



FARM COMMONS

Getting Work Done on New Hampshire Farms: Employment law basics in classification and payroll issues

By Farm Commons

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Classifying Workers on New Hampshire Farms**

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Classifying Workers on New Hampshire Farms

Getting Started

Classification: Facts, Not Titles, Matter

Farmers often ask: What's really the difference between an employee and an intern or volunteer under the law? And, what is an independent contractor? How do I know what type of worker I have, legally speaking?

The first thing to know is job titles don't matter; calling someone an independent contractor doesn't make them one, necessarily. The substance of the worker's tasks are what matters: How are tasks assigned? What does the worker expect in return? Who controls the worker's time? These and many other questions determine the legal classification of the position. **There are four main classifications of workers: (1) a volunteer, (2) an independent contractor, (3) a non-employee intern, and (4) an employee.**

The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers' compensation, withhold and pay taxes, and so on. Oftentimes, what farmers call interns, volunteers, independent contractors, and so on are in fact “employees” in the eyes of the law. Misclassification is common in many industries, including farming. If a worker is in fact an employee and the farmer doesn't properly classify them as such, the farmer risks having to pay back wages, taxes, and even penalties.

The good news is that farmers can be proactive. By learning the factors that the law takes into consideration, farmers can craft their worker arrangements to both suit their needs and fulfill their legal obligations. It's helpful to keep in mind that employment law shares the farmer's goal of treating their workers well. Employment law ultimately serves to protect workers—all workers—to ensure fairness, and prevent coercion and exploitation in the workplace. To facilitate this goal, the law will assume that anyone doing work for the farm business is an employee. **The farmer may classify a worker as something else if, and only if, the specific criteria for another classification are met.**

Using This Guide

This guide helps farmers better understand the legal definitions and criteria for classifying their workers. The first step is to walk through the summary flowchart that follows. The flowchart will lead the farmer to an initial determination

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“The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers' compensation, withhold and pay taxes, and so on.”
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of which of the four categories their worker(s) fall into. Note that if you have more than one person working on the farm, you may need to walk through the flowchart for each worker as the classification could be different. The sections that follow provide detailed explanations and criteria for each of the classifications.

The various categories and criteria may feel overly nuanced or abstract at first. To help ground this all in reality, we'll be following the stories of Amanda and Ralph throughout the guide.



Farmer Amanda is a beginning farmer. She has a small CSA and is looking into labor issues, including whether she can rely on some of her CSA members to do some of the farm work and help out with packing and such. She's ultimately looking to grow and expand her business, and hopefully start selling at farmers' markets and even restaurants to diversify and better improve profits.



Farmer Ralph is also a beginning farmer. He sells his products mostly at farmers' markets and to local upscale restaurants. He's a retired math professor, and doesn't depend at all on the farm's income for his livelihood. It's really just a hobby. Ralph's main priority is to teach new farmers the ropes and pass on his legacy in this way. He loves teaching and really wants to help and train young farmers so they can go out and start their own farm businesses.

Other resources are referred to throughout that provide more detail on specific legal issues. In particular, this guide is a 3-part series on New Hampshire employment law:

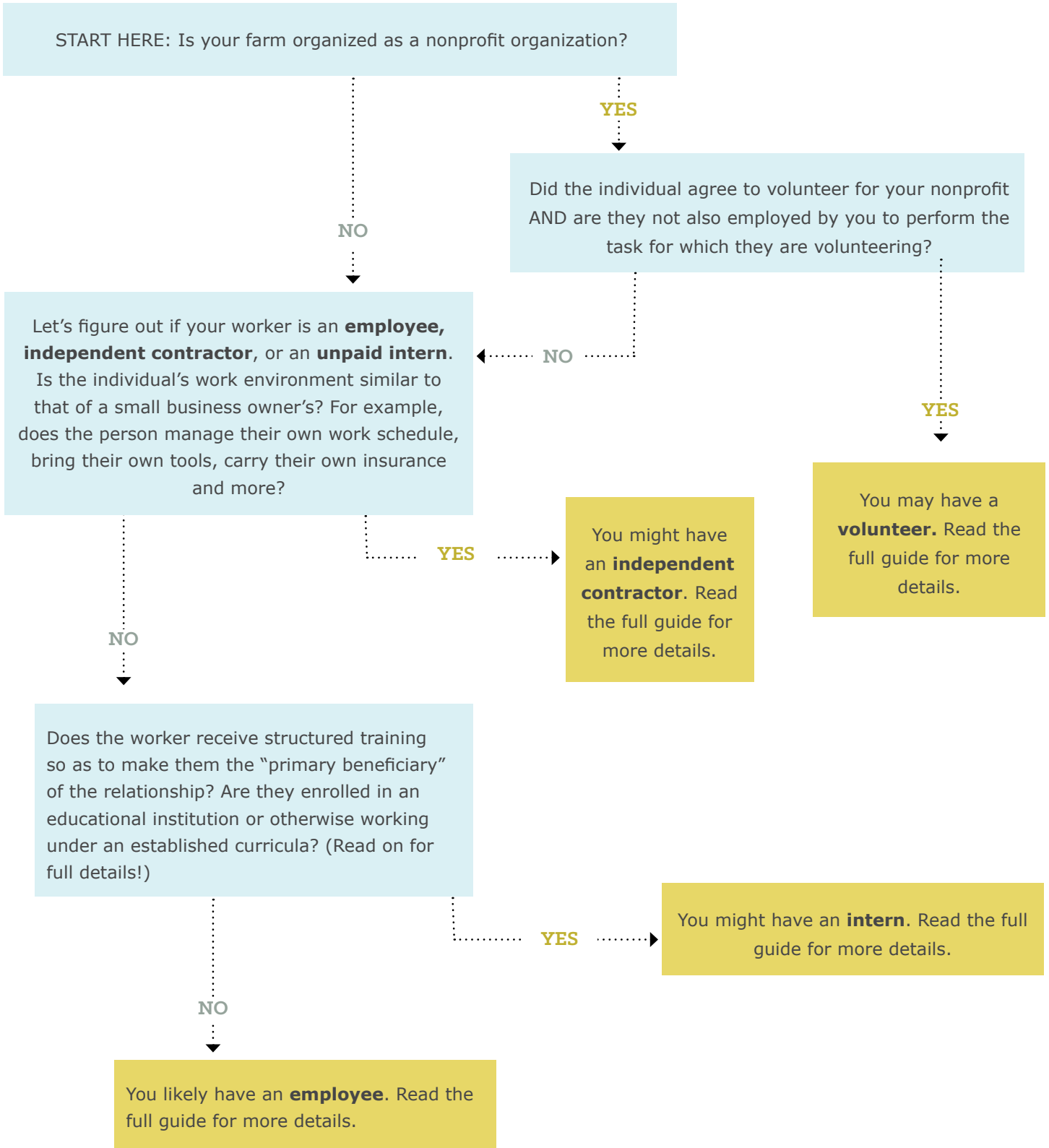
Basic Checklist for Hiring a Farm Employee in New Hampshire:

Classifying Workers on New Hampshire Farms—Employees vs. Interns, Volunteers, and Independent Contractors

Managing Risks of Farm Interns and Volunteers in New Hampshire

Be sure to check out these and other relevant legal resources for sustainable farmers, which are all available for free on Farm Commons' website—www.farmcommons.org.

Flowchart: How Do I Classify My Workers?



Details: What Do the Classifications Mean?

Volunteers

Legal definition

What is a volunteer? The law defines a volunteer as someone who performs service for charitable or humanitarian reasons for a nonprofit or public agency without expecting compensation.

Does your farm meet the six criteria for a volunteer?

Folks are often willing to work on farms for “free.” Some want job training, others simply appreciate the opportunity to be out in nature and see where their food comes from. Is this okay? Yes, so long as the farm meets certain criteria. Both the US Department of Labor Wage and Hour Division (US DOL) and the New Hampshire Department of Labor (NH DOL) consider the following six factors when determining whether someone is a true volunteer.

1. The farm must be operating as a nonprofit organization

Legally speaking, a for-profit business cannot have a volunteer. The law defines employing someone as permitting someone to work for the business. The fact that the worker isn't paid is not relevant—the farm is being helped and the farm owner is permitting the work. That means the worker is an employee (unless they are an intern or independent contractor). The federal definition of a volunteer is someone who is motivated by charitable or humanitarian reasons for a public agency with no expectation of receiving compensation for her services. So, volunteering for a for-profit business just doesn't work under the dominant legal paradigm.

The reasoning behind this is again about preventing exploitation and coercion of workers. If a business could “persuade” employees to volunteer without any legal repercussions, the resulting economic and power dynamic would easily create unjust situations. A notion of fairness is also at play; if the business is operating to make money, workers deserve compensation for their labors.

Read further in Section 2 “Managing Risks of Interns and Volunteers in New Hampshire” for more details on this criterion.

2. The volunteer must work less than full time

This factor protects the workers from coercion and exploitation. If a volunteer

works full time for a nonprofit farm, they may become dependent on the farm for their livelihood. Let's say the nonprofit farm has "volunteers" that work full time and the farm provides them room, board, and essentially all they need for their livelihood. This puts these workers in a potentially exploitative situation. The workers may feel pressured to do everything the farmer says to protect their living arrangement, even if unfair working conditions prevail. This is precisely the type of arrangement that employment laws protect. Nonprofit farms should be careful not to create such a dependency relationship. The best way to do this is to have the volunteers work only part time. This provides them opportunities to create a livelihood outside of the farm.

3. The volunteer must offer the services freely, without pressure or coercion

The volunteer needs to have some level of autonomy. As the name depicts, a volunteer must "voluntarily" agree to the tasks at hand. While the farmer can provide instruction and direction, the farmer cannot force a volunteer to do arduous or repulsive tasks such as shovel horse manure for hours on end—unless, of course, the volunteer freely volunteers to do it!

In addition, the non-profit farm cannot force a regular employee to perform volunteer services for free. Forcing an employee to volunteer is by no means volunteering! With that said, the farm can have a one-off event, such as a weekend fundraiser, and open up volunteer opportunities to regular employees. However, the farmer cannot require employees to participate or make it in any way a condition of continued employment.

4. The volunteer must not receive or expect to receive compensation from the nonprofit farm

This gets to the heart of the legal definition of a volunteer—someone who does not expect compensation for the services offered. If the worker expects compensation in return, they are not a volunteer. This brings up a couple key points.

First, farmers who provide some compensation to volunteers—whether in the form of cash or in-kind payments—should tread cautiously. By paying volunteers some compensations, the farmer risks making it look more like an employee arrangement. The "volunteer" begins to expect this compensation. Farmers in New Hampshire who are required to pay minimum wage to their employees (i.e., farms with 500 or more man-days or farms assigning non-agricultural tasks to

their volunteers), should strongly consider providing at least the minimum wage to volunteers. If at least the minimum wage isn't possible, no compensation at all may be better as it will look less like an employment arrangement.

In addition, as mentioned earlier, a non-profit farm cannot suddenly require a regular employee to do the work they regularly do for free. For example, let's say the farm is running low on cash. The farmer can't ask the employee to work for free for a couple weeks to get the farm through a tough time. The law sees this as unfair to the employee expects compensation for their work. The farm will need to figure out another way to make payroll.

Minimum wage refresher:

New Hampshire law fully exempts agricultural labor from minimum wage requirements. Federal law provides an exemption for agricultural labor based on farm size. Farms with less than 500 man days of agricultural labor in each calendar quarter of the previous year do not have to pay minimum wage. Those with 500 or more man days do. Note that these exemptions only apply to agricultural labor. For more details on these exemptions, see pages 9-13 of the *Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist*.

5. The nonprofit farm cannot leverage its unpaid volunteers to unfairly compete with other farms

In addition to protecting the workers, the law is also interested in protecting overall fairness in the marketplace. Nonprofit farms gain a bit of an advantage over for-profit farms given they don't have to pay their volunteers. They can, in turn, undercut their prices. This runs counter to how the free market system is supposed to work, so the law does not allow this! If a nonprofit farm is using its volunteer base to get an upper hand at the market, the law may step in and say that the volunteers must be treated and paid as employees. What can the nonprofit farm do to prevent this? First, the nonprofit farm should be sure that the tasks assigned to volunteers are typical of volunteer tasks. Basically, they should be more tangential than essential to the farm's core operations. While the volunteer base can offer a significant help to the nonprofit farm, the volunteers should not be running or even playing a critical role in the operation. In addition, the farm should be sure to charge the going market rate for its products.

6. The volunteer's work must be informal

This factor goes hand-in-hand with the previous factor. The volunteer's work should be informal. This means that if the volunteer doesn't show up, the farm's regular operations won't be significantly affected. In other words, the volunteers should not be fulfilling essential duties of the organization that would otherwise be done by paid employees. One way the law gauges this factor is to see if regular employees are being displaced by volunteers. If they are, it's looking more like an employee. To be on the safe side, the nonprofit farm should continually ask itself whether volunteers are displacing their employees. In addition, if the volunteer is being told to come in at a specific time for a specific duration on a specific day, the

law will most likely see this as an employee. Farmers should extend flexibility and forgiveness to volunteers and not become overly dependent on them.

Now What?



Farms that do meet the volunteer criteria

“This is terrific! I already looked into setting my farm up as a nonprofit with my mission to train the next generation of sustainable farmers! What now?”

Farmers like Farmer Ralph who have a non-profit farm and feel they meet these criteria should review *Managing Risks of Interns and Volunteers in New Hampshire* for more information on the legal aspects of hosting volunteers.



Farms that don't meet the volunteer criteria

“Okay, clearly I cannot have unpaid volunteers as I am operating my farm as a for-profit. So what does this mean?”

Farmers like Amanda will most likely need to treat their workers as employees. First, however, they can review the criteria in the next two sections for independent contractors and interns to see if they might qualify.

Independent Contractors

Legal Definition:

What is an independent contractor? The law defines an independent contractor as someone who performs a specific service for another while having **control** over precisely how the work is done.

Does your farm meet the six criteria for an independent contractor?

Farmers may be asking, what are the benefits of classifying workers as independent contractors? The main benefit in New Hampshire is that unlike for employees, the farm isn't required to get workers' compensation coverage or pay payroll

taxes for independent contractors. When farm budgets are tight, the flexibility that independent contractors allow can seem attractive. However, if the farm misclassifies a worker as an independent contractor, it potentially faces penalties and fines at both the state and federal level.

The New Hampshire Department of Labor (NH DOL) sets forth six criteria for determining whether a worker is an independent contractor. These criteria mirror those considered by the US Department of Labor (US DOL) and the IRS. Misclassification of independent contractors has become a heated issue in the past several years. In 2014, the US DOL and the NH DOL entered a Memorandum of Understanding where they agreed to work together to crack down on the misclassification of independent contractors. Farmers must be particularly cautious that they are following the legal criteria for independent contractors if they choose to have independent contractors.

As we'll see, the key word in defining an independent contractor is "control." Before getting into the details of the legal criteria, it's helpful to start with an example of an independent contractor—a plumber. The plumber comes to your house, brings her own tools, and her skills and expertise to determine what needs to be done to reach your goal of fixing your pipes. She doesn't take orders from you. Also, she likely has other clients, and has business skills to build her plumbing business. You hire her for a specific project, and while you may call her back when things break, you don't have a permanent or ongoing relationship. This is a true independent contractor. With this in mind, let's turn to the criteria.

1. The worker controls *how* the work gets done

A worker is more likely to be an independent contractor if the farmer provides little to no instruction to the worker for how the task gets done and simply cares about the end result. In other words, the employer may set the goal or overall objective, but typically the independent contractor sets tasks and controls implementation to meet the broader objective. That's because the law assumes that independent contractors are already skilled at the services they provide. They know best *how* to do the work. If the farmer trains or instructs the worker on the specifics for *how* to pull weeds or *how* to transplant tomatoes, it's likely an employee.

Another aspect of this factor is that the independent contractor typically

conducts tangential tasks and not the core or day-to-day tasks of the farm operation. For example, core tasks like harvesting crops on a daily basis would not be appropriate for an independent contractor. However, a farmer may hire an independent contractor to install or fix the irrigation system or build an equipment shed, as these are more one-off projects.

2. The worker controls *when* the work gets done and sets her own schedule

The independent contractor is also typically not working full time and they set their own schedule. So if you're telling your workers exactly when to arrive and how long they must work out in the field, they're likely employees. With that said, the farmer can set a deadline or a time when the project needs to be completed. The farmer can also specify a range of hours such as a maximum number of hours they can work. With that said, independent contractors are typically paid for the services they provide. **They often bid out the project and their pay is typically not based on an hourly, weekly, or monthly rate.** On the other hand, some true independent contractors are paid by the hour. That is acceptable when the rest of the criteria clearly show the individual is still operating an independent small business, such as the example of a plumber.

3. The worker is free to assign work to others

Independent contractors can choose to hire and pay assistants if that's what it takes to get the job done. If any assistants are hired, these folks must be supervised by the independent contractor and not the farmer.

4. The worker is in business for herself

An independent contractor is generally someone who demonstrates business skill and initiative. Like the plumber, she's building her client base to run an independent business. The independent contractor typically has her own specialized tools and equipment rather than using the farm's tools and equipment.

5. The worker takes full responsibility for the completion of the work

The independent contractor is ultimately responsible for the satisfactory completion of the work. The farmer can hold them legally or contractually responsible if they fail to complete the work. Unlike an employee, the independent contractor has a stake in the success of the project or tasks assigned. They should have the potential to earn profit or conversely suffer loss.

6. The worker makes her service available to the general public

An independent contractor typically has a number of clients and doesn't work solely for one farm. After all, they're operating a business and to be successful they need a broad client base. If the worker primarily works for the farm, or is essentially "full-time," it's most likely an employee and not an independent contractor.

Now What?



Farms that do meet the independent contractor criteria

My neighbor Alex has a hay baler and I was thinking about hiring him to bale some hay for me this season. I am sure I can meet the above criteria. What next?

Independent contractors are not covered by employment laws such as workers' compensation, minimum wage, and others. As with any contract relationship, farmers should write down the terms of the agreement as a best practice.



Farms that do not meet the independent contractor criteria

"We now realize that our day-to-day workers clearly don't meet the criteria for independent contractors. What do we do now?"

If you don't meet the criteria, you likely don't have an independent contractor. In all likelihood, the worker is an employee. First, there's one more option: interns. Read the following section to confirm your status there. Or, assume you have an employee and skip to the last section.

Interns

Legal definition:

What is an intern? Unfortunately, the law does not provide a precise definition of an intern; however, the legal criteria for an intern emphasizes the **educational** dimension of the arrangement. In addition, the intern should be the sole beneficiary, or at least the primary beneficiary, of the internship program.



Does your farm meet the legal test for a non-employee intern?

“I love having college students working on my farm over the summer. And I provide them extensive training. What about having interns instead of employees?”



“What if I decide not to form a nonprofit and therefore can’t have volunteers. Can I run my educational farm as a for-profit with interns instead of employees?”

These are tough questions, as the law surrounding non-employee interns is rather complex. Like Amanda and Ralph, farmers are attracted to offering “intern” positions because they want to offer a lot of education. However, farmers are often under the impression that because education is such a strong component, the intern is different than a regular employee. This is a misimpression. Simply providing education to a worker does not mean the worker is not an employee. Even if the farmer calls the worker an “intern,” the law will treat the worker as an employee unless they meet the legal test for interns.

In January 2018, the US Department of Labor (US DOL) updated its “legal test” for whether a worker qualifies as non-employee intern. The US DOL now applies the “primary beneficiary test” which matches the more flexible approach that several federal appellate courts have recently developed. The “primary beneficiary test” reflects the principle that to be a non-employee intern, the primary beneficiary of the internship program must be the intern, not the farmer. Under this test, the US DOL evaluates the following seven criteria to determine whether a worker is the “primary beneficiary” of the relationship and thus a non-employee intern:

1. The farmer and the intern both understand that the intern is not entitled to compensation.
2. The internship program provides training that would be given in an educational environment.
3. The intern receives academic credit upon completion of the internship program.

4. The internship program corresponds with the academic calendar.
5. The duration of the internship program is limited to the time when the intern receives the education or training provided.
6. The tasks the intern performs provide significant educational benefit and they complement rather than displace the tasks of paid employees.
7. The intern and the farmer both understand that the intern is not entitled to a paid job when the internship program ends.

How does the farmer know if its internship program sufficiently meets these seven criteria of the US DOL's "primary beneficiary test"? The reality is, there's no absolute certainty. The primary beneficiary test is a flexible test. Not all seven criteria need to be met and no single criteria is determinative. Whether an intern is an employee depends on the unique circumstances of each situation.

What does this mean for farmers in New Hampshire? It means there's a level of uncertainty, which carries risks. What are the risks here? If the farmer treats their workers as non-employee interns and the law determines otherwise, the farmer risks having to pay back wages, back taxes, penalties, and risks lawsuits.

With this in mind, farmers basically have two options. Farmers who are risk averse and want to play it safe should treat their interns like employees and follow all applicable employment laws. Farmers who are less risk averse can choose to follow the seven criteria in the US DOL's "primary beneficiary test" the best they can. Farms that accommodate a worker's formal academic commitments, such as offering the intern position in the summer when school's not in session, providing structured training with set curricula and learning objectives, tying the internship to an academic institution, and offering a limited term position will have an easier time arguing that the intern is not an employee.

For more details on these criteria on interns, see Section 2, Managing Risks of Interns and Volunteers in New Hampshire.

Now what?

Farms that do meet the legal criteria for interns



“This is great! I’m nearly certain I meet all of the DOL’s six criteria. I’m already working in partnership with a college and I’m certain I’ll be able to arrange academic credit for my interns. My mission is to help young aspiring farmers and I’m willing to dedicate my time and energy toward providing training to interns so they can start their own farms.”

Farmers should read *Managing Risks of Interns and Volunteers in New Hampshire* for more information on the legal aspects of interns.



Farms that do not meet the legal criteria for interns

“I don’t think I meet these criteria. I know I can’t risk the harm of an enforcement action. What do I do now?”

Farmers uncertain if they meet the non-employee intern criteria should read *Managing Risks of Interns and Volunteers in New Hampshire* for more information. If these criteria are not met, the farm’s interns are legally classified as employees.

Employees

Legal Definition

What is an employee? New Hampshire law defines an employee as someone who an employer directs or permits to work for her or him

Employee is the default category

The bottom line: If someone performs work for a for-profit business the assumption is that he or she is an employee. That is, unless that person can be classified as an independent contractor or a non-employee intern. Again, for-profit businesses generally cannot have volunteers, so that is not an option.

Now what?

What must farmers do when they have employees? They must follow all applicable state and federal employment laws. For an overview of these requirements, see *Basic Checklist for Hiring a Farm Employee in New Hampshire*.

Remaining Questions?

Farmer Amanda still has some questions, which are common to many farmers.

What about the websites and programs that help me find travelers and vacationers who work on my farm in exchange for housing and food?

Everything in this guide applies to worker networking services. The above are your options: independent contractors, interns, employees, or volunteers. There's nothing else. No matter how the farmer finds the worker, they will fit into one of the above categories. Again, farmers should work under the assumption that everyone who performs work for a farm is an employee. The worker can only be classified as something else if the worker meets the criteria for a volunteer, intern, or independent contractor.



What about work trade and in-kind payment arrangements (i.e., room and board)? Do those affect their classification?

Work trade and in-kind arrangements do not affect the classification as described in this guide. Farmers can certainly pay their employees in room and board to meet any minimum wage requirements; however, that is a separate issue. For more details on in-kind arrangements, see Section 2, *Managing Risks of Interns and Volunteers in New Hampshire*.



What if my workers don't care how they are classified?

It does not matter. By law, someone cannot waive their right to protections provided under employment laws. Unlike other areas of law, employment law is simply nonnegotiable. This is because of the overarching policy reasons behind employment



laws, including the prevention of coercion and oppression in the workplace.

What if I still don't know which classification my workers fall into?

Farmers who still have questions or are left with uncertainty as to the proper legal classification of their workers can seek further assistance from the following:

- **New Hampshire Department of Labor**
- **United States Department of Labor**
- **Internal Revenue Service**
- **An attorney familiar with agricultural employment laws in New Hampshire**

Conclusion

Employment law can seem overwhelming and complex. A key takeaway is that when in doubt, play it safe. If you treat your workers like they are employees, you are going a long way to minimize your liability risks.

Keep reading the next two sections for more information.

Managing Risks of Farm Interns and Volunteers in New Hampshire

Basic Checklist for Hiring a Farm Employee in New Hampshire

Section 2

Managing Risks of Interns and Volunteers in New Hampshire

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Getting Started

The Reality Of Uncertainty

Spoiler Alert: This guide cannot lay out exactly how to assemble a legally sound intern or volunteer program because the law itself is uncertain. Most folks believe that the law is black and white—all they need to do is find out what the law is and follow it. In legal reality, that’s not always the case. What should the farmer do to move forward? The first step is to learn the facts, which this guide provides. The second step is to carefully weigh the factors and make a personal decision. It’s not an easy process, but it’s a valuable one for every farm considering interns and volunteers.

Many farmers approach uncertainty, legal or otherwise, by weighing the potential costs against the potential benefits of taking on a level of risk. When thinking about the potential costs, what would a legal enforcement action under a “worst case scenario” mean for the farm? What if a volunteer gets injured while working on the farm and the farmer becomes responsible for hospital bills and has to pay penalties for not carrying workers’ compensation? Aside from the financial implications, what about all the worry and fear of such a scenario happening? As for the benefits, what cost savings does the farm achieve by not having to obtain workers’ compensation or pay minimum wage if required? What about the emotional stress of not being able to make payroll? For other farms, the sense of purpose and community that comes from integrating interns and volunteers into your farm is a significant benefit.

In the end, the right risk management strategy regarding interns and volunteers is a personal decision that depends on you and your farm. Your own financial, emotional, and business considerations all factor into the appropriate strategy for you. This resource can help you understand and assess those factors.

Employment Laws Generally Apply to Farm Interns and Volunteers

Spoiler Alert: As readers will learn, most employment laws such as minimum wage and workers’ compensation apply to interns and volunteers. This is the case even though many farms offer win-win intern and volunteer programs. The interns or volunteers enjoy the time out on the farm, gain skills, and likely enjoy some fresh, healthy farm products. The farmer gets extra help and the joy of

“The right risk management strategy regarding interns and volunteers is a personal decision that depends on you and your farm.”

working with community members.

Although titles like “volunteer,” “intern,” or “apprentice” convey a positive working environment, the fact that these workers do the work of the farm means employment laws generally apply. Such laws may include obligations to provide minimum wage, workers’ compensation, and contribute payroll taxes—depending on whether state or federal agricultural labor exemptions apply.

Our Goal

This guide will explain the laws behind interns and volunteers. It also provides insights and strategies to help farmers reduce liability risks related to interns and volunteers. To facilitate the process, the hypothetical stories of farmers Amanda and Ralph are weaved in throughout. The guide will follow their decision-making process as they learn about the legal issues and begin to better understand their options for having interns and volunteers. Readers may recall Amanda and Ralph from Section 1.



Farmer Amanda is a beginning farmer. She has a small CSA and is looking into labor issues, including whether she can rely on some of her CSA members to do some of the farm work and help out with packing and such. She’s ultimately looking to grow and expand her business, and hopefully start selling at farmers’ markets and even restaurants to diversify and better improve profits.



Farmer Ralph is also a beginning farmer. He sells his products mostly at farmers’ markets and to local upscale restaurants. He’s a retired math professor and doesn’t depend at all on the farm’s income for his livelihood. It’s really just a hobby. Ralph’s main priority is to teach new farmers the ropes and pass on his legacy in this way. He loves teaching and really wants to help and train young farmers so they can go out and start their own farm businesses.

Interns: Generally Speaking, Interns Are Employees



“We would like interns on our farm, but we hear there might be legal issues to deal with. What is going on?”

The answer is: Yes, there are potential legal issues with having an unpaid

intern. Interns are generally covered by employment laws—if the law doesn’t allow a farm to have an unpaid employee (or an employee without workers’ compensation), the farm can’t have an unpaid intern (or an intern without workers’ compensation). Amanda, Ralph, and any other New Hampshire farmer will have to read this chapter to determine their obligations.

Situations Where Interns Are Not Considered Employees

It is possible to have an intern who is not an employee where very specific criteria are met. In January 2018, the US Department of Labor (US DOL) updated its guidance on whether a worker qualifies as a non-employee intern. If the intern is not an employee, they are not covered by employment laws.

The US DOL now applies the “primary beneficiary test” which matches the more flexible approach that several federal appellate courts have recently developed. The “primary beneficiary test” reflects the principle that **to be a non-employee intern, the primary beneficiary of the internship program must be the intern, not the farmer.** Under this test, the US DOL evaluates the following seven criteria to determine whether a worker is the “primary beneficiary” of the relationship and thus a non-employee intern:

1. The farmer and the intern both understand that the intern is not entitled to compensation.

If a farmer chooses to have an unpaid intern, she needs to be sure to clearly communicate the arrangement with the intern. *The best approach is to have the intern sign a statement at the get go acknowledging that this is an internship program and that limited or no compensation will be provided.* Not only will this ensure that the farmer and the intern have a shared understanding that the position is unpaid or paid at less than the minimum wage, it provides proof that this arrangement was agreed to in advance should any issue arise.

2. The internship program provides training that would be given in an educational environment.

The farm must provide training to the intern. Ideally, this training is structured, or similar to a classroom style education. In addition, the training should be transferrable to other farms across the industry. In this way, the internship should prepare the intern for launching her career in farming or starting her own

farm operation, not simply for working on that farm. *Farms that establish set curricula and learning objectives and monitor the intern's learning achievements are more likely to have a non-employee intern.*

3. The intern receives academic credit upon completion of the internship program.

While academic credit is not essential, it can go a long way in helping the farmer establish a legally sound internship program. ***Having ties to an educational institution is an important risk management step when building a non-employment intern program.***

4. The internship program corresponds with the academic calendar.

It's more likely an internship program if the farm accommodates a worker's formal academic commitments, such as offering the intern position in the summer when school's not in session. Similarly, it's best if the farmer allows the worker to return to school in August or September, even though this might be the height of the farm's harvest season.

5. The duration of the internship program is limited to the time when the intern receives the education or training provided.

Workers that work on the farm year-round or for multiple seasons are more likely employees and not non-employee interns. *The most risk averse approach is for the farm to limit the duration of an internship program.* The duration should provide just enough time for the intern to learn the set curriculum or learning objectives.

6. The tasks the intern performs provide significant educational benefit and they complement rather than displace the tasks of paid employees.

It likely doesn't take 8 hours of picking carrots to learn how to pick carrots. Nor does it take 40 hours of weeding to learn how to weed! These sorts of tedious and time-consuming tasks would likely not be appropriate to assign to an intern under this factor. *The intern should only perform work to the extent that she needs to learn the task at hand.* Similarly, if the farm hires less employees because the intern performs tasks that a paid employee would ordinarily perform, it will look more like an employee than an intern. With that said, an unpaid intern can perform some tedious tasks, so long as the intern's training is the number one

priority.

7. The intern and the farmer both understand that the intern is not entitled to a paid job when the internship program ends.

The internship program must serve to set the intern up for a career in the industry; it cannot simply be a trial period, or training for future work on that farm. *The best approach is to have the worker sign a statement at the get go explaining that there's no guaranteed employment position on the farm once the internship position ends.*

What Does This Mean For The Farmer Who Wants To Have Interns?

How does the farmer know if its internship program sufficiently meets these seven criteria of the “primary beneficiary test”? The reality is, there's no absolute certainty. The primary beneficiary test is a flexible test. Not all seven criteria need to be met and no single criteria is determinative. Whether an intern is an employee depends on the unique circumstances of each situation.

These strategies feel uncertain, right? There is an alternative worth mentioning: Farmers can choose to follow all employment laws for their internship program. Then the question of whether the intern is eligible to be treated as a non-employee is insignificant. **The single best risk management strategy is to simply know and follow all employment laws for every intern.**

Treating interns like employees isn't going to work for some farms. Farms wanting a non-employment intern program should become familiar with the seven criteria in the US DOL's “primary beneficiary test.” They can then make a personal decision. The appropriate approach to a non-employment intern program depends on the farmer's level of risk aversion.

Farmers willing to accept risk may choose to follow the seven criteria of the “primary beneficiary test” the best they can. This is still not an easy standard to meet. Fundamentally, education is an important part of any non-employment intern program, the structure of the position matters. Farms that accommodate a worker's formal academic commitments, such as offering the intern position in the summer when school's not in session, providing structured training with set curricula and learning objectives, tying the internship to an academic institution, and offering a limited term position will have an easier time arguing that the intern is not an employee.

What about farmers who can't sufficiently meet the US DOL's "primary beneficiary test"?



"I don't meet the DOL's criteria. My farm is a business—all workers need to pull their weight. But, I really want to have young college students working on my farm over the summer. And, I like the idea of calling them "interns" as this seems to make them more open to learning my eccentric farming practices. So now what do I do?"

Farmers like Amanda who can't or don't want to meet the "primary beneficiary test" for non-employee interns have "employees." They can still call their workers "interns" but they must treat them as employees when it comes to legal requirements. They must follow all applicable state and federal employment laws. To get started, see Section 3. (While it's unlikely, farmers could check if their "interns" meet the legal criteria of independent contractors, which allows more flexibility than employment. (See Section 1, Classifying Workers on New Hampshire Farms)

What about farmers who feel they can sufficiently meet the US DOL's "primary beneficiary test"?



"I meet the criteria. Now what?"

Farmer Ralph is delighted! He's already working in partnership with a college and is certain he'll be able to arrange academic credit for his interns. His retirement provides the money he needs to make a living. His mission is to help young aspiring farmers and he's willing to dedicate his time and energy toward providing training to his interns so they can start their own farms. He doesn't care whether his sales at the farmers' market or through restaurants are low. He simply wants to provide his interns with diverse experiences in a variety of market channels. He feels strongly that he sufficiently meets the US DOL's "primary beneficiary test." Either way, he was thinking about starting a non-profit that is exclusively dedicated to education

Farmers like Ralph who emphasize the educational component of the internship program and have established ties with academic institutions most likely have legally sound non-employee "interns."

While it may not be necessary for these farmers to follow employment laws for their interns, these farmers must take special steps to keep detailed records of the internship arrangement. Primarily, this will help them run a more efficient

and effective internship program. In addition, the paperwork leaves a trail of proof of the intern program’s legitimacy should an enforcement action ever happen. The following provides some examples of documents and records that should be maintained.

- **Keep records of hours worked, tasks performed, and training curriculum utilized for the internship program**

One way to do this is to have the intern keep a log book that the farm then retains or copies at the end of the season. This log book could also provide a way to monitor the intern’s progress throughout the program. Either way, these records should be accurate and kept on file for at least 3 years .

- **File reports and paperwork with affiliated schools or institutions that are providing course credit**

Verification of an academic connection will help support the farm’s case that the internship emphasized the structured, classroom style education that the US DOL’s “primary beneficiary test” highlights. The intern might appreciate this attention as it may help the intern get the academic credit they need.

- **Have the intern sign an agreement acknowledging they’re a non-employee intern**

Getting the details of the arrangement in writing, including the fact the position is not employment, ensures that the farmer and the intern have shared expectations. Having a shared understanding helps foster good relations throughout the internship, which is undoubtedly a good thing. In addition, having the intern acknowledge key aspects of the arrangement in writing, including that the intern is not entitled to compensation and there’s no guaranteed position once the internship ends, are criteria in the US DOL’s “primary beneficiary test.”

- **Get insurance coverage for worker injuries**

Even though farmers in New Hampshire are not legally required to carry workers’ compensation for non-employee interns, it’s highly recommended that the farm carry insurance to cover injuries for all workers. Farming is dangerous and accidents happen. With no insurance, the farmer is subject to huge legal liability and financial risk should an intern get hurt. The best option in New Hampshire is for the farmer to simply carry workers’ compensation for interns if it is required to do so for employees—which most farms are. Another option

could be to look into a commercial general liability plan that would cover the intern.

For more information on available workers' compensation exemptions in New Hampshire, read through Section 3 of this guide. For more general information on insurance coverage, see Farm Commons' resource—Managing the Sustainable Farm's Risks with Insurance: Navigating Common Options.

What about other options?

Amanda is feeling disappointed so she has a couple of other creative questions.



“I can’t follow the US DOL’s ‘primary beneficiary test’ and I don’t want to follow all employment laws—those laws are a huge burden. I’m going to have my intern sign an agreement that they aren’t an employee. Won’t that work on its own?”

Amanda has a nice idea in theory, but it doesn’t work in reality. If the law says a work position is employment, it’s employment, regardless of any agreement between worker and employer. By law, a worker cannot waive their right to minimum wage or other employment law protections. Unlike other areas of law, employment law is simply nonnegotiable. This is because of the overarching policy reasons behind employment laws, including the prevention of coercion and oppression in the workplace.



“Can I have an apprentice instead of an intern? Does that change anything?”

Generally speaking, the same rules for interns apply to apprentices, or any other title a farmer might assign to a person for whom they do not want to follow employment law obligations. There is a different legal framework for an apprentice, but it doesn’t help much. More often than not apprentices are also considered “employees” in the eyes of the law, and therefore the basic employment laws need to be followed.

There is one exception to the minimum wage requirement specific to apprentices. If market conditions are such that work opportunities will be expanded for a specific trade by paying less than minimum wage, apprenticeship programs do not need to comply with minimum wage requirements. But this is a well orchestrated arrangement, often through trade schools or community colleges. The program first needs to prove the market conditions, including

While it's unlikely, farmers could check if their "interns" meet the legal criteria of independent contractors, which allows more flexibility than employment.

See *Classifying Workers on New Hampshire Farms: Are they Independent Contractors, Interns, Volunteers, or Employees?*



projections of increased opportunities resulting from apprenticeship programs. They'll also need to get government approval. For more information on registered apprenticeship programs in New Hampshire, contact the NH Department of Education Registered Apprenticeship Office.

“Okay, if I choose to follow employment laws, can I still call my worker an apprentice or intern?”

Yes. The bottom line is that regardless of what you call the workers, the farmers should assume they are employees unless the farm's internship program sufficiently meets the US DOL's "primary beneficiary test."

Volunteers: For profit farms generally cannot have volunteers



“What if I just use volunteers? Can I call my interns volunteers? I know many farms have volunteers and they aren't following employment laws. Does this have legal complications?”

Understanding why the law doesn't allow for-profit farms to have volunteers

Legally speaking, a for-profit business cannot have a volunteer. The law defines employing someone as permitting someone to work for the business. The fact that the worker isn't paid is not relevant—the farm is being helped and the farm owner is permitting the work. That means the worker is an employee (unless they are an intern or independent contractor). **The federal definition of a volunteer is someone who is motivated by charitable or humanitarian reasons for a public agency with no expectation of receiving compensation for her services.** So, volunteering for a for-profit business just doesn't work under the dominant legal paradigm.

The reasoning behind this is again about preventing exploitation and coercion of workers. If a business could "persuade" employees to volunteer without any legal repercussions, the resulting economic and power dynamic would easily create unjust situations. A notion of fairness is also at play; if the business is operating to make money, workers deserve compensation for their labors.



“My CSA members work in return for their share, come and pick their own produce, and have family days where I incorporate picking as a fun activity for kids? Is that somehow prohibited because it’s like volunteering and I’m a for-profit business?”

Good question! We have two rules of thumb when deciding if a situation creates a volunteer-that’s-actually-an-employee situation: 1) Is the work of a for-profit business being performed? And 2) If it looks like an employee, it’s an employee. The following scenarios give a better idea of how this all plays out in legal reality.

U-pick operations: People paying to pick their own product are not generally employees.

Across the country, farms offer customers the chance to pick their own produce at the farm before the customer pays for it and takes it home. Is this employment? The simple answer is no. Focus on the first rule of thumb: Is the work of a for-profit business being performed? A U-pick farm is in the business of offering customers the opportunity to pick their own product. So, the work of a u-pick farm is to advertise to customers, give them a parking space, tell them where to pick, take their money, and so forth. If volunteers were to do those business activities, that would be employment. Picking the fruit is not the farm’s work; the opportunity to pick fruit is the thing customers are buying. It isn’t volunteering, either. Rather, the person is simply a customer..

Gleaning: Picking unmarketable product for a food shelf is not generally employment.

By definition, gleaning is when non-marketable product is removed from the fields. Referring back to the first rule of thumb, removing non-marketable product from the fields is generally not the work of the farm. If the product truly isn’t marketable, no business reason exists to remove it. (Yes, field sanitation may motivate removal but a farmer would likely choose a more efficient method than hand labor followed by transit to a food pantry.) Allowing a nonprofit organization to supply hand labor to remove the product and take it to the food pantry does not create employment for the farm. The volunteers are doing the work of the nonprofit, perhaps, but nonprofits have much greater latitude to have volunteers without creating an employment situation.

Recreation: It’s okay for folks to recreate at the farm.

For more on insurance coverage, see Farm Commons resource – *Managing the Sustainable Farm’s Risks with Insurance: Navigating Common Options*

Recall that in New Hampshire, an employee must receive at least the minimum wage if the farm has 500 or more man-days in a calendar quarter of the previous year OR if the farmer is assigning non-agricultural tasks to workers.

If a farm has CSA members coming out to the farm solely to pick for themselves, then they are not working for the farm. The farm may have a u-pick component to the farm, which is addressed above. Or, the farm may simply allow customers to pick products as they wish. Let's say that a mother and her child come to Amanda's farm to pick up their CSA share. While they are there, they pick some raspberries. Turning to our second rule of thumb, this does not look like employment. The mother and her child weren't asked to pick the raspberries and there is no expectation that they do so; it was part of the recreation opportunities on the farm.

Worker shares: Folks who come out and “volunteer” on the farm in exchange for farm products are most likely “employees.”

Let's say instead that farmer Amanda sets schedules, assigns specific tasks, requires a certain level of work in return for a CSA share, tells the CSA members what to do, has expectations in terms of speed and effectiveness of the tasks at hand, and, as a result the work of the farm is achieved by the “volunteer.”

Farms often enter such arrangements with CSA members or other community members and friends where “volunteer” time is required in exchange for farm products. This type of an arrangement is also known as a “worker share”, “working sharer”, or other title. In the eyes of the law, this is most likely seen as employment. Recall that under the legal definition, an employee is someone who employers direct or permit to work for them under a for-profit business. Unlike a volunteer, the employee expects compensation for her services. In addition, the employee typically has little discretion over the work that is assigned or how the work is performed. The farmer sets the schedules and assigns duties for worker shares and folks doing the work expect compensation—here, in the form of farm product. Assigning tasks, following schedules, and receiving compensation is quite similar to an employment experience. The CSA member or worker share is most likely an employee.

**What does this mean for the for-profit farm that wants to have volunteers?
Employment laws most likely apply to volunteers**

In summary, “volunteers” who actually engage in work for a for-profit farm are most likely considered “employees.” This means that all the applicable employment laws must be followed for these workers. To start, review Section 3, Basic Checklist for Hiring a Farm Employee in New Hampshire, to learn more.

The following highlights some key points relevant to “volunteers” engaging in work for a for-profit farm:

- **Workers compensation:** Farms in New Hampshire are required to carry workers’ compensation.
- **Minimum Wage:** Many New Hampshire farms must pay at least the New Hampshire minimum wage for all hours worked.
- **In-kind payments:** For work shares where the farm is providing farm product in exchange for hours worked, the value of the farm product must be at least equivalent to the minimum wage owed. Federal law sets forth strict guidelines and limitations for how such in-kind payments must be valued and recorded. More detail is provided in the next few pages under Paying In-Kind Wages.



“It will take time to adapt my volunteer programs to be consistent with employment rules. What can I do to manage risk right now?”

Prioritizing risk management for volunteers—injuries and wages

Following all these employment laws can be overwhelming for farmers with volunteers of any type. After all, even though for-profit farms are motivated to some degree by profits, many also emphasize social and ecological missions such as providing healthy food to the community and adopting conservation measures and sustainable farming practices. This explains why so many folks are willing to volunteer on sustainable farms with joy!

Farmers with for-profit operations must realize that they are taking on some level of risk if they do not fully comply with applicable employment laws when having “volunteers.” With that said, a couple areas present particularly high risk. It’s highly recommended that farmers pay close attention to two areas as soon as possible: injuries and minimum wage requirements.

□ **Carry workers’ compensation for volunteers**

Farming is dangerous and there’s a high potential that injuries will happen no matter what precautions are taken. Even if a volunteer gets hurt and has no intention of suing the farm, the volunteer’s health insurance company will likely have a different perspective. Insurance companies have a right to file a claim against a farm where an injury occurs, even if the injured person doesn’t want to

file the claim. In addition, employers are required to carry workers' compensation for all employees (and volunteers who are actually employees) in New Hampshire. If the farm doesn't have workers' compensation in place, the farm could be fined even if an injury never occurs. To avoid such risks and headaches, farmers should strongly consider carrying workers' compensation for any and all volunteers.

□ **Follow wage requirements if volunteers are paid**

In addition, farmers who provide some compensation to volunteers—whether in the form of cash or in-kind payments—run the risk of making it look more like an employee arrangement. Farmers who are required to pay minimum wage to their employees (i.e. farms with 500 or more man-days or farms assigning non-agricultural tasks to their volunteers), should strongly consider ratcheting up any compensation provided to volunteers to at least the minimum wage amount. Otherwise, they may be better off offering no compensation, as it will look less like an employment arrangement.

Keep in mind that taxes, recordkeeping, eligibility to work requirements, and so on all still apply. However, these are not necessarily the highest risk factors considered by most farmers. It's up to each farmer to assess their risk while realizing what's at stake. For basic obligations when hiring an employee, refer to Section 3, *Basic Checklist for Hiring a Farm Employee in New Hampshire*.

What about online volunteer matching services?

Many farms have used online services that connect volunteers to farmers. These volunteers are often domestic or international travelers who work in exchange for room and board. Farmers may be asking, why can these folks work for free in exchange for room and board? Are these types of work-for-lodging arrangements exempt from employment laws?

The answer is no. **Work-for-lodging arrangements are not any different from what was discussed above for interns and volunteers.** Folks who do work on a for-profit farm under the direction of the farmer for some sort of compensation—including room and board—are employees in the eyes of the law and therefore employment laws apply.

This is not to say that work-for-lodging is illegal. It's more accurate to say

that the law has not caught up to these innovations. Many online sites and services such as shared rides and shared home-stay services are relatively new and on the fringe of the law. It takes time for the law to adapt itself and apply to new systems and structures. This naturally creates a level of uncertainty. With that said, farmers need to be cautious, as having a work-for-lodging volunteer involves uncertainty and therefore a degree of risk. The farmers could face legal and financial liability in the form of injuries, wage claims, and various enforcement actions.

So what should the farmer do? The truth is that volunteering comes in all shapes and sizes. The answer to what a farmer should do to manage and reduce these risks is going to depend on the individual circumstances of each farm, including the farmer's level of risk adversity, the types of activities the volunteer is engaged in, the duration of the arrangement and so on. The purpose of the guide is to explain what the law is. The risk-managing conclusions are up to you!



Non-profit farms face some limits on having volunteers

“I got it made! I am really going to form a nonprofit now, so I can have volunteers. Then I’m good, right? Can I structure my volunteer positions however I want?”

Ralph’s idea of setting up a non-profit farm so he can have volunteers will certainly work for him given his mission and dedication to training. But it will only get him so far. For the most part, non-profit farms can have unpaid volunteers. However, non-profit farms need to pay attention to three key limitations.

1. Non-profit farms cannot ask a regular employee to “volunteer”

A non-profit farm cannot suddenly require a regular employee to do the work they regularly do for free or require additional unpaid work. This is obviously unfair to the employee who expects compensation for their work. With that said, the farm can have a one-off event, such as a weekend fundraiser, and open up volunteer opportunities to regular employees. However, the farmer cannot require employees to participate in such “volunteer” opportunities or make it in any way a condition of continued employment. Effectively forcing an employee to volunteer is by no means volunteering!

2. **Non-profit farms cannot provide unpaid volunteers everything they need for their livelihood in exchange for their work**

Nonprofit farms also need to be cautious about situations where they're providing "volunteers" everything they need for their livelihood in exchange for their work. This is based on a U.S. Supreme Court decision, which is known as the *Alamo* case. The *Alamo* case is the strongest legal guidance we have to go on to determine when it's acceptable for non-profits to have volunteers. The background facts of the case help put these guidelines in perspective.

The *Alamo* case involved a nonprofit organization that ran a set of commercial operations including making and selling clothing, distributing candy, and raising animals to sell as meat. The organization ran these operations to help train and rehabilitate previously homeless folks with drug dependency issues. The organization provided these folks food, shelter, and job training. In exchange, the recipients "volunteered" for the non-profit's different commercial operations. The Supreme Court said this was not okay. Here's why. The "economic reality" was that the nonprofit provided these folks everything they needed for their livelihood. They were dependent on the arrangement for their survival and couldn't simply leave. This type of arrangement put the workers in a potentially coercive power structure, which is precisely why employment laws exist.

The takeaway is this: **If the non-profit farm provides everything its volunteers need—such as room, board, and clothing for long periods of time—it risks creating an employment relationship.**

3. **Non-profit farms cannot use unpaid volunteers to compete at an unfair advantage with other farms**

Non-profit farms must also be sure not to undercut prices to give them a leg up over other farms. This is again based on the Supreme Court's insights in the *Alamo* case. The court pointed out that the "economic reality" of how the nonprofit was structured gave the non-profit an unfair advantage over competitors. Because the non-profit wasn't paying the workers minimum wage, it was able to sell its candy, clothing, and meat products at a far lower price point than their competitors. The court said this isn't fair to others engaged in commerce. Based on this economic reality, the court said that the "volunteers" were actually employees and that the non-profit was required to pay them minimum wage and follow other employment laws.

The lesson here is that **non-profit farms can't leverage their unpaid volunteers as a way to compete at an unfair advantage with other farms.** The farm must play fair, or it loses its privileges as a non-profit to have volunteers.

What does this mean for the non-profit farm that wants to have volunteers?

Farmers who have or are thinking about having a non-profit farm will want to be careful about how they structure volunteer arrangements. First, they must not require regular employees to “volunteer” for free. Second, it's recommended that the non-profit farm not provide their volunteers with everything needed for a livelihood—such as room, board, clothing, and so on. The non-profit farm may want to consider making its volunteer positions part-time or temporary as this will less likely appear as though the volunteers are depending on the nonprofit entirely. Finally, the non-profit farm must be careful not to compete with an unfair advantage with for profit farms. A simple way to do this is to price the items the non-profit farm sells at market-level prices.

Paying In-Kind Wages



“I'm finally accepting the fact that my workers are employees. And, I did the calculations and I don't meet the federal “500 man-day” agricultural labor exemption to minimum wage. I understand that I legally have to pay all my employees at least minimum wage. But, I don't have a lot of cash flow. I've decided I want to pay wages in the form of food and lodging. Is this okay?”

In a word, yes, it's okay to pay wages in the form of food and lodging. The good news is that if minimum wage is not owed at all, in-kind wages can be offered without having to jump through any hoops. In this case, farmers need to at least be sure to keep records proving that they are exempt from the minimum wage requirements. In addition, if in-kind compensation is provided on top of a cash payment of at least the minimum wage, there are no legal restrictions on how in-kind payments must be made. In other words, if the farmer pays her employee \$7.25 per hour in cash and on top of that provides lunchtime meals as a bonus, the farmer doesn't have to comply with the legal requirements for valuing and recording the costs of the lunches provided (discussed below). Where in-kind payments are used to achieve at least the minimum wage, the rules below apply.

Minimum wage refresher

Farms with less than 500 man days of agricultural labor in each calendar

quarter of the previous year do not have to pay minimum wage. Those with 500 or more man days do. In addition, these exemptions only apply to agricultural labor. The federal definition of agricultural labor is very limited and likely does not include tasks that are off-farm or tangential to farming—including agritourism, value-added, packing other farms' products, and so on. Diversified farms that assign their workers such non-agricultural tasks must pay these workers at least minimum wage for the entire workweek in which non-ag labor is performed.

New Hampshire farmers who are obligated to pay their workers at least the minimum wage and who provide in kind wages to meet all or a portion of that obligation must follow federal rules.

When in-kind wages are paid to cover minimum wage owed, additional rules apply. The law has strict guidelines and limitations on how to value and account for in-kind payments made to cover minimum wage requirements. Before we dive into the legal requirements, we need reframe the lingo that we'll be using. Most folks think of an in-kind payment as just that, a payment. Typically, when making in-kind payments farmers add up all the in-kind payments and then top it off with cash to cover anything remaining. However, the law thinks of it differently. The law assumes that a cash payment is being made to cover the minimum wage. So it thinks of the payment of in-kind wages as a *deduction* from the cash wage. Along these lines, the farmer would say: "I owe you \$200 in minimum wage. I'm offering you lodging that is equivalent to \$100 and meals that are equivalent to \$50, so I'm deducting the \$150 from the \$200 in cash owed." It's really all the same in the end. However, this guide is using the phrase "deduction from wages" because that's how the law thinks about it.

- **Deduct only in-kind payments that are allowed by the law and authorized and agreed to by the employee**

The law specifically sets out what can and cannot be deducted from an employee's paycheck. Specific types of in-kind wage deductions that are permitted by the law include **meals, housing, and transportation**. Nevertheless, the farmer cannot make deductions for these items unless the worker willingly authorizes it and actually uses or takes these items when offered. For example, if the farmer prepares daily lunches for her workers, she cannot automatically

deduct the value of these meals from all her workers' paychecks. She can only make the deduction for employees that actually eat each of the meals offered. Farmers providing meals will therefore have to keep track of who eats what, whether through a log book or some other system.

A farmer cannot deduct items that would simply be for her own convenience or benefit. Examples of such items include tools and equipment used on the farm. Requiring the employee to pay for these items financially benefits the farmer as she's passing on a necessary business expense. A farmer can deduct from wages for such items if, and only if, the farmer has already fulfilled her obligation of paying any minimum wage owed AND the education does not financially benefit the farmer AND the employee willingly authorizes it.



“I would like to account for the value of the education I provide when I determine an intern's wage. Can I deduct for educational value?”

Education and training provided to workers falls into the category of something that's primarily beneficial to the farmer. Sure, the worker benefits from learning general farming practices. But it's really the farm that benefits the most by having well trained, efficient workers. The farmer could certainly put a value on the education and training she'll provide and use that added value as a marketing piece to attract good workers. Another option would be to run a separate educational series and charge employees tuition for it. However, the farm cannot force its workers to participate in these trainings. That would for all intents and purposes be the same thing as deducting it from their wages!

- **Have the worker sign an agreement acknowledging the in-kind payment arrangement**

Any in-kind arrangement that the farmer has with an employee to fulfill the minimum wage obligation must be in-writing and signed by employee at the get go. Getting the arrangement in writing helps ensure that the farmer and the employee have a shared understanding of the details. This alone can help prevent unmet expectations or disagreements. In addition, it provides written proof that wages were in fact paid if an issue were to ever arise.



□ **Properly assess the value of the lodging and meals**

“Okay, so I want to deduct for meals and lodging. I have to follow the federal rules because the meals and lodging are helping me satisfy my minimum wage obligations. But how do I value it?”

The federal rules set out a very specific method for determining the value of in-kind payments. Here’s the rule:

Farmers can deduct the *lesser* of two things:

- + The fair market value, or;
- + The actual cost to the farmer in providing it

This is easier to understand through an example. Let’s say that Farmer Amanda has a mobile home on her property that’s completely paid off. She wants to let one of her workers stay there in exchange for work. How much can she deduct for this lodging?

The first step is to determine the fair market value. The question to ask is what do mobile homes in Amanda’s area rent out for? If she’s in a rural area of New Hampshire, it might not be much. If she’s near the heart of Manchester or some bustling small town, it will, of course, be more. Let’s say the going rate is \$400 a month for Amanda’s area. The next step is to determine what it actually costs Amanda to have this mobile home. Let’s say she’s already paid it off in full, so her costs are minimal. Perhaps Amanda is only paying utilities for operation, which run her about \$75 a month. This is the lesser of the two. Therefore, \$75 a month for lodging is all that Amanda can deduct from the minimum wage she owes her worker. (Please note that Amanda’s valuation must comply with 29 CFR 531.3, which is not discussed in detail here. This is a simplified example. See Farm Commons’ forthcoming in-kind wage guide for full details.)

Basically, the farmer cannot profit from offering in-kind wages. If Amanda deducted more than it cost her to provide housing, she would profit. Farmers providing lodging will need to do some research on rent prices in their specific area to provide evidence of the going rate. They’ll also have to be honest about what the lodging actually costs them. Bottom line, they’ll need to keep records to support the value that is being deducted in case an issue or discrepancy about wages paid were to ever arise—including a tax audit or a wage claim.

This same formula applies to meals. Let's say that Amanda offers lunches and dinners for her workers. What can she deduct for these meals? First, she'll need to determine what the fair market value is for lunch and dinner in her area. Let's say it's \$8 for lunch and \$10 for dinner for a comparable meal at the diner down the road. Now Amanda needs to figure out how much it costs her to make the meal. This includes her costs of the ingredients, including any products from the farm, as well as her time to make the meal. If it's less, say \$5 a meal, she can deduct only \$5 per meal as in-kind wages. Farmers will need to keep records of how they valued the meals provided in case a dispute or discrepancy arises.

Most farmers are probably thinking: "This is way too cumbersome! Is it even worth it?" That question can only be answered by each individual farmer. The best route is to play it safe and be conservative by following the required method for valuing in-kind payments as well as keeping records sufficient to show you are complying with the requirements. Alternatively, a farmer may simply decide it's not worth it and simply pay any minimum wage owed in cash and provide in-kind payments as a bonus.

□ **Itemize deductions on each pay stub**

Any deductions made for in-kind wages must be itemized on the pay stub that is provided to the employee at each pay period. This is required by law as it provides the employee the opportunity to see what has been taken each time. In addition, it provides yet another way to prove that in-kind payments were in fact made.

□ **Investigate tax obligations**

Wages paid in anything other than cash for agricultural labor are exempt from FICA (i.e. social security and Medicare tax) as well as federal income tax withholding obligations. This means that the farmer would not need to withhold federal income tax on the non-cash wages. In addition, neither the farmer nor the employee would need to pay social security and Medicare taxes on non-cash wages. However, taking advantage of this exemptions comes with a whole new set of limitations and recordkeeping obligations. What's more, it raises a huge risk for an audit. For more details on the risks and requirements of utilizing this exemption, see Farm Commons resource—*Paying In-Kind Wages: The Federal "Commodity Wage" Exception to Payroll Taxes*.

Other Rules When Providing Lodging

An array of laws come into when farmers provide housing to their workers. These include zoning, federal Occupational Safety and Health Act (OSHA), and the federal Migrant and Seasonal Farmworker Protection Act.

□ **Look into the local zoning code**

Most, if not all, zoning ordinances have something to say about housing and occupancy of residences. Some zoning laws include restrictions on how many people may in on the property or how many non-related people may live in a single residence. Zoning laws could also have limitations or prohibitions on temporary structures such as RVs, tents, and yurts. Bottom line, farmers who provide housing to their workers will need to look into their zoning ordinance to be sure their plans coincide with what is permitted. While farmers could play the game of wait and see, they run the risk of costly fines and disputes down the road. They could even be forced to take down a structure that doesn't comply with the ordinance. One approach would be to get a copy of the ordinance and read it yourself. However, these ordinances are not always a fun and straightforward read. Farmers could also ask neighbors or other farmers who house workers. Or, they could call the local zoning office to ask their questions directly.

□ **Determine whether by providing housing to workers the farm is subject to the federal Occupational Safety and Health Act (OSHA)**

Farmers must be aware that by providing housing to their workers, they may subject their farms to an inspection under the federal Occupational Safety and Health Act, commonly known as OSHA. Although OSHA is not generally enforceable against smaller farms, that exception does not apply when housing is provided in a "temporary labor camp." Temporary labor camps are defined broadly. Basically, they include any housing that is provided to a temporary worker as a condition of employment. In other words, it's a temporary labor camp if the worker, for all intents and purposes, has no other choice than to live in the housing provided by the farm based on the location or other circumstances of the job. For example, this could be the case if the farm is located in a rural area, and there's practically no other affordable place nearby to live. If this is the case, the farmer will want to be sure that they are in full compliance with OSHA housing standards.

Farmers wanting to learn more about OSHA enforcement when providing

housing, as well a basic overview of the housing standards, can refer to Farm Commons' resource—*Paying In-Kind Wages: OSHA Impacts When Providing Housing*. Farmers may also want to contact the Department of Labor's OSHA office in Concord, which oversees OSHA compliance and enforcement in New Hampshire. In addition, WorkWISE NH provides free, on-site OSHA consultation services to eligible employers.

□ **Determine whether the farm is subject to the federal Migrant and Seasonal Farmworker Protection Act**

In addition, when a farmer provides housing to “migrant workers,” the farmer may subject the farm to the federal Migrant and Seasonal Agricultural Worker Protection Act (called the MSPA). Despite what many may believe, “migrant workers” are not limited to out-of-state or foreign workers. Migrant workers include anyone who must stay overnight away from their regular home in order to make it feasible for them to work on the farm. A migrant worker could be someone who regularly lives just an hour or two away from the farm, if such a lengthy drive makes it impractical for them to fulfill their obligations on the farm each day they're required to work.

A few exemptions to the MSPA are available. Just as for the federal minimum wage, farms that have fewer than 500 man-days in each calendar quarter of the previous year are exempt. In addition, farms that are exclusively owned and run by a single farmer or his or her immediate family members (i.e. legal spouse, children (biological, step, adopted, foster), and parents) are also exempt. Finally, if the housing provided is also provided to the general public, the farm is exempt from having to comply with the MSPA.

Farmers who provide housing to “migrant workers” and don't meet one of the available exemptions must arrange for an inspection of the housing provided and obtain a certification of occupancy. They must do this *each year*. The farmer must also maintain certain housing conditions and follow recordkeeping and disclosure requirements. The MSPA is also overseen by the Department of Labor in New Hampshire. Farmers wanting to learn more about the applicability and requirements of the MSPA can refer to Farm Commons' resource—*Paying In-Kind Wages: Migrant Worker Laws and Providing Housing*.

Some farmers who provide enough cash to meet the minimum wage obligation would like to exclude lodging and meals from wages in order to reduce their tax burden. This is an entirely different issue with its own set of criteria and is beyond the scope of this guide. Farmers who are in this situation should seek the advice of a tax attorney or accountant or contact the IRS.

Conclusion

This guide provides an overview of selected legal standards and requirements for farmers who have or want to have interns and volunteers. This area of law carries a level of uncertainty. With this uncertainty, farmers have the opportunity to strategically choose the approach they want to take.

Farmers who have a high level of adversity to risk may want to take a conservative approach. This basically means either following the DOL's strict criteria for having interns OR treating their interns as though they were "employees" and following all applicable employment laws. Farmers who are willing to take on some degree of risk may choose to follow the more lenient approach taken by the *Black Swan* court. Regardless, farmers who choose to have unpaid interns will want to be sure to emphasize the education dimension. A good option is to partner with a college or academic institution and offer credit. However, this alone is likely not enough to have a legally sound internship. In addition, farmers who choose to have unpaid interns will want to be sure to keep accurate records of the hours worked and activities performed by the interns as well as the curriculum and training provided. This will provide proof of the legitimacy of the program should a dispute or enforcement action arise.

As for volunteers, the law is pretty clear that for-profit businesses are not permitted to have unpaid volunteers. To play it safe, for-profit farms may want to consider following all applicable employment laws for volunteers who work on their farm. This includes carrying workers' compensation for these volunteers as well as paying minimum wage unless the farm falls within the federal agricultural labor exemption.

This guide also discusses some basic guidelines for paying workers in-kind wages. Farmers who have or are thinking about having worker shares or otherwise paying their workers in-kind should review and follow the *Paying In-Kind Wages* section of this guide in detail.

Keep reading through the final section to learn the basics of what New Hampshire law requires for employees.

Basic Checklist for Hiring a Farm Employee in New Hampshire

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Introduction

Hiring a farm employee is an exciting moment. It means the farm is getting large enough and stable enough to take on additional help. On the downside, the paperwork requirements of hiring feel much less exciting. Getting familiar with the process early is a tremendous help. Farm owners should start preparing well before the new employee begins the first day of work. This checklist will help farmers understand the basic paperwork process for hiring a farm employee.

Although it's a useful starting point, this checklist does not explore every single area of farm employment law. It does not address workplace safety laws, in-kind wage rules, minor children, discrimination, and many other employment law matters. It's simply a concise checklist of select legal issues at the time of hiring. Farmers should also consult Farm Commons' other employment law resources for more information.

Farm Commons aims to help farmers get started, but moving through the checklist can lead to more questions than answers. On the positive side, knowing the right questions to ask is half the battle. Calling the relevant agency such as the New Hampshire Department of Labor, New Hampshire Department of Employment Security, Internal Revenue Service, or United States Department of Labor is an excellent next step when complications arise. Agency employees are trained experts and able to answer most questions. Some farmers will prefer to contact an attorney with experience in farm employment law, which is always a good choice as well.

This resource does not explore every single area of employment law.

The Summary Checklist

- Determine whether you must comply with Chapter 275 of the New Hampshire Statutes.
- Prepare to maintain records, including hours worked and wage payments made, and to post notices.
- Secure a workers' compensation policy and post notice.
- Verify eligibility to work in the United States.
- Set up to withhold federal income tax.
- Set up to withhold Social Security and Medicare contributions from employee wages.

- Arrange to pay the farm's contribution to the employee's Social Security and Medicare account.
- Arrange to pay federal and state unemployment taxes, if required.
- If you plan to offer less than the minimum wage (to interns, for example), verify your eligibility.
- If you do not plan to provide overtime, verify your eligibility.

The Detailed Checklist

- Determine whether you must comply with Chapter 275 of the New Hampshire Statutes.

New Hampshire law provides many protections for employees, including mandatory lunch times, mandatory days of rest, set pay frequency, and many other rules detailed in Chapter 275 of the New Hampshire Statutes. Included in this law is the obligation to display a poster notifying employees of the minimum wage and of all employment policies such as vacations, holidays, and more. The New Hampshire Department of Labor has a website with [links to the required posters and notices](#). **All of the protections and obligations of Chapter 275 only apply to farms with five or more people employed.** Farms with five or more individuals on the payroll must review Chapter 275 in detail and comply with it, including posting required notices. Farms with fewer than five individuals on the payroll do not have to post these notices or adhere to the other rules of Chapter 275. Farms subject to Chapter 275 should also pay close attention to the chapter's rules requiring recordkeeping, including keeping records of all hours worked, wages paid, and deductions made from wage payments.

- Prepare to maintain records, including hours worked and wage payments made, and to post notices.

Farm employers must keep records with the full names, addresses, and occupations of all employees, except the farmer's children. This is a federal law, so it applies to farms regardless of whether Chapter 275 applies, as discussed above. For each pay period, the farm must prepare documentation of the payments. For each individual, the farm must record the person's rate of pay, the total hours worked, and the total wages received in that pay period. If the farm employs more than "500 man-days" of labor (explained in detail in the minimum

wage section), then the farm must also keep the following records for each employee, which must be kept for at least three years:

1. Social Security number
2. Time and day of week when employee's workweek begins
3. Hours worked each day
4. Total hours worked each workweek
5. Basis on which employee's wages are paid (e.g., "\$9 per hour," "\$440 a week," "piecework")
6. Regular hourly pay rate
7. Total daily or weekly straight-time earnings
8. Total overtime earnings for the workweek
9. All additions to or deductions from the employee's wages
10. Total wages paid each pay period
11. Date of payment and the pay period covered by the payment

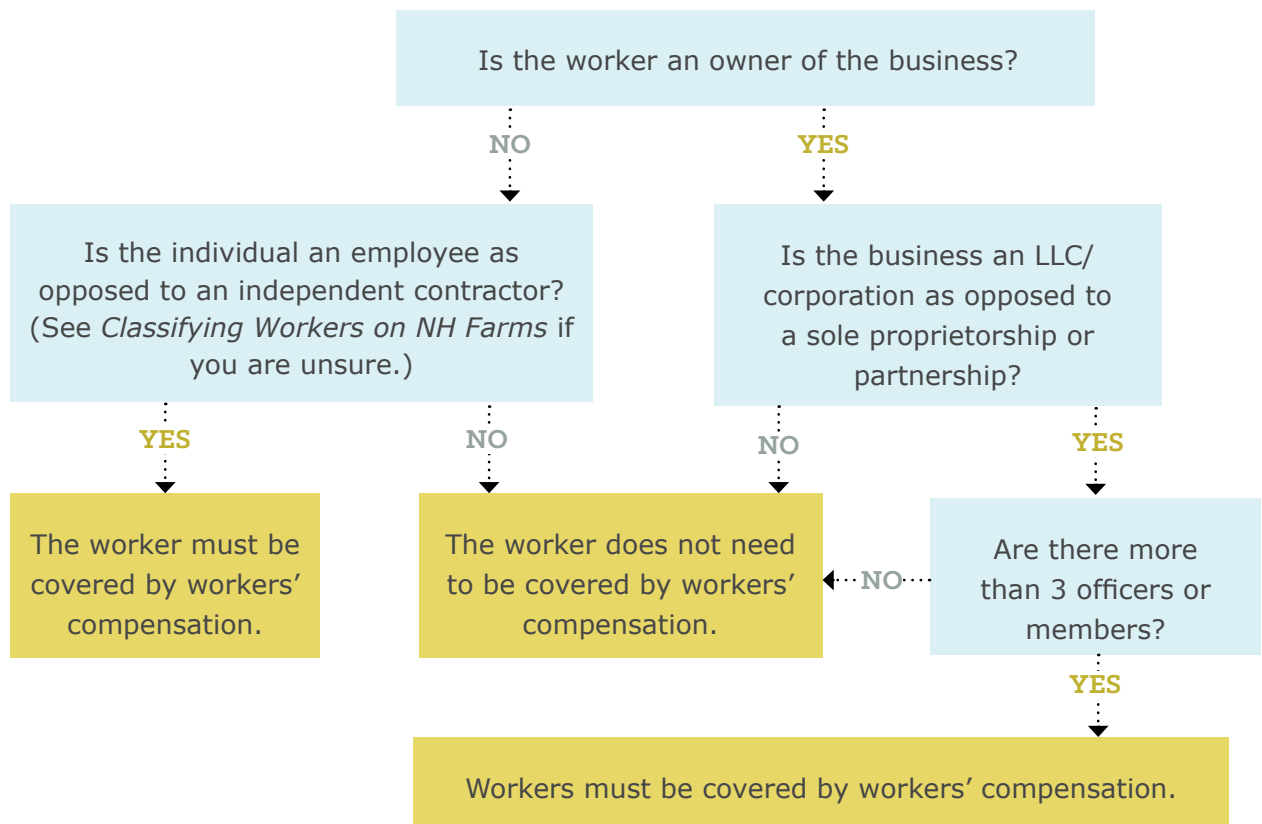
The law does not require farms to use specific timesheets; however, the farm must have some way to collect the information above so it can be reported on paystubs. A detailed timesheet regularly kept by the employee is the best way to collect accurate information. Detailed timesheets are also essential to demonstrate that the farm is eligible for exemptions from New Hampshire's Chapter 275 (detailed above) or the federal 500 man-day exception (detailed below).

- Secure a workers' compensation policy and post notice.

New Hampshire requires that every business, including farm businesses, provide a workers' compensation insurance policy that covers each employee from the first day of work. This rule applies to part-time workers and employees of nonprofits. The workers' compensation rule also applies to family members who are employed by the farm business. Farm business owners do not have to cover themselves if the farm is a sole proprietorship or partnership. If the farm is organized as an LLC or corporation, the LLC members or corporate officers are required to cover themselves when the operation reaches or exceeds four members or officers. (Note: farm LLCs and corporations must still provide coverage for all employees immediately upon hire. The exception for members or

officers only applies to members or officers.)

Workers' compensation is purchased through private insurance companies. The cost of the policy is determined by a number of factors, including the classification of the labor performed, the frequency of injuries by workers performing that labor, and the total dollar value of the business' payroll, among other factors. For farm businesses that use only traditional employees and pay cash (not in-kind) wages, a quote is easy to come by. Farm businesses that pay wages in the form of food and lodging may have a more difficult time determining the value of their payroll and will need to work more closely with their insurance agent. Likewise, farms seeking coverage for interns, volunteers, and other non-traditional employees may need to work closely with their insurance agent to ensure coverage is secured for all individuals performing work for the farm. The following flowchart outlines a New Hampshire farm businesses' employment obligations.



Businesses are required to post a notice for employees stating that the employer is working under RSA 281-A, the New Hampshire workers' compensation law. The farm's workers' compensation insurance company should provide a copy of

the necessary notices for the farm's usage.

Verify eligibility to work in the United States.

Farms may only hire individuals who are eligible to work in the United States. The employer satisfies the duty to verify eligibility by properly completing Form I-9 (for employees not hired through a worker program). This form is available from the U.S. Citizenship and Immigration Services agency. It is available [online and instructions are included](#). The form is not submitted to the agency. Rather, the employer copies the necessary documentation and keeps the form on file. The completed forms should be kept for the longer of the following: (1) three years after the worker began employment, or (2) one year after the worker leaves the position. The forms and documentation must be available if an enforcement agency inspects the farm.

Set up to withhold federal income tax.

Farms are required to withhold a percentage of an employee's wages and remit the withheld portion to the IRS for federal income tax purposes. A farm must begin withholding income tax when either of the following happens: the farm pays a total of \$2,500 or more in wages to all employees, or any individual employee receives cash wages of \$150 or more per year. Most farms with an employee will have to withhold federal income tax.

To begin the withholding process, the farm needs a completed [IRS Form W-4](#) from the employee. This form allows employees to choose the number of withholding exemptions. Form W-4 is not sent into an agency; it remains in the farm's files. The farm then uses the tax tables in [IRS Publication 15](#) (Employer's Tax Guide) to determine the withholding per paycheck based on the individual's pay, exemptions, and payment frequency. The farm must record the amount withheld and remit it to the IRS. The due date is dependent on the total tax owed. For most farms, the tax must be deposited monthly. The IRS uses an online system, the Electronic Federal Tax Payment System (EFTPS), and deposits must be made electronically. Farms must register with the EFTPS system ahead of time as it can take a few days to receive the passwords.

Set up to withhold Social Security and Medicare contributions from employee wages.

Most farms are required to withhold Social Security and Medicare taxes from their workers' paychecks. The same rules apply as for withholding federal income tax: the obligation begins when the farm's total payroll for employees exceeds \$2,500 or an individual's wage exceeds \$150 per year. Where the amount of income tax to withhold is determined by using the IRS's tables, Social Security and Medicare tax is calculated as a percentage of the employee's wages for that pay period. The most recent percentage will be listed in [IRS Publication 51](#) (Agricultural Employer's Tax Guide). Currently, 6.2% of wages are withheld for Social Security and 1.45% for Medicare. Each time the employee receives a paycheck, a portion of the Social Security and Medicare taxes are withheld. This is then remitted to the IRS through the same EFTPS process used for remitting withheld income taxes.

- Arrange to pay the farm's contribution to the employee's Social Security and Medicare account.

The checklist item above explains that a portion of Social Security and Medicare taxes owed by the employee must be withheld from the employee's paycheck. This checklist item discusses the Social Security and Medicare taxes owed by the employer. **These are two different taxes—the employee is taxed and the employer is taxed.** The employee's tax is deducted from wages. The employer's tax is paid by the employer, and may not be deducted from wages. The taxes go to the same agency for the same ultimate purpose, but are separate.

The farm is taxed at the same threshold where the employee must be taxed. (See the \$2,500 or \$150 rule above.) Currently, the farm is taxed at the same rate as the employee, although this may change—6.2% of wages are withheld for Social Security and 1.45% for Medicare. The most recent percentage will be listed in [IRS Publication 51](#) (Agricultural Employer's Tax Guide).

Although the employee's and employer's shares of Social Security and Medicare taxes are technically separate, they are deposited at the same time through the IRS's EFTPS process.

Farmers who work with a payroll service provider can escape the details of withholding and remitting taxes. Payroll service providers help employers determine which taxes are owed and assist in coordinating payment of the taxes. Farmers who can afford a payroll service may find it well worth the money.

- Arrange to pay federal and state unemployment taxes, if required.

Unemployment tax is paid by the farm and is not deducted from an employee's wages. This tax contributes to a compensation fund available to individuals who have become unemployed. Most employers are required to pay unemployment tax immediately; however, farms are exempt until the operation reaches a certain size. New Hampshire and the federal government follow the same rules for farms. When a farm owes unemployment tax to the federal government, the farm will also owe it to the state.

The farm must begin paying federal unemployment tax when either of the following happens: (1) The farm pays wages of \$20,000 or more to farmworkers during any calendar quarter of the previous two years; or, (2) the farm employed 10 or more workers for any part of a day (even if not at the same time during the day) during any 20 or more weeks in the last year, or in the year before that. After a farm crosses either threshold, the farm must begin paying into state and federal funds. The farm will pay federal unemployment tax on up to \$7,000 of each employee's wages. The tax is determined by percentage; the latest percentage is listed in [IRS Publication 51](#). Federal unemployment tax is paid through the same EFTPS procedures as income withholding and Social Security/Medicare taxes. State unemployment tax is owed on up to \$14,000 of each employee's wages. The current state rate is available by contacting the [New Hampshire Employment Security office](#).

The above unemployment tax rule is for farm businesses assigning farm labor. For non-farm enterprises (which may include diversified farms engaging in separate non-agricultural enterprises, such as packing other farmers' produce, hosting on-farm events and agritourism, and so on as discussed in the minimum wage section), farmers may need to follow the regular unemployment tax rules.

For non-farm businesses in New Hampshire, state unemployment tax is owed when either of the following happens: (1) the business has one or more employees during some portion of a day in 20 different calendar weeks in either the current or prior year (whether consecutive weeks or not); or (2) the business paid out \$1,500 or more in gross wages during any calendar quarter of the current or previous year. Non-farm businesses owe federal unemployment tax when the total annual payroll for that enterprise reaches \$1,000.

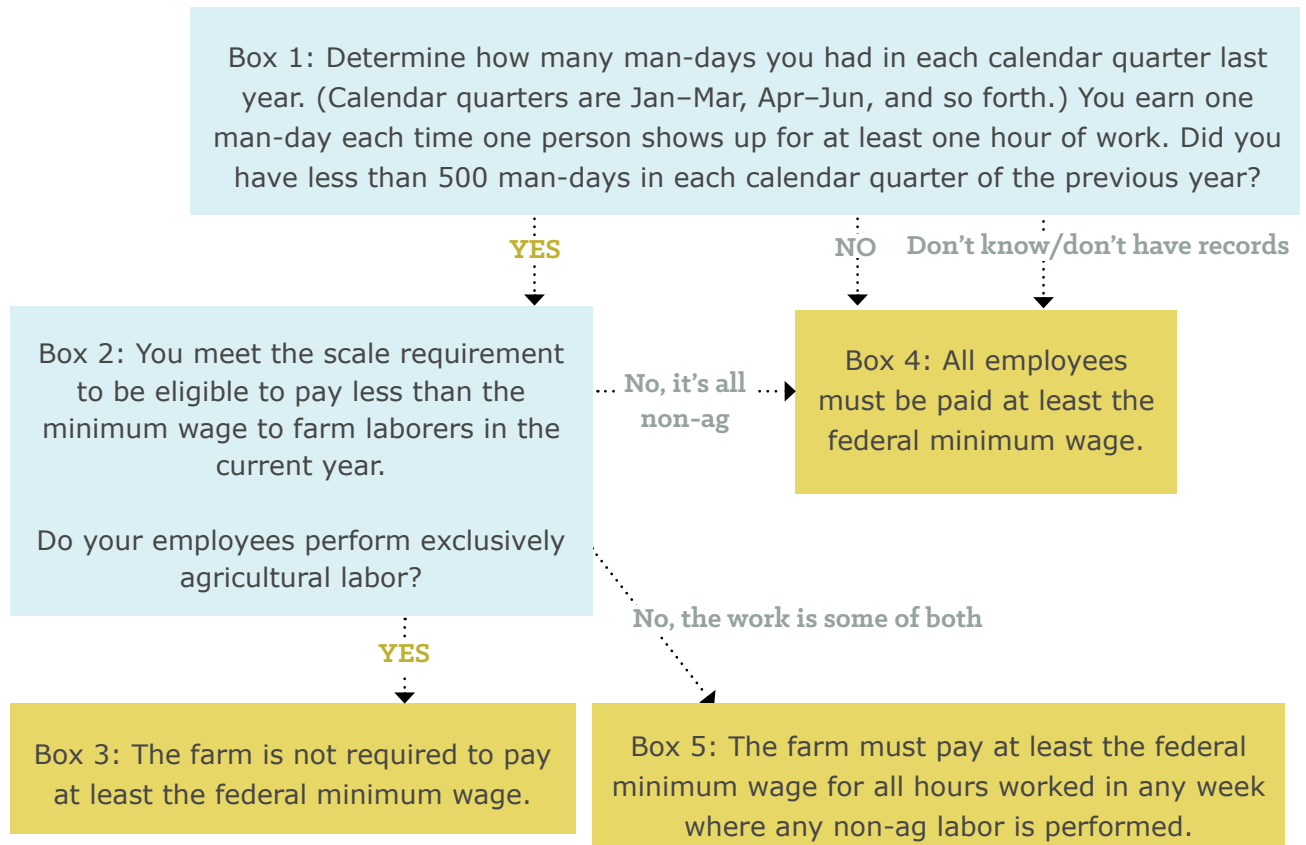
- If you plan to offer less than the minimum wage (to interns, for example), verify your eligibility.

Most farm businesses find that they need to offer at least the minimum wage to attract a qualified work force. Offering educational internships helps some operations recruit good workers while keeping payroll costs at a minimum. This can be a good strategy, but legal cautions apply. To start, farms considering offering internships should consult the *Managing Risks of Interns and Volunteers in New Hampshire* guide. Readers of this guide will learn that minimum wage law still applies to most farm internship positions. This section will help farmers determine if they are complying with minimum wage law.

The New Hampshire and federal minimum wage is currently set at \$7.25 per hour. Although most other businesses must pay at least the minimum wage, both New Hampshire and federal law provide an agricultural labor exemption to minimum wage requirements. Because federal law is more stringent, farmers must focus on federal law, which exempts employees who perform farm labor for farms under a certain size. New Hampshire farms with fewer than 500 “man-days” of agricultural labor in each calendar quarter of the previous year do not have to pay at least the minimum wage. To put it another way, farms who used over 500 man-days of agricultural labor in any calendar quarter of the previous year must pay employees at least the minimum wage.

This rule sounds complicated. What is a man-day? What is agricultural labor? These are important questions with detailed considerations.

The flowchart below will help farmers breakdown the rule and determine whether the federal minimum wage applies to their farm. (Please do not use the flowchart without also reading the text below as it is necessary to effectively use the flowchart.)



Box 1: The first step is for a farm to determine how many man-days the farm had in each calendar quarter of the previous year. A man-day is any day on which a person does at least one hour of work. Each person who works is counted as a separate man-day. For example, if three individuals work for one hour each on the same day, the farm has three man-days. If three individuals work for eight hours each on the same day, the farm still has three man-days. As long as the person worked at least one hour, it doesn't matter how long they worked that day.

The spouse, children, and other members of the employer's immediate family are not counted when calculating man-days. Having 500 man-days roughly equates to about five or six full-time employees, considering that many farms employ workers six or seven days per week.

Now that we understand how a man-day is calculated, we need to count them. Divide the calendar into January through March, April through June, July through September, and October to December. Now determine the number of man-days in each calendar quarter. Do you have less than 500 man-days in each one? If the answer is yes, the farm is eligible for the minimum wage exception as

indicated by Box 2. If the answer is no, the farm is not eligible for the exception and must pay at least the minimum wage as indicated by Box 4.

These calculations require careful recordkeeping. Remember that the 500 man-day rule applies to the previous year. To determine federal minimum wage obligations this year, we need to determine the farm's man-days from last year. If records were not kept last year or are not detailed enough, we will have a difficult time demonstrating compliance with the law. In that case, the safest choice is for the farm to act as if the minimum wage applies as indicated by Box 4.

Box 2: You meet the scale requirement to be eligible to pay less than the minimum wage to farm laborers in the current year.

Do your employees perform exclusively agricultural labor?

Box 2: We arrive at Box 2 because we know we are at the appropriate size—we are under the 500 man-day threshold. Thus, we know we are eligible to pay less than the federal minimum wage. Now we have one more question to ask to determine if we can actually pay less than the minimum wage.

The 500 man-day exemption applies only to agricultural labor. If an employee spends any time working on something that is not deemed agricultural, the minimum wage exemption does not apply. And it does not apply with respect to all work that employee does during that workweek. This means that if a farm employee spends even one hour of time on a non-agricultural task, the employee must be paid at least the minimum wage for all hours worked in that week.

Whether work is agricultural labor under the law is not always intuitive. That's because it's based on legal definitions. It is also because the definition of "agricultural" has not been litigated very much in either the courts of New Hampshire or federal courts. Litigation helps clarify legal definitions. For now, we're left with a broad definition that does not account for the realities of modern and direct-to-consumer farms.

Diversified farms are prevalent in New Hampshire and throughout the country. These farms typically engage in activities—selling at farmers' markets, making

value-added products, organizing on-farm events, and so on—that fall outside the traditional scope of farming activities. Unfortunately, the legal definition of agricultural labor has not yet evolved to meet this new type of diversified farm. Without any statutes or case law for guidance, it can be challenging to draw the line between agricultural and non-agricultural labor.

Agricultural labor is the growing and harvesting of crops, raising of livestock or poultry, and preparing of unmanufactured farm products for market and delivery to market. Agricultural labor includes work done on a farm in connection to farming operations. Conversely, most if not all work done off-farm is not agricultural labor. Sales at a farmers' market are off the farm and are potentially not agricultural labor. It also may include marketing activities such as pitching products to restaurants and grocery stores.

In addition, some work done on a diversified farm is tangential to agricultural production, for example, making value-added products and planning and hosting agritourism or on-farm events such as dinners, weddings, and potlucks. These activities most likely do not fall within the agricultural labor definition. Aggregating and packing products from another farm into a CSA box, for example, is a gray area. Most likely, it would not be considered agricultural labor as it's more akin to marketing and value-added production.

The safest route is to assume that off-farm and any activities that are tangential to farming are not agricultural labor. A farm can quickly resolve any legal risk by paying at least the minimum wage and paying overtime for any hours worked over 40 in a week. If the farm pays at least the minimum wage plus overtime, there is no need to determine if tasks are agricultural or not.

Box 4: All employees must be paid at least the federal minimum wage.

Box 4: If the work assigned to an individual is non-agricultural, then minimum wage is owed, even if the farm is under the 500 man-day threshold.

Box 5: The farm must pay at least the federal minimum wage for all hours worked in any week where any non-ag labor is performed.

Box 5: Again, when an employee does non-agricultural labor, the employee is owed minimum wage for the entire workweek, not just for the non-agricultural hours worked. As a reminder, farms need to keep complete records to demonstrate compliance with minimum wage law. Timesheets recording the date, hours worked, and tasks performed are essential, even if no minimum wage is owed. The records are necessary to show that minimum wage is not owed.

Farms may be able to satisfy their minimum wage obligations (in whole or in part) by providing housing, food, and other in-kind wages. Make sure to consult the ***Farm Interns and Volunteers in New Hampshire Guide*** for more information. Specific rules dictate how in-kind wages are valued and additional laws apply when providing housing, especially.

Box 3: The farm is not required to pay at least the federal minimum wage.

Box 3: If we arrive here, then the hours worked by the agricultural laborer do not fall under minimum wage laws. Where a farm is under the 500 man-day threshold last year and assigns only ag labor, the farm is allowed to pay less than the minimum wage. Now, that doesn't mean no rules apply to the wage payment relationship. Of course, the farm is obligated to pay the employee whatever the farmer said the employee would be paid for the work. If a farmer promises to pay \$3 per hour and then pays the employee just \$2 per hour, the farm could certainly be sued by the employee for breaking that promise. The farmer couldn't be sued under minimum wage laws, but laws covering mutual agreements and contracts still apply.

□ If you do not plan to provide overtime, verify your eligibility.

Farms are exempt from paying overtime to farm employees under New Hampshire and federal law, regardless of the size of the farm. However, just as with minimum wage, the exemption only applies to agricultural labor. If the employee performs non-agricultural labor, the farm must pay overtime for

all hours worked over 40 in that week. If the employee performs exclusively agricultural labor in a week, no overtime is owed for hours over 40.

Conclusion

This checklist illustrates selected, immediate paperwork responsibilities of the farmer at the time of hiring. It also reveals that the farmer's responsibilities don't stop there—the law requires ongoing recordkeeping, withholding, remitting, and payment responsibilities. If a farm creates a clear, consistent system for hiring, tracking payroll, and calculating taxes, employment paperwork burdens can be minimized. For farmers who don't enjoy creating these procedures and can afford modest fees, accountants and payroll service providers will be happy to handle this aspect of hiring. To find a local service provider, ask other farmers if they have a recommendation.

This resource guides farmers in the initial steps necessary in hiring an employee; it does not discuss many other tax aspects of hiring. For example, employers must keep certain records and must provide specific documentation to employees at the end of the year. Payroll service providers and Small Business Administration offices can help, and the IRS provides information in many publications. Farmers may want to read [IRS Publication 51: Agricultural Employer's Tax Guide](#), [Publication 15-B: Employer's Tax Guide to Fringe Benefits](#), and [Publication 225: Farmer's Tax Guide](#). Farmers working with employees under 18 years of age should also consult child labor laws, such as the [guide from the U.S. Department of Labor](#) and from [the New Hampshire Department of Labor](#).

For more checklists, flowcharts, webinars, and guides on farm law issues, including injury liability, volunteer workers, providing food and lodging, and much more, please see Farm Commons' website: www.farmcommons.org.



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REPONDS**

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