

The Basics of Agriculture Labor Laws

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Robert Noonan & Associates

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- Representing Employers
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Our Agenda

- Hiring Workers
 - Who is an employee?
- Minimum Wage and Overtime
 - FLSA Agricultural Overtime Exemption
 - Types of Employees: Minors, Seasonals, Temps, Migrant workers, “Volunteers”, “Apprentices”
 - Exempt, salaried employees
- Basic Recordkeeping at Hire

Hiring Workers: Employees or Independent Contractors

- Common Law, IRS 20-Factor Test – Who has control over the work being done?
- CT – ABC Test
 - A. Worker is free from direction and control in the performance of the service, under contract and in fact (common law test);
AND
 - B. The services are performed EITHER
 - Outside the usual course of the employer’s business, OR Outside all of the employer’s places of business, AND
 - C. Worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service being provided.

What is “Wage and Hour” Law?

- Wage and Hour law includes issues relating to:
 - Minimum wage
 - Overtime payments and eligibility
 - Classification of employees
 - Employee vs. Independent Contractor
 - “Non-exempt” vs. “Exempt”
 - Hours worked
 - Recordkeeping
 - Form and timing of wage and salary payments

Which Laws Apply?

- The Federal Fair Labor Standards Act [“FLSA”]
- Connecticut Wage and Hour Laws
- Contract
 - Collective bargaining agreements or individual employment contracts that provide more generous wage and hour benefits than the law provides

FLSA: Who is Covered?

- FLSA covers more than 130 million workers
- FLSA covers employers who:
 - Employ at least two employees, and
 - Have at least \$500,000 in annual dollar volume of business
- Other employers such as hospitals, schools and federal, state and local governmental agencies are automatically covered.
- Only applies to employer-employee relationships:
 - Independent contractors are not covered
 - Volunteers, interns and certain trainees are not covered

CT Wage Law: Who is Covered?

- Connecticut wage and hour laws apply to 1.6 million Connecticut workers and over 97,000 Connecticut employers
- Certain types of employees are not covered:
 - Summer camp or resort employees
 - Certain domestic service workers
 - Federal employees
 - College resident advisors (“RA’s)
 - Babysitters

The Minimum Wage

- Connecticut minimum wage:
 - \$9.15 per hour effective January 1, 2015
 - \$9.60 per hour in 2016
 - \$10.10 per hour in 2017
- Federal minimum wage: \$7.25 per hour
- Special minimum wage provisions for employees who customarily receive tips (bartenders, waiters/waitresses, hotel workers, etc.) and minors working in agriculture or government

“Non-exempt” Employees vs. “Exempt” Employees

- Minimum wage and overtime requirements only apply to “non-exempt” employees
- “Exempt” employees are exempt from the minimum wage and overtime provisions of the FLSA and Connecticut wage and hour laws
- Just because an employee is paid a salary instead of hourly wages does not make the employee exempt!

What Counts as Time Worked?

- Classic definition is that employee is employed for any time he or she is “suffered or permitted to work”
 - May include time outside of regular work day
- The test is whether the activity is done at employer’s request and for employer’s benefit
 - Changing in and out of clothes (i.e. “donning and doffing “ time)
 - Showering
 - Prep time

What Counts as Time Worked?

- Breaks?
 - Employers are not required by law to give employees coffee breaks, smoke breaks, etc.
 - If an employer does allow employees to take breaks then special rules apply:
 - Breaks of 20 minutes or less count as time worked unless employee extends break period in violation of employer policy
 - Breaks of more than 20 minutes do not count as time worked
- Special rules for breastfeeding mothers

What Counts as Time Worked?

- Meal periods?
 - C.G.S. § 31-51ii prohibits Connecticut employers from requiring employees to work more than 7.5 consecutive hours without at least a 30 minute meal period
 - Has to be after 2 hours of shift and before last 2 hours of shift
 - Some exceptions for certain workers
 - Meal periods of less than 30 minutes must be treated as working time
 - Meal periods of over 30 minutes do not have to be treated as working time if employee is completely relieved of duties during meal period and is free to leave his or her post

What Counts as Time Worked?

- Travel time?
 - Ordinary commuting time is not time worked even if employee must go to different job sites on different days and some locations are farther than others
 - Travel during the work day (i.e. from site to work site) is time worked

What Counts as Time Worked?

- On-call time?
 - Key question: Can employee use the time as he or she pleases or are there are significant restrictions on use of time:
 - Does the employee have to stay at a specified location?
 - Does the employee have to respond within a certain time frame?
 - C.G.S. § 31-76b(2)(c), working time for an employee who is “called in” for emergency service begins when employee is notified of assignment. As such, travel time counts as time worked.

What Counts as Time Worked?

- Training time?
 - Training time counts as time worked unless:
 - Attendance is voluntary
 - Occurs outside of normal hours
 - Is not directly related to employee's job, and
 - Employee does not perform productive work while training

Overtime

- Non-exempt employees must be paid one and one-half times their regular rate of pay (“time-and-a-half”) for all hours worked over 40 in a single workweek
- Example: Employee is paid \$10/hour and works 42 hours in a workweek.
- (40 regular-time hours x \$10/hour = \$400) + (2 overtime hours x \$15/hour = \$30)
 - \$400 + \$30 = \$430

Overtime – Common Misconceptions

- No requirement to pay employees 1.5 time unless such hours are over 40 in the week:
 - Hours worked after 8 hours in the workday
 - Night, weekend or holiday shifts
- Employers may be more generous than the law requires through collective bargaining agreements or policies, but they do not have to be

Exemptions May Apply to Your Farm Workers

Agricultural Exemption from Overtime

Connecticut law, C.G.S. 31-76i(k)

- C.G.S. 1-1(q): the words “agriculture” and “farming” shall include cultivation of the soil, dairying, forestry, raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, including horses, bees, poultry, fur-bearing animals and wildlife, and the raising or harvesting of oysters, clams, mussels, other molluscan shellfish or fish; the operation, management, conservation, improvement or maintenance of a farm and its buildings, tools and equipment, or salvaging timber or cleared land of brush or other debris left by a storm, as an incident to such farming operations; the production or harvesting of maple syrup or maple sugar, or any agricultural commodity, including lumber, as an incident to ordinary farming operations or the harvesting of mushrooms, the hatching of poultry, or the construction, operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for farming purposes; handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, or for direct sale any agricultural or horticultural commodity as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market or for direct sale.

Agricultural Exemption from Overtime

Section 3(f) of the FLSA:

- “Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Engaged in Agriculture

- “Primarily Employed” - Most of his time (at least more than ½ his work time in the workweek
- Includes work performed on a farm which is incidental to or in conjunction with such farmer's farming operation.
- Does not include operations performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on.

Examples of “Incidental To”

- The selling (including selling at roadside stands or by mail order and house to house selling) by a farmer and his employees of his agricultural commodities – provided it does not amount to a separate business.
- Secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm.
- With respect to all practices performed on products for which exemption is claimed – they must be performed only on the products produced or raised by the particular farmer or on the particular farm.

Work that is “Incidental To” the Farming Operation

- Yes: Nursery Activities – sowing seeds, propagating plants, planting, watering, spraying, fertilizing, pruning, feeding the growing
- Yes: If plant stock raised by the employer, then planting it on private property
- No: Planting plants on private property when plants are not grown by employer

FLSA Agricultural Exemption from Minimum Wage (Not applicable in CT) & Overtime

- Any employer in agriculture who did not utilize more than 500 "man days" of agricultural labor in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA for the current calendar year.
 - A "man day" is defined as any day during which an employee performs agricultural work for at least one hour.
 - 5 employees working 6 days/week = 30 man days/week
 - 5 employees working 1 hour/day, 6 days/week = 30 man days

FLSA Minimum Wage and Overtime Exemption

ALSO EXEMPT:

- Agricultural employees who are immediate family members of their employer

CT Law and Minors

- Under CT Law:
 - Minors as young as 14 are permitted to work in agriculture (subject to Federal law)
 - Can pay minors, age 14-18, lower minimum hourly wage
 - may be paid 85% of Connecticut's minimum wage **for the first 200 hours of employment** in any industry or occupation.
 - agricultural employees employed by employers who did not, during the preceding calendar year, employ 8 or more workers at the same time shall be paid a minimum wage of not less than 70 % of the minimum wage

Federal Law on Minors Applicable in CT

- Age 14-15: May work in agriculture except those activities declared hazardous by U.S. DOL
- Youth of any age may be employed at any time, in any occupation in agriculture on a farm owned or operated by their parent or person standing in place of their parent.

Internships and Apprenticeships

- Federal law defines “Internship” as:
 - unpaid academic or vocational training
 - that is primarily for the benefit of the intern,
 - does not displace regular employees,
 - does not guarantee a job to the intern when the internship ends, and
 - is of no immediate advantage to the employer.

H-2A Workers

- To qualify for H-2A nonimmigrant classification, the petitioner must:
 - Offer a job that is of a temporary or seasonal nature.
 - Demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work.
 - Show that the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.
 - Generally, submit with the H-2A petition, a single valid temporary labor certification from the U.S. Department of Labor.
- Pay is generally same or better than minimum wage, and pay must be the same for everyone doing the same work
- Employer covers transportation to farm from home, and from housing to farm
- Employer provides housing, housing is inspected for compliance with regs
- Employer must provide work for at least 3/4 of the total hours specified in contract period

Exemption for “Salaried” Employees

- Based on three characteristics:
 - Employee gets pre-determined amount
 - Salary must meet a minimum salary test
 - Duties must meet minimum duties test
- Automatically non-exempt: Those earning less than \$23,660 per year.
- Salary:
 - FLSA \$455
 - Connecticut \$475

Salary Basis Test

- Employees must be paid on a “salary basis”
- A salary basis means that the employee is paid “on a weekly, or less frequent basis, a predetermined amount ... which amount is not subject to reduction because of variations in the quality or quantity of work performed”

Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs any work
- Need not be paid for any workweek when no work is performed

Job Duties Tests

- An employee's job title alone is insufficient to determine whether an employee is exempt from minimum wage and overtime requirements
- The key is what the employee actually does for his or her job

Who Are Exempt Employees?

- 4 major white-collar exemptions under FLSA and recognized in CT:
 - The “Executive” exemption
 - The “Administrative” exemption
 - The “Professional” exemption
 - The “Outside Sales” exemption

Executive Employee Exemption

- Exemption applies to employees who meet all of the following requirements:
 - Compensated on a salary basis at rate of at least \$475 per week
 - Primary duty is management of enterprise in which employee is employed or subdivision of enterprise
 - Customarily and regularly directs the work of two or more employees, and
 - Has the authority to hire or fire other employees or whose suggestions on hiring, firing, etc. carry particular weight

Primary Duty is Management

- The principal, main, major or most important duty that the employee performs.
- Factors to consider include, but are not limited to:
 - Relative importance of the exempt duties;
 - Amount of time spent performing exempt work;
 - Relative freedom from direct supervision; and
 - Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.

Primary Duty

- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement
- However, the regulations do not require that exempt employees spend more than 50% of time performing exempt work

Management

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Maintaining production or sales records
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work among employees

Management

- Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used; or the merchandise to be bought, stocked and sold
- Providing for the safety and security of employees or property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

Department or Subdivision

- A “customarily recognized department or subdivision” must have a permanent status and continuing function
 - Need not be physically within the employer’s establishment, and may move from place to place
 - Continuity of the same subordinate personnel is not essential to the existence of a recognized unit.
 - The employee in charge of each branch establishment is in charge of a recognized subdivision
- Does not include a mere collection of employees assigned from time to time to a specific job

Supervises Two or More

- The phrase “two or more other employees” means two full-time employees or the equivalent
- Full-time generally means 40 hours per week
- The supervision of the same employees can be distributed among two or more exempt executives, but the hours worked by an employee cannot be credited more than once

Third Element

- Employment Authority
- Influence in employment
 - Opinions are given “particular weight”

Administrative Exemption

- 1) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- 2) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Management or General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

Discretion and Independent Judgment

- The comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered
- Must be exercised with respect to “matters of significance,” which refers to the level of importance or consequence of the work performed
- Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed

Discretion and Independent Judgment

- Discretion and independent judgment *does not* include:
 - Applying well-established techniques, procedures or specific standards described in manuals or other sources
 - Clerical or secretarial work
 - Recording or tabulating data
 - Performing mechanical, repetitive, recurrent or routine work

Learned Professional

- 1) The employee's primary duty must be the performance of work requiring advanced knowledge
- 2) In a field of science or learning
- 3) Customarily acquired by a prolonged course of specialized intellectual instruction

Advanced Knowledge

- Predominately intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances
- *Not* work involving routine mental, manual, mechanical, or physical work
- *Cannot* be attained at the high school level

Field of Science or Learning

- Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law

Accounting

Actuarial
Computation

Theology

Teaching

Physical Sciences

Medicine

Architecture

Chemical Sciences

Pharmacy

Engineering

Biological Sciences

Prolonged Course of Specialized Intellectual Instruction

- Specialized academic training is a prerequisite for entering the profession
- Best evidence that an employee meets this requirement is possession of the appropriate academic degree

Prolonged Course of Specialized Intellectual Instruction

- The learned professional exemption is not available for occupations that may be performed with:
 - Only the general knowledge acquired by an academic degree in any field
 - Knowledge acquired through an apprenticeship
 - Training in the performance of routine mental, manual, mechanical or physical processes
- The exemption also does not apply to occupations in which most employees acquire skill by experience

Recordkeeping

Recordkeeping

Records to be kept by employers

- True and accurate time and wage record maintained at the place of employment for 3 years
- All time worked must be computed to nearest unit of 15 minutes showing the beginning and ending of each work period.
- Failure of an employer to maintain time records exposes the employer to back pay liability since the Department would accept the employee's testimony of hours to be appropriate.

Recordkeeping – CGS 31-71f

- Employer to furnish certain information:
- Advise in writing at the time of hiring
 - Rate of pay
 - Hours of employment
 - Wage payment schedule
- Make available to employees in writing
 - Any employment practices and policies or changes
 - Policies including vacation, sick pay, wages, health and welfare matters and comparable matters.

Form I-9

- Current Form: “03/08/13 N” in bottom left, “Expires 03/31/2016” top right
- Must be used for all employees at hire

Unemployment Compensation

- Generally – liable when 1 employee for 20 weeks or paid out \$1,500 to employee
- Agricultural Exception: Employer only liable if, in any quarter current/preceding year,
 - paid \$20,000 or more to individuals employed in agriculture, or
 - employed for some portion of a day in each of 20 different calendar weeks (non-consecutive) 10 or more individuals regardless of whether employed at the same moment in time.

Conclusion