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AGRICULTURAL EMPLOYMENT LAW AND POLICY

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

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## Chapter 13

### OVERVIEW

#### A General Commentary on Agricultural Employment Policy

Special attention has been given to 11 areas of concern. In each instance, specific recommendations have been made, but it is intended that all such recommendations be viewed in light of this general commentary and the general recommendations that follow. Farm employment policymaking has been characterized by a tendency to enact laws and promulgate regulations in a compartmentalized fashion. Therefore, it is important to identify and comment on some of the more pressing concerns that cut across the artificial lines of the topics considered in this study. Matters selected for comment are labor supply; compensation and benefits; equitable regulation; and special subgroups, including migrant workers, hired workers who are members of the farmer's family, sharecroppers who are currently classified as independent contractors, farm labor contractors, youthful workers, and illegal aliens.

#### Labor Supply

While it is difficult to predict the precise nature of changes that will take place in American agriculture between now and the end of the century, it seems reasonably certain that the size of farms will continue to grow and that reliance on machines and chemicals will continue to increase. Crop changes are also likely to continue to occur from time to time on specific farms and in certain geographical areas. Many factors can be cited in an effort to explain why these things have been happening and why they are likely to continue to occur. Inevitably, the increasing cost of hired labor will be identified as one of those factors.

As wage rates and related costs are forced up by changes in the law and, in some locations by union pressure, certain agricultural operators will continue to find it more economical to convert to less labor-intensive crops or rely more on machines and chemicals. Therefore, it is no surprise to learn that the hired labor force in American agriculture has been shrinking in size and that more is being demanded of many of the hired workers who remain by way of increased technical skills and knowledge of agronomy, animal husbandry, and the like.

In recent years, certain exceptional situations aside, there has been a general labor surplus in agriculture, resulting largely from the decrease in the number of available jobs. Accordingly, there seems to be no immediate concern about meeting the hired labor needs of agricultural operators and there have been no serious complaints that settling-out programs and retraining programs administered in the Department of Labor have been creating a labor supply shortage.

The question arises, however, whether further changes in agricultural employment policy, such as those suggested in this study, are likely to generate shortages, other than on an isolated and short-term basis. Assuming that labor costs increase as more and more farmworkers are brought under existing programs and as the labor movement gains added strength in agriculture, the kinds of adjustments that we have been experiencing are likely to continue. Farmers who find it advantageous to switch to less labor-intensive crops or methods will do so if they can. Others, who would have difficulty making these changes, may be forced to ride out a period of adjustment and allow market forces to operate over a period of time to pass these increased costs on to the consumer. Thus, the demand for hired labor will probably continue to decrease. However, it seems unlikely that the size of the available hired work force will decrease at a faster rate than the decline in demand so as to produce a crisis. Indeed, it seems reasonable to expect that if wages and benefits go up in the agricultural employment sector, the economic return from such employment may be substantial enough to generate more competition for existing jobs than at present. Further, there is no reason to suspect that employment services programs will diminish in scope and effectiveness. Indeed, it appears that the increased attention given to the whole rural employment scene should be an assurance to farmers and others that best efforts will be made to insure an adequate hired work force for all rural enterprises, including agriculture.



### Compensation and Benefits

Viewed in its entirety, this study points to establishing as a clear national goal the providing of a hired farmworker force at a cost that is fair to farm operators, while at the same time moving steadily toward bringing that work force into the mainstream of the national production labor force. Is this a realistic goal? Is it possible to accomplish the objectives set forth for the hired farmworker force without bringing impossible and unreasonable labor costs to farm operators?

In several sections of this study, the matter of the cost of various employment-related legislation to agricultural operators has been discussed. It has been pointed out that the extension of benefits under a number of legislative schemes has been delayed and in some instances is still not a reality because of the fear that the cost would be too great for agricultural employers to absorb. Doubt has also been expressed that such costs can be passed along to the consuming public.

It has been argued in various sections of this study that this concern ought no longer to stand in the way of expansion of benefits to farmworkers. It is recognized that this is a controversial position and that the concerns of agricultural operators cannot be dismissed lightly. However, whatever the peculiarities of agriculture when viewed against the economic structure of American industry in general, agriculture has passed on a host of increased operating costs, particularly in the post-World War II era. This includes costs attributable to the use of hired workers. Wages have increased, social security taxes have become a commonplace expense, unemployment taxes are paid in some instances, as are worker's compensation premiums. Even in the states where the increases have been the greatest, agricultural employers have been able to adjust and, with few exceptions, have survived. A price is to be paid in terms of the number of available jobs for hired farmworkers in light of crop changes and mechanization yet, for those who remain in the hired farmworker force, wage rates and benefits have improved.

Much lies ahead before most farmworkers will be brought into the economic mainstream and pressure for better wages and benefits will continue. What is called for is neither a sudden halt in efforts to improve the economic situation of farmworkers nor a sudden elimination of all existing exclusions and exemptions. What is necessary is a coordinated effort that will allow future changes to be made in a staggered fashion designed to give agricultural operators the time to make adjustments and to allow the slow market process to operate to pass through increased costs.

What is needed, therefore, is a major study delineating the labor costs involved in farming, broken down to indicate how much of the overall cost is attributable to each piece of existing social legislation and each current benefit plan. The potential impact of further changes in social legislation on labor costs should be carefully studied with special attention being given to the situation of farmers with specialized operations, those located in district regions of the country, and those using a small number of hired workers. Only through such a comprehensive study can data be gathered that will allow informed judgments to be made about the order in which changes in existing laws should be made and the intervals that may be needed between future legislative acts to allow farm employers to cope.

### Workable Regulation

Much in this study has been directed toward the current state of the law and suggesting ways in which agricultural employment regulations and programs might be made more effective, less confusing, and more equitable. It is ironic, that in 1980 the administrative complexities of employer-employee law are greater in agriculture than in most other industries. Congress and the state legislatures have succeeded in doing what they repeatedly said they must not do -- impose heavy administrative burdens on agriculture.

Currently, a farmer who hires workers for his agricultural operation must, if he is to feel secure about being in compliance with agricultural employment laws, be a master of a vast array of technical rules and remain ever vigilant to know when thresholds are reached that trigger the application of a host of different requirements. Small- and medium-sized farm employers have a particularly heavy burden, for it is the farmer with a small labor force, one to 12 workers, who may be constantly hovering around various thresholds. When that farmer uses youthful workers, "day-haul" workers, or migrant workers, the problems are compounded.

By way of review, consider this sampling of regulations that might have application on a particular farm and the questions that the farm operator must continually ask himself: Has the 500-man-days test been met, thus triggering the application of federal minimum wage requirements? If that test has

been met, are there still workers who are excluded and who can be paid at a lesser rate? If the minimum wage must be paid, have prerequisites been valued properly, have piece rates been calculated to meet the minimum wage, are there state wage laws or hour laws that must be observed where federal law does not apply or in combination with federal law? If youthful workers have been hired, have they been assigned appropriate work given their ages and have the proper consents and certificates been obtained? Must youthful workers be paid at the same level as adults employed on the same farm? Which OSHA regulations currently apply to agriculture? Is the exclusion for employers with 10 or fewer hired workers still in effect and does it apply to the particular farmer's operation? Does the "general duty" clause apply to the particular operation and what obligations exist if it does? Have any workers worked long enough or earned enough to require Social Security withholding and filing of the annual returns? If withholding is required, has the amount withheld reached a sufficient level to require compliance with depository rules? Is the farmer engaged in activities that require him or his employees to register as a farm labor contractor? Is the farmer getting any workers through a farm labor contractor and, if so, must that contractor be registered and must the farmer thus demand evidence of that registration and copies of various records? Does the farmer meet the 10-or-more-hired-workers-during-20-weeks test under unemployment compensation laws or some different threshold test if one more favorable to workers has been enacted in the particular state? If unemployment taxes must be paid, what rate applies to the particular farm and what forms must be filed? Does worker's compensation apply to agriculture in the employer's state at the moment; if so, has the farmer met the threshold requirements under state law and, if so, how is satisfactory coverage obtained? Are there any state laws that require that health insurance be provided for hired farm workers? If the farmer elects to use his state employment services office, what regulations then apply and will this have an effect on wage rates that must be paid and other benefits required by law? What are the rights of union organizers if they should attempt to organize the farmer's employees? Is there labor-management legislation at the state level applicable to the farmer's operation? Can alien workers be hired and, if so, what treatment are they entitled to under all of the above laws and regulations? If some of the employers are relatives, when and how do they fit into the regulatory scheme? How does one determine whether one or more of the workers on the farm are independent contractors and what are the obligations to such workers, if any, under current law? What records must be kept and in what form and how long when one or more of the above schemes has application? How do civil rights laws affect agricultural employment? What does one do if the local, state, and federal laws seem to apply to some activity but with inconsistent provisions? What happens if the farmer buys a farm and continues to use some of the seller's employees?

The list could be made much more elaborate. The purpose of posing these questions is to illustrate the degree of sophistication that is being demanded of farmers as they attempt to understand when regulations become applicable and the substance of those regulations.

If the present system, viewed in its entirety, is to be more manageable for farm operators and more effective for farmworkers, two important developments are essential.

First, assuming that there will be no sudden simplification of the law, it is clear that much needs to be done to communicate current requirements to farm operators, farm-labor contractors, farm employees, and to many of the attorneys -- general practitioners for the most part -- who represent them. Several references have already been made in this study to problems with governmental efforts to communicate with those who are faced with the necessity of comprehending their status under the myriad statutory and regulatory programs affecting farm employment. It is not sufficient that the laws be published in official form. It is manifestly unreasonable to expect that those affected, or even their attorneys, will have all of the following on hand: the United States Code, the Code of Federal Regulations, the Federal Register, the relevant state statutes, the state administrative code, the state register, and reports of decisions of administrative agencies. This material is costly, and occupies many shelves. Even where all relevant volumes are available, it takes many hours to work through indexes, some of them extremely inefficient, to locate all of the current statutes and regulations bearing on farm employment.

Some efforts have been made to attack this problem. For example, the Ohio Agricultural Management Association, an affiliate of the Ohio Farm Bureau Federation, prepared a short document entitled "Summary of State-Federal Farm Labor Laws" designed for Ohio farmers.<sup>1/</sup> Extension services in some states have also attempted to fill the void by publishing farm labor handbooks.<sup>2/</sup> The Migrant Legal Action Program, Inc. has produced and made available a wide range of excellent publications and resource materials.<sup>3/</sup> All of these publications, while very helpful, need constant updating and, unless supplemented or revised on more than an annual basis, lose much of their usefulness. State and federal agencies publish specialized pamphlets, forms, and guides, but what is missing is a comprehensive treatment of the many regulatory and assistance programs which is kept up-to-date. What is needed is a comprehensive looseleaf service with frequent supplementation.

A 1980 publication goes a long way toward filling this need by including, in a multi-volume agricultural law treatise, good analytical material on most, though not all, of the areas considered in this study.<sup>4/</sup> Further, for the user who does not have access to federal legal materials, the notes set forth in full text, many of the most important federal statutes and regulations, plus some selected state statutes and regulations.<sup>5/</sup> Given the rapid pace of development of certain of the agriculture employment law areas, the frequency of supplementation will impact the value of the work as a source of primary materials.<sup>6/</sup>

The second phase of the suggested plan to improve the effectiveness of current statutes and regulations involves the implementation of many of the specific suggestions made earlier in this study. One of the more critical is the gradual elimination of many thresholds that apply in agriculture, but not in other industries. The substance of the regulatory schemes are difficult enough to deal with without having the question in so many cases of whether the regulations apply at all. The gradual elimination of most, if not all, thresholds and, thus, the exclusions and exemptions, would bring about a simpler and arguably more effective system of regulation. Such changes would also be socially desirable from the perspective of those who have vital concerns about the lot of hired farmworkers. From the standpoint of agricultural operators, benefits would include a less complex regulatory system and, quite probably, a more satisfied and more productive work force. As has already been pointed out, careful phasing out of thresholds is necessary so that resulting increased costs can be accommodated by farm employers without adverse long-range effects.

#### Special Subgroups

While the sections of this study allude to particular problems of migrants, family members employed on family farms, sharecroppers, farm labor contractors, and youthful workers, the only subgroup treated separately was the alien work force. At this point, some broad suggestions are made about each of these groups with a view to supplementing specific recommendations set forth previously.

Migrant farmworkers. As farmworkers are increasingly brought closer to the mainstream economically, there is little question that more jobs will be eliminated. This means that some workers who rely entirely or heavily on income from agricultural employment, including many now in the migrant streams, will continue to be displaced and forced to settle out. Thus, for the foreseeable future, programs should be continued and possibly expanded to assist these workers and their families in the adjustment period. Retraining, education, and relocation programs such as those funded through the Office of National Programs of ETA deserve continued funding and should be reassessed continually to determine whether additional appropriations are required. Health, nutrition, child care, and similar service programs also will have to remain in place for the foreseeable future until migrant and seasonal farmworkers are either settled out and are economically independent or have found permanent, year-round employment in agriculture which brings a family income significantly above the poverty level. It is hoped that the time will come when these special programs can be reduced substantially and remain in place only to deal with hard-core poverty problems which will probably always exist at some level. The pace of mechanization and other changes leading to the requirement of fewer workers probably cannot be predicted accurately; thus, there must be a great deal of flexibility from year to year and from region to region in determining the level of funding for these programs.

Family members. There is a need for a comprehensive look at the treatment of family members in agricultural employment legislation and, in particular, the treatment of family members who are employed by family farm corporations. As has been pointed out a number of times in this study, there is confusion and inconsistency in the law as it applies to such persons. A satisfactory definition of family farm corporation needs to be arrived at and careful attention needs to be given to whether family members employed by such a corporation are to be excluded or included under employment-related legislation. Unfortunately, in many instances the problem has simply not been addressed. No specific recommendations are made, but it is urged that there be more conscious decisionmaking in this area.

Sharecroppers. This study does not explore the status of sharecroppers in any detail and only makes incidental references to their situation. However, there may be a great number of people working in agriculture as independent contractors who are functioning at about the same level of management independence as hired farmworkers. Whether there are conscious efforts on the part of farm operators to slip people into this category rather than putting them on the payroll or whether it is simply a matter of custom or tradition in certain areas is difficult to say. However, it seems likely that many are being treated for all practical purposes as employees, while not qualifying for benefits under most of the social legislation discussed in this study.

The problem is perplexing and disturbing since most of these workers and their families are presumably in as much need as are many hired farmworkers. However, short of major changes in the defini-

tion of independent contractor as that concept applies to the relationship of farm operator and share-cropper, it is difficult to see what can be done. Careful study of the law and of relevant economic data is clearly needed. Given the current data base, it is difficult to predict what numbers will emerge and what a detailed economic analysis will indicate.

Farm labor contractors. Much has been said in this study about the problems of farmers and hired workers in their relationships with farm labor contractors. Those problems are important and much continued attention to the legislation in this area can be anticipated as competing interests promote changes in existing law.

In addition, however, there is a definite need to look at the problems of the farm labor contractor as he deals with government regulations, with his workers, and with farm employers. As this study suggests, some farm labor contractors may have very difficult problems with crew members ranging over a broad spectrum. They may also have problems with some farmers who use their services begrudgingly and without understanding the regulatory scheme that the contractors must live with. Much could be done to improve the lot of all concerned if there were more active efforts to assist farm labor contractors in keeping current with the law and in assisting highly qualified members of their own profession in offering training and consultation to others. The possibility of government assistance for such programs needs to be given serious consideration.

Youthful workers. Total elimination of the use of youthful workers in agriculture is not a realistic or desirable goal. Yet, to insure that such workers are employed in safe jobs, healthful conditions, and are being treated fairly, strict regulations are needed. Unfortunately, the current system of regulations is too complex to be more than minimally successful. This study has proposed major changes in the law designed to produce a situation where more control is possible than at present, but under a scheme that does not depend as much on employers being up-to-date on a plethora of regulations and being motivated to abide by them. One impact of what has been proposed would be to insure a supply of youthful labor under appropriate circumstances to farm operators who have a real need for this type of labor input, but to discourage the use of child labor where the primary objective of the farm operators is to save money.

Illegal aliens. While it is possible to discuss theoretically the status of illegal aliens under agricultural employment laws, it is difficult, if not impossible, to assess the real-life situation. There are simply no accurate data to indicate how many workers are involved, where they are employed, or how they are being treated. Are such workers being routinely discriminated against by employers? Are employers typically ignoring employment laws? What impact do illegal aliens have on the overall farm employment picture in the United States? Attempts to answer these questions lead inevitably to a great deal of guesswork.

As this study points out, the best information currently available suggests that there are large numbers of such workers, that many have been in the United States for some time, that others continue to return to the United States season after season, and that there are no prospects that the situation is going to change in the foreseeable future. Further, there is no move afoot to engage in mass deportation. Therefore, it has been suggested in this study and elsewhere that a positive approach would be to face these realities and afford illegal alien workers some kind of legal immigrant status. When this happens, there is an excellent chance that most of these people will surface and we will be able to identify them and begin to study their situation and obtain some accurate information on which to make policy judgments. The continued existence of the illegal phenomenon tends to fog the entire agricultural employment picture, particularly in some parts of the country, making it very difficult to assess the impact and effectiveness of existing agricultural employment laws.

#### General Recommendations

These recommendations, for the most part, cut across the various chapters of this study and are designed to supplement and, in some instances, coordinate the recommendations made in particular areas.

#### Review of Regulatory Schemes

Current statutes and regulations affecting the farm employment scene are in need of a general review with a view to correcting mistakes, clarifying ambiguities, eliminating unnecessary provisions, and dealing with oversights. This review should be comprehensive so that conflicts between different sets of regulations can be uncovered and dealt with.

### Economic Study

An overall economic study of the farm employment sector should be mounted. Careful attention should be paid to generating a breakdown of labor costs so that the impact of current social legislation can be identified on an item-by-item basis. Major commodity categories should be studied separately and regional breakdowns would also be important. If there appears to be a reasonable prospect that legislation will be passed in the near future granting amnesty to illegal aliens, the proposed study might be delayed until it is possible to identify and include those in this group who are engaged in agricultural employment. The cost of further increasing coverage and benefits for hired agricultural workers under the various legislative areas covered in this study should be projected. Estimates of how long it would take farm operators, particularly those with a small number of employees, to pass through added costs should also be attempted. Consideration should also be given to studying the current impact of negotiated wage levels and benefits in California and elsewhere in labor costs. Such a study, updated annually, would provide an ongoing data source vital to the design of a systematic phase-out with the least possible economic disruption of most of the current exclusions and exceptions that apply to agricultural employment.

### Coordination of Future Legislation and Rulemaking

Future changes in agricultural employment statutes and regulations should be made only after useful evaluation of the effects such changes may have on the entire agricultural employment regulation scheme. This approach would give greater assurance that what is being done is socially appropriate from the standpoint of farmworkers and reasonable from the standpoint of farm employers. While the goal of bringing farmworkers into the mainstream of the national production economy is advocated, there cannot be an immediate wholesale abandonment of existing thresholds, exclusions, and exemptions. All this must be accomplished in phases to insure that farm operators have sufficient opportunity to adjust their operations or to allow the market to pass through added costs. It is imperative that the piecemeal approach to legislation be replaced by comprehensive planning. This is particularly important to smaller farm operators if exclusions, exemptions, and thresholds are phased out.

Any legislative scheme that is considered in the future should give attention to recordkeeping and reporting requirements as they now exist in many statutes and regulations. It should be possible to devise a uniform, universal, and reasonably simple farm employment recordkeeping system to generate the kind of data required by the various programs. A cooperative venture by various agencies could produce such a system with the cost legitimately charged off to enforcement expenses. Once in place, such a recordkeeping system would probably produce more cooperation from employers and may well help to root out unintentional violations of many statutes and regulations.

### The Information Problem

Closely related to the recordkeeping recommendation is the suggestion that -- either at the private level or, if need be, at the public level -- a complete agricultural employment law service be available in a form that can be frequently supplemented. If available at a reasonable cost, such a service could do much to improve the effectiveness of current statutes and regulations as well as promote a better attitude toward agricultural employment laws. A system that elicits the following remarks has a strike or two against it from the outset: "Government laws and regulations have exploded in such profusion that it is difficult if not impossible for farmers to keep up-to-date. Unfortunately, as the saying goes, 'ignorance of the law is no excuse.' You could be taking very grave financial risks when you hire farm labor."7/

### Special Subgroups

Attention to the problems of certain subgroups within the farm labor force should be given priority. As more on-farm production jobs are eliminated, retraining and relocation assistance will continue to be required, particularly for migrant workers. Needs in this area may actually increase. It is hoped that such increased needs can be anticipated so that programs can be in place and sufficiently funded to deal with the situation as it arises. Problems of sharecroppers need attention. If the major study advocated above is carried out, it should include a careful analysis of the legal and economic situation of sharecroppers so an accurate assessment can be made as to whether their self-employment status is, in many cases, nothing more than a thinly veiled device to avoid the employer-employee relationship and the regulations applicable to it. If this suspicion is verified, serious consideration should be given to making changes in the law that would somehow bring these people into

the mainstream of agricultural employment law so that they may qualify for all available benefits. The matter of illegal aliens employed in agriculture also needs attention. Once these workers are identified, it will be possible to assess their impact on the agricultural employment scene and the effectiveness of delivery to them of social services and benefits under employment-related laws. Finally, special attention to problems of youthful workers is recommended with a view to evolving employment laws that are not afflicted with undue complexity.

#### Labor-Management Legislation

Finally, it is of great importance to remember that even the full extension of all existing employment-related laws will not alone bring farmworkers to or near the level of other production workers in this society. The minimum wage lags well behind the industrial average and wages for farmworkers, even in employment covered by current minimum wage legislation, are not much above the current statutory minimum. This means that annual income is quite low and many other benefits are paid at low levels since they are tied to past experience. As long as earnings hover around the poverty level and unemployment, worker's compensation, social security, and other benefits, if any, are paid at the low end of the scale of benefits, life will be difficult for those who depend entirely or heavily on agricultural employment for their livelihood. Thus, the underlying conditions generating poor nutrition, poor health, and poor educational experiences will be ever present and programs that attempt to treat these conditions, while vital, will have little chance of preventing the same problems from appearing in generation after generation. Thus, for those who remain in farm work, the only obvious way of pushing wage levels to 150 to 200 percent of current minimum wage levels and simultaneously creating the potential of better benefits under many social programs, is to fight, no doubt at the cost of some jobs, through farmworker labor unions. The states -- or the federal government, if the key agricultural states fail to act in a reasonable time -- should support the union movement in agriculture by extending the protection afforded by labor and management relations legislation, with the California Act as the most likely model.

The complex problems of agricultural employment are never going to become simple, but much can be done to improve the current state of the law and the way in which it is administered. It is not suggested that the proposals in this study that focus on the improvement of the lot of hired farmworkers can be put into effect without controversy and without causing difficult periods of adjustment for some farm operators. However, the results of the proposals contained in this study make the obstacles worth running. What is good for the hired farmworker force may also be generally good for farm operators and agriculture and rural society in the long run. A better paid, more secure, more stable, more satisfied, healthier, more skilled, less frequently injured, less transient, and more productive hired farmworker force should be an exciting prospect for all elements in American agriculture.

#### Notes to Chapter 13

1. Slade, "Summary of State-Federal Farm Labor Laws," Ohio Farm Bureau Federation (n.d.).
2. Ohio Farm Labor Handbook, Ohio Cooperative Extension Service (November 1976), as an example.
3. See Farmworker Resource Directory for Advocates (April 1980), which lists the available materials. Contact, MLAP, 806 15th St. N.W., Suite 600, Washington, DC 20005.
4. Harl, Agricultural Law (Matthew-Bender, 1980), particularly §§16.01 - 23.07[2] and §§38.01 - 38.06. This multi-volume treatise deals with a number of other important areas of agricultural law, in addition to the employment related matters.
5. Ib.
6. The current intent is to supplement the work more than once a year, possibly on a semi-annual basis.
7. Slade, supra note 1.