



Agricultural Law Update

October 2014

BEST PRACTICES AGRICULTURAL BUSINESSES SHOULD FOLLOW WHEN CREATING OR REVISING AN EMPLOYEE HANDBOOK

- Melissa J. Jackson



An employee handbook is one of the most important tools employers in the agricultural industry have at their disposal to communicate with employees about important workplace issues. It also can serve as an excellent

defense to claims. Having a handbook signals to employees that the business regards itself as a professionally managed and operated business, and helps assure employees that they will be treated fairly and consistently.

While many employers have handbooks, the creation of a handbook is too often seen as a one-time event, as opposed to an ongoing process. To be relevant and effective, a handbook needs to be reviewed and updated frequently in order to ensure that it accurately describes company policies and procedures, addresses changing laws and regulations, and aligns with company objectives.

Whether you are planning to update an existing handbook, or develop a new one, there are many important considerations to keep in mind. Following is a list of best practices to apply when creating and maintaining an employee handbook:

Legal Compliance. To ensure compliance with applicable laws and regulations and to reduce risk in the event of litigation or government audit, a handbook must take into

account federal, state and local laws and regulations. Laws vary by state and locality, but federal laws and regulations are uniform. Accordingly, an employee handbook should be written in compliance with federal workplace laws and regulations such as the Fair Labor Standards Act, the Civil Rights Act of 1964, the Occupational Safety and Health Act, the Family and Medical Leave Act, and the Americans with Disabilities Act, to name a few. National Labor Relations Board rulings should also be taken into account. Other laws and regulations should be addressed on state-by-state and locality-by-locality bases.

Special Considerations for Multi-State Employers.

While many agricultural businesses do not have multi-state operations, those that do must take this fact into account when preparing a handbook. It can be challenging, cumbersome and expensive for multi-state employers to maintain a handbook that complies with laws and regulations for each state in which employees are located. One approach to consider is maintaining a single handbook that addresses federal laws and regulations, with addendums for each state where employees are located. This allows employers to maintain a uniform set of policies and procedures, and also address state and locality-specific laws and regulations, without the need to extend state and locality-specific policies across state lines.

Reinforce the Employment Status, Whether "At Will" or "Just Cause." A handbook should affirmatively explain the employment relationship. In an at-will relationship, the

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employer retains the right to make employment decisions at any time, with or without notice and for any or no reason, as long as it is not an unlawful reason. In an at-will relationship, it is important to note that the at-will employment relationship cannot be modified unless it is in writing, for that purpose, and is signed by a specified person that would have such authority, such as the Executive Director or CEO. In a just cause relationship, the employee will not be discharged from employment without "cause," which should be defined in the handbook.

Payroll and Benefits. Policies related to payroll, frequency of pay, overtime, payroll deductions and social security number privacy should be addressed, as well as those related to health, dental and other benefits.

Work Hours, Attendance and Leave. Hours and scheduling expectations, vacation, leave (military, maternity, jury duty, etc.), and sick day policies should be explained.

Employee Conduct and Use of Technology. You should address rules of conduct, including nondiscrimination, prohibited harassment, prohibited weapons, use of drugs and alcohol, and expected behavior toward coworkers. It is also important to explain rules related to employee technology use and equipment care, including email, Internet, social media, laptop computers and cell phones and affirm that employees should have no expectation of privacy in any communications over the employer's communications equipment.

Shortened Limitations Period. Consider including a statement which states that employees are to bring any claims, suits or demands within the lesser of: (i) a specified period of time (should be no fewer than 180 calendar days) of the date that the employee knew or should have known about the basis for the claim, suit or demand, or (ii) the applicable statute of limitation.

Acknowledgement. Ask employees to sign an acknowledgement that they have received the handbook policies. If the Shortened Limitations Period is included

in the handbook it also should be included in the Acknowledgement, and the employee should affirm his/her agreement and understanding.

These are just a few of the considerations and policies that an employer should address in an employee handbook. Every agricultural industry employer's policies, procedures and culture are different, so every handbook should be tailored to an employer's unique circumstances and business objectives. Don't adopt another organization's handbook; you may inadvertently undercut an important declaration or what would otherwise have been a good legal defense.

You should also have an employment attorney review the employee handbook because there are other policies that are required by law to be posted or communicated, such as notice of accommodation, and the employee handbook is where those should be included. Many people find it easier to have an attorney draft and update their employee handbook.

One final point – we are often asked by owners of family owned farms, orchards and other agricultural operations whether employee handbooks are necessary, or even advisable, when the business primarily, or exclusively, employs a spouse, children, brothers, sisters or other family members. In short – "yes." Whether you employ family members or not, state and federal law requires employees to be treated fairly and in accordance with the law. Especially if you have both family and non-family employees, having a handbook and defined policies in place can help ensure that all employees feel that they are on equal footing.

The creation of a new handbook, or revision of an existing one, is an ideal time to train employees regarding a company's policies and procedures, as well as the laws and regulations from which they were derived. Foster Swift's attorneys routinely help clients create, review, revise, and train their employees on employee handbooks. Give us a call if you'd like some assistance.

\$5.15 MILLION VERDICT FOR FARM EQUIPMENT DEALER UPHOLD

The June 2013 jury verdict received by a Foster Swift trial team granting \$5.15 million in favor of McCormick International, LLC, a former Ionia County farm equipment dealer, was upheld on September 22, 2014 following an extensive 15 months of post-judgment motions. Judge Suzanne Hoseth Kreeger denied Manitou North America Inc.'s Motion for New Trial, Motion for Judgment Notwithstanding the Verdict, and Motion for Remittitur.

The trial involved McCormick's claims against Manitou under the Michigan Farm and Utility Equipment Act, MCL 445.1451, and the Michigan Antitrust Reform Act, MCL 445.771. Including interests, costs and attorney fees awarded in favor of McCormick following trial, the total Judgment amount is now over \$6 million.

The trial team was led by attorney John Inhulsen, including Andrew Vredenburg and Joshua Richardson.

REMINDER: ENROLL IN DAIRY MARGIN PROTECTION PROGRAM BY NOVEMBER 28, 2014 FOR 2014 AND 2015

- Liza C. Moore

The new 2014 Farm Bill created a Dairy Margin Protection Program that will provide financial assistance to participating farmers when the margin is below the coverage level selected by the farmer. Enrollment in the program began on September 2, 2014 and will end on November 28, 2014 for 2014 and 2015. In a press release about the new program, USDA Michigan Farm Service Agency Executive Director Christine White said "The Margin Protection Program is an important tool that allows dairy producers to build a safety net that fits the

needs of their operation." "This program has the potential to assist 2,000 dairy farmers throughout Michigan where 386,000 head of cattle produce 9,679,143,000 pounds of milk," said White. Be sure to contact your local USDA FSA office for more information about this new program and what it means for you and your farm.

Michigan USDA FSA press release regarding the new program: <http://1.usa.gov/1pEombQ>

STEER CLEAR OF EMPLOYMENT LAW ISSUES DURING HARVEST SEASON

- Karl W. Butterer

Harvest time is often the busiest time of the season for Michigan's farms, orchards, vineyards and other agricultural operations. It's also peak employment season, requiring new workers and resources to keep up with the demands of the harvest, the proclivities of nature, and the nuances of the market.

Harvest season also raises employment law issues. Many state and federal laws come into play and must be

considered by agricultural operations in order to remain in compliance and reduce risks. Among these are workers' compensation, wage law, labor law, and employee classification issues. We will touch upon some of these issues below, but remember that's it's a good idea to review and assess your specific employment practices and processes with an employment law attorney annually.

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WORKERS' COMPENSATION

If an agricultural employer meets both of the following conditions, then the employer must comply with Michigan's Workers' Disability Compensation Act:

- It employs **three or more** regular employees paid hourly wages or salaries and not paid on a piecework basis, and
- The employees were employed 35 or more hours per week by that same employer for 13 or more consecutive weeks during the preceding 52 weeks.

Additionally, if an agricultural employer meets all of the following conditions, then the employer must pay the medical and hospital expenses for personal injuries suffered by an employee:

- It employs **one or more** employees.
- The employee was employed 35 or more hours per week by that same employer for 5 or more consecutive weeks.
- The personal injury arose out of and in the course of employment.

Agricultural employers that meet these standards must provide workers' disability compensation insurance for all regular employees.

FEDERAL AND MICHIGAN WAGE LAWS

The federal wage law under the Fair Labor Standards Act applies to agricultural operations that employ enough workers - excluding the employer's immediate family and certain seasonal harvest workers - to have 500 worker days of hired work during any quarter of the preceding calendar year. Any employee who performs work for 1 hour or more on any day counts toward the 500 worker days.

The Michigan minimum wage law is even broader, and applies to some employers not required to comply with the federal law. It applies to any agricultural operation employing two or more employees at least 16 years old at any one time during the calendar year. The Michigan minimum wage is \$8.15 per hour (versus the \$7.25 federal minimum wage).

Michigan law also impacts the timing of payments to workers, including harvest workers. While wage workers must be paid no later than 15 days after the close of the pay period, hand harvesters must be paid at least once per week for wages earned on or before the second day following the workweek (unless another arrangement is agreed upon in a written contract).

WORKER CLASSIFICATION

The application of these and other statutes, rules and regulations differ depending on the proper classification of workers. While a law may apply to a full-time employee, it may not to an independent contractor or seasonal employee. While a discussion of all of the factors that need to be examined to determine proper worker classification is beyond the scope of this article, it's important to understand that the issue is one of legal and financial significance.

With the influx of workers that many agricultural operations experience during harvest season, it's critical to classify correctly. Some risks of not doing so include: unpaid federal income tax plus a penalty for failure to withhold; your share of FICA plus a substantial penalty for failure to withhold; state and federal unemployment tax, plus interest and penalties; worker's compensation liabilities to include a percentage of the worker's wages plus fines; Department of Labor penalties, fees and back wages, including overtime. Keep in mind that many agricultural operations can be designated a "seasonal employer" which can reduce unemployment costs.

There is much more to know about each of these issues - and more issues to consider than this space allows for. Please contact a Foster Swift attorney to review your employment law practices.

MSU PRODUCT CENTER

Registration is open for the "Making it In Michigan Conference and Trade Show" Wednesday, Nov. 12 at the Lansing Center. Register here: [http:// bit.ly/1nXapMg](http://bit.ly/1nXapMg)

LITIGATION CORNER

- Liza C. Moore

WHAT'S A MOTION FOR SUMMARY DISPOSITION OR MOTION FOR SUMMARY JUDGMENT?

In most television shows and movies about civil (non-criminal) lawsuits, the case is resolved after a dramatic trial. But many civil lawsuits are resolved not by trial but by motion. At certain times in a lawsuit and depending upon which court the case was filed in, parties may file dispositive motions—motions to dismiss, motions for summary disposition, or motions for summary judgment. These types of motions ask the court to decide the case without a trial based on the papers filed with the court. These motions are filed with supporting papers called briefs (often very long and not brief at all) that explain the parties' legal arguments and attach supporting

evidence as exhibits. Preparation of dispositive motions usually requires an attorney to spend time doing legal research to gather the law that applies to the facts of the particular case. The attorney will then argue in writing why the case should be resolved without a trial. If one party files a motion, the other party will have a chance to file a written response. The judge may schedule oral argument on the motion, where the attorneys will have to appear in court and verbally explain their position. The judge will make a decision, either orally at the hearing or in a written order or opinion. Parties may appeal final decisions or orders. Each case is different and the facts of some cases make resolution of a case by motion easier than in other situations.

REMINDER: KEEP CLOSE TABS ON DEADLINES FOR BASE ACRE REALLOCATION AND YIELD UPDATES AND ARC/PLC ELECTION AND ENROLLMENT

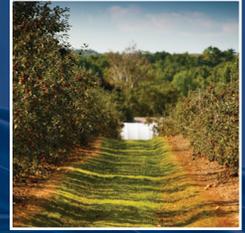
- Liza C. Moore

The new 2014 Farm Bill created new Agricultural Risk Coverage (ARC) and Price Loss Coverage (PLC) programs. Fall 2014 and early spring 2015 have important deadlines for these new programs. Be sure to meet the deadlines for a one-time opportunity to reallocate the farm's base acres or update yields. According to an October 2, 2014 USDA FSA press release, land owners may visit their local FSA office from September 29, 2014 to February 27, 2015 to update yield history and/or reallocate base acres. Then, between November 17, 2014 and March 31, 2015, farmers will need to make a **one-time, irrevocable election** for 2014-2018 crop years between ARC or PLC programs. And then later, farmers will sign contracts to participate in ARC or PLC for the 2014 and 2015 crop years. In a press release,

FSA Administrator Val Dolcini said "The ARC and PLC programs are a significant reform in the farm safety net." "FSA wants to keep producers well informed on all steps in the process. We will continue our outreach efforts and maintain resources online to help them understand the new programs before they come in to make decisions for their operations," said Dolcini. Bottom line: keep close tabs on the deadlines for these important programs and stay in contact with your local FSA office for details.

USDA FSA website for ARC/PLC Programs, with online tools: <http://1.usa.gov/1yyaVEP>

USDA FSA October 2, 2014 News Release: <http://1.usa.gov/1qUJzPz>



FOSTER SWIFT ATTORNEYS RE-ELECTED AT STATE BAR OF MICHIGAN AGRICULTURAL LAW SECTION'S SECOND ANNUAL MEETING

On September 18, 2014, the attorney members of the State Bar of Michigan Agricultural Law Section re-elected Liza Moore to be the Section's Secretary for 2014-2015 and Todd Hoppe to be a member of the Council for 2014-2016.

Members of the Section gathered in Grand Rapids for the Second Annual Meeting. The meeting provided attorneys

servicing agricultural clients an opportunity to share ideas and receive updates on hot topics of agricultural law. Highlights of the meeting included informative presentations on the 2014 Farm Bill from Sheila Burkhardt, Member Relations/Public Affairs, Michigan Milk Producers Association and Bob Boehm, Manager of Center for Commodity, Farm & Industry Relations, Michigan Farm Bureau.

UPCOMING AG EVENTS

Oct. 13-17, 2014 Global Trade Days, Traverse City, Grand Rapids, Saginaw, Troy & Novi, MI - [http:// puremi.ch/1usDWhs](http://puremi.ch/1usDWhs)

Dec. 4-5, 2014 Attorney Liza Moore will present on the topic of "Manage Your Farm's Legal Liability" at the 4th Annual Top Producer's Executive Women in Agriculture Conference, Chicago, IL - <http://bit.ly/1nGuCGb>

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