



**AgEcon** SEARCH  
RESEARCH IN AGRICULTURAL & APPLIED ECONOMICS

*The World's Largest Open Access Agricultural & Applied Economics Digital Library*

**This document is discoverable and free to researchers across the globe due to the work of AgEcon Search.**

**Help ensure our sustainability.**

Give to AgEcon Search

AgEcon Search  
<http://ageconsearch.umn.edu>  
[aesearch@umn.edu](mailto:aesearch@umn.edu)

*Papers downloaded from **AgEcon Search** may be used for non-commercial purposes and personal study only. No other use, including posting to another Internet site, is permitted without permission from the copyright owner (not AgEcon Search), or as allowed under the provisions of Fair Use, U.S. Copyright Act, Title 17 U.S.C.*

AGRICULTURAL EMPLOYMENT LAW AND POLICY

A Study of the Impact of Modern Social and Labor  
Relations Legislation on Agricultural Employment

by

Donald B. Pederson  
Professor of Law  
The Law School  
Capital University  
Columbus, Ohio

and

Dale C. Dahl  
Professor of Agricultural and Applied Economics  
and Adjunct Professor of Law  
University of Minnesota  
St. Paul, Minnesota

Minnesota Agricultural Experiment Station  
University of Minnesota  
St. Paul, Minnesota  
July 1981

## TABLE OF CONTENTS

Chapter 1	INTRODUCTION . . . . .	1
	Farm Labor Cost . . . . .	1
	The Farm Labor Force . . . . .	2
	Downward trends . . . . .	2
	Dominance of family labor . . . . .	2
	Hired farmworkers . . . . .	2
	Geographic and seasonal distribution of the farm labor force . . . . .	3
	A note on the adequacy of farm labor data . . . . .	3
	Scope and Purpose of This Study . . . . .	4
	Notes to Chapter 1. . . . .	17
Chapter 2	WAGE AND HOUR LAWS: AGRICULTURAL EMPLOYMENT . . . . .	18
	Historical Development. . . . .	18
	Wage Law Development in General . . . . .	18
	Wage Law Development in Agriculture . . . . .	19
	The Sugar Act of 1937 . . . . .	19
	The Fair Labor Standards Act of 1938 . . . . .	19
	Current Status of the Law . . . . .	20
	Federal Law . . . . .	20
	State Legislation . . . . .	22
	Enforcement Efforts . . . . .	23
	Emerging Developments . . . . .	24
	Evaluation . . . . .	24
	Recommendations . . . . .	26
	Notes to Chapter 2. . . . .	27
Chapter 3	CHILD LABOR IN AGRICULTURE . . . . .	32
	Historical Development. . . . .	32
	Current Status of Federal Law . . . . .	33
	Ages 16 and 17. . . . .	34
	Ages 14 and 15. . . . .	34
	Ages 12 and 13. . . . .	35
	Ages 10 and 11. . . . .	35
	Under age 10. . . . .	35
	Current Status of State Law: An Example. . . . .	36
	Ages 16 and 17. . . . .	36
	Ages 14 and 15. . . . .	36
	Ages 12 and 13. . . . .	37
	Children under age 12 . . . . .	37
	Summaries . . . . .	37
	Enforcement . . . . .	37
	Recent Developments . . . . .	39
	Recommendations . . . . .	40
	Notes to Chapter 3 . . . . .	42
Chapter 4	OCCUPATIONAL SAFETY AND HEALTH IN AGRICULTURE. . . . .	48
	History . . . . .	48

Current Status of the Law . . . . .	49
Employment-related Housing . . . . .	50
Storage and Handling of Anhydrous Ammonia . . . . .	51
Slow-moving Vehicles . . . . .	51
Farm Tractor Safety Regulations . . . . .	52
Farm Machinery Safety Regulations . . . . .	52
Field Worker Exposure to Organophosphorous Products . . . . .	52
Regulation of Transporters of Migrant Workers . . . . .	53
Exposure to Cotton Dust in Cotton Gins. . . . .	53
Enforcement Problems . . . . .	53
Emerging Developments . . . . .	54
Recommendations . . . . .	56
Notes to Chapter 4 . . . . .	58
Chapter 5 REGULATION OF FARM LABOR CONTRACTORS . . . . .	65
Historical Development. . . . .	65
Current Status of the Law . . . . .	66
Enforcement . . . . .	69
Recent Developments . . . . .	70
Exemptions. . . . .	70
Sole Proprietors. . . . .	70
Farm Corporations . . . . .	71
Employees . . . . .	72
Agricultural Cooperatives . . . . .	73
Day-Haul Operators. . . . .	74
Recordkeeping . . . . .	75
Insurance . . . . .	75
Recommendations . . . . .	76
Notes to Chapter 5 . . . . .	77
Chapter 6 UNEMPLOYMENT INSURANCE AND AGRICULTURAL EMPLOYMENT . . . . .	84
Historical Development. . . . .	84
General Unemployment Compensation . . . . .	84
Farmworker Coverage . . . . .	86
Current State of the Law . . . . .	88
Evaluation . . . . .	89
Recommendations . . . . .	91
Notes to Chapter 6 . . . . .	91
Chapter 7 WORKERS' COMPENSATION IN AGRICULTURE . . . . .	96
Historical Development. . . . .	96
Current Status of the Law . . . . .	97
Recent Developments . . . . .	99
Recommendations and Conclusions . . . . .	100
Notes to Chapter 7. . . . .	102

Chapter 8 SOCIAL SECURITY FOR HIRED FARMWORKERS. . . . .	106
Historical Development. . . . .	106
Development of Social Security in General . . . . .	106
Special Treatment of Farmworkers. . . . .	107
Current State of the Law. . . . .	108
Evaluation. . . . .	109
Current Developments. . . . .	111
Recommendations . . . . .	112
Notes to Chapter 8 . . . . .	113
Chapter 9 HEALTH CARE POLICY AND THE HIRED FARMWORKER FORCE. . . . .	117
Historical Development. . . . .	118
Migrant Health Act. . . . .	119
The Rural Health Initiative . . . . .	121
Medicare and Medicaid . . . . .	122
Nutrition and Food Programs . . . . .	123
The Hill-Burton Act . . . . .	125
Health Maintenance Organizations . . . . .	127
Evaluation. . . . .	128
Recommendations . . . . .	128
Notes to Chapter 9. . . . .	129
Chapter 10 FARMWORKER EMPLOYMENT AND TRAINING PROGRAMS . . . . .	135
Historical Development. . . . .	135
Current Status of the Law . . . . .	139
Programs of the United States Employment Service. . . . .	139
Programs of the Office of National Programs . . . . .	143
Evaluation. . . . .	145
ES Laws and Their Impact. . . . .	145
MSFW Programs and Their Administration. . . . .	146
General Policy Considerations . . . . .	147
Recommendations . . . . .	147
Future Government Support . . . . .	147
Nature of Training. . . . .	148
Attractiveness of ES Services . . . . .	148
Goals of ES and MSFW Programs . . . . .	148
Continued Study of the MSFW Problem . . . . .	148
Notes to Chapter 10 . . . . .	148
Chapter 11 AGRICULTURAL LABOR-MANAGEMENT LAW . . . . .	154
Historical Development of Labor Relations Legislation . . . . .	154
Development in General. . . . .	154
Agricultural Exemption . . . . .	155
Current Status of the Law . . . . .	155

Early Regulation of Agricultural Labor Relations . . . . .	155
Secondary Boycott and Anti-injunction Acts . . . . .	156
Jurisdictional Strick Acts . . . . .	156
Antitrust Statutes . . . . .	157
The Tort of Interference with Business Relations . . . . .	157
Agricultural Labor Relations Legislation . . . . .	158
Emerging Developments . . . . .	165
Evaluation . . . . .	165
Recommendations . . . . .	168
Notes to Chapter 11 . . . . .	169
Chapter 12 ALIEN FARMWORKERS AND IMMIGRATION AND NATURALIZATION LAWS . . . . .	176
Historical Development . . . . .	176
Current Status of the Law . . . . .	177
"H-2" Workers . . . . .	177
"Commuters" . . . . .	178
"Illegal" Aliens . . . . .	179
Emerging Developments . . . . .	180
Recommendations . . . . .	181
Notes to Chapter 12 . . . . .	184
Chapter 13 OVERVIEW . . . . .	188
A General Commentary on Agricultural Employment Policy . . . . .	188
Labor Supply . . . . .	188
Compensation and Benefits . . . . .	189
Workable Regulation . . . . .	189
Special Subgroups . . . . .	191
Migrant Farmworkers . . . . .	191
Family Members . . . . .	191
Sharecroppers . . . . .	191
Farm Labor Contractors . . . . .	192
Youthful Workers . . . . .	192
Illegal Aliens . . . . .	192
General Recommendations . . . . .	192
Review of Regulatory Schemes . . . . .	192
Economic Study . . . . .	193
Coordination of Future Legislation and Rulemaking . . . . .	193
The Information Problem . . . . .	193
Special Subgroups . . . . .	193
Labor-Management Legislation . . . . .	194
Notes to Chapter 13 . . . . .	194

## LIST OF FIGURES

Figure 1. Use of selected farm inputs. . . . .	6
Figure 2. Indices of farm expenses . . . . .	6
Figure 3. Farm production expenditures . . . . .	6
Figure 4. People employed on farms . . . . .	6
Figure 5. Indices of numbers of persons employed on farms, 1963-1979, 1967=100 . . . . .	7
Figure 6. Farm population. . . . .	7
Figure 7. Family farm labor and hired farm labor as percent of total farm labor, 1910-1979 . . . . .	8
Figure 8. Seasonality of U.S. farm labor, 1978-1980. . . . .	8
Figure 9. Average annual number of workers on farms by Standard Federal Region, 1979 . . . . .	9
Figure 10. Standard Federal Regions . . . . .	10

## LIST OF TABLES

Table 1. Number of hired farmworkers, by duration of farmwork, 1945-77 . . . . .	11
Table 2. Number of hired farmworkers and trends by race, age, and duration of farmwork, averages 1965-67 and 1975-77. . . . .	12
Table 3. Hired farmworkers: Average annual earnings by primary employment status, 1977. . . . .	13
Table 4. Number and distribution of hired farmworkers, by racial/ethnic group and Standard Federal Regions, 1977. . . . .	13
Table 5. Geographic seasonality of farm labor: Workers on farms, selected weeks, by Standard Federal Regions and United States, in thousands, 1978-1980. . . . .	14
Table 6. Workers on farms, annual averages, with U.S. indices, 1975 to 1979. . . . .	15

## Chapter 8

### SOCIAL SECURITY FOR HIRED FARMWORKERS

In the middle of the 1930s, Congress determined that there was a need to impose on the population a compulsory "insurance" system designed to provide old age retirement benefits. The debacle of the depression years made it impossible to ignore the unpleasant reality that most persons could not or would not provide for old age on their own. The result was the Social Security Act of 1935,<sup>1/</sup> which has been amended numerous times in succeeding years. Today, the system, identified as OASDHI,<sup>2/</sup> pays billions of dollars annually in survivors, disability and health insurance benefits, in addition to retirement benefits.<sup>3/</sup> Farm employees were not covered under the original version of the law, but starting in 1951 coverage was phased in and now extends to a substantial percentage of hired agricultural workers.<sup>4/</sup> Certain continuing problems relate to the application of the act to agricultural employment.

#### Historical Development

##### Development of Social Security in General

The Social Security Act of 1935 <sup>5/</sup> provided old age retirement benefits to millions of workers who were brought under the compulsory provisions of the statute. Benefits for dependents and survivors were added by 1939 amendments <sup>6/</sup> and benefits for the disabled by 1956 amendments.<sup>7/</sup> In 1958, benefits were extended to the dependents of disabled workers.<sup>8/</sup> The health insurance program, popularly known as Medicare, was initiated by Congress in 1965.<sup>9/</sup> Numerous other amendments have addressed coverage questions and have periodically increased benefits.

It is essential to understand that in addition to the Social Security Act there are two other pieces of legislation that are critical to the operation of OASDHI. Two portions of the Internal Revenue Code, The Self-Employment Contributions Act <sup>10/</sup> and the Federal Insurance Contributions Act <sup>11/</sup> (FICA), provide for the collection of taxes needed to fund the benefit schemes.

Only persons who are "employees"<sup>12/</sup> can have "wages"<sup>13/</sup> under FICA and only those workers who have "wages" will pay FICA taxes and have employer contributions credited to their accounts. Only where there are taxable wages is there the possibility of a worker earning the quarters of coverage which are essential to attaining insured status. In other words, eligibility for benefits under OASDHI is determined by the extent of taxable employment, measured in terms of quarters of coverage.<sup>14/</sup>

There are three basic categories into which an insured worker may fall: currently insured, fully insured, and transitionally insured. To be "currently" insured, the worker must have earned at least six quarters of coverage in the last 13 quarters period ending with the quarter in which he died, became entitled to old-age insurance benefits or became most recently entitled to disability insurance benefits.<sup>15/</sup> In the case of death, the 13th quarter can be the quarter in which death occurred. To be "fully" insured, more complex rules must be complied with, but the basic rule is that 40 quarters of coverage must have been accumulated.<sup>16/</sup> However, one may be "fully" insured with fewer than 40 quarters if he has at least one quarter for each year since 1950 or for each year after the year in which he became 21, if that occurred after 1950. In any event, the minimum requirement is six quarters of coverage. "Transitionally" insured status applies to certain claimants who attained age 72 before 1969. The status may be achieved with fewer than six quarters having been earned.<sup>17/</sup>

Where the worker is fully insured, the whole range of retirement and survivor benefits is available.<sup>18/</sup> Where the worker is currently insured, only certain of the survivor benefits are available: those for a widow or widower caring for a child, a divorced wife caring for a child, unmarried children or dependent grandchildren under age 18, certain students and disabled dependents over 18, and the lump-sum death benefit.<sup>19/</sup> Transitionally insured workers are entitled to special reduced retirement benefits,<sup>20/</sup> certain hospital insurance benefits,<sup>21/</sup> and specified survivor's benefits.<sup>22/</sup>



A special insured status is needed to qualify for disability benefits and the test is somewhat more liberal than for fully insured status. One who is fully insured is entitled to disability benefits if the disability is sufficient in character and duration to meet established prerequisites to recovery.<sup>23/</sup>

A worker who is 65 or over and who is a Social Security beneficiary is automatically entitled to hospital insurance. Also, certain disabled persons and those suffering from chronic kidney disease are entitled to hospital insurance. A person who is not entitled to monthly insurance protection may still be eligible for hospital insurance protection if he attained age 65 before 1968 even if he has no quarters of coverage.<sup>24/</sup>

An elective hospital insurance plan is available to those age 65 and over who are not entitled to Social Security retirement benefits and who are not transitionally insured. Enrollment in this voluntary plan requires the payment of a monthly premium.<sup>25/</sup>

An aged, blind, or disabled person is eligible for supplemental security income under a program which began in January 1974 if the person has "countable" monthly income that falls below certain set levels.<sup>26/</sup> Eligibility is not related to insured status or quarters of coverage.<sup>27/</sup>

The Social Security system currently reaches or has the potential of reaching most Americans. While it is technically labeled an insurance system, it does not have the characteristics of private insurance programs. Years of payments into the program may result in a return of a \$255 lump-sum death benefit and no more. This would involve a situation where a worker died before reaching retirement age, left no spouse or dependents, and had suffered no disability. The annual contributions into the program by way of FICA taxes, while theoretically held in trust, are used to meet current claims for benefits. Thus, it has been argued that the system is, in essence, a taxation and income redistribution scheme with superficial insurance characteristics.<sup>28/</sup>

#### Special Treatment of Farmworkers

When the 1935 legislation was being drafted, The Committee on Economic Security recommended that all employed persons be included under the old age insurance system.<sup>29/</sup> However, subordinate officials in the treasury department, particularly those concerned with internal revenue collections, objected to the inclusion of farmworkers on the theory that it would be impossible to collect payroll taxes from such workers.<sup>30/</sup> Secretary of the Treasury Morgenthau presented this view to the House Ways and Means Committee where Secretary of Labor Perkins raised strong objections to such restriction of coverage.<sup>31/</sup> However, the Ways and Means Committee adopted the Morgenthau recommendation, being influenced, according to one source, far less by the threat of potential administrative difficulties than by a feeling that farmers would object to being taxed for old age insurance for their employees.<sup>32/</sup> Agriculture had routinely been excluded from laws regulating conditions of employment and the exclusion of farmworkers was thus consistent with established policy.<sup>33/</sup> Secretary Perkins, while never favoring the exclusion, made no real effort to have it deleted once it was in the bill, feeling that the law could easily be amended in future years to afford wider coverage.<sup>34/</sup>

In 1951, approximately 710,000 <sup>35/</sup> regularly employed farmworkers came under the compulsory provisions of the act by virtue of legislation passed in 1951.<sup>36/</sup> The figure climbed to 725,000 in 1954 and then jumped to 1,788,000 in 1955.<sup>37/</sup> The explanation for the startling increase is the 1954 amendments to the Social Security Act.<sup>38/</sup> This milestone in farmworker legislation brought a substantial percentage of the hired farm working force under the compulsory provisions of the act by eliminating the regularly employed requirement. Taxes were to be paid by the employee and the employer where the cash wages from the particular employer amounted to \$100 or more during the calendar year. It should be understood that because 1,788,000 farmworkers were under the compulsory provisions of the act does not mean that they had suddenly all achieved insured status. That depended in each instance on whether the covered worker accumulated the required number of quarters of coverage.

A major change in the threshold requirement for payment of FICA taxes came just two years later in 1957. Under the revised scheme, an agricultural worker had no FICA wages subject to tax unless there was cash <sup>39/</sup> remuneration of \$150 or more from a particular employer or the farmworker was employed on 20 days or more by a particular employer.<sup>40/</sup> In the latter instance, taxes were due even where the cash remuneration was less than \$150, but only if the farmworker was paid on a time rather than on a piece-rate basis.

By 1969, 2,018,700 farmworkers fell under the compulsory contribution provisions. Of that group, 860,000 had benefit eligibility for retirement and survivor benefits, an additional 802,800 had eligi-

bility just for survivor benefits, and only 348,900 had not yet qualified for full or current coverage. Six thousand four hundred of the group died during the year.<sup>41/</sup> Preliminary data for 1974 revealed 2,262,000 farmworkers with taxable wages.<sup>42/</sup> No breakdown on insured status was available for 1974.

While the Federal Insurance Contributions Act requires payment of taxes, not every person who contributes earns quarters of coverage or sufficient quarters to attain insured status. Farmworkers have been and remain subject to the same rules as other workers as to the number of quarters required to attain insured status. However, under the system that prevailed from 1957 through 1977, the method for determining quarters earned was different for agricultural workers than for workers in other sectors. During these years, there were no wages to be taxed unless the wages were cash and employment on a specific farm satisfied the \$150 test or the 20-days test. If there were cash wages on which taxes were paid but they amounted to less than \$100 during the calendar year, zero quarters were earned. If \$100 to \$199.99 was taxed, one quarter was earned. If \$200 to \$299.99 was taxed, two quarters were earned. If \$300 to \$399.99 was taxed, three quarters were earned. If \$400 or more was taxed, four quarters were earned. The number of employers worked for to accumulate the cash wages was not important, nor was the amount of wages paid in a particular quarter. Ordinarily, quarters of coverage based on farm wages were assigned to calendar quarters in the year beginning with the last quarter and then counting back. However, they could be assigned to different calendar quarters in the year if it was to the worker's advantage to do so. Another major change in the method of earning and assigning quarters to farmworkers became effective in 1978.

#### Current State of the Law

For Social Security purposes, agricultural labor is defined in the Internal Revenue Code, Section 3121(g),<sup>43/</sup> and includes virtually all on-farm production employment plus employment in certain enumerated peripheral activities as well as employment in processing if the employer himself produced more than one-half of the commodity with respect to which the services are performed.<sup>44/</sup> The definition in the Social Security Act is identical. The statutory definition of agricultural labor has given rise to frequent litigation growing out of a multitude of fact settings. Any attempt to review the many cases is outside the scope of this study.<sup>45/</sup>

Agricultural work performed by illegal aliens can theoretically produce insured status under the Social Security Act. Wages paid to such workers are subject to FICA taxes and taxes are being paid in some instances. However, benefits are rarely received by such persons because when they come forward to make claim, their illegal status is usually uncovered and deportation results. Benefits are not paid to deported workers.<sup>46/</sup>

Agricultural work performed by foreign workers lawfully admitted to the United States on a temporary basis has not been covered by Social Security since 1956. Agricultural work performed in 1955 and 1956 by foreign workers other than those from the British West Indies and those admitted from Mexico under the bracero program was covered by Social Security. Agricultural work performed by foreign agricultural workers legally admitted on a temporary basis from the British West Indies was covered in 1954 and for a time prior thereto. Agricultural work performed by workers legally admitted to the United States from Mexico was covered prior to July 12, 1951, although Mexican contract workers were never covered.<sup>47/</sup>

An agricultural worker, including a pieceworker, who receives cash wages of at least \$150 from a particular farm employer during a calendar year must pay FICA taxes and the employer must contribute as well. If the cash remuneration is less than \$150 from a particular employer, the agricultural worker, other than a pieceworker, will have "wages" if he works for the employer on 20 days or more during the calendar year.<sup>48/</sup> This is the rule that has been in effect since 1957 and it survives even though changes have been made, effective 1978, in the method of determining quarters of coverage for agricultural employees. Since 1978, farmworkers have been included under a new provision which has general application and which replaces the old "\$100-earns-a-quarter-of-coverage" test. In 1979, quarters of coverage were earned for every \$260 of taxable "wages" earned during the calendar year.<sup>49/</sup>

Only in cases where the worker is over 62 years of age, disabled, or has died during the calendar year is there any necessity to allocate to particular quarters. Thus, a farmworker who earns \$1,040 in wages in the final quarter of 1979 will have earned four quarters of coverage for that year.

Under current law, employers are required to maintain records for four years, although no particular form is prescribed. General guidelines are set forth in Circular A, "Agricultural Employer's Tax Guide," Publication 51 of the Internal Revenue Service (IRS), which is normally revised and

reissued annually. Employers who must withhold FICA taxes are required to follow depository rules which are prescribed by the regulations and summarized in Circular A. If, at the end of the year, the total amount of undeposited taxes (including income taxes withheld) for all workers is less than \$200, no deposit is required and remittance may be made with a timely filed Form 943, "Employer's Annual Tax Return for Agricultural Employees." If the amount at the end of the year is over \$200 but less than \$2,000, a deposit must be made in an authorized commercial bank or a Federal Reserve Bank by January 31. If at the end of any month, other than December, the cumulative amount of undeposited taxes for the year is \$200 or more, special rules apply which require periodic deposits within specified time limits. Penalties may be imposed for failure to deposit in a timely manner, absent reasonable cause.<sup>50/</sup>

While the method of determining "wages" is unique for agricultural employment, once that hurdle is passed and the number of quarters accumulated through the years has been determined, benefits are figured on the same basis as for other workers.

### Evaluation

The Social Security Act as amended has provided a substantial number of farmworkers with an opportunity to build minimum retirement, disability, survivor, and health care benefits. Since few farmworkers are fortunate enough to have private programs available to them, most would have no protection other than workers' compensation where it is available, were it not for the Social Security system.<sup>51/</sup>

Inequities which have existed by virtue of the exclusionary features of the \$150 test have been softened somewhat by a self-correcting process with inflation as the operative factor. The recent change to the one quarter for each \$260 or wages with a maximum of four a year has been a slight step backward and has doubtlessly worked to the disadvantage of some farmworkers.<sup>52/</sup> For those who earned only \$400 in wages during a calendar year, it was possible, under the old system, to accumulate four quarters of coverage. Now, however, the same worker will accumulate only one quarter of coverage for the year. Still, except for the farmworker who works just a few weeks in the summer, it will be difficult to be employed for the entire cropping season and not accumulate several quarters of coverage. The major exception is the farmworker who moves to many farms during the year and has many employers. Here the \$150 and 20-day tests still have the potential of working major inequities.

It is possible for pieceworkers and others who move rapidly from one farm to another to work an entire season without accumulating a single quarter of coverage. By working on one farm for less than 20 days and then moving on to another, never earning more than \$149.99 anywhere, a worker could work the entire season and not have "wages" for Social Security purposes.<sup>53/</sup> Documentation is sparse on the scope of this problem. However, one study indicates that in 1969 only 133,700 farmworkers had three or more employers, while 255,200 had two, and 1,629,700 had only one.<sup>54/</sup> These statistics tend to minimize the need for concern about the \$150 and 20-day tests. However, in the Florida citrus industry, a crew may move 50 to 100 times during a season.<sup>55/</sup> At first, one would conclude that the farmworkers involved would have no chance to earn "wages." However, if these workers are members of a crew headed by a farm labor contractor who is deemed to be the employer, the problem does not exist.<sup>56/</sup> The legislative intent in making the contractor the employer was to facilitate coverage for the crew members by combining several earnings into a single amount, increasing the chances of satisfying the minimum criteria for taxability and coverage.<sup>57/</sup> However, another study indicates that as many as 29 percent of the nation's farmworkers fail to meet either the \$150 or 20-day test.<sup>58/</sup> The 20-day test does not apply to pieceworkers, and since migrant workers often work on this basis rather than on a time basis, their short periods of employment coupled with low wages often means failure to meet the \$150 test with a particular employer.<sup>59/</sup> Other figures tend to support the findings of these studies. According to the Social Security Administration taxable farm wages for 1974 were \$4,820,000,000.<sup>60/</sup> Yet, it is clear that the labor expense for farm employers for the same period was around \$6,200,000,000.<sup>61/</sup> Given these figures, it is apparent that as much as 22 percent of the wages paid were not taxed for Social Security purposes. However, the definition of agriculture which generated the \$4,820,000,000 figure is somewhat broader than the definition that generated the \$6,200,000,000 figure.<sup>62/</sup>

It is difficult to know if avoidance of Social Security taxes is a widespread phenomenon. Successful Farming magazine in 1978 contained "advice" on avoidance suggesting that since the only compensation that constitutes "wages" for FICA purposes is cash, farmers and employees can avoid the expense of FICA taxes if workers are paid with produce.<sup>63/</sup> It was suggested that, if a month's wages would amount to \$1,000, the farmer can simply haul a load of grain to the elevator and have a storage ticket

issued to the employee for enough bushels to make up the \$1,000.<sup>64/</sup> If the wages due the employee for the entire year add up to \$10,000, the employer will, according to the Successful Farming article, have saved \$605 in FICA taxes in 1978 and so will the employee.<sup>65/</sup> The article then points out that the employee, upon selling the grain, can pay the minimum tax on \$150 and work toward qualifying for minimum Social Security coverage.<sup>66/</sup> The approach is consistent with the act and with the regulations which provide that "remuneration paid in any medium other than cash such as...farm products...does not constitute wages."<sup>67/</sup>

Another avoidance device is to treat the farmworkers as sharecroppers. This method worked out for a farmer in Sachs v. United States,<sup>68/</sup> where migrant workers who did not plant cucumber crops came in and assumed responsibility for cultivation and harvesting. There was no crew leader involved, and each migrant family was assigned a portion of the field. When the crop was sold, the family received an amount equal to one-half of the receipts paid to the farmer. The court found that while the farmer furnished the seed, planted the crop, fertilized, furnished the equipment for cultivation, and periodically inspected the fields, the workers were not employees, but independent contractors. Of course, the farmer was thus not required to withhold or to pay Social Security taxes. One commentator has stated that "the Commissioner of Internal Revenue claims that one of his 'most intractable problems' is the distinction between an employee and an independent contractor. There is a substantial revenue loss if an individual is treated as an independent contractor when he is really an employee."<sup>69/</sup>

Any efforts by the IRS to challenge an independent contractor classification in a particular case are prohibited by Act of Congress through 1980 where the taxpayer did not treat the person in question as an employee for any period before January 1, 1981, filed all returns for periods after December 31, 1978, consistent with the independent contractor status, and had a reasonable basis for not treating the individual in question as an employee.<sup>70/</sup> "Reasonable basis" is defined to exist when there has been "reasonable reliance" by the taxpayer on any of several specified past events or authoritative documents.<sup>71/</sup>

The real evil in the avoidance devices is that the farmworker may fail to pay FICA taxes on the proceeds from grain sold or self-employment income from the cucumber crop. Even if the farmworker does comply with the law, there is a good chance that he will pay the minimum tax, thus assuring bare minimum Social Security coverage when claims are eventually made. For those who have no other benefits, the minimum Social Security payments barely sustain life.

Another matter that cannot be ignored is the possibility of outright evasion of FICA taxes. The problem has been identified in two areas of farm employment. The first involves the farmer who only occasionally hires a few workers and who really has never come to appreciate his obligations under the law.<sup>72/</sup> The other involves "migrant workers" who work for crew leaders. One study indicates that in 1972 as many as 200,000 migrant farmworkers who probably should have been covered under Social Security were unaccounted for.<sup>73/</sup>

Three things are helping to identify the problem so that it can be eradicated. The computer capabilities of the IRS make it possible to cross-check to see if the deductions on a farmer's income tax return for wages paid match data submitted by the same farmer on Form 943 and the accompanying W-2 forms. Such cross-checking should at least identify farmers who are failing to withhold and remit FICA taxes through ignorance. Also, the emergence of somewhat better enforcement of the Farm Labor Contractor Registration Act should help to reduce abuses by crew leaders. Finally, it is reported that the Social Security Administration and the Office of Economic Opportunity have made increased efforts to reach farmworkers with educational and information materials in English and Spanish designed to encourage readers to see that the FICA taxes are paid and benefits received.<sup>74/</sup>

Unfortunately, it is reasonable to assume that some farmworkers, considering their low pay, are quite happy to forget about the Social Security tax if the employer will, and take the immediate increase in take-home pay. The regressive nature of the FICA tax which hits lower paid workers as hard or harder than higher paid workers in terms of percentage of income taken has been identified as bad public policy by some.<sup>75/</sup>

Provisions of the act exempt amounts paid to an employer's spouse or the employer's children under age 21.<sup>76/</sup> While this aspect of the act is consistent with the general social policy of "hands off" family operations, it raises some questions as to why these members of the work force should be denied the benefits of the system. Formation of a family farm corporation is one method of getting around the problem, and in some instances, formal creation of a partnership will accomplish the same thing. Not only does the farmer switch from self-employed status to employed status, but family members can become employees of the corporation thus coming under the compulsory contribution require-

ments. Salaries for the farmer who shifts from self-employed to employee status may be set at levels that allow higher contributions and thus the potential of greater benefits. However, the increased cost that results from going, in 1979 for example, from an 8.10 percent tax on self-employed earnings to what is in effect a 12.26 percent tax in the corporate setting is enough, when added to the costs resulting from the application of other social legislation, to deter some small family farmers from opting for the corporate form of business.77/

When the corporate form is used, some interesting problems have emerged when the farmer reaches retirement age. There have been several instances where farmers claim benefits, and then to avoid having more income than is permitted a retired person under the system, simply keep working but have the corporation pay salaries to other members of the family or pay out dividends rather than wages. In a number of such instances, the IRS has been successful in establishing that such devices are simply shams designed to conceal continued salary payments to the claimant.78/

A recent study by Griffing and others concludes that the eligibility of occupationally injured and disabled agricultural workers for Social Security disability coverage is severely limited.79/ This conclusion is reached in part on the basis of evidence, already cited herein, that about 29 percent of farmworkers fail to earn enough under the \$150 and 20-days tests to have wages and thus are unable to accumulate quarters of coverage.80/ Failure of crew leaders to report wages when they should is also cited as a problem.81/ All of this, coupled with the need for a worker over 31 years of age and under age 65 to have 20 quarters during the 40 quarters prior to disability, is cited as creating a very special problem for farmworkers given their erratic and often limited work patterns.82/

The Griffing study notes that since disability payments are keyed to a complex formula which averages monthly earnings during the years the worker was receiving Social Security wages (including the five years of lowest earnings), farmworkers are likely to receive minimal payments.83/ It is further noted that where farmworkers are covered by Worker's Compensation for job-related disability the typical payment of two-thirds of the average weekly wage, up to a certain maximum, is likely to yield a substantially better benefit. The waiting period before Social Security benefits for disability can begin, plus the requirement of a finding of disability that will persist for at least one year, further limits the number of farmworkers who receive benefits. This is especially important to farmworkers who in many states are still not covered under worker's compensation and who do not generally have the benefit of private disability insurance to take care of disabilities not related to their jobs.

In the final analysis, the Social Security system as it now impacts agricultural employment is not without its inequities and problem areas. The level of benefits for those farmworkers who are covered is low because the wage base upon which benefits are determined is commonly at minimum levels. An ameliorating factor in some instances is that the farmworker in the family is not the principal source of income. This is the case with students and housewives who work in the fields for short periods each year. Further, many who fall into the statistical studies as farmworkers have nonfarm employment and thus farm wages alone are not an accurate measure of their overall earning power and FICA tax contributions. Still, low wages, erratic employment and other disadvantages tie together to produce minimum Social Security protection, if indeed, there is any coverage at all for many farmers.

Whatever the merits or deficiencies of the scope and scale of coverage provided at present, the Social Security experience has established that a complex and expensive social program can be administered with reasonable success for farmworkers as a class. To the extent that arguments are made against the extension of other social programs to agriculture on the basis of cost and administrative impossibility, the Social Security experiment provides a strong answer. It becomes exceedingly difficult to accept the proposition that there is something peculiar about agriculture that creates insurmountable administrative problems and a market structure that does not allow added costs of production to be absorbed.

#### Current Developments

The major Social Security bills that are pending in the 96th Congress at the time of this writing for the most part do not relate directly to matters discussed herein. Two bills are designed to deal with problems of self-employed farmers after retirement.84/ Another is designed to make changes in the disability scheme of the act.85/

One bill that was considered in the 95th Congress that did not become law, but is likely to re-surface, is the Alien Adjustment and Employment Act of 1977.<sup>86/</sup> This is the administration amnesty bill which would have allowed lawful admission for permanent residence to certain undocumented aliens and temporary resident alien status to certain others for a period of five years. Temporary resident alien status would have entitled those in it to contribute toward Social Security protection and receive various other benefits and social services not specifically excluded.<sup>87/</sup> Persons in that category, however, would not receive supplemental security income, aid to families with dependent children, and Medicaid. Such legislation, if ever enacted, would probably withstand constitutional challenge.<sup>88/</sup>

#### Recommendations

In light of the funding crisis that exists for the entire Social Security system at the present time, suggestions that would call for a greater drain on the financial resources of the system may not have much chance of being implemented in the foreseeable future. Still, such suggestions must be voiced so that issues are not lost sight of.

Clearly there is a need for continuous study of the Social Security system as it relates to agricultural employment. Better data will help policymakers see the farm situation more clearly.

The impact of the \$150 and 20-days rules is just one example of where a more accurate picture is needed. Serious doubts must be expressed over perpetuating those thresholds. They can be justified only on the theory that they save farm employers a certain amount of administrative work. Yet there can be no doubt that farmers are as capable as employers in other sectors and ought to be able to deal quite well with a \$50 threshold as must employers of domestic help and babysitters or with no threshold at all. If 29 percent of the hired farm work force is kept out of the system by the threshold, the problem of the thresholds is exceedingly serious and needs immediate reexamination.<sup>89/</sup>

Farmworkers as a class suffer considerably from the regressive nature of FICA taxes. More should be done to eradicate the regressive characteristics of FICA taxes even if this means exploring the use of general revenues to partially fund the system.

Perhaps the time has also come to reexamine the exclusion of non-cash remuneration. Farming is one area where this type of remuneration is actually resorted to in order to avoid taxes. Are there really good administrative reasons for current policy or is Congress simply perpetuating certain assumptions about administrative difficulties that may no longer have validity, if indeed, they ever had merit?

The Congress also would be well advised to look at the problems of sharecroppers with a view toward creating a definition of independent contractor that would not include migrants who find themselves in the position of the families participating in the kinds of operations represented by the cucumber case discussed previously. It is one thing for a person to lease land and run his own farming operation as a self-employed person, but it is quite another to treat farmworkers as independent contractors when they are working under circumstances that have most of the characteristics of the master-servant relationship other than mode of pay. It is extremely difficult to determine just how many farmworkers are being forced into this category to their detriment not only under the Social Security scheme, but also with respect to other programs designed to regulate employment in agriculture.

Rigorous enforcement of FICA rules by the Internal Revenue Service and of farm labor contractors rules by the Department of Labor needs to be encouraged and this probably means more funding. Educational programs are also of critical importance and should be encouraged.

There is little question that Social Security disability programs will never achieve the same level as those under state worker's compensation laws. For this reason, plus many others, there is a need for the Congress to provide whatever pressure is necessary to cause all states to treat farmworkers on a par with those in other industries under worker's compensation laws.

Finally, if we intend as a society to use large numbers of illegal aliens in on-farm production work, there seems to be a moral obligation to afford these people social and economic benefits, including Social Security coverage, and in this connection the amnesty program deserves further consideration unless a better alternative can be suggested.

## Notes to Chapter 8

1. 49 Stat. 622 (1935), as amended, codified as 42 U.S.C. §401 et seq.
2. An acronym for old-age, survivors, disability, and health insurance.
3. Social Security Bulletin, Annual Statistical Suppl. 1975, Tables 122 and 123.
4. One study suggests that 71% of farmworkers earn "wages" on which FICA taxes are paid. Griffing, Walker, Weitzman & Youtie, A Social and Economic Analysis of the Exclusion of Farm Workers From Coverage Under The Indiana Workmen's Compensation Act Of 1929 at 41. Other statistics indicate that as of 1974-75 about 78% of the "cash" remuneration paid to farmworkers was subject to FICA taxes. Taxable farm wages for 1974 were \$4,820,000,000. Social Security Bulletin supra, note 3 at Table 38.
5. Supra, Note 1.
6. As amended Aug. 10, 1939, c. 666, Title II, §201, 53 Stat. 1362, as amended 42 U.S.C. §402.
7. As amended Aug. 1, 1956, c. 836, Title I §103(a), 70 Stat. 815, as amended 42 U.S.C. §423.
8. As amended Aug. 28, 1958 Pub. L.85-840, Title II §§202, 204(b), 72 Stat. 1020, 1021 as amended 42 U.S.C. §423.
9. As added July 30, 1965, Pub. L. 89-97, Title I 101, 79 Stat. 290, as amended 42 U.S.C. §426.
10. 26 U.S.C. §1401 et seq. (1976) as amended.
11. 26 U.S.C. §3101 et seq. (1976) as amended.
12. 26 U.S.C. §3121(d) (1976).
13. 26 U.S.C. §3121(a) (1976).
14. 42 U.S.C. §413 (1976) as amended.
15. 42 U.S.C. §414(b) (1976) as amended.
16. 42 U.S.C. §414(a) (1976) as amended.
17. 42 U.S.C. §426a (1976) as amended.
18. O'Byrne, Farm Income Tax Manual, 5th Ed. at §1019(e).
19. Ib.
20. 42 U.S.C. §427 (1976) as amended.
21. 42 U.S.C. §426a (1976) as amended.
22. 20 C.F.R. §404.113a (1978).
23. Social Security Handbook 1973 at §211.
24. Id. at §200.
25. Id. at §2114.
26. Id. at §2600.
27. 42 U.S.C. §1382(a) (1976) as amended; 20 C.F.R. §§416.201-.202 (1976), as amended 43 Fed. Reg. 25091.

28. Friedman, "Payroll Taxes, No; General Revenues, Yes," The Crisis In Social Security: Problems and Prospects, 2nd Ed., at 25-39.
29. Witte, The Development Of The Social Security Act at 152.
30. Id. at 153.
31. Ib.
32. Ib.
33. Ib.
34. Id. at 154.
35. Social Security Bulletin, Annual Statistical Supp. 1973 at 66.
36. Aug. 28, 1950, Pub. L. 81-734, Title I §104(a), 64 Stat. 477.
37. Supra, note 35.
38. Sept. 1, 1954, c. 836, Title I §106(a)(2) as amended. 42 U.S.C. §413(a)(2)(iv).
39. 26 U.S.C. §3121(a)(8)(A) (1976).
40. 26 U.S.C. §3121(a)(8)(B) (1976).
41. See U.S. Dept. Of Health, Education, And Welfare, Research and Statistics Note 8 (1975) Table 3, at 8.
42. McCormick, Social Security Claims And Procedures, 2nd Ed. at §200.
43. 26 U.S.C. §3121(g) (1976) as amended.
44. 42 U.S.C. §410(f) (1976) as amended.
45. See Annotation, 53 A.L.R.2d 406 (1957).
46. 20 C.F.R. §404.464 (1978).
47. McCormick, supra note 42 at §136.
48. 26 U.S.C. §3121(a)(8)(B); 26 C.F.R. §31.3121(a)(8)-1.
49. 42 U.S.C. §413(a)(2)(A) (1976), as amended by Pub. L. 95-216, §§351(c) and 352(a), the latter adding 42 U.S.C. §413(d); the statutory \$250 figure is subject to being changed by regulation and was moved to \$260 for 1979. No change 1980.
50. IRS Notice 201.
51. See Gruber, "An Analysis of the Hired Farm Work Force of the Ohio Cash Grain and Livestock Farms," M.S. Thesis, Ohio State Univ., 1974, Gruber reports on full-time hired workers on Ohio grain and livestock farms and notes the following fringe benefits on a percent of the work force basis (1970) at p. 55:

	Monthly Salary	Weekly Salary	Hourly Salary	All Workers
Health Ins.	72.9	17.9	6.4	26.4
Life Ins.	63.5	15.3	3.4	22.3

52. See, supra note 49.



53. It is also possible for a farm employee who works for a single employer more than 20 days in a mix of hourly work and piecework to fail to earn "wages." IRS Pub 51, Agricultural Employer's Tax Guide 1979 at p. 3 gives this example: "You pay Employee C \$116 in 1979. \$76 is for 19 days at \$4 a day. The balance of \$40 is for 8 days on a piecework basis. No taxes are due because neither the \$150-a-year test (\$116) nor the 20-days-a-year test (19 days) is met."
54. See A. Larson, "Basic Concepts and Objectives of Workmen's Compensation," Supplemental Studies For The National Commission On State Workmen's Compensation Laws (1973) at 32.
55. Hearings on Farm Labor Contractors Registration Act Before the Subcommittee on Economic Opportunity of the House Committee on Education and Labor, 95th Cong., 2d Sess. at 31.
56. O'Byrne, supra note 18, at §1001(a).
57. Research And Statistics Note 8, supra note 41, at 3.
58. Social And Economic Analysis, supra note 4, at 41.
59. Staff Report prepared for Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 94th Cong. 2d Sess., at 116.
60. Social Security Bulletin, supra note 3 at Table 38.
61. Based on 1975 annual average hired farm labor force of 1,323,600 working an average of 36.45 hours per week at the reported average hourly wage for 1975 of \$2.43. Farm Labor, Feb. 27, 1976.
62. The \$4,820,000,000 includes certain processing workers and others not considered in "farm labor" statistics.
63. Successful Farming, Feb. 1978, at 18.
64. Ib.
65. Ib.
66. Ib.
67. 20 C.F.R. §404.127(i)(1) (1978).
68. 422 F. Supp. 1092 (N.D. Ohio 1976); discussed at 37 A.L.R. Fed. 149(n).
69. O'Byrne, supra note 18, at 1978 Supp. 208-9; (note that quoted comment deleted from 1979 Supp); see also Annotation 37 A.L.R. Fed. 95 (1978).
70. Public Law 95-600, §530, as amended by Public Law 96-167, §9.
71. Discussed at Tanquary, "Employment Tax Provisions of the Revenue Act of 1978," 1 Agricultural Law Journal (1979) 221.
72. One of the authors has had experiences with such clients while in private law practice.
73. Staff Report, supra note 59, at 117.
74. Ib.
75. Pechman, "The Social Security System: An Overview," The Crisis In Social Security: Problems And Prospects, 2d Ed., 1978 at 33-35.
76. 42 U.S.C. §410(a)(3)(A) (1976).
77. One of the authors has witnessed this kind of decision-making while in private law practice.
78. See Newman v. Celebreeze, 310 F.2d 780 (2nd Cir. 1962); Ludeking v. Finch, 421 F.2d 499 (8th Cir. 1970).

79. Social And Economic Analysis, supra note 4, at 42.
80. Supra note 58.
81. Staff Report, Supra note 59 at 117.
82. Social And Economic Analysis, supra note 4, at 41.
83. Id. at 43.
84. H.R. 396 and H.R. 397, 96th Cong., 1st Sess.
85. H.R. 3236, 96th Cong., 1st Sess.
86. S. 2252, 95th Cong., 1st Sess.
87. Hearings on S. 2252 Before Senate Committee on the Judiciary, 95th Cong. 2d Sess., at 215-19.
88. Mathes v. Diaz, 426 U.S. 67, 96 S.C.T. 1883, 48 L.Ed.2d.478 (1976).
89. Supra note 58.