – AGRICULTURAL PRESERVATION*, http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-ag.html (last visited Apr. 22, 2015).

30 USDA NASS, *2019 FARM REAL ESTATE VALUE BY STATE* (Aug. 6, 2019), https://www.nass.usda.gov/Charts_and_Maps/graphics/farm_value_map.pdf.

31 Vt. LAND LINK, *FIND A FARM*, <https://vermontlandlink.org/search-properties> (last visited Jan. 5, 2020).

32 Vt. LAND TR., <https://www.vlt.org/> (last visited Jan. 5, 2020).

33 *Id.*

34 USDA NRCS Vt., *EASEMENTS*, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/vt/programs/easements/> (last visited Jan. 5, 2020).

35 VHCB, *CONSERVATION*, <https://vhcb.org/our-programs/conservation> (last visited Jan. 5, 2020).



conservation easement for a meaningful amount. However, the farmer will have to agree to give up significant development rights. This ability to convey away development rights can offer a significant financial advantage while allowing the farmland to remain in farming. This is important in many farm transfer processes as it can provide a revenue stream to provide some financial return to off-farm heirs and keep the land in farming by the on-farm heir. It can also bring the value of the farmland down to a level that a new or a beginning farmer can afford.

This strategy should be employed cautiously. Development rights can only be given away once, so this tool only works for one generation or one farm transfer. Therefore, care must be taken to ensure that the conservation easement being conveyed provides sufficient operational flexibility to continue the farm's economic activity over time as this is a permanent property restriction.³⁶ Attorneys can leverage resources and expertise in Vermont, such as through the Agency of Agriculture, Food and Markets, the Farm & Forest Viability Program, University of Vermont Extension, Land for Good, Vermont Land Trust, the Upper Valley Land Trust, and the Vermont Agricultural Mediation Program, in exploring available conservation options.³⁷

CHALLENGE 2: TRANSFERRING MANAGEMENT AND CONTROL OVER THE OPERATION

In many cases, to ensure a successful farm transition, the successor needs an opportunity to develop experience managing the farm business.³⁸ Because farmers are so deeply connected to their farms, they may struggle to relinquish control over farm operations, particularly as they may continue to live on the farm or in close proximity.³⁹ As a result, successors may not be given a sufficient opportunity to develop management or business skills prior to taking control of the farm.⁴⁰ A plan that provides for gradual transition over a period of several years can help the farmer and their successor develop a trusting relationship and provide for a successful bridge.⁴¹ The successor gains experience managing the farm, and the farmer provides mentorship and gains confidence in their successor. Gradual transitions can be accomplished by creating an employer-employee relationship between the current owner and successor before the transition or through a lease arrangement or a limited liability company model with interests gradually conveyed from the existing farmer to the successor farmer over time. Such relationships can help each party develop a sense of whether the transition will be successful and whether it meets their respective objectives.

Gradual transition plans can also help farmers maintain their quality of life. For instance, a gradual transition plan may allow a farmer to continue to live on the farm during retirement.⁴² A gradual transition may also help the farmer address any concerns about the

36 UNIV. OF ME. SCH. OF L., *supra* note 16, at 69.

37 See, e.g., MIKE GHIA, LAND FOR GOOD, *Farm Succession*, VAAFM, <https://agriculture.vermont.gov/take-steps-plan-future-workshops-available-farm-succession> (last visited Jan. 5, 2020); UNIV. OF VT., *Transferring the Farm Virtual Workshop*, VT. FAMILY FARM SUCCESSION, <http://www.uvm.edu/farmtransfer/?Page=ttf.html&SM=ttfsubmenu.html> (last visited Jan. 5, 2020); VHCB, *Farmland Conservation*, CONSERVATION, <https://vhcb.org/our-programs/conservation/farmland-conservation> (last visited Jan. 5, 2020); ENVT. MEDIATION CTR., *About VTAMP*, VERMONT AGRICULTURAL MEDIATION PROGRAM, <http://www.emcenter.org/vtamp/> (last visited Jan. 5, 2020).

38 AM. FARMLAND TR., *supra* note 3.

39 *Id.*

40 *Id.*

41 ROBERT PARSONS ET AL., *supra* note 13, at 4.

42 *Id.*



future of the farm by allowing the farmer to reduce involvement in the farm operation over a longer period of time. There may also be tax advantages to a more gradual transition that the attorney should explore with the farmer's accountant while developing a succession schedule.

One issue that an attorney may wish to advise their clients about, if their goal is to keep a farm operation going, is the challenge of conveying the business or land to multiple family members. Passing the farm to multiple heirs can create tenuous joint farming situations, which can be difficult to maintain over the long term. In particular, if one heir does not wish to farm, that heir could potentially bring a partition action, which may break up the farm or require a buyout of their interest.⁴³ Conversely, breaking up the farm to satisfy multiple heirs can destroy the farm operation by creating multiple smaller farms that are not of sufficient size or scale to survive as successful businesses. Therefore, considering how to treat non-farming family members equitably is an important element of transferring control of a farming operation intended to continue. If the farmer's plan is to not provide off-farm heirs an interest in the business, this should be disclosed to the off-farm heir to manage expectations.

CHALLENGE 3: PROTECTING PEOPLE

Perhaps the most challenging issue facing farm transitions is how to ensure equitable treatment. Farm clients need to balance a variety of concerns when planning for transition. For farms to be successful after transition, farmers must provide sufficient resources to their successors. Farmers should be concerned with their own retirement savings, long-term care, and the needs of surviving spouses and heirs. They may also worry about the impact of the farm transfer on other stakeholders, such as business partners, employees, customers, and neighbors.

Farm transfer agreements, regardless of how they are structured, should be in writing and tailored to the specific plan the parties intend to implement.⁴⁴ This structure will obviously vary depending on the relationship between the parties, the nature of the operation, and the financial considerations involved.

A farm transition plan needs to address the farmer's own monetary needs. Farm transitions are unique, in part because the farmer's assets are largely illiquid; tractors, harvesters, other equipment, and land may be essential for farm operation, but may also constitute of bulk of the farmer's wealth. The old expression is that many farmers are land rich and cash poor—meaning that most of their wealth is in the land itself. Therefore, farmers may struggle to balance their retirement needs with the ongoing farm solvency for the next generation.⁴⁵ Passing these assets intact to the next generation may be necessary to ensure the continuation of a successful farm operation, but doing so may leave the older generation with limited retirement income, which can create tensions in planning and implementing a farm transfer.⁴⁶

43 12 V.S.A. § 5163.

44 GARY A. HACHFELD ET AL., TREATMENT OF HEIRS IN THE TRANSFER PROCESS (2014), <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/treatment-of-heirs-2014.pdf>.

45 See ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 1, 34 (Univ. of Vt. Extension ed. 2006), <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

46 See *id.*



A farm transition process needs to consider a successor's financial ability to take over a farm operation—whether the farm is being sold or transferred to a new farmer or being passed to the farmer's children. If the property is being sold, successors may not have enough capital to purchase the farm's assets, which may require a more gradual conveyance.⁴⁷ Gathering sufficient capital to acquire farm assets can be even more difficult for farming families if an older generation suddenly passes away and assets are distributed equally among the farmer's family (potentially breaking up the farm and farm business).⁴⁸ Successors obviously need to make an informed business decision about the farm's financial viability before moving forward with a plan to take over an agricultural operation. It may not be in the successor's interest to take over a farm that is not profitable or would take too much investment to become profitable. These issues need to be explored in depth before making this type of investment and commitment.⁴⁹

A farm transition may need to consider the impact of the transition on a farmer's family. When a farmer wants to transfer their farm business to a single child or family member, it can be difficult to treat the other, non-farming members of the family equitably through the estate plan.⁵⁰ Finding alternative means to compensate non-farming family members, such as through life insurance policies, discussed in the next section, can be a key part of a farm transition. Importantly, treating each family member fairly during the farm transition process may result in distributing assets unequally amongst heirs (that is, equitable treatment may not result in equal allocations of assets amongst heirs).⁵¹ For instance, the farmer's family members may have contributed unequally to the farm's growth over the years.⁵² Family members who have worked on the farm or invested in its development may, in the farmer's view, rightly deserve a larger share of the farm portion of the estate.⁵³ The apparent disparity in treatment, however, could produce resentment, and the farmer will likely want to ensure that their family members feel that the farm transition process is fair and appropriately balanced.

A common farm transition mistake is moving forward on a plan that reflects the interests of only some stakeholders.⁵⁴ Similar to transfers for non-farming clients, this can lead to prolonged battles between affected parties and have strong negative consequences for family relationships—which the farmer likely wants to avoid.⁵⁵ Unless every family member is given the opportunity to express their opinions about the future of the farm, the risk of hard feelings and resentment greatly increases.

A farm transition plan should be flexible enough to change or adjust if it is not working for all parties and is not adequately rewarding their respective investments of time and resources. For example, if a successor works for the farmer in return for the future transfer of the farm, how will that individual be compensated if the transfer never goes through and, alternatively, what exit ramps exist if the relationship is not working

47 SARA SCHAFFER, FARM J. LEGACY PROJECT, MATTERS OF THE ESTATE (June 30, 2012), http://www.farmjournallegacyproject.com/article/legacy2012_matters_of_the_estate-sara-schafer/.

48 UNIV. OF ME. SCH. OF L., *supra* note 16, at 71.

49 AM. FARMLAND TR., *supra* note 3.

50 SARA SCHAFFER, *supra* note 47.

51 David Goeller, *Putting a Value on Sweat Equity*, UNIV. OF MINN. EXTENSION (2011), <https://extension.umn.edu/transfer-and-estate-planning/treatment-heirs-transfer-process#putting-a-value-on-sweat-equity-246612> (reviewed in 2017) (last viewed Jan. 5, 2020).

52 *Id.*

53 *Id.*

54 N.J. FARM LINK PROGRAM, *supra* note 15, at 10-11.

55 *Id.*



as intended? An attorney can help a farm client work through these issues and develop a balanced plan for both entering and exiting farmers.

Overall, a farm succession plan involves protecting the land base, the business, and the people; doing so successfully requires or involves the use of transfer-related tools, several of which are introduced below.

MECHANISMS TO FACILITATE FARM TRANSITIONS

Attorneys can use a variety of tools to transfer farmland, assets, and managerial control over a farm and farm business. This section briefly discusses several of the most important or more common tools, including sales, leases, purchase agreements, trusts, conservation easements, business structure, and life insurance as potential means for accomplishing farm transition goals.

This section analyzes the implications of each method using the three topics discussed above: preserving agricultural land and production, transferring management and control, and protecting people. Each tool has benefits and drawbacks depending on the farmer's unique needs and priorities. Notably, these tools are not exclusive and can often complement each other within the farm transfer process.

SALES

Farmers can transfer their land and assets to the new owners through a commercial sale, meaning that there likely will be no ongoing management or ownership role for the farmer after the transfer. Outright sales are relatively straightforward, although there are complications to the sale of farmland that attorneys should consider.

Preserving Agricultural Land and Production

Benefits:

- If the family is uninterested or unable to continue farming, an outright sale may be an effective way to transfer the farm to a person outside the family who shares the farmer's values.
- If an entering farmer has sufficient capital to purchase the land outright, this gives him or her control over the land and security to make investments in the farm and farm business.

Drawbacks:

- Absent specific conditions, such as the existence of a conservation easement, outright sales do not provide the farmer with assurance of any baseline level of land management or any control over the farm's future uses.
- This option may require subdivision of the farm if the farmer is living on the farm and wants to remain on the land, or alternatively, may require the farmer to sell their home and move off the land.



Transferring Management and Control over the Operation

Benefits:

- As a seller, the farmer freely controls to whom they ultimately sell the farm, allowing the farmer to pick their successor.

Drawbacks:

- The farmer will have no ongoing involvement with the farm business.
- Outright sales do not allow the gradual transfer of ownership and management, which may make it difficult to identify and bring in a successor farmer.

Protecting People

Benefits:

- Outright sales usually produce liquid capital, which is easily distributed between the farmer and other stakeholders and can help to meet the farmer's financial objectives, including retirement costs.

Drawbacks:

- Because farm assets are often held for a very long time, the farmer likely has a low tax basis, which means there could be a large tax liability upon sale. However, if sold, the farmer may be able to take advantage of the lower rate on long-term capital gains, depending on the type of asset.⁵⁶
- Buyers may not be able to afford the outright purchase of land and assets or doing so may hinder their ability to weather unforeseen risks after the sale (or their ability to invest in expanding the farm business).

TAILORED SALES

More uniquely constructed sale arrangements can give entering and exiting farmers greater shared control over the transition process. For instance, the farmer may grant the purchaser an option on the farm, that is, the right to purchase the farm at a later date for a specified price, or provide seller financing.⁵⁷ Alternatively, the farm can be sold over time through an installment contract to allow the farmer to gain experience and capital and pay for the land more gradually.

Preserving Agricultural Land and Production

Benefits:

- The length of an option or contract allows farmers to include conditions to ensure that the purchaser acts in accordance with the values or practices identified in that agreement.

Drawbacks:

- Unless included in the contract, the farmer has no control over the land's future use once it has been conveyed.

56 Tracy T. Grondine & Mace Thornton, *Cap Gains Tax Precludes Farmers from Passing Torch*, AM. FARM BUREAU FED'N (Sept. 20, 2012), <http://www.fb.org/index.php?action=newsroom.news&year=2012&file=nr0920.html>.

57 GARY A. HACHFELD ET AL., *supra* note 44.



Transferring Management and Control over the Operation

Benefits:

- The farmer and purchaser can develop a cooperative working and mentorship relationship for gradually transferring ownership and control of the farm, which can be appealing to both parties.
- Sales can be structured to allow farm purchasers to gain ownership of farm assets incrementally over time, which allows the incoming farmer to gain the management and business skills necessary to operate the farm.⁵⁸
- Gradual sales and seller financing can help beginning farmers slowly take over the management and assets of a farm operation—again, bridging the gap and making the farm more affordable to the incoming farmer.

Protecting People

Benefits:

- Tailored sales can increase affordability and financial security for both farmers and successors.
- There could potentially be tax advantages to a more gradual farm succession model.

Drawbacks:

- Long-term transitions create more opportunities for either the seller or purchaser to breach the contract and terminate the sale and, for the existing farmer, provide less assurance of return than a market sale.
- The existing farmer's capital is tied up for a considerable amount of time, and delay the farmer's receipt of sale funds, which may be problematic.
- For the entering farmer, these plans also create additional risk and delay in obtaining secure tenure over the farmland and control over the farm business and create some additional investment risk that they will need to evaluate.

TRUSTS

Trusts have a variety of applications in the farming context. In the estate-planning context, trusts can protect retiring farmers and non-farming heirs and provide ongoing control over the farm's future. In the trust context, the farm will transfer their assets to the trust designating a trustee who will have control over the assets, as well as the beneficiaries of the trust, and the management instructions or dictates that should be followed.

Preserving Agricultural Land and Production

Benefits:

- Trusts can be particularly helpful when dealing with farmers who have strong convictions about how the farm business should be managed after they are gone. A farmer can require their trustees to ensure that their vision for the farm's future will be carried out by the farm successor.

58 *Id.*



- Trust documents can establish conditions for use of the land to promote the farmer's land management goals.

Drawbacks:

- Overly restrictive trust provisions may limit the future operator's flexibility in responding to evolving conditions.

Transferring Management and Control over the Operation

Benefits:

- The trust allows the farmer to separate management from beneficiaries. Therefore, the farmer can designate individual leadership and multiple beneficiaries (allowing an on-farm heir to farm with minimal off-farm heir involvement, while allowing the off-farm heirs to benefit financially).

Drawbacks:

- A trust can be complex and create operational challenges.
- Revocable trusts are very flexible during lifetime of the grantor, but become rigid upon the grantor's death—which can create operational issues.

Protecting People

Benefits:

- Trusts can divide the profits of a farm business without forcing a sale or dividing control. In this way, they can fairly distribute assets among many beneficiaries.
- Trusts allow assets to be transferred before death, which can reduce estate tax liability.
- Trusts also avoid (or reduce) probate and probate expense, are more difficult to contest than a will, avoid public disclosure of most assets, and allow for a quick transfer of assets upon death.

Drawbacks:

- Trusts can be complex to create at the outset and can involve considerable up-front expense, particularly if it is more than a simple grantor revocable trust for holding real property.
- Trusts require the conveyance of property to the trust, which requires going through a process to retitle assets and transfer these to the new entity, which can be expensive and time consuming.

ESTATE PLANNING

There are a variety of other estate planning tools that can assist within the farm transfer process. The first tool is a will conveying the farm and farm business at the farmer's death. Estate planning techniques are generally flexible, and can be modified up until death, and there are very few restrictions on how assets can pass. Wills must undergo the probate process, which can be expensive and time consuming.⁵⁹ Overall, having a will is an important step for a farmer to ensure that there is a succession plan, but should probably

59 See generally, Vt. Judiciary, Wills & Estates (2017), <https://www.vermontjudiciary.org/probate/wills-and-estates> (last visited Jan. 5, 2020).



be considered in conjunction with other tools and in consultation with the farmer's accountant and estate planning attorney.

The second tool is through a life estate. A life estate involves conveying the land to a successor in fee (the remainderman) but reserving the right to use and enjoy the land for the remainder of the farmer's life (the life tenant). A life estate gives the next generation the assurance that they will eventually own the farm. However, it also separates ownership from control, which can lead to some potential issues if the relationships change. Moreover, this arrangement may create administrative and financial issues as it may be a difficult asset to borrow against.

CONSERVATION EASEMENTS

A conservation easement is, at its most basic, a legal agreement whereby a landowner conveys certain rights associated with their property to a qualified nonprofit or government entity, inhibiting future owners from using the land for non-farm development.⁶⁰ Vermont law dictates requirements for the creation, maintenance, and termination of conservation easements.⁶¹

Conservation easements can be an effective tool for ensuring that farmland remains in agricultural production while simultaneously securing liquid capital. The easement can be tailored to match the farmer's goals for how the farmland will be used in the future.⁶² The farmer maintains most management and ownership control, but they and future owners are restricted in perpetuity from developing the land, as this agreement will be binding on all successive landowners. The farmer will still receive all the benefits of landownership and farming. Conservation easements can be sold or gifted in the same manner as any other property interest. Typically, in the farming context, conservation easements are donated or sold to a government agency or a nonprofit land trust.⁶³

Preserving Agricultural Land and Production

Benefits:

- Conservation easements protect land for agricultural production in perpetuity, so if protection of the farmland is a goal of the landowner's, easements can be an effective tool for accomplishing this objective.
- Conservation easements can also require certain land use activities or encourage more conservation-related benefits, including the creation of riparian buffers, etc.
- By preventing development, easements can make the land more affordable for beginning farmers.

60 AM. FARMLAND TR., FARMLAND INFO. CTR., FACT SHEET: AGRICULTURAL CONSERVATION EASEMENTS (June 2008), <http://www.massland.org/files/ACE062008.pdf>.

61 Conservation and Development: Acquisition of Interests in Land by Public Agencies, 10 V.S.A. §§ 6301 *et seq.*; Conservation and Preservation Rights and Interests, 10 V.S.A. § 821; see Vermont Housing and Conservation Trust Fund, 10 V.S.A. §§ 301 *et seq.*, <https://legislature.vermont.gov/statutes/chapter/10/015>.

62 VT. LAND TR., CONSERVATION OPTIONS, <https://www.vlt.org/conserve/> (last visited Jan. 5, 2020).

63 AM. FARMLAND TR., *supra* note 61.



Drawbacks:

- Depending on how the easement is written, conservation requirements may be overly restrictive or permissive in governing farming practices, resulting in unforeseen effects in the future.

Transferring Management and Control over the Operation**Benefits:**

- The easement, to some extent, can be written to incorporate the farmer's values and goals for the future of their land. Conservation easements dictate in what ways farmland can and cannot be used, and in that respect the farmer has some control over how the successor farms the land.

Drawbacks:

- Conservation easements do not require farming mentorship or business training, which may be a drawback for farmers that want to provide mentorship and training to their successors and ensure that the farm business continues to operate in a certain fashion.
- Conservation easement sales transfer some oversight and control to the easement holder, namely the government or land trust, which adds a layer of operational complexity.

Protecting People**Benefits:**

- The sale of a conservation easement will lead to a cash payment, which can be used to satisfy the financial needs of non-farming heirs or pay existing debt. Similarly, if the farmer instead donates part or all of the easement to a nonprofit land trust, the donated value may be deductible under section 170(f) of the Internal Revenue Code. Note that for some transactions, an easement conveyance may involve both components (sale and donation).

Drawbacks:

- There is a risk that the combined value of the conservation easement and the residual sale of the land results in less return than a fair market value sale of the land—resulting in less return to the farmer.
- A conservation easement is a one-time transaction. If the development rights have been conveyed away, the next generation will not have this option.
- A conservation easement may reduce a bank's appraisal of the value of the land and as a result may reduce the farmer's borrowing capacity. The farmer may also have to pay some of the proceeds from the sale to the bank to repay all or a portion of outstanding debt.
- A poorly designed easement may have negative consequences on the operational options for a farm business, particularly in expanding nontraditional agricultural operations on the landscape.



BUSINESS STRUCTURES

Business structures provide a variety of forms for transferring responsibility for farm assets over an extended period of time. Chapter II of this Guide describes the various business structures available to farm businesses in greater detail (such as limited liability companies, partnerships, and corporations). This section, however, briefly describes how business entity selection and structure can further the goals of preserving agricultural land and production, transferring management and control of the operation, and protecting people that are discussed throughout this section. This section will discuss these business structures, such as a limited liability company, at a general or generic level within this unique context.

Developing an appropriate business structure to address the unique goals of a farm transfer can be critical to a successful transition, and there are a variety of ways that business structures can be tailored or adapted as needed.⁶⁴ For example, an exiting farmer or heir can become partners or members in the farm business, while allowing the farm successor to have most operational control.⁶⁵ If the successor farmer is interested in eventually assuming full ownership, a purchase agreement can allow the successor to obtain others' ownership interests over time.⁶⁶

Preserving Agricultural Land and Production

Benefits:

- Specific land management goals can be included in organizational documents and operating or partnership agreements. These goals will bind future officers of the farm organization and ensure the farmer's values continue to be respected.

Drawbacks:

- As with trusts and easements, narrow language in organizational documents can limit flexibility or inappropriately bind future farmers.
- Corporate structures involve or impose fiduciary duties that may be contrary to agricultural or conservation objectives.

Transferring Management and Control over the Operation

Benefits:

- Farm businesses may be structured to allow both the existing farmer and successor to operate the farm simultaneously. Organizational documents can clarify specific roles and duties, establish decision-making processes, and thereby stabilize or document complicated farming relationships.
- Organizational structures can divide roles and responsibilities between multiple successors with different competencies and interests.
- Entity formation hedges against the sudden death or disability of the farmer by better ensuring that the farm will continue.
- Organizational documents allow the farmer to more explicitly control the transition process and allow gradual transfer of management.

64 KATHY RUHF ET AL., *supra* note 17, at 11.

65 *Id.*

66 GARY A. HACHFELD ET AL., *supra* note 44.



Drawbacks:

- Without clear entity governance, multiple operators can create confusion and conflicts.
- Entity formation involves considerable up-front work and expense.
- There are operational costs associated with creating a business entity, such as complying with processes and meeting regulatory requirements.

Protecting People

Benefits:

- Formal business structures may be used to limit estate tax liability.
- These structures can be organized so the successor farmer gains ownership with sweat equity or pays more slowly over time.
- Entity formation can also be used to protect family assets and can divide management from ownership.
- Entity formation can help divide assets among many dependents.

Drawbacks:

- Depending on the structure, formation and formality costs may outweigh the above benefits.

LIFE INSURANCE

Life insurance can be used to provide for non-farming family members in the estate settlement process without granting them an ownership interest in the farm business. The proceeds from a farmer's life insurance policy can go exclusively to the non-farming family members.⁶⁷ This enables the older generation to transfer all of the farm assets to the successor without excluding the non-farming family members from their fair share of the estate. Life insurance can involve substantial up-front and out-of-pocket expense to acquire and maintain the coverage, but it may be a bridge to keeping the farm together when conveying to the next generation.

LAND-LINKING PROGRAMS

For farmers whose family members are not interested in taking over the farming business, land-linking programs can help to identify possible farm successors from outside the family. Land-linking programs are designed to connect retiring farmers who want to see their farm businesses continue with aspiring farmers who are looking to secure farmland.⁶⁸ Land-linking programs maintain a database of available farmland and farmers looking to buy or lease land; they facilitate matches by acting as a liaison between the farmer and landowner.⁶⁹

67 GARY A. HACHFELD ET AL., *supra* note 44.

68 VERMONT LAND LINK, <https://vermontlandlink.org/> (last visited Jan. 5, 2020).

69 VERMONT LAND LINK, *Resources*, <https://vermontlandlink.org/resources> (last visited Jan. 5, 2020).



Land-linking programs also provide additional services such as free technical assistance in forming tenure agreements.⁷⁰ Programs may facilitate farm transfers by providing educational support, property assessment, business planning services, and suggested matches.⁷¹ In some cases, land-linking programs may also include services to help communities by identifying unused, viable farmland and encouraging landowners to lease their land to a farmer in order to increase active agriculture in the community.⁷² Vermont Land Link⁷³ and New England Landlink⁷⁴ list available Vermont farmland for would-be farmers.

CONCLUSION

Transition planning can be complicated. If you are counseling farm clients, it is advisable to recommend that they start as soon as possible on this process and revisit their plans upon any significant life or financial change. Every farm family is unique, and every family requires a different farm transition plan to satisfy its needs and address its shared values. It is important to have meaningful conversations and to gather client-specific information to help inform constructive family and business conversations. Only then can the attorney assisting with a farm transfer process begin to assess the potential legal options and help put together a plan that best aligns with their client's vision for the future of the farm. Many of the organizations identified in the Resources section below can serve as valuable partners and advisors in this process.

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- 70 NEW ENGLAND SMALL FARM INSTITUTE (NESFI), http://www.smallfarm.org/main/for_new_farmers/new_england_l (last visited Jan. 5, 2020); New Entry Sustainable Farming Project, Tufts Univ., Looking for Land to Farm?, <http://nesfp.nutrition.tufts.edu/farmland/how-farmland-matching-service-works> (last visited Mar. 15, 2019) (providing a link to a New England Farm Land Finder to find property listings or to list a property for lease).
- 71 KATHY RUHF & JON JAFFE, LAND FOR GOOD, SUCCESSFUL FARM TRANSFER PLANNING FOR FARMERS WITHOUT AN IDENTIFIED SUCCESSOR 1, 13 (2012), <http://landforgood.org/wp-content/uploads/LFG-Farm-Transfer-PlanningWithout-An-Identified-Successor-Handbook.pdf>.
- 72 See NEW ENTRY SUSTAINABLE FARMING PROJECT, TUFTS UNIV., RESOURCES ON FARMLAND, <http://nesfp.nutrition.tufts.edu/farmland> (last visited Mar. 15, 2019).
- 73 VERMONT LAND LINK, <https://vermontlandlink.org/> (last visited Jan. 5, 2020).
- 74 NESFI, NEW ENGLAND LANDLINK, http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/ (last visited Jan. 5, 2020).





Center for Agriculture and Food Systems Farmland Access Legal Toolkit

- <http://farmlandaccesslegaltoolkit.org>
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Vermont Land Link

- <https://vermontlandlink.org/>
-

Vermont Land Trust

- <https://www.vlt.org/>
-

Vermont Agricultural Mediation Program

- <http://www.emcenter.org/vtamp/>
-

Vermont Housing & Conservation Board

- Farmland Conservation, <https://vhcb.org/our-programs/conservation/farmland-conservation>
 - Vermont Farm & Forest Viability Program, <https://vhcb.org/viability>
-

Land For Good

- <http://www.landforgood.org/>
-

Tufts New Entry Sustainable Farming Project

- <https://nesfp.org/>

University of Vermont

- Transferring the Farm Video Series, <http://www.uvm.edu/farmtransfer/?Page=videos.html>
 - Transferring the Farm Virtual Workshop, <http://www.uvm.edu/farmtransfer/?Page=ttf.html&SM=ttfsubmenu.html>
 - The Family and Farm Transfers, <https://www.uvm.edu/farmtransfer/?Page=ttf-family.html&SM=ttfsubmenu.html>
-

American Farmland Trust

- <https://www.farmland.org/>
-

Farm Transfer New England

- <https://farmtransfernewengland.org/>
-

New England Landlink

- http://www.smallfarm.org/main/for_new_farmers/new_england_landlink/
-

New England Farmland Finder

- <https://newenglandfarmlandfinder.org/>



CHAPTER VII

FARMLAND ACQUISITION

Chapter Overview

Farmland acquisition involves unique considerations by virtue of the land itself and the farming operations that are intended to occur upon acquisition. This chapter is designed to introduce these considerations to Legal Food Hub attorneys working with farmers who are seeking to purchase or lease farmland.

- 1. Evaluating the Farmer's Needs and Limitations** This section assists an attorney in helping identify a farmer's needs by highlighting certain considerations, such as financing and particular tax exemptions.
- 2. Land Selection** This section discusses some of the state and local issues related to identifying and acquiring farmland, including zoning considerations and community support.
- 3. Purchasing Farmland** This section provides an overview of the decisions involved in purchasing farmland, particularly the various types of acquisition models.
- 4. Leasing Farmland** This section covers options for leasing farmland, including different types of leases, with a focus on some of the more important farm-related lease provisions.



EVALUATING THE FARMER'S NEEDS AND LIMITATIONS

Acquiring farmland is a big decision for a farmer and involves numerous considerations in addition to the location and size of the farm. A few of the most notable factors include:

Finances: The attorney should get a sense of the farmer's finances. What are their resources? What funding sources is the farmer going to draw upon and how does that impact the transaction?

Potential Loans and Grants: Can the farmer take advantage of any loans or grants available at the federal, state, or local level? If you are working with a new farmer, a Beginning Farmers and Ranchers Loan administered by the Farm Service Agency of the USDA may be a good source of debt financing.¹ The USDA also administers various grants, including for promoting local food and farmers markets, developing rural businesses, and more, so depending on the type of operation, these other funding streams may be options.² At the state level, the Vermont Agency of Agriculture, Food and Markets (VAAFAM) offers a number of grant programs to promote farmland restoration and viability, as well as for specialty crops, sustainable milk production, and cost-sharing for organic certification.³

Potential Tax Exemptions: Vermont has a variety of tax exemptions for agricultural assets like farm equipment.⁴ The farmer should check with the municipality to see if it has enacted additional exemptions for certain farm machinery, livestock, or buildings.⁵ Additionally, landowners can enroll farm and forest land in the Current Use Program, which allows for such lands to be taxed at a lower rate.⁶ For more information about current use, see Chapter VII, Land Regulations.

Timing: How quickly does the farmer need the transaction to close and how quickly do they want to be on the land? Do they want to acquire the land right away or are they looking to structure a more gradual acquisition?

Partners: Has the farmer connected with the various entities and agencies working on farmland acquisition? Have they put together a business plan through the Vermont Farm and Forest Viability Program network? Have they lined up financing? Do they have existing markets? Understanding the partnerships and networks that the farm client has, or could be connected with, can help the attorney assist the client to develop a more thorough strategy early in the process.

LAND SELECTION

It is important that the land acquired work for a farmer's intended operation. After getting a sense of what plans, in both the short term and the long term, the farmer has for the land, an attorney might wish to bring to the farmer's attention several key issues. These

1 USDA FSA, BEGINNING FARMERS & RANCHERS LOANS, <https://www.fsa.usda.gov/programs-and-services/farmloan-programs/beginning-farmers-and-ranchers-loans/>.

2 See USDA, GRANTS & LOANS (2017), <http://www.usda.gov/topics/farming/grants-and-loans> (last visited Jan. 5, 2020).

3 VAAFAM, FUNDING OPPORTUNITIES: GRANTS, LOANS & FINANCIAL ASSISTANCE, <https://agriculture.vermont.gov/grants> (last visited Jan. 5, 2020).

4 VT. DEP'T OF TAXES, AGRICULTURAL MACHINERY, EQUIPMENT & SUPPLIES: TAXABLE OR TAX EXEMPT? 1, 1 (June, 2016), <https://tax.vermont.gov/sites/tax/files/documents/Ag-Exemption-FS-2016.pdf>.

5 *Id.*

6 VT. DEP'T OF TAXES, CURRENT USE, <https://tax.vermont.gov/property-owners/current-use> (last visited Jan. 5, 2020).



include the municipality’s zoning regulations, any environmental restrictions or concerns, any conservation easements that might restrict uses of the land, potential nuisance concerns, and the support in the community.

UNDERSTANDING FARMLAND SELECTION IN VERMONT

In Vermont, land may be subject to overlapping state and local regulatory requirements. Sixty percent of the state’s 255 municipalities have enacted their own land use and development regulations, in addition to the state laws regarding land use.⁷ Farming generally enjoys broad exemptions from most zoning requirements, but these exemptions are only available for certain statutorily defined agricultural activities. For a more complete summary of land use regulations affecting Vermont farmland, see Chapter VII, Land Regulations.

EVALUATING COMMUNITY SUPPORT AND COMPATIBILITY

Many municipalities are very welcoming and supportive of their farming community. It is worth researching what support systems are in place in the municipality where the farmer’s land is located. These supports can manifest in laws the locality has enacted to encourage agriculture or from networks that advocate for the farming community’s interests, as well as from the community of farmers that exist in that area. To avoid long-term issues or conflicts, it is important to consider how compatible the farming operation is within the specific geographic area.

Right-to-Farm Statutes: Like almost all states, Vermont has a right-to-farm law, which applies statewide and protects agricultural activity from nuisance liability.⁸ In order to fall within the parameters of this statute, a farming operation must meet four conditions:

- It must follow federal, state, and local laws and regulations;
- It must operate in a manner consistent with good agricultural practices;
- It must have been “established prior to surrounding nonagricultural activities”; and
- It must not have “significantly changed since the commencement of the prior surrounding nonagricultural activity.”⁹

Though this right-to-farm law generally supports farmers by reducing nuisance complaints and defines state policy in support of farms within the working landscape, it only creates a rebuttable presumption that a nuisance does not exist.¹⁰ Neighbors still have the chance to challenge a farm on nuisance grounds by demonstrating that the farming operation has “a substantial adverse effect on health, safety, or welfare, or has a noxious and significant interference” on neighbors.¹¹

7 Vt. NAT. RES. COUNCIL, LAND USE LAW, <http://vnrc.org/resources/community-planning-toolbox/land-use-law/> (last visited Jan. 5, 2020); 24 V.S.A. §§ 4401, 4403, & 4410-14.

8 12 V.S.A. § 5753.

9 *Id.* at § 5753.

10 *Id.* at § 5753(a)(1).

11 *Id.* at § 5753 (a)(2).



PURCHASING FARMLAND

Purchasing farmland is often a farmer's goal, and also one of the most complex components of the farmland transfer process. Farmland is expensive and requires considerable capital to pay for both the land and the transaction costs associated with the purchase. This section will briefly touch upon the types of due diligence involved in farm acquisitions as well as the most common purchase structures employed in farmland sales.

DUE DILIGENCE

Farmland acquisition is like all real estate transactions—it requires due diligence on a variety of issues. The following is a short non-exhaustive list of diligence work that must occur:

Title: The purchaser's attorney will be responsible for investigating title to the land to be acquired and confirming its marketability under the state's title standards. Common issues in Vermont farmland transactions include understanding conservation easements, access issues, addressing undischarged mortgages, and any other issues related to ownership or the legal description that arise in the title search.

Zoning/Permits: There are a variety of permits that should be explored within the farmland transfer, including wastewater permits, subdivision permits, and any other permits or USDA program-related issues that need to be addressed and either transferred or terminated.¹² Additionally, depending on how the farmer intends to use the land, it will be necessary to determine whether the zoning district permits or conditionally permits their intended use.

Environmental: A Phase I investigation will help the farmer determine whether there are any environmental issues of concern on the land, including protection against liability for hazardous waste disposal by prior owners.¹³ It is advisable that farm purchasers obtain a Phase I investigation. However, if the client is not interested in doing so, some basic due diligence, including use of the Vermont Agency of Natural Resources (ANR) Natural Resources Atlas to confirm the presence of sites, should be undertaken to avoid these issues.¹⁴

Transfer-Related Taxes: Real estate transfers in Vermont are generally subject to real property transfer tax, which is paid by the purchaser unless the parties agree otherwise.¹⁵ There also may be land gains tax,¹⁶ depending on how long the land has been owned and other considerations, as well as land use change tax if the land is enrolled in the Current Use

12 See, e.g., Vt. DEP'T OF ENVTL. CONSERVATION, INFORMATION SHEETS, <https://dec.vermont.gov/permits/handbook/info-sheets> (last visited Jan. 5, 2020); NOFA-Vt., UNDERSTANDING LAND USE REGULATIONS FOR FARM BUSINESSES 1, 1-6 (Feb. 2016), https://nofavt.org/sites/default/files/files/resources/understanding_land_use_regulations_for_farm_businesses.pdf; Vt. L. SCH. LAND USE CLINIC, FACILITATING INNOVATIVE AGRICULTURAL ENTERPRISES: CONSIDERATIONS AND EXAMPLE LANGUAGE FOR Vt. MUNICIPALITIES 1, 1-35 (2012), <http://www.nvda.net/files/VT-Ag-Guide.pdf>.

13 Vt. DEP'T OF ENVTL. CONSERVATION, BROWNFIELDS RESOURCES FOR CITIZENS (Apr. 2018), <https://dec.vermont.gov/waste-management/contaminated-sites/brownfields/citizens> (last visited Jan. 5, 2020).

14 Vt. AGENCY OF NAT. RES. NATURAL RESOURCES ATLAS, <https://anr.vermont.gov/maps/nr-atlas> (last visited Jan. 5, 2020).

15 Vt. DEP'T OF TAXES, PROPERTY TRANSFER TAX, <https://tax.vermont.gov/property-owners/real-estate-transaction-taxes/property-transfer-tax> (last visited Jan. 5, 2020).

16 Vt. DEP'T OF TAXES, LAND GAINS WITHHOLDING TAX, <https://tax.vermont.gov/property-owners/real-estate-transaction-taxes/land-gains-withholding-tax> (last visited Jan. 5, 2020).



Program and the use will change.¹⁷ The land use change tax will not apply if the land remains in its current use.

Other Issues: Is personal property included? Is this a purchase of a business as well as land? If so, are there employees? Depending on the complexity of the operation, many additional due diligence items may apply to ensure that the transfer is happening as intended and negotiated by the parties.

TYPES OF PURCHASES

For farmers able to take the step of purchasing farmland, this section describes some of the most common methods to structure a farmland purchase.

Fee Simple Purchase with Conventional Financing: This is the most traditional way of purchasing farmland. The farmer finds a property and buys it using a loan secured by a first-position mortgage on the property. The benefit to this approach is that the farmer will own the land, offering the greatest flexibility in how to utilize it and build their farming operation. Unfortunately, financing can be difficult to procure, especially for a beginning farmer who lacks an established track record and cash flow projections.¹⁸ As noted above, there may be options through the USDA to help farmers gain access to financing that they cannot obtain through traditional lending networks.

Fee Simple Purchase with Seller Financing: In this situation, a flexible seller is willing to give a mortgage to the entering farmer. In some instances, the seller may be willing to use an entity structure, such as a limited liability company, to facilitate a gradual transfer of membership interests over time as the exiting farmer gradually phases out of ownership of the business, and potentially the land. Options involving seller financing or other flexible arrangements offer strong potential to allow an entering farmer to gain access to land, but must be carefully discussed and documented to avoid unrealistic and divergent expectations about the relationship.

Installment Sale: In an installment sale, a buyer and seller agree that the seller will sell the property over a period of years. This may be a good solution for beginning farmers who are unable to obtain traditional financing on their own. The seller benefits from potentially limiting capital gains and income tax liability, as these are paid over time in accordance with the payment schedule, as opposed to being due at the outset, as in the case of a traditional fee simple sale.¹⁹ There are, however, downsides to this approach and if a farmer client is exploring this option, the attorney should advise the exiting farmer of the amount of time their asset will be tied up (as opposed to an immediate cash return through a conventional sale). On the incoming farmer side, a significant risk is that in the event of a default (for example, a missed payment), the seller will be able to repossess the property and all of the buyer's equity will be forfeited—even when most of the payments have been made.

17 Vt. NAT. RES. COUNCIL, CURRENT USE TAXATION, <https://vnrc.org/community-planning-toolbox/tools/current-use-taxation/> (last visited Jan. 5, 2020).

18 GETTING ON SOLID GROUND: AN OVERVIEW OF 15 WAYS TO SECURE LAND, CAL. FARMLINK (2008), http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf.

19 ANTHONY IARRAPINO & ELIZABETH SPELLMAN, UNIV. OF VT. CTR. FOR SUSTAINABLE AGRIC., OWNER-FINANCED SALES AND LAND CONTRACTS, GUIDE TO FINANCING THE COMMUNITY SUPPORTED FARM: WAYS FOR FARMS TO ACQUIRE CAPITAL WITHIN COMMUNITIES 1, 11 (2012), http://www.lvm.edu/newfarmer/business/financeguide/Guide%20to%20Financing%20the%20Community%20Supported%20Farm_March2012.pdf.



Fee Simple Purchase with Agricultural Conservation Easement: This option is similar to a fee simple purchase with conventional financing; however, the purchase price of the land is reduced due to the sale of a conservation easement. The trade-off is that the easement restricts further development of the land, making it less appealing to non-farmers looking to develop the land by removing its development potential. This approach may appeal to both the exiting farmer and the incoming farmer. For the exiting farmer, if they have located a potential beginning farmer buyer, the conservation easement sale can play a large role in facilitating the transfer. However, this approach requires patience as it may require delaying the sale for a significant period to allow time to secure easement funding. For an incoming farmer, the same appeal applies: the conservation easement can allow the farmer to buy land at a lower rate, or post-acquisition, sell an easement to recover some of their investment and use this amount to pay down debt or invest in their operation.

LEASING FARMLAND

Due to the expense and difficulty a small-scale or beginning farmer may have in purchasing farmland, leasing such land may be a more attractive alternative, particularly as they get started. In Vermont, 32 percent of farmers rely wholly or in part on lease agreements.²⁰ An attorney should review with their client the various types of leases available, emphasizing the term of the lease and the different payment arrangements, even if the client already has an idea of what the lease should look like. Additionally, there are some farm-specific terms that should be considered when drafting a lease agreement.

TYPES OF LEASES

This section discusses the primary lease types. These lease types can be combined in a variety of ways to provide greater flexibility to the parties to the lease.

Duration

Short-Term Leases: These leases typically last between one and three years, often with options for renewal at the end of the term. They are the most common form of farmland lease, offering the greatest flexibility for the parties. Having a short-term lease can serve as a trial period for the parties involved, since the commitment is lower than it is in a long-term lease, thus alleviating some concerns the lessor might have about a beginning farmer or one who will be engaged in experimental practices, and may be a bridge to a future sale or more structured and longer-term relationship.²¹

The disadvantage to a short-term lease is that there is little incentive for the farmer to invest in the property, through development or conservation practices. After all, any effort may be lost upon termination of the lease.²² Moreover, it can become more difficult to secure creditor lending for farmers in short-term lease arrangements.²³

20 USDA NASS, SELECTED FARM CHARACTERISTICS BY PRODUCERS' INVOLVEMENT IN DECISION MAKING 45, 45-46 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Vermont/st50_1_0053_0053.pdf.

21 ANNETTE HIGBY ET AL., A LANDOWNER'S GUIDE TO LEASING LAND FOR FARMING 1, 18-19 (2012), <http://landforgood.org/wpcontent/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

22 UNIV. OF VT., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 1, 73 <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

23 ANNETTE HIGBY ET AL., *supra* note 21, at 16.



Long-Term Leases: Long-term leases typically last at least three years.²⁴ Long-term leases are less common than short-term leases due to the level of complexity and level of ongoing commitment.²⁵ Careful drafting of the lease can preserve some needed flexibility.²⁶ For example, some long-term leases are drafted to provide points in time when the terms of the lease may be modified by the parties.²⁷ In Vermont, a lease with a term over more than 50 years (including renewals) will be subject to land gains, subdivision, and Act 250, so care must be taken in drafting a long-term lease to avoid these issues if that is the intention of the parties.²⁸

Payment Structure

Fixed and Flexible Cash Leases: Farmers can pay either a fixed or variable sum to the landlord as rent. Fixed price leases set a rent amount and payment schedule, providing a level of predictability. However, the burden is on the farmer to meet the rental payment regardless of crop yield or prices. If that is a concern for the farmer, the attorney might consider some form of flexible cash lease. Here, the payment is variable, determined by a percentage of the annual crop revenue. The profit share can comprise the entire payment or be in addition to a “base rent” that is lower than would be due in a fixed-cash lease. In this way, the landlord and tenant share in the risk of the farm’s profitability.²⁹ However, the added level of variability can make it difficult for the farmer to calculate a budget and break-even profit. To protect the farmer, some leases may stipulate a maximum rent.³⁰

Crop-Share Leases: In this type of lease, the landlord receives a percentage of the crop yield in exchange for use of the land.³¹ Crop-share leases are flexible and can be tailored to meet the needs of both parties. For example, the lease may stipulate a minimum and maximum threshold for the landlord’s portion to account for variability in crop price and yield.³² This option may be attractive for beginning farmers who are short on startup capital and want the risks of the contract to be shared with the landlord.

Other Lease Forms

Leases with Option to Purchase: This type of lease provides a point in time after a “triggering event” at which the tenant has the option to purchase the land. This occurs either after a determined period (the option period) or after the landlord decides to sell the property (right of first refusal). In the latter option, the lease term stipulates that the landlord cannot sell the property without first offering it to the tenant at a price comparable to that offered by a third party. The lease provisions may also state that a portion of the rent paid

24 UNIV. OF VT., *supra* note 22, at 71.

25 *Id.* at 67.

26 *Id.* at 80.

27 ANNETTE HIGBY ET AL., *supra* note 21, at 19.

28 UNIV. OF VT., *supra* note 22, at 80.

29 KRISTINA LORIA ET AL., AFFORDING OUR LAND: A FINANCE LITERACY GUIDEBOOK FOR YOUNG FARMERS (AND ALL FARMERS) 1, 22 (2013), <http://www.farmlandinfo.org/sites/default/files/AFFORDING-OURLAND-5-23-13.pdf>.

30 STEVEN D. JOHNSON, FLEXIBLE CASH FARM LEASE CONSIDERATIONS, IOWA STATE UNIV. EXTENSION & OUTREACH (Mar. 2009), <http://www.extension.iastate.edu/agdm/articles/others/JohMar09.html>.

31 CAL. FARMLINK, GETTING ON SOLID GROUND: AN OVERVIEW OF 15 WAYS TO SECURE LAND 1, 22 (2008), http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf.

32 See, e.g., STONEBERG & KELVIN LEIBOLD, IOWA STATE UNIV. EXTENSION & OUTREACH, IMPROVING YOUR FARM LEASE CONTRACT (last updated May 2017), <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-01.html> (last visited Jan. 5, 2020).



prior to the option to purchase will convert into credit toward the purchase of the land.³³

The lease agreement should be carefully drafted to explicitly state when the option to purchase arises and anything that may affect the price at which the tenant can purchase the land. If these provisions are unclear in the terms of the lease, the option to purchase will be rendered invalid and the landlord will have no duty to sell to the tenant.³⁴ In Vermont, leases with options to purchase can also trigger transfer tax, so care must be given in designing this type of lease to avoid unintended tax consequences.³⁵

DRAFTING AN AGRICULTURAL LEASE

Under Vermont law, a lease for longer than a year does not need to be “recorded at length” if there is a notice of memorandum recorded with the town clerk.³⁶ Most parties agree in the lease that the lease will not be recorded, but the notice can put other parties on record notice of its existence. This notice must contain:

- The names of the parties;
- A statement of any right to extend or renew the lease;
- The party’s addresses, and the date the lease was signed;
- The term of the lease including when it started and the date of termination;
- A description of the property being leased;
- A statement of any right of the party to purchase the property or to exercise a right of first refusal; and
- A statement of restrictions, and the location of the original lease.³⁷

An oral agreement or “handshake deal” should be avoided and likely will not be enforceable.³⁸ The formation of the lease is critical for validity as well as to avoid future misunderstandings. It also is often needed to serve as documentation to the IRS or other financial institutions.³⁹ Negotiation is key to identifying and dividing the risks and responsibilities of both parties. Moreover, much of the same due diligence that goes into the acquisition of farmland through purchase should also be used when entering into an agricultural lease.

33 LAND FOR GOOD, A LANDOWNER’S GUIDE TO LEASING LAND FOR FARMING 1, 19-20 (2012), <http://landforgood.org/wpcontent/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf>.

34 *Id.*

35 32 V.S.A. § 9601(3)(B)(iii).

36 27 V.S.A. § 341 (c).

37 *Id.*

38 See 12 V.S.A. § 181(5); see also Univ. of Vt., *supra* note 22.

39 ROGER McEOWEN, LEASE TERMINATION AND OTHER LEGAL CONSIDERATIONS FOR LEASE CONTRACTS, AG. DECISION MAKER 1 (Aug. 2007), <http://www.extension.iastate.edu/iowa/sites/www.extension.iastate.edu/files/iowa/Termination%20and%200th>.



LEASE PROVISIONS

In drafting a lease for agricultural land, there are several provisions that merit particular attention.

- **Parties:** Who are the actual parties to the lease? Care should be taken to make sure that the party signing the lease as the lessor actually owns the land they are purporting to let.
- **Description of the Property:** The description of the property in the lease should be specific and include maps for clarity. This is particularly important when only part of the property is being leased or there is an option to purchase.⁴⁰ If there is personal property beyond the real property that is or is not being leased, this should also be addressed.
- **Duration:** In addition to the standard durational lease terms of start date, end date, and options for renewal, there are other terms that should be written into the lease. If it is a long-term lease, there should be provisions providing for periodic review of the lease terms by the landlord and tenant.⁴¹ Renewal rights should also be spelled out in this agreement.
- **Rent:** A schedule of payments should accompany the amount of rent. Depending on the lease type, this can be a fixed sum of money, a variable share of the farm's profits, or a mixture of both. If payment is to be made in nonmonetary form, such as through a crop share or contributed labor, the type of consideration given must be specified in the lease.⁴² Additionally, the lease should be clear as to when these payments will be due.
- **Permitted Uses of Land and Property:** The lease should specify clearly and thoroughly what uses of the land and property are permitted and what uses are prohibited. It is not enough for it to permit "agricultural uses" without detailing what the parties consider "agricultural uses."⁴³ Crop production, livestock keeping or slaughtering, aquaculture, and agritourism are just some of the uses that may be permitted. The lease should also specify if the general public is allowed on the land.⁴⁴
- **Stewardship:** Some leases will have "stewardship clauses." These place a responsibility on the tenant to ensure the long-term quality of the land. This may require that the tenant engage in conservation and soil-nutrient management practices, for instance.⁴⁵ It may also require the tenant to obtain or maintain organic certification, with specifications as to whether the costs of certification will be shared. Provisions limiting the use and frequency of pesticide applications may be also included in some leases.⁴⁶
- **Maintenance and Repairs:** The lease should be clear about who is responsible for the maintenance and repairs of the land and property. It should also specify who is responsible for keeping the land and property safe and clean. Typically, the tenant is responsible for unskilled labor repairs and general upkeep to prevent deterioration, such as making sure

40 LAND FOR GOOD, *supra* note 33, at 13.

41 *Id.*

42 *Id.*

43 BECCA WEAVER ET AL., FINDING, ASSESSING, AND SECURING FARMLAND: A PLAIN LANGUAGE GUIDE FROM THE NEW ENTRY SUSTAINABLE FARMING PROJECT 18, 32 (2012), http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf.

44 LAND FOR GOOD, *supra* note 33, at 14.

45 VT. FARM TO PLATE, AGRICULTURAL LAND CONSERVATION 1, 2 https://docs.google.com/file/d/0B2JX8yK6_gciN2tRc3hTU19HT3M/edit.

46 LAND FOR GOOD, *supra* note 33, at 32.



the buildings are painted. The landlord usually bears responsibility for major repairs, rehabilitation, and replacement of farm systems such as water and sewage.⁴⁷

- **Structures:** If there is a house on the property, the lease should state whether its use is included. Since Vermont law has specific provisions applying to residential landlord-tenant relationships, sometimes a separate residential lease is drafted.⁴⁸ It should also be stipulated in the lease whether there any limitations as to what structures the farmer can build on the property.⁴⁹
- **Alterations and Improvements:** If the farmer has plans for improving the land, the lease should state which types of improvements are permitted or prohibited along with any possible approval process. It should be stipulated if the landlord has any responsibility to reimburse the farmer for costs, either during or at the end of the lease term. If any of the improvements are mobile, it should be indicated whether the tenant may keep them at the lease's end.⁵⁰ Responsibility for capital improvements should also be discussed and addressed. If the tenant is paying for these improvements, how will their investment factor into rent or recovery of value at the end of the lease term?
- **Communication:** If desired, the lease should provide for when communication should occur between the parties. Some might require that the tenant communicate with the landlord before planting season and after harvest. Occasionally, additional reporting on conservation or nutrient management practices is required.⁵¹
- **Insurance:** Who will carry the various policies for the property (e.g., liability, crop, and casualty policies)?
- **Emergency Provisions:** The lease should specify what happens in the event the property is condemned, destroyed by fire, or suffers another casualty. Does the landowner have the right to terminate the lease? How are insurance proceeds shared?⁵²
- **Default:** What will qualify as a default by landlord and tenant and what will this mean for the lease agreement?
- **Termination:** Particular to farmers, the lease should specify what happens to unharvested crops in the event of termination. The tenant should either be compensated by the landlord for the value of the crops or be allowed to sell the crops directly to the next tenant.⁵³
- **Entry:** It should be clear in the lease provisions if and when the landlord may come onto the property. Must the tenant be present? How much notice should be given?⁵⁴
- **Taxes, Utilities, and Insurance:** The lease should clearly identify whose duty it is to pay taxes, utilities, and insurance (liability, crop, and casualty policies) on the property.⁵⁵

47 *Id.* at 14-15.

48 Champlain Valley Office of Economic Opportunity, *Renting in Vermont*, https://www.cvoeo.org/fileLibrary/file_99.pdf, pp. 3.

49 LAND FOR GOOD, *supra* note 33, at 16.

50 *Id.*

51 *Id.* at 11.

52 LAND FOR GOOD, *supra* note 33, at 13, 46.

53 *Id.* at 17, 46.

54 *Id.* at 46.

55 *Id.* at 13, 17.



CONCLUSION

When representing a farmer in a farmland acquisition, there are several considerations attorneys should keep in mind. The attorney should first get a sense of the farmer's needs and wants to determine what assistance the attorney may be able to provide. This information will be helpful in determining what financing options are available and whether the farmer is eligible for any loans, grants, or tax credits. Knowing the farmer's plans for the growth of the farm can affect whether a parcel of land may be suited for the farmer's interests. Special concerns regarding land selection include zoning regulations, support in the local community, and environmental restrictions, which the attorney may be able to help the client assess.

Once a client has targeted a parcel of land for acquisition, the attorney should walk the farmer through all available acquisition options including various types of purchase options and leases. If the farmer elects to purchase, the attorney will need to assist in the drafting of a purchase and sale agreement and to facilitate the transfer, including by performing due diligence and a title search on the property. If the farmer chooses to lease, a similar process applies. After diligence is complete and the attorney is working on the lease, there are some agriculture-specific provisions that an attorney may want to include, such as stipulating what will happen to unharvested crops in the event of early termination. When representing the farmer client, the attorney should be mindful of how the practical concerns of farmers may differ from those of non-farmers and how the law and regulations may treat agricultural land differently from other real estate as these insights will be particularly important to the farm client.



Resources



Center for Agriculture and Food Systems

- Farmland Access Legal Toolkit:
<https://farmlandaccess.org/>
- Farm Lease Builder:
<https://farmlandaccess.org/farm-lease-builder/>

Annette M. Higby, A Legal Guide to the Business of Farming in Vermont

- Chapter II. Farm Transfer and Estate Planning:
<http://www.uvm.edu/farmtransfer/LegalGuide.pdf>
- Chapter III. Farmland Tenure and Leasing:
<http://www.uvm.edu/farmtransfer/LegalGuide.pdf>

Land for Good

- <http://www.landforgood.org>

Vermont Department of Taxes

- <https://tax.vermont.gov/business-and-corp/sales-and-use-tax/exemptions/agricultural-equipment>

**Vermont Housing and Conservation Board:
Farm & Forest Viability**

- <https://vhcb.org/viability>

New England Farmland Finder

- <http://www.newenglandfarmlandfinder.org>

Vermont Land Trust

- <http://vlt.org>



CHAPTER VIII

LAND REGULATIONS



Chapter Overview

There are a variety of Vermont laws that directly impact how farmers and food entrepreneurs use their land. These laws may impact a farmer's ability to construct new buildings or host events, or they may regulate the types of agricultural production practices that can occur on farms. This chapter is intended to assist attorneys advising farmers and food entrepreneurs whose operation may trigger various land use regulations at the state and local level. Currently, information sheets for most state-level permits issued by the state of Vermont can be found at the Department of Environmental Conservation's website,¹ but this chapter focuses on a few of the more common state-level permits, particularly related to land use:

- **Land Use and Development Law (Act 250)** This section provides background information on Act 250, Vermont's statewide land use law.
- **Wastewater System and Potable Water Supply Permitting** This section provides some background on these permits and their impacts on potential subdivision of farmland.
- **Required Agricultural Practices (RAPs)** This section reviews RAPs and the requirements farms must meet to ensure water quality.
- **Accessory On-Farm Businesses (Act 143)** This section discusses the relationship between agritourism and municipal zoning laws.
- **Universal Recycling Law (Act 148)** This law applies to farmers who wish to compost on their land or neighboring property.

1 Vt. DEP'T OF ENV. CONSERVATION, <https://dec.vermont.gov/permits/handbook/info-sheets> (last visited Jan. 8, 2020).



- **Hemp Production** This is a growing industry in Vermont, though there is still legal ambiguity surrounding its production and sale.
- **Conservation Easements** Conservation easements protect thousands of acres of farmland across the state and, while designed to protect farms, must ensure that the specific agricultural operation will be allowed under the terms of the applicable restrictions.
- **Use Value Appraisal Program (Current Use)** This section briefly discusses the state's preferential tax treatment for working lands.

LAND USE AND DEVELOPMENT LAW (ACT 250)

Enacted in 1970, Act 250 requires consideration of Vermont's environment and communities when considering new development.² At the time of enactment, there was growing concern that the state's landscape would become prime real estate for tourists seeking to buy summer or second homes.³ As a result, Act 250 seeks to regulate land use and development to provide a "public, quasi-judicial process for reviewing and managing the environmental, social and fiscal consequences of major subdivisions and developments in Vermont."⁴ Act 250 is somewhat unique in that it allows communities, municipalities, and state agencies to participate in the permit review process together.⁵ Act 250's primary impacts on farming operations are (1) the application of the permitting regime, and (2) the protection of primary agricultural soils through the Act 250 process.

STATE LAND USE PERMITTING

First, before commencing "development," any landowner will have to obtain a state land use permit.⁶ Development under Act 250 means the construction of improvements, involving more than 10 acres of land, for commercial or industrial purposes.⁷ If a state land use permit is required, the district commissioner will evaluate the proposed use under ten statutory criteria, including whether the project will unduly pollute the air or water, unreasonably congest traffic, or overburden municipal infrastructure. Act 250 review can be a complex and expensive process to navigate, but there are pathways for expediting review for minor projects or permit amendments.

Importantly, Act 250 exempts agricultural construction projects that support on-farm processing and on-farm sales of products "principally produced on the farm," such as farm stands and on-farm stores.⁸ The word "principally" means that more than 50 percent (in either volume or weight) of the products "stored, prepared or sold at the farm, are grown or

2 Vt. NAT. RES. BD., ACT 250 PROGRAM, <https://nrb.vermont.gov/act250-program> (last visited Jan. 8, 2020).

3 Jess Phelps, *Agricultural Exceptionalism and Vermont Land Use Law*, 30 DUKE ENVTL. L. & POLICY FORUM (forthcoming Summer 2019).

4 Vt. NAT. RES. BD., *supra* note 2.

5 Vt. NAT. RES. BD., DO I NEED A PERMIT?, <https://nrb.vermont.gov/act250-permit/need-a-permit> (last visited Jan. 8, 2020).

6 10 V.S.A. § 6081(a).

7 *Id.* at § 6001.

8 *Id.* at § 6001 (22)(E).



produced on the farm.”⁹ Farmers selling products not produced on their farms may have difficulty meeting this exemption and will need to pay close attention to their product mix—particularly for value-added agricultural products.¹⁰

A few practical pointers on Act 250:

- If a farm operation is concerned about the potential application of Act 250, the farmer can request a jurisdictional opinion to determine whether the project is exempt. This request for jurisdictional order and/or a project review sheet can give the landowner a comprehensive sense of which permits might be required for their proposed operation.¹¹
- Farming operations focused on brewing or distilling may trigger Act 250 jurisdiction because water is not an agricultural product based on state law precedent.¹²
- Once Act 250 jurisdiction has attached to a property (i.e., the property has been covered by an Act 250 permit), Act 250 jurisdiction will continue to apply—even if the subject property is subsequently converted back to agricultural use.¹³
- To date, the scale of agricultural operations has not impacted whether a farmer will qualify for exemption under Act 250. Whether it raises 10 cows or 1000 cows, a farm has been deemed to be a farm.¹⁴ Vermont courts have also been willing to take a broad view of farming as farming has changed to encompass a greater variety of business activities.¹⁵ However, the further the project diverges from “traditional” farming activities or seems to be commercial in scope, the more likely the project is to fall outside of the agricultural exemption.¹⁶

ACT 250'S CRITERION 9(B)

(B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in the agricultural potential of the primary agricultural soils; or:

(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and

(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and

(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and

(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.

Source: Vermont Farm to Plate, Sustaining Agriculture: State Regulations 1, 5

9 *Id.*

10 UNIV. OF VT., LAND USE AND ZONING FOR AGRITOURISM, <https://www.uvm.edu/vtagritourism/files/agritourism-guide/bestpractices-land-use-regulation.pdf> (last visited Jan. 8, 2020).

11 VT. NAT. RES. BD., JURISDICTIONAL ORDERS & PROJECT REVIEW SHEETS, https://nrb.vermont.gov/decisions/JOs_and_PRSs.

12 *In re Whistlepig LLC Act 250 JO* (No. 21-2-13 Vtec, slip op. (Vt. Super. Ct. Envtl. Div., Apr. 11, 2014).

13 *In re Eustance*, 185 Vt. 448 (2009).

14 *Vt. Egg Farms, Inc., Declaratory Ruling #317* (Vt. Envtl. Bd. June 14, 1996).

15 *Id.*

16 *Id.*



FARMLAND PROTECTION

Between 1982 and 2012, Vermont lost 43,800 acres—or approximately 58,000 football fields—of agricultural land to development.¹⁷ One way Act 250 attempts to limit this loss is that one of its criteria¹⁸ focuses on agricultural soils.¹⁹ Under the Act, a permit will only be granted if the development will not result in any reduction in the agricultural potential of the property or on “primary agricultural soils or if the project meets subcriteria, including mitigation.”²⁰

WASTEWATER SYSTEM AND POTABLE WATER SUPPLY PERMITTING

A Wastewater System or Potable Water Supply permit may be required for the subdivision of land or for construction, modification, or changes in the uses of buildings or structures.²¹ If a permit is triggered, a licensed examiner will need to design plans for the septic and water system. This requirement is most commonly triggered by subdivision, but if the newly created lot will remain undeveloped, then this transfer can be exempt (although a notice of permit requirements will need to be recorded in the land records).²²

REQUIRED AGRICULTURAL PRACTICES (RAPs)

Vermont has established required agricultural practices, or RAPs, to address the impact of agricultural activities on water quality.²³ Enforced by the Vermont Agency of Agriculture, Food and Markets (VAAFAM), these standards promote agricultural techniques and practices that “reduce cropland erosion, nutrient and sediment loss.”²⁴ These techniques include manure management,²⁵ cover crop requirements,²⁶ and nutrient management planning,²⁷ and are designed to create a baseline or uniform set of practices and management strategies across all farming operations in the state.

FUNDING OPPORTUNITIES

The U.S. Department of Agriculture’s NRCS offers financial and technical assistance to assist farms in achieving environmental compliance.

<https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmland/>

The Vermont Agency of Agriculture Food and Markets also has a number of financial incentives available to farms focused on water quality.

<https://agriculture.vermont.gov/water-quality/assistance-programs>

17 FARMLAND INFORMATION CENTER, VERMONT DATA & STATISTICS, <https://www.farmlandinfo.org/statistics/vermont> (last visited Jan. 8, 2020).

18 10 V.S.A. § 6086(a)(9)(B).

19 *Id.* at § 6001(15)(A).

20 *Id.* at § 6086(a)(9)(B)(i)-(iv) (noting that “primary agricultural soils” are defined as “important farmland soils map unit[s] that the U.S. Department of Agriculture’s Natural Resources Conservation Service (NRCS) has identified and determined to have a rating of prime, statewide, or local importance”).

21 VT. DEP’T OF ENV. CONSERVATION, VT. ENVIRONMENTAL PROTECTION RULES, CH. 21, WATER SUPPLY RULE 1, 1-153 (rev. Apr. 12, 2019), <https://dec.vermont.gov/sites/dec/files/dwgwp/DW/Water-Supply-Rule-April-12-2019.pdf>.

22 VT. PERMIT AND LICENSE INFORMATION, SUBDIVISION OF LAND, <https://dec.vermont.gov/sites/dec/files/permit-handbook/sheet02.pdf>.

23 6 V.S.A. § 4810a(a); see VAAFAM, VERMONT REQUIRED AGRICULTURAL PRACTICES RULE FOR THE AGRICULTURAL NONPOINT SOURCE POLLUTION CONTROL PROGRAM 1, 1-2 (2018), https://agriculture.vermont.gov/sites/agriculture/files/documents/RAPFINALRULE12-21-2018_WEB.pdf [hereinafter REQUIRED AGRICULTURAL PRACTICES].

24 *Id.*

25 *Id.* at 22.

26 *Id.* at 21.

27 *Id.* at 19.



Any farm that operates four or more acres for farming, has filed a 1040(F) tax form once in the last two years, or has an annual gross income above \$2,000 from the sale of agricultural products must comply with the RAPs.²⁸

Different rules or requirements beyond the RAPs apply to different types and scales of farming operations. For most small farms, this generally means compliance with the RAPs. Once the farming operation hits the threshold of a Certified Small Farm Operation, it will be required to certify its compliance with the RAPs for Certified Small Farm Operations.²⁹ As farm size continues to increase, whether based on cropland for vegetable production or number of animals raised on the farm,³⁰ additional requirements may be triggered, such as water quality training,³¹ farm inspections,³² and creating nutrient management plans.³³

For more information, visit VAAFM's RAPs website or contact the VAAFM.³⁴

ACCESSORY ON-FARM BUSINESSES (ACT 143)

Act 143 supports Vermont farmers who wish to diversify their businesses and revenue streams by expanding their product mix and by allowing the public to participate in on-farm activities.³⁵ The Act does so by more clearly allowing value-added agricultural production, limiting municipalities' ability to bar these processing and recreational activities through local zoning, and making review of this land use form more consistent from community to community.³⁶ These types of activities, generally described as value-added agriculture or agritourism,³⁷ are defined in the statute as "accessory on-farm businesses."³⁸ Under Act 143, municipal land use regulations may not prohibit otherwise allowable accessory on-farm businesses.³⁹

A "farm" is defined under the law as a parcel of land "devoted primarily to farming" that is subject to RAP rules.⁴⁰ An "accessory on-farm business" is defined as any activity that takes place on a farm that includes either or both of the following:

1. The storage, preparation, processing, and sale of qualifying products, provided that more than 50 percent of the total annual sales are from qualifying products that are principally produced on the farm at which the business is located.
2. Educational, recreational, or social events that feature agricultural practices or qualifying products, or both. Such events may include tours of the farm, farm stays,

28 VAAFM, FARM SIZE CLASSIFICATIONS, https://agriculture.vermont.gov/sites/agriculture/files/documents/Water_Quality/FarmSizeClass.pdf.

29 VAAFM, CERTIFIED SMALL FARM OPERATIONS, <https://agriculture.vermont.gov/csfo#INTRODUCTION> (last visited Jan. 8, 2020).

30 *Farm Size Classifications*, *supra* note 29.

31 VAAFM, WATER QUALITY INITIATIVES, <https://agriculture.vermont.gov/water-quality/water-quality-initiatives> (last visited Jan. 8, 2020).

32 *Farm Size Classifications*, *supra* note 29.

33 NRCS, NUTRIENT MANAGEMENT, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1192371.pdf.

34 REQUIRED AGRICULTURAL PRACTICES, *supra* note 24.

35 See Act 143 § 1 (2018), <https://legislature.vermont.gov/Documents/2018/Docs/ACTS/ACT143/ACT143%20As%20Enacted.pdf>; see also VAAFM, Q&A, ACT 143, ACCESSORY ON-FARM BUSINESSES 1, 1, https://agriculture.vermont.gov/sites/agriculture/files/documents/land_use/FAQ%20Act%20143_20181003.pdf [hereinafter Act 143 Q&A].

36 24 V.S.A. § 4412(11).

37 VAAFM, AGRITOURISM, <https://agriculture.vermont.gov/businessdevelopment/agritourism> (last visited Jan. 8, 2020).

38 24 V.S.A. § 4412(11); Act 143 Q&A, *supra* note 36, at 1.

39 Jess Phelps, *supra* note 3, at 29.

40 24 V.S.A. § 4412 (11)(A)(ii).



tastings and meals featuring qualifying products, and classes or exhibits in the preparation, processing, or harvesting of qualifying products.⁴¹

Qualifying products are broadly defined to include (1) agricultural, horticultural, viticultural, dairy, or maple products; (2) livestock or fish products; (3) poultry, bees, orchard, or fiber crops; (4) other commodities grown or raised on farms; and (5) products manufactured on one or more farms from commodities entirely grown or raised on one or more farms.⁴²

If the farmer's business does not fit within the Act 143 accessory on-farm business definition, then the generally applicable municipal laws apply, which may require planning and zoning approvals depending on the community.⁴³ Though municipalities may not prohibit these on-farm activities, they can decide to conduct a "site plan review" to understand the type of impact these activities may have on public safety and welfare and to create performance standards.⁴⁴ The municipality can also make the determination as to whether the business is, in fact, accessory to the primary agricultural business and whether the products being sold are qualifying products. These determinations, and the limited site review process, provide communities with considerable discretion.⁴⁵ It is under the discretion of the municipality to apply their interpretation of the definition of "accessory on-farm businesses" during the site review.⁴⁶ Therefore, municipalities may have differing interpretations or views on how they want to address accessory on-farm businesses within their communities.

To summarize, Act 143 interacts closely with local zoning regulations that communities have in place to determine where and what types of land uses can be located in that jurisdiction. This ranges from constructing a new building, changing the use of a piece of land, and subdividing land, depending on the nature and scope of the community's ordinance. For farming businesses, attorneys will want to work closely with VAAFM and, most importantly, the local community in working through these issues and determining what, if any, review process the municipality intends to apply to the accessory on-farm business.

UNIVERSAL RECYCLING LAW (ACT 148)

Vermont passed Act 148⁴⁷ in 2012 to prevent certain materials from entering the waste stream.⁴⁸ These materials include leaf and yard debris and food scraps, in addition to recyclables.⁴⁹ By July 1, 2020, all persons and businesses with food scraps over 18 tons per year must transport the scraps to a certified facility.⁵⁰

41 *Id.* at § 4412(11)(A)(i)(I)-(II).

42 *Id.* at § 4412(11)(1)(iii).

43 Jess Phelps, *supra* note 3, at 29.

44 Q&A, Act 143, *supra* note 36, at 1.

45 Jess Phelps, *supra* note 3, at 28.

46 Q&A, Act 143, *supra* note 36, at 1.

47 10 V.S.A. § 6602.

48 VTDEC, UNIVERSAL RECYCLING SUMMARY SHEET 1, 1,

https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/Universal-Recycling/UR_SummarySheet_CURRENT.pdf.

49 VTANR, UNIVERSAL RECYCLING SUMMARY SHEET, <https://dec.vermont.gov/waste-management/solid/universal-recycling>.

50 VTDEC, *supra* note 50.



Act 148 may impact farmers and food producers. For example, farmers who may import food scraps from other farms for compost will need a solid waste permit from ANR to continue that practice.⁵¹ This may put a strain on farmers who depend on these “scraps” to feed poultry and the compost to enrich their soil.⁵² However, Rural Vermont and Poultry Farmers for Chicken Foraging have been working together with the legislature starting in the 2019 Legislative Session to make sure that farmers using food scraps for poultry and composting are not required to apply for a solid waste permit.⁵³ Due to the complexity of the issue, PCFC, VAAFM, and ANR signed a Memorandum of Understanding to develop a solution for legislation that better supports farmers.⁵⁴

Attorneys may wish to stay apprised of potential changes to Act 148 and how additional changes may impact farmers’ responsibilities under the law as the treatment of composting under a variety of Vermont laws continues to evolve.

HEMP PRODUCTION

The 2018 Farm Bill expanded upon the 2014 Farm Bill’s more limited authorization relating to the production and sale of hemp (defined as a cannabis plant containing less than 0.3 percent THC) and hemp-derived products by establishing a process by which the USDA will review and approve state programs to regulate hemp production and processing.⁵⁵ The USDA promulgated an interim final rule in October 2019⁵⁶ and VAAFM is also in the process of finalizing its program for registering and monitoring industrial hemp production and processing operations.⁵⁷ Meanwhile, hemp production has grown rapidly in Vermont and elsewhere in the country, and food products containing CBD (a derivative of hemp) are ubiquitous.⁵⁸

We are considering developing an additional resource focused on this issue as the federal and state programs become more established. Meanwhile, we direct attorneys to the state and federal agriculture agencies for more information on this rapidly evolving area of the law.

CONSERVATION EASEMENTS

While not unique to Vermont, conservation easements also play an important role in governing land use in the state. Conservation easements are legal agreements between a landowner and a conservation easement holder (usually a land trust or a governmental agency) whereby the landowner gives up certain rights to modify or develop their property,

51 VTDEC, STATE OF VERMONT AGENCY OF NATURAL RESOURCES DEPARTMENT OF ENVIRONMENTAL CONSERVATION: SOLID WASTE MANAGEMENT RULES 1, 11-15 (2012), <https://dec.vermont.gov/sites/dec/files/documents/dec-solid-waste-management-rules-2012-03-15.pdf>.

52 Taylor Dobbs, *Solid Waste or Chicken Feed? Regulatory Change Riles Farmers*, SEVEN DAYS, <https://www.sevendaysvt.com/vermont/solid-waste-or-chicken-feed-regulatory-change-riles-farmers/Content?oid=19217479> (last visited Jan. 8, 2020).

53 RURAL VERMONT, RURAL VERMONT LEGISLATIVE PREVIEW - 2020 SESSION (January 30, 2020), <https://www.ruralvermont.org/from-the-statehouse>.

54 *Id.*

55 USDA AMS, U.S. DOMESTIC HEMP PRODUCTION PROGRAM, <https://www.ams.usda.gov/rules-regulations/farbill-hemp> (last visited Jan. 8, 2020).

56 Establishment of a Domestic Hemp Program; Interim Final Rule, 84 Fed. Reg. 58522 (Oct. 31, 2019).

57 USDA AMS, ESTABLISHMENT OF A DOMESTIC HEMP PRODUCTION PROGRAM (Oct. 31, 2019), <https://agriculture.vermont.gov/public-health-agricultural-resource-management-division/hemp-program/hemp-program-registration>.

58 USDA AMS, HEMP PRODUCTION PROGRAM, <https://www.ams.usda.gov/content/hemp-production-program> (last visited Jan. 8, 2020).



typically by selling these rights.⁵⁹ “Using the traditional ‘bundle of sticks’ metaphor for property, we can describe the landowner as losing one of the bundle of sticks in [their] bundle” and giving it to a land trust or government agency.⁶⁰ In Vermont, conservation easements have been used to protect many resource forms—including a large number of farms.⁶¹ The Vermont Land Trust alone protects over 900 farms and over 555,000 acres of land across the state (approximately 10 percent of the state).⁶²

Conservation easements are specifically tailored to a property, but there are a few general points to keep in mind.

- During the acquisition process, the landowner and landowner’s attorney will locate a recorded conservation easement during their title work.
- If the property is protected by a conservation easement, the attorney will want to closely review its terms, and may find it helpful to reach out to the land trust, to determine whether the selling party is in compliance with its terms and whether the proposed farming activity will be allowed.
- Conservation easements also play an important function in the farmland transfer arena by bringing a farm’s value down to its agricultural value, which may allow a beginning or new farmer to more affordably acquire the land. Relatedly, any easements throughout Vermont include what is referred to as an Option to Purchase at Agricultural Value (OPAV) which allows the applicable land trust to buy the land, when offered for sale, at its agricultural value and help keep the land farmed.⁶³

USE VALUE APPRAISAL PROGRAM (CURRENT USE)

Vermont’s Current Use Program is an important tool for helping farms and farm businesses remain viable.⁶⁴ The purpose of current use is to keep agricultural and forest land in production by providing landowners with lower taxes for that land. However, a substantial penalty (a land use change tax) will apply if the land is developed, imposing a contingent lien on the property to protect this interest.⁶⁵

Land enrolled in the program is taxed at its current agricultural or forestry value rather than its fair market value.⁶⁶ The basic requirements for agricultural land to be enrolled are:

The land has to be in active agricultural use and be more than 25 acres. There is a presumption that the land is being used for agricultural purposes if various factors are met, including being farmed by a farmer, under a lease, and generating a certain amount of revenue.⁶⁷

59 Jess R. Phelps, *Defining the Role of Agriculture in Agricultural Conservation Easements*, 45 *Ecology L. Q.* 647, 654 (2018).

60 *Id.*

61 VT. NAT. RESOURCES COUNCIL, CONSERVATION EASEMENT, <https://vnrc.org/community-planning-toolbox/tools/conservation-easement/>.

62 VERMONT LAND TRUST, ABOUT, <https://www.vlt.org/about>.

63 LAND FOR GOOD, VERMONT LAND TRUST, SELLING A FARM WITH A CONSERVATION EASEMENT THAT INCLUDES AN OPTION TO PURCHASE AT AGRICULTURAL VALUE, <https://landforgood.org/wp-content/uploads/Selling-an-OPAV-Farm.pdf>.

64 32 V.S.A. § 3752.

65 VT. DEP’T OF TAXES, CURRENT USE, <https://tax.vermont.gov/property-owners/current-use>.

66 VT. DEP’T OF TAXES, UNDERSTANDING CURRENT USE, <https://tax.vermont.gov/property-owners/current-use/current-use-enrollment>

67 VT. DEP’T OF TAXES, UNDERSTANDING CURRENT USE: TYPES OF PROPERTIES ELIGIBLE FOR CURRENT USE, <https://tax.vermont.gov/property-owners/current-use/property-types>.



Farm buildings will qualify for current use treatment if they are used by a farmer in association with a farm business, including qualifying farm processing facilities and housing for farm employees.⁶⁸

Attorneys assisting a farmer with acquiring land will want to advise their farm client about continuing enrollment in the program and maintaining eligibility and compliance with this important tax advantage program, including the annual requirement for certification to keep the property enrolled in Current Use.

CONCLUSION

It is evident that Vermont recognizes the importance of supporting small to medium-sized farms and food processors and its laws and regulations have generally tried to help these operations. There are, however, a number of generally applicable laws that attorneys must navigate and which may restrict certain agricultural practices and activities. Attorneys who develop knowledge in this area can guide farmers and food processors through the web of relevant laws and regulations and assist them in building strong businesses to support the state's critical agricultural economy.



Resources



U.S. Food and Drug Administration

- What you need to know about products containing cannabis or cannabis-derived compounds, including CBD: <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd>

United States Department of Agriculture: Hemp Production

- <https://www.ams.usda.gov/rules-regulations/farm-bill-hemp>

Vermont Natural Resources Board: Act 250

- <https://nrb.vermont.gov/act250-program>

Vermont Agency of Agriculture, Food, and Markets

- Hemp Program: <https://agriculture.vermont.gov/public-health-agricultural-resource-management-division/hemp-program>
- RAPs website: <https://agriculture.vermont.gov/rap>
- Agritourism: <https://agriculture.vermont.gov/businessdevelopment/agritourism>

Vermont Agency of Natural Resources: Act 148

- <https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/Universal-Recycling/2019.Universal.Recycling.Status.Report.pdf>

68 *Id.*



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