



FARM COMMONS

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

By Farm Commons

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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 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 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.”

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 part of a series of guides by Farm Commons on Vermont employment law:

Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist

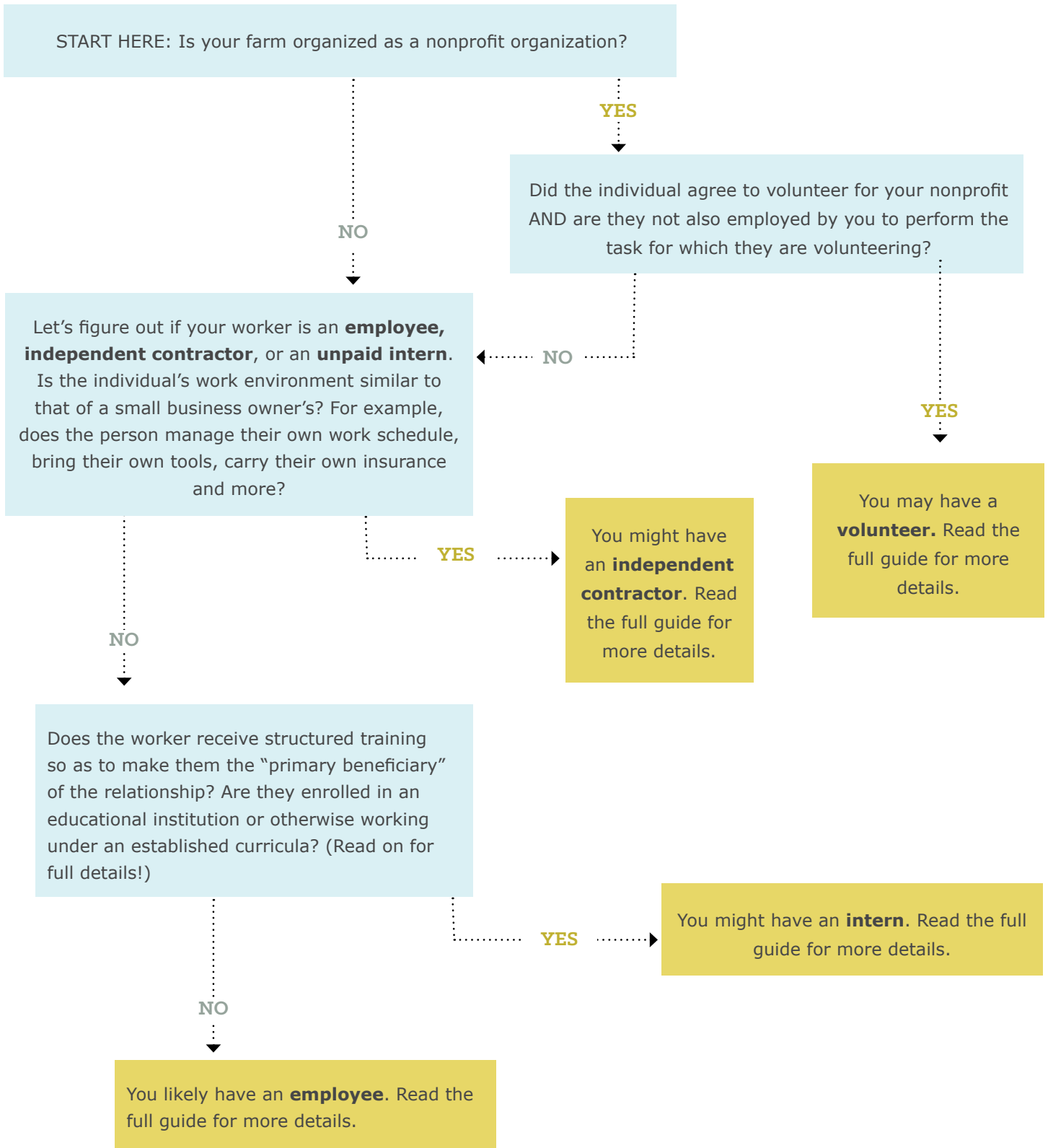
Classifying Workers on Vermont Farms—Employees vs. Interns, Volunteers, and Independent Contractors

Managing Risks of Farm Interns and Volunteers in Vermont

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 sustainable 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 Vermont of Labor (VT 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 Vermont, for more details on this criterion.

2. The worker works 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 worker offers 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 worker doesn't expect to be compensated

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 Vermont who are required to pay at least the minimum wage to their employees should strongly consider ratcheting up any compensation provided to

volunteers to at least the minimum wage amount. Otherwise, they may be better off risking it and paying their volunteers no compensation, as it will look less like an employment arrangement. In Vermont, farms with 500 or more man-days must pay at least the federal minimum wage. A man-day is any day on which a person does at least one hour of work. Farms assigning non-agricultural labor tasks to workers must pay at least the higher Vermont minimum wage.

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 who expects compensation for their work. The farm will need to figure out another way to make payroll.

5. **Your nonprofit farm does not undercut prices 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. **Your nonprofit farm does not rely on the worker for essential duties**

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 Section 2, *Managing Risks of Interns and Volunteers in Vermont* 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 Vermont is that the farm is not required to pay minimum wage, carry workers' compensation, or pay payroll taxes for independent contractors—whereas the farm may have to for employees (depending on available exemptions). 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 Vermont Department of Labor (VT DOL) uses the ABC test to determine whether a worker is an independent contractor versus an employee. The ABC is not an acronym, but rather signifies a three-part test. All three criteria must be met for the worker to be considered an independent contractor. Vermont's ABC test is more stringent than the test used by the US Department of Labor (US DOL). Farmers must be particularly cautious that they are following Vermont's legal criteria for independent contractors if they choose to have independent contractors.

Before getting into the details of the legal criteria, it's helpful to start with a "perfect" 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.

A: The worker is free from any control and direction over how the work gets done

Under this criteria, the worker is an individual contractor if she completes the work with no direction, supervision, or set hours. The worker is more likely an independent contractor if the farmer provides little to no instruction for how the task gets done and simply cares about the end result. 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. In addition, the independent contractor typically sets their own schedule. So if the farmer is telling her workers exactly when to arrive and how long they must work out in the field, they're likely employees. However, the farmer can set a deadline or a time when the project needs to be completed. Independent contractors can choose to hire and pay assistants if that's what it

takes to get the job done on time. If any assistants are hired, these folks must be supervised by the independent contractor and not the farmer.

Also, 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.

B: The worker does not perform tasks or services that are core to the farm business

Independent contractors must conduct tangential tasks and not the core or day-to-day tasks of the farm operation. One way the VDOL measures this is to assess whether the worker performs tasks that other employees perform. For example, core tasks like harvesting crops on a daily basis would not be appropriate for an independent contractor. These tasks are essential and get to the core of the farm operation; they are typically completed by employees. 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.

In addition, if the worker performs the service at her own facility it often looks more like an independent contractor. For example, the farm may decide to outsource its accounting to an independent contractor who does the work from her own office.

C: The worker must be 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. She may also have her own employees, which she manages. The independent contractor will also have her own unemployment insurance account with VDOL.

In addition, an independent contractor typically has a number of clients and doesn't work solely for one farm. Independent contractors conduct their own advertising to promote their services. 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.



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?”

So you don't meet these criteria? This means you don't have an independent contractor. You likely need to go back to the default classification of 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 Vermont? 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 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 Farm Commons’ resource *Managing Risks of Interns and Volunteers in Vermont*.

Now what?

Farms that do meet the legal criteria for interns:



“This is great! I’m nearly certain I meet all the DOL’s primary beneficiary test. 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.”

The law surrounding interns is uncertain, and involves a level of risk. Farmers should read Section 2, *Managing Risks of Interns and Volunteers in Vermont*, for more information on working with interns and to learn ways to minimize risk.

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

Section 2, *Managing Risks of Interns and Volunteers in Vermont* 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? Vermont law defines an employee as someone who an employer directs or permits to work for her for profit business.

Employee is the default category

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 Section 3, *Basic Checklist for Hiring a Farm Employee in Vermont*.

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 Vermont*.



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:

- **Vermont Department of Labor:** <http://labor.vermont.gov/contact-us/>
- **United States Department of Labor:** <https://www.dol.gov/general/contact>
- **Internal Revenue Service:** <https://www.irs.com/articles/contact-the-irs>
- **An attorney familiar with agricultural employment laws in Vermont**

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.

Again, for further guidance, be sure to check out the other sections in this guide:

Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist

Managing Risks of Farm Interns and Volunteers in Vermont

The following are some additional recommended resources on employment law for Vermont farmers:

QUESTIONS?

[Vermont Farm Worker Wage, Hour and Housing Fact Sheet](#)

Provided by the VT Agency of Agriculture Food and Markets

[FAQ: Labor Regulations for Farmers](#)

Provided by the Northeast Organic Farming Association of Vermont

Section 2

Managing Risks of Interns and Volunteers in Vermont

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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. This can apply to uncertain legal situations as well. 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

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 sustainable 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 working with community members.

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

Sustainable farm operations are unique from most traditional businesses. You don't see folks lining up to volunteer at the local gas station to pump gas or at a big box retail store to work the check out lines. Sustainable farms don't necessarily fit the mold when it comes to employment laws either. Employment laws are designed to protect the disadvantaged, which are generally the folks doing the work as opposed to the employers. Farmworkers in particular have been subjected to poor working conditions, long hours, and low to no pay. Sustainable farmers still need to be aware of the potential power imbalance—even when shared values and mutual respect are present. 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.

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“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.”
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Even though the law is uncertain and has potentially harsh implications for most farm intern and volunteer programs, all is not lost. Ultimately, employment laws reflect society's shared goals of good working environments for all. By complying with the law, the farmer is helping to ensure a positive working environment and viable livelihood for all of the farm's workers, including volunteers and interns. State and federal enforcement actions can be time consuming, expensive, and can occur over the objections of the worker himself or herself. While keeping the farm's interns and volunteers happy has its own benefits, it's not always going to get the farmer out of legal obligations.

Often farmers complain that the law stifles innovation and creativity. It can be limiting to design the farm's internship and volunteer programs based on what the law says rather than on what's seemingly best for the community. Think of this as an opportunity. While we must first work with what we have, we can strive together to create a better system—one that better fosters innovation and creativity alongside preserving fairness and sharing power. Changing the law takes time and effort, but it can and does happen if and when enough people get behind it! The first step is understanding the law as it is.

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. Section 2 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, just as was done in 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 Vermont 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 on Classifying Workers on Vermont Farms)

Federal and state minimum wage requirements in Vermont: An overview

The basic rule of thumb is that unless an exemption applies at BOTH the state and federal level, farmers must pay at least the minimum wage to all employees—including interns and volunteers who are considered “employees” in the eyes of the law. When the state and federal minimum wage laws differ, farmers must adhere to whichever law is strictest. Vermont law fully exempts *agricultural labor* from minimum wage requirements. Federal law provides an exemption for *agricultural labor* based on farm size. This is known as the “500 man-day agricultural labor exemption.” Under the federal exemption, if the farm has fewer than 500 “man days” performing agricultural labor in each calendar quarter of the previous year, minimum wage is not required. One “man day” is when one worker performs at least one hour of *agricultural labor*. The long and short of it is that if a farmer wants to rely on the federal exemption for minimum wage, she must keep records of hours worked and activities performed, and do some calculations.

Neither the federal nor Vermont exemption applies to *non-agricultural labor*. Non-agricultural labor includes off farm activities such as selling at farmers’ markets as well as activities that are tangential to farming such as making value-added products, packing other farms’ products, or activities related to agritourism and farm events. Therefore, farms that assign their workers non-agricultural tasks must pay these workers the minimum wage for the entire workweek. Note too that Vermont’s minimum wage rate is higher than the federal rate. Therefore this higher wage rate applies for all farms that do not fall within the federal exemption and for all workers performing non-agricultural work. The 500-man day exemption and the interplay of the federal and Vermont minimum wage requirements are explained in further detail in Section 3, *Basic Checklist for hiring a Farm Employee in Vermont*.

What about farmers who feel they can sufficiently meet the US DOL’s “primary beneficiary test”?



“My interns are the ‘primary beneficiaries’ of the internship program. Now what?”

Farmer Ralph is delighted! He’s already working in partnership with a college and is certain he can 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 training his interns so they can start their own farms. He doesn’t care whether his farmers’ market or restaurant sales are low. He simply wants to provide his interns with diverse experiences in a variety of market channels. He feels strongly that he meets the DOL’s 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 Vermont are not legally required to carry workers' compensation for non-employee interns, it's highly recommended that the farm carry insurance to cover worker injuries. 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 Vermont is for the farmer to simply carry workers' compensation for interns if the farm has a payroll of \$10,000 or more (i.e., it does not meet the Vermont small farm exemption). Another option could be to look into a commercial general liability plan that would cover the intern.

What about other options?

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



"I can't sufficiently meet 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. Basically, employment laws set the baseline or

floor for minimum wages, and no one can go under that.



“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 have 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. An apprenticeship program combines on-the-job training with academic instruction for folks entering the workforce. Typically, apprenticeship programs are formally registered through a state or federal government agency. They are also most often affiliated with a community college or trade school where the formal classroom training is provided. Unlike internships, most apprenticeships last for a longer period of time—anywhere from 1 year to 5 years. In addition, most apprenticeship positions are paid pursuant to minimum wage laws. Often, the compensation increases as the apprentice completes parts of the program.

There is one exception to the minimum wage requirement for 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 must be approved by the government agency overseeing the apprenticeship program. The program needs to prove the market conditions, including projections of increased opportunities resulting from apprenticeship programs. Some states offer apprenticeship programs in the agricultural industry. For more information on registered apprenticeship programs in Vermont, contact the VT Department of Labor Apprenticeship Office in Montpelier.



“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. Vermont law defines an employee as someone who an employer directs or permits to work for her so the employer can retain a profit. Likewise, a for profit operation is traditionally motivated by profits. Someone who does work at a for-profit farm is generally helping the farm meet that end. 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. As the theory goes, the business owner is effectively making money off the employee, so the employee deserves a cut in it. Otherwise the economic and power dynamic is just not equitable.



“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-cum-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. Actually, 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 and 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.

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 Vermont* to learn more. In Vermont, workers’ compensation is required for all employees unless the farm has a total payroll of less than \$10,000 (i.e., the small farm exemption). Therefore, if the farm has a total payroll of \$10,000 or more, it must carry workers’ compensation for “volunteers” as if they were employees. 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 in the next few pages on *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! The law has yet to catch up with this line of thinking.

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 without the consent of the insured. In addition, farm businesses are required to carry workers’ compensation for all employees (and volunteers who are actually employees) in Vermont unless the total payroll for all workers is less than \$10,000. If the farm doesn’t have workers’ compensation in place when required, 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 more details on basic obligations to farm employees, refer to Section 3, Basic Checklist for *Hiring a Farm Employee in Vermont*.

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. If in-kind compensation is provided on top of a cash payment of at least the minimum wage, the farmer has more flexibility. In other words, if the farmer pays her employee the going minimum wage rate 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.

Following the Rules

When in-kind wages are paid to cover minimum wage owed, additional rules apply. Federal 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 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.

Also, the farmer cannot deduct items that would simply be for her own convenience or benefit—even if the employee authorizes it. Examples of such items include tools and equipment used on the farm or uniforms or attire that can only be worn at work. Requiring the employee to pay for these items essentially benefits the farmer as she's passing on a necessary business expense. Note that the farmer can make a deduction from wages for these items if, and only if, the farmer has already fulfilled her obligation of paying any minimum wage owed 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. Therefore, the farmer can only make a deduction from wages for education and training if the farm has already fulfilled its obligation of paying any minimum wage owed AND the employee willingly authorizes.

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 Vermont, it might not be much. If she’s near the heart of Montpelier 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. She’s already paid it off in full, so her costs are minimal. She’s only paying utilities, 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.

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 \$3 a meal, she can deduct only \$3 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.***Farmers assigning workers non-agricultural tasks must also follow Vermont rules—including established maximum amounts for food and lodging**

Neither the federal nor Vermont agricultural labor exemption to minimum wage apply to farmers who assign their workers non-agricultural tasks. The farmer must pay at least the higher Vermont minimum wage for the entire workweek once a worker performs a task that is not considered agricultural labor. These farmers must also comply with the Vermont rules that apply for paying in-kind wages. These rules mirror the federal rules—including the requirement that the farmer get an authorization of the deduction from wages in writing. In addition, Vermont rules specify maximum amounts that employers may deduct for meals and lodging. These rates change each year based on inflation. Farmers should check with the VT Department of Labor to confirm the applicable amounts. The following chart provides these amounts for 2016.

*Maximum allowable deductions for room and board if Vermont minimum wage is owed—Effective January 1, 2019**

<i>Breakfast</i>	<i>\$3.17</i>
<i>Lunch</i>	<i>\$3.56</i>
<i>Dinner</i>	<i>\$3.95</i>
<i>Full Board: Daily</i>	<i>\$10.68</i>
<i>Full Board: Weekly</i>	<i>\$74.76</i>
<i>Nightly Lodging</i>	<i>\$4.36</i>
<i>Full Room (weekly)</i>	<i>\$26.20</i>
<i>Full Room and Board (weekly)</i>	<i>\$90.49</i>

**Amounts are adjusted yearly, be sure to check latest amounts with VT Department of Labor*

Other Rules When Providing Lodging

An array of laws come into play when farmers provide housing to their workers. These include zoning, the Vermont Rental Housing Health Code, the

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.

□ **Look into and comply with the Vermont Rental Housing Health Code**

Farmers in Vermont who provide housing to workers (i.e., interns, volunteers, and employees) must comply with Vermont's Rental Housing Health Code. This rule applies regardless of whether the workers are domestic or migrant. In addition, the Code defines "dwelling" broadly, and includes mobile homes and other structures that are used for sleeping. These requirements ensure basic living conditions such as water, electricity, safety, and cleanliness and range from having smoke detectors to providing working sinks and toilets in bathrooms. The full Rental Housing Health Code is available on the VT Department of Health website.

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

The Vermont Occupational Safety and Health Administration (VOSHA) oversees occupational safety and health standards for all public and private sector places of employment in Vermont with the exception of certain federal employees. VOSHA has adopted most of the standards in the federal Occupational Safety and Health Act (OSHA), including certain inspection and enforcement exemptions for small farms.

Farmers must be aware that by providing housing to their workers, they may

subject their farms to an OSHA inspection. Although OSHA standards are 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.

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.

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 Vermont Occupational Safety and Health Administration, which is part of the Vermont Department of Labor. The main office is located in Montpelier. In addition, the Vermont Agency of Agriculture, in conjunction with UVM Extension and the Vermont Department of Labor, has a program that offers farmers assistance and support with OSHA compliance. For more information on this program, contact the Vermont Agency of Agriculture.

□ **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. 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*.

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 aversion to risk may want to take a conservative approach. This basically means 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 seven criteria in the US DOL’s “primary beneficiary test” as best they can. Ultimately, 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 paying minimum wage and carrying workers’

compensation unless an exemption applies.

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.

This section is one of a 3-part guide on Vermont employment law:

Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist

Classifying Workers on Vermont Farms: Are they Independent Contractors, Interns, Volunteers, or Employees?

Managing Risks of Farm Interns and Volunteers in Vermont

Be sure to check out these and many more resources on employment law and other legal issues that are relevant to sustainable farmers. All of Farm Commons' resources are available for free download at www.farmcommons.org.

Section 3:

Basic Checklist for Hiring a Farm Employee in Vermont

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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 their 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 wage-related recordkeeping, workplace safety laws, in-kind wage rules, 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.

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

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. Unfortunately, easy answers are often hard to come by. Calling the relevant agency, such as the Vermont Department of Labor, Vermont Department of Taxes, United States Department of Labor, or the Internal Revenue Service, 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.

Checklist Summary

The following is a summarized list of the steps addressed in this guide. Check off each step here once you have completed it.

- If you plan to offer less than the minimum wage, verify your eligibility
- If you do not plan to provide overtime, verify your eligibility
- Follow laws of payment, notice requirements, and working conditions
- Secure a workers' compensation policy
- Verify eligibility to work in the United States
- Set up to withhold federal and state income taxes
- Set up to withhold federal Social Security and Medicare contributions from the employee's wages
- Arrange to pay the farm's contribution to the employee's federal Social Security and Medicare accounts
- Arrange to pay federal and state unemployment tax, if required

Checklist with Explanations

□ **If you plan to offer less than the minimum wage, verify your eligibility**

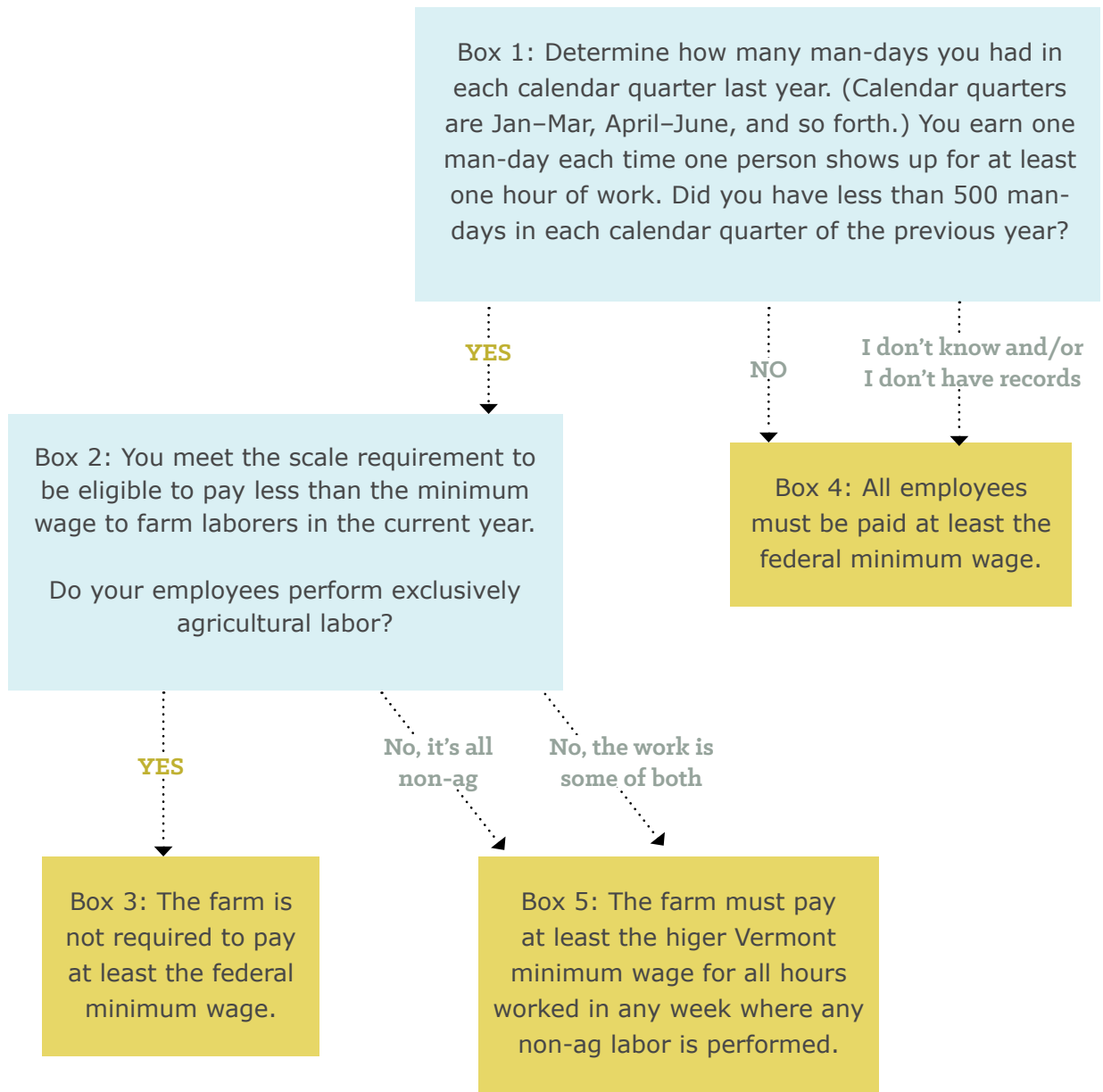
The Vermont minimum wage is higher than the federal minimum wage.

Vermont's minimum wage is currently set at \$9.60 per hour while the federal minimum wage is currently set at \$7.25 per hour. The Vermont minimum wage generally increases each year; it will increase to \$10 on January 1, 2017.

While most businesses in Vermont must pay at least the Vermont minimum wage, both Vermont and federal law provide an agricultural labor exemption to minimum wage requirements. Vermont law exempts employees who perform farm labor from minimum wage entirely. Federal law only exempts employees who perform farm labor for farms under a certain size, which is based on a measure called "man-days." This means that, depending on their size, farm businesses may have to pay employees performing farm labor at least the federal minimum wage. Also, if a farm has employees who perform tasks that are not considered farm labor, the farm will need to pay these employees at least the Vermont minimum wage. Vermont farm businesses must pay close attention to the rules if they wish to avoid the risks of noncompliance.

Again, Vermont law entirely exempts employees who perform farm labor from the higher Vermont minimum wage. The federal minimum wage exemption is more limited. Federal law only exempts Vermont farms with 500 or fewer "man-days" of agricultural labor in each calendar quarter of the previous year. To put it another way, farms that used more than 500 man-days of agricultural labor in any calendar quarter of the last year are exempt from the higher Vermont minimum wage; however, they must pay employees at least the federal minimum wage of \$7.25. Farms that used 500 or fewer man-days in each calendar quarter of the previous year are exempt from having to pay both the Vermont and federal minimum wages.

This rule sounds complicated. What is a man-day? What is agricultural labor? These are important questions with detailed considerations. The flowchart on the following page will help farmers breakdown the rule and determine whether the federal minimum wage applies to their farms. (Please do not use the flowchart without also reading the text below it, as it is necessary to effectively use the flowchart.)



Box 1: Determine how many man-days you had in each calendar quarter last year. (Calendar quarters are Jan–Mar, April–June, and so forth.) You earn one man-day each time one person shows up for at least one hour of work. Did you have less than 500 man-days in each calendar quarter of the previous year?

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 in a day it is considered a man-day; it doesn't matter how long they worked.

The spouse, children, and other members of the employer's immediate family are not counted when calculating man-days. Roughly, 500 man-days equates to about five to six full-time employees, considering 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 January through March, April through June, July through September, and October through 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 exemption (go to Box 2). If the answer is no, the farm is not eligible for the exemption and must pay at least the minimum wage (go to 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 last year. If records were not kept last year or are not detailed enough, we will have a hard time demonstrating compliance with the law. In that case, the safe choice is for the farm to act as if the federal minimum wage requirement applies (go to Box 4).

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

Again, we arrive at Box 4 if the farm has 500 or more man-days. The farm is not eligible for the exemption and must pay at least the minimum wage. In addition, if records were not kept or are not detailed enough, the safe choice is for the farm to act as if the minimum wage requirements apply.

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?

We arrive at Box 2 because we know we are at the acceptable 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 both the federal and Vermont minimum wages.

Both the Vermont and federal agricultural labor exemptions apply only to agricultural labor. If an employee spends any time working on something that is not deemed agricultural, neither the Vermont nor the federal minimum wage exemption applies. This means the farm must pay the employee the higher Vermont minimum wage. What's more, these exemptions do not apply with respect to all work—including agricultural labor—performed by that employee during that entire 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 higher Vermont 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 Vermont 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 sprouting up in Vermont and throughout the country. These farms typically engage in activities—such as 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 certainly includes growing and harvesting crops, raising livestock or poultry, and preparing unmanufactured farm products for market and delivery to market. Generally, agricultural labor includes work done on a farm in connection to farming operations. Conversely, most if not all work done off-farm is likely not farm labor. For example, because sales at a farmers' market are conducted off the farm, they are most likely not agricultural labor. Similarly, marketing activities such as pitching products to restaurants and grocery stores are likely not agricultural labor. In addition, some work done on a diversified farm is tangential to agricultural production, for example, making value-added products or 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, for example into a CSA box, is a gray area. Most likely, it would not be considered agricultural labor as it's really more akin to marketing and providing value to the customer, more so than agricultural production.

The safest route is to assume that off-farm and any activities that are tangential to farming, such as those just mentioned, 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 to all employees. If the farm pays at least the minimum wage plus overtime, there is no need to determine if tasks are agricultural or not.

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

If the work assigned to an employee is non-agricultural, then the higher Vermont minimum wage is owed—as neither the Vermont nor federal minimum wage exemption for agricultural labor applies.

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.

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

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 for the previous 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 Vermont and federal laws, 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.

□ **Follow laws of payment, notice requirements, and working conditions**

Vermont's laws relating to payment of wages and employment conditions apply regardless of whether a farm is exempt from minimum wage requirements. All

employees must be paid weekly or twice weekly. The farm can pay employees biweekly or semimonthly only if prior written notice is given. If an employee is discharged, the farm must pay all wages owed within 72 hours. The farm must provide a wage statement each time the employee receives a paycheck, which must include gross pay, hours worked, the hourly rate, and all itemized deductions. Vermont farms must also display a poster notifying employees of the minimum wage requirements. This poster and other required posters can be found on the Vermont Department of Labor website: <http://labor.vermont.gov/>. The posters can also easily be found on the internet by searching for the agency name with the phrase “mandatory posters.”

While Vermont does not require mandatory breaks, employees must be provided with reasonable opportunities to eat and use toilet facilities during work periods.

□ **Secure a workers' compensation policy**

Vermont provides an exemption for workers' compensation for small farms. So long as the farm has less than a total of \$10,000 in payroll in a calendar year, they are not required to carry workers' compensation for employees engaged in agricultural labor. If the farm provides housing or meals to its employees as an in-kind wage, this amount must be included when calculating the gross payroll.

Like the minimum wage exemption, this exemption only applies to agricultural labor. This means that even if the farm falls below the \$10,000 payroll threshold, it must carry workers' compensation for any employee that engages in non-agricultural labor.

For farms with a payroll of \$10,000 or more, they must carry workers' compensation for all employees. This includes family members and part-time workers. 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 may choose to be excluded; however, they first have to obtain approval from the Vermont Department of Labor.

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 harder 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. Insurance rates may vary, so farms may want to contact several different authorized carriers to compare rates.

□ **Verify eligibility to work in the United States**

Farms may only hire individuals who are eligible to work in the United States. For employees not hired through a guest worker program, the employer satisfies the duty to verify eligibility by properly completing Form I-9. This form is available from the U.S. Citizenship and Immigration Services agency: <https://www.uscis.gov/>. 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 forms and documentation must be available if an enforcement agency inspects the farm.

□ **Set up to withhold federal and state income taxes**

Farms are required to withhold a percentage of an employee's wages and remit the withheld portion to both the IRS and the Vermont Department of Taxes.

A farm must begin withholding federal and state income taxes 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 income tax. Note too that this rule applies only for agricultural labor. Farms employing workers performing non-agriculture tasks typically must withhold state and federal income taxes once any wages are paid.

To begin the federal income tax 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 amount per paycheck based on the individual's pay, exemptions, and payment frequency. Form W-4 and the Employer's Tax Guide can be downloaded from the IRS website: <https://www.irs.gov/>. 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). 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. Registration can be completed at <https://www.eftps.gov/eftps/>.

To begin the Vermont income tax withholding process, the farm needs a completed Form W-4VT from the employee, which mirrors the IRS Form W-4. The farm then uses the tax tables available on the Vermont Department of Taxes' website: <http://tax.vermont.gov/>. The amount is computed in the same manner as the federal tax. The farm must record the amount withheld and remit it to the Vermont Department of Taxes. Farms must first register for a withholding account. This can be done online at <http://mytax.vermont.gov>, or by using Form BR-400. The department will determine the filing frequency based on the annual withholding totals. The returns may be filed and taxes remitted either online or by using paper forms and sending in a check.

□ **Set up to withhold federal Social Security and Medicare contributions from the employee's wages**

Most farms are required to withhold Social Security and Medicare taxes from 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 wages exceed \$150 per year. Where the amount of income tax to withhold is determined by using the IRS's tables, Social Security and Medicare taxes are calculated as percentages of the employee's wages for that pay period. The most recent percentages 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 federal Social Security and Medicare accounts**

In the checklist item above, we explained that a portion of Social Security and Medicare taxes owed by the employee must be withheld from the employee's paycheck. In this checklist item, we are discussing 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 percentages 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.

Farms that 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.

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. Vermont and the federal government follow the same rules for farms. When a farm owes unemployment tax to the federal government, it will also owe it to the state.

The farm must begin paying federal and state unemployment taxes 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 federal and state unemployment compensation 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.

Vermont unemployment tax is owed on up to \$16,800 of each employee's wages. Just as for the federal tax, the state unemployment tax rate is determined by percentage. The current state rate is available by contacting the Vermont Department of Labor office. Payments are made by filing Quarterly Wage and Contribution reports with the Vermont Department of Labor: <http://labor.vermont.gov/unemployment-insurance>.

Like the minimum wage, overtime, and workers' compensation exemptions, the rule above is for farm businesses assigning agricultural labor to their employees. 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 Vermont, both federal and state unemployment taxes are 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.

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 to hire an employee; it does not discuss many other tax aspects of hiring. For example, employers must keep certain records and 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.)

This guide is part of a series of guides provided by Farm Commons on Vermont employment law:

Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist

Classifying Workers on Vermont Farms: Are They Independent Contractors, Interns, Volunteers, or Employees?

Managing Risks of Farm Interns and Volunteers in Vermont

Be sure to check out these and many more resources on employment law and other legal issues that are relevant to sustainable farmers. All of Farm Commons' resources are available for free download at www.farmcommons.org.

The following are some additional recommended resources on employment law for Vermont farmers:

[Vermont Farm Worker Wage, Hour, and Housing Fact Sheet](#)

Provided by the VT Agency of Agriculture Food and Markets

[FAQ: Labor Regulations for Farmers](#)

Provided by the Northeast Organic Farming Association of Vermont

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