



Employment Law Guidance for Massachusetts Farmers

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TABLE OF CONTENTS

| | |
|--|----|
| 1.0 Introduction | 3 |
| 2.0 Massachusetts & Federal Leave Laws..... | 4 |
| 2.1 Massachusetts Sick Leave | 4 |
| 2.2 Parental Leave | 5 |
| 2.3 Massachusetts Jury Duty..... | 7 |
| 2.4 Massachusetts Small Necessities Leave..... | 7 |
| 2.5 Massachusetts Domestic Violence Leave | 8 |
| 3.0 Minimum Wage | 8 |
| 4.0 Overtime..... | 9 |
| 5.0 Meal Break..... | 10 |
| 6.0 Deductions from Wages for Meals and Lodging..... | 10 |
| 6.1 Employer-provided lodging | 10 |
| 6.2 Employer-provided meals..... | 11 |
| 6.3 Lodging and meal deductions | 11 |
| 7.0 Unpaid Interns, Volunteers, and Apprentices..... | 11 |
| 7.1 Interns and Trainees..... | 11 |
| 7.2 Volunteers..... | 12 |
| 8.0 Independent Contractor/Employee Distinction | 13 |
| 9.0 Employer Record Keeping Requirements..... | 14 |
| 9.1 Payroll records..... | 14 |
| 9.2 Personnel records..... | 14 |
| 9.3 Records pertaining to discrimination statutes..... | 14 |
| 9.4 Employment Eligibility Verification | 15 |
| 10.0 Workers' Compensation Insurance Requirements..... | 15 |
| 11.0 Employee Handbooks..... | 15 |

I.0 Introduction

Farmers choose their work for many reasons, but we can guess that tracking legal requirements and filling out paperwork are not among them. However, it is important that farmers comply with state and federal laws on the farm. This handbook is designed to help.

One area where there is often confusion on the farm is employment law. Legal questions frequently arise in this area. For example, is it legal to have volunteers working on your farm? How can a farm design an apprenticeship program to meet legal requirements? When are employees entitled to sick leave?

This handbook, prepared by attorneys at Conn Kavanaugh, provides a basic outline of the legal issues related to employment that you should consider on your farm. It is not conclusive and it does not constitute legal advice. It is meant to be a starting point for the kinds of issues you should consider.

The handbook will review the following areas of employment law that farmers may encounter: leave laws, including sick leave and parental leave; minimum wage and overtime; meals and lodging; unpaid interns and volunteers; independent contractors; requirements for recordkeeping and workers' compensation requirements; and advice on employee handbooks.

We encourage you to seek legal help if you have questions or concerns about how any of the issues raised in this guidebook apply to your individual operation. You can begin by reaching out to the Legal Food Hub, which provides free legal assistance to income-eligible farmers, at legalfoodhub@clf.org or 1-844-LAW-GROW. To learn more about the Legal Food Hub, visit www.legalfoodhub.org.

2.0 Massachusetts & Federal Leave Laws

This section reviews the types of leave that farms may need to provide to employees. All farms, regardless of size, must allow employees to take sick leave and jury duty leave. Farms with six or more employees need to provide parental leave under state law. Larger businesses with 50 or more employees need to provide additional leave options, including small necessities leave, domestic violence leave, and comply with federal family and medical leave requirements.

The Massachusetts Attorney General has a useful guide for state leave policies at <http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/leave-time/>.

| Number of Employees | Applicable Leave Laws | Section |
|---------------------|--|-------------------|
| Any | <ul style="list-style-type: none">• MA Sick Leave (unpaid if 10 or fewer employees; paid if 11 or more)• MA Jury Duty | 2.1 2.3 |
| 6 or more | <ul style="list-style-type: none">• MA Parental Leave | 2.2 |
| 50 or more | <ul style="list-style-type: none">• Federal Family and Medical Leave• MA Small Necessities Leave• MA Domestic Violence Leave | 2.2 2.4 2.5 |

2.1 Massachusetts Sick Leave

Who is covered by sick leave?

Sick leave applies to Massachusetts employers, regardless of number of employees. It covers *all* employees.

Is sick leave paid or unpaid?

If employer employs 10 or fewer employees, sick time is unpaid. If the employer employs 11 or more employees, sick time must be paid.

How can an employee earn and use sick leave?

Employees begin to earn sick time from the first day of actual employment. Employees are permitted to use earned sick time after being employed for 90 days. Sick time is earned at a rate of one hour of sick time for every 30 hours worked. All hours worked count, including overtime hours.

The employer can cap sick time earned and limit sick time used in a year at 40 hours. The employee is allowed to carry forward earned but unused sick time from one year to the next, up to 40 hours. If sick time is paid, the employer is not required to pay out earned but unused sick time when an employee leaves their employment (termination).

What qualifies as sick leave?

Earned sick leave can be used for:

- Caring for the employee's own physical or mental illness, injury, or medical condition;

- Caring for the employee’s child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition;
- Attending a routine medical appointment or a routine medical appointment for the employee’s child, spouse, parent, or parent of spouse;
- Addressing the mental, physical, or legal effects of domestic violence; or
- Traveling to and from an appointment, a pharmacy, or other location to address the above issues.

Are there paperwork and notification requirements?

There are paperwork requirements and employer and employee notification requirements for sick leave. For example, employers may require employees to notify them before using sick time, except in an emergency. Employers may also require employees to fill out a form stating that they have used the sick time for a covered purpose, but employers can only require doctors’ notes in limited circumstances. Employers may not demand details about the nature of the illness.

For more information, review the Massachusetts Attorney General’s Earned Sick Time Frequently Asked Questions at <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf>.

2.2 Parental and Family and Medical Leave

When does parental leave apply?

State parental leave law applies to Massachusetts employers with 6 or more employees. It covers male and female *full-time* employees, who have been employed full time for 3 months or longer.

Federal family and medical leave law, under the Family and Medical Leave Act, applies to Massachusetts employers with 50 or more employees. It covers employees employed for 12 months (may be non-consecutive) who have worked for 1,250 hours in the 12-month period immediately preceding requested leave.

| Type of Leave | Business Size | Duration | Uses |
|---|----------------------|-----------------|--|
| State Parental Leave | 6 or more employees | 8 weeks unpaid | <ul style="list-style-type: none"> • Giving birth • Adopting a child |
| Federal Family and Medical Leave | 50 or more employees | 12 weeks unpaid | <ul style="list-style-type: none"> • Incapacity due to pregnancy or child birth; • Bonding with child after birth, or placement for adoption • Caring for family member with serious health condition • Coping with own health condition |

What is provided?

State parental leave is unpaid leave of 8 weeks.

Federal family and medical leave is unpaid leave of 12 weeks during a 12-month period. The leave may be taken all at once, intermittently, or on a reduced work schedule.

What are permitted uses?

State parental leave can be used for:

- Giving birth
- Adopting a child under the age of 18, or under the age of 23 if the child is mentally or physically disabled

Federal family and medical leave can be used for:

- Incapacity due to pregnancy, prenatal medical care or child birth;
- Bonding with the employee's child after birth, or placement for adoption or foster care;
- Caring for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- When serious health condition of the employee makes the employee unable to perform job functions.

What are additional considerations for employers?

Use of Sick Time or Vacation Time

Under state law, the employer may *not* require the employee to use accrued or earned paid sick time, vacation time and/or personal leave time during parental leave, *but* the employee may choose to do so.

Under federal law, the employer *may* require the employee to use accrued or earned paid sick time, vacation time and/or personal leave time during his/her leave. If the employer does not require the employee to use accrued or earned paid sick time, vacation time and/or personal leave time, the employee may still choose to do so.

Parents Employed by Same Employer

Under state law, 2 employees employed by the same employer who each qualify for parental leave for the birth or adoption of the same child are only entitled to 8 weeks of leave total.

Under federal law, 2 employees employed by the same employer who each qualify for family and medical leave are only entitled to 12 weeks of leave total where the leave is taken for the placement of a child for adoption or foster care or to care for the child, for the birth of a child or to care for the child after birth, or to care for a parent with a serious health condition.

Returning to Work

Under state law, an employee timely returning to full time work at the completion of parental leave must be restored to his or her previous, or a similar, position.

Under federal law, an employee timely returning to work at the completion of family and medical

leave must be returned either to the same position that he or she had before the leave or to a position equivalent in pay, benefits, and other terms and conditions of employment.

Military Families

Under federal law, there are special provisions for Military Family Leave. For additional requirements under this law, see U.S. Department of Labor's guide at https://www.dol.gov/whd/fmla/2013rule/FMLA_Military_Guide_ENGLISH.pdf.

2.3 Massachusetts Jury Duty

Who is covered?

Jury duty leave applies to all Massachusetts employers. It covers all regularly employed employees.

When does it apply?

Leave is for any employee called for jury service as a trial juror or grand juror. Jury duty leave is paid for the first three days of juror service for employees who are "regularly employed" by the employer. This includes all full-time employees, as well as all part-time, temporary, or seasonal employees whose hours may be determined based upon a schedule established during a 3-month period before jury service.

2.4 Massachusetts Small Necessities Leave

When does small necessities leave apply?

Small necessities leave is applicable to Massachusetts employers with 50 or more employees.

Who is covered?

Small necessities leave covers employees who have been employed for 12 months (may be non-consecutive). The employees must have worked for 1,250 hours in 12-month period immediately preceding requested leave.

What is provided?

Unpaid leave of up to total of 24 hours during any 12-month period.

What are permitted uses of small necessities leave?

Small necessities leave can be used for:

- Participating in school activities directly related to the educational advancement of the employee's children;
- Accompanying employee's children to routine medical or dental appointments; or
- Accompanying elderly relatives to routine medical or dental appointments or appointments for other services.

What are additional considerations?

Unlike parental leave, the employer *may* require the employee to use accrued or earned paid sick time, vacation time and/or personal leave time during small necessities leave. If the employer does not require the employee to use accrued or earned paid sick time, vacation time and/or personal leave time, the employee still may choose to do so.

2.5 Massachusetts Domestic Violence Leave

Who is covered?

Domestic violence leave applies to Massachusetts employers with 50 or more employees. It covers *all* employees.

What is provided?

Unpaid leave of a total of 15 days in any 12 month period.

What are permitted uses of domestic violence leave?

Domestic violence leave can be used when:

- The employee or a family member of the employee is a victim of abusive behavior as defined in the law; or
- The employee is using the leave from work to seek or obtain medical attention, counseling, victim services or legal assistance; secure housing; obtain a protective order from a court or appear in a court proceeding; or meet with law enforcement.

Note that the employee *may not be* the perpetrator of the abusive behavior.

For more information, see an advisory on the Domestic Violence Leave law from the Massachusetts Attorney General's Office at <http://www.mass.gov/ago/docs/workplace/dvla/m-g-l-c-149-s-52e-advisory.pdf>.

3.0 Minimum Wage

Farms must follow the state minimum wage requirements. There is a special exception for agricultural workers, who may be paid a lower hourly rate for "agricultural and farm work."

What is Massachusetts minimum wage?

Massachusetts minimum wage is \$11 an hour as of January 1, 2017.

Is it different than federal minimum wage?

Federal minimum wage is lower (\$7.25 an hour), but Massachusetts employers must comply with Massachusetts minimum wage law because it is more advantageous to the employee.

Is there a minimum wage exception for agriculture?

Massachusetts minimum wage is \$8 an hour for employees employed in agricultural and farm work. The law defines “agricultural and farm work” as “labor on a farm and the growing and harvesting of agricultural, floricultural and horticultural commodities.”

How is “agricultural and farm work” defined?

Generally, “agricultural and farm work” includes on-farm labor for growing and harvesting commodities. It does not include work performed on a farm which is not directly associated with the farmer’s farming operation. It also does not include work done off a farm by an employee or work done processing products not grown on the farm. There is still some gray area in the law here.

Guidance for how to interpret what is and is not “agricultural and farm work” may be found in how the federal law defines “agriculture” under the federal wage and hours laws. As defined, it “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 ... 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.”

Work that will likely fall within agricultural minimum wage exception (\$8 per hour):

- Working in the field, including planting and harvesting crops
- Preparing harvested crops for sale
- Operating a tractor or other machinery on-farm

Work that will likely be governed by state minimum wage (\$11 per hour):

- Working at a farm stand that is located on or off the farm
- Making jam with berries that were grown on or off the farm
- Working in agritourism, for example operating hay rides or corn mazes

4.0 Overtime

Farms must also follow state overtime law unless they fall within the exceptions for seasonal business and farm workers.

What is overtime?

Workers are paid time and a half for hours *actually* worked in excess of 40 in a work week.

Exceptions to overtime

Farms may *not* need to pay overtime in the following situations:

1. *Seasonal business waiver*: A seasonal business is one whose business is carried on up to 120 days in a year. Note that a single business may have portions of its workforce and operations that are considered seasonal, while other portions are not.

Application for a seasonal business waiver is a formal process made to the Department of Labor Standards, which determines if the business is seasonal in nature. If approved for a waiver, the employer is not required to pay overtime to the employees working in the seasonal business. The application is available at <http://www.mass.gov/lwd/docs/dos/mw/mw-seasonal-app.pdf>.

2. *Farm labor*: Laborers engaged in agriculture and farming on a farm are also exempted from overtime pay requirements. On-farm work, including field work, operating machinery, and packing the farm's produce are generally considered exempt. However, selling produce, working in agritourism, and processing produce (e.g. making apples into apple cider) are types of labor that are generally *not* considered exempt.

5.0 Meal Break

Farms with employees who work more than 6 hours in a day should review meal break guidelines.

Who gets a meal break?

Any employee who works *more than* 6 hours is entitled to a 30 minute *unpaid* meal break. The meal break does not count towards “hours actually worked” for overtime purposes.

What is required for a meal break?

The employee must be given a break from all work and allowed to leave the work site during the meal break. If the employee stops working but remains at the work site voluntarily, the meal break is not counted as working time.

6.0 Deductions from Wages for Meals and Lodging

Farms providing meals and lodging for workers should consider the following guidelines, which govern wage deductions for meals and lodging.

6.1 What if the employer provides housing?

An employer may deduct part of the cost of lodging from an employee's pay, even if doing so

reduces the employee's earnings below minimum wage. However, such deductions may only be made in the following amounts:

- Up to \$35 per week for a room occupied by one person.
- Up to \$30 per week for a room occupied by two persons.
- Up to a sum not exceeding \$25 per week for a room occupied by three or more persons.

6.2 What if the employer provides meals?

An employer may deduct part of the cost of meals from an employee's pay, even if doing so reduces the employee's earnings below minimum wage. However, deductions are only allowed up to \$1.50 for breakfast, \$2.25 for lunch, and \$2.25 for dinner. Additionally, these deductions may only be made as follows:

- If an employee is working 3 hours or more, the employer may deduct for **1** meal.
- If the employee's shift covers 2 meal periods, or if the employee works 8 hours or more, the employer may deduct for **2** meals.
- If lodging is provided, or if Commonwealth of Massachusetts Department of Labor Standards grants special permission, the employer may deduct for **3** meals.

6.3 How do lodging and meal deductions work?

To apply lodging and meal deductions, the employer must first give the employee prior written notice describing the lodging or meal plan provided, explaining the amount to be charged to the employee for the lodging or meal, and informing the employee that their acceptance is voluntary. The employee must provide voluntary, written acceptance and must actually receive the lodging and/or meals.

7.0 Unpaid Interns, Volunteers, and Apprentices

Farms seeking to work with unpaid apprentices, interns, or volunteers should review the following requirements.

In general, Massachusetts farms must pay employees at least minimum wage. Farms may allow an individual to work unpaid if the individual constitutes either (1) an intern/trainee or (2) a volunteer. An unpaid apprenticeship program, volunteer program, or other arrangement will be legal only if it falls into one of these categories. The categories are defined in more detail below.

7.1 How does the law define interns and trainees?

Massachusetts minimum wage law creates an exception for "training programs in charitable,

educational or religious institutions.” A farm generally will fall into this category only if it is organized as a non-profit entity.

Internships and training programs are typically interpreted under this exemption. Follow these two steps to determine if an individual is an intern or trainee who is allowed to work without pay.

1. Is the internship or training program run by a charitable, educational, or religious institution?

If the farm is a for-profit entity, then an unpaid training or internship program is not allowed.

If the farm is a non-profit, continue to question 2.

2. Does the internship meet the definition of a “training program”?

The Massachusetts Department of Labor Standards considers the following six factors to decide if an internship qualifies as a “training program” in which individuals may work unpaid. In Massachusetts, these factors will be viewed together and the internship does not necessarily have to meet all six criteria to qualify.

However, where applicable, the federal U.S. Department of Labor requires that *all* six factors be satisfied.

1. The training is similar to that which would be given in an educational environment even though it includes work on the farm.
2. The internship is for the benefit of the trainees.
3. The trainees do not fill the role of regular employees, but work under their close supervision.
4. The employer does not receive an immediate advantage from the activities of the interns, and the employer’s operations may actually be hurt.
5. The interns are not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the interns understand that the interns are not entitled to pay.

If the answer to both of these questions is “yes,” then the farm may utilize unpaid interns/trainees. If not, these farm workers must be paid.

7.2 How does the law define volunteers?

Employers in Massachusetts may allow individuals to provide “volunteer” work unpaid. However, the “volunteer” exemption applies only to charitable and non-profit entities, *not* for-profit entities.

Under Massachusetts and federal law, a “volunteer” is an individual “performing charitable activities for not-for-profit organizations.” Individuals who work with for-profit entities cannot claim to be unpaid “volunteers” under this standard.

8.0 Independent Contractor/Employee Distinction

Farmers should consider the following when seeking to hire workers as independent contractors. Massachusetts is strict about classifying staff as independent contractors. The state wants to protect employees from being deprived of the benefits enjoyed by employees through being incorrectly classified as independent contractors.

What is an independent contractor?

Under the Independent Contractor Law, workers are presumed to be employees. This matters because an employee, as opposed to an independent contractor, gets the protections of minimum wage and overtime requirements. Misclassification can result in significant criminal and civil liability for the employer.

To prove that a worker is properly treated as an independent contractor, the farm must prove that:

1. The worker is free from the farm's control and direction in performing the service.
Questions to ask: Does the presumed employer have the right to control the hours and location of the work performed?
2. The service is performed outside the usual course of business of the farm.
Questions to ask: Does the worker perform services that are a regular and continuing part of the presumed employer's business?
3. The worker usually works in an independently established trade, occupation, professional or business of the same nature as that involved in the service performed.
Questions to ask: Is the worker capable of performing the service to anyone wishing to use the services? Or is the nature of the business such that the worker must depend upon a single employer for the continuation of the services?

Some common misconceptions

- A worker is *not* an independent contractor just because s/he signed a contract stating that s/he is an independent contractor.
- A worker is *not* an independent contractor just because s/he had an informal agreement or understanding with the employer that s/he would be treated as an independent contractor.
- A worker is *not* an independent contractor just because s/he was issued a Form 1099 rather than a Form W-2.

9.0 Employer Record Keeping Requirements

Farms must follow state record keeping requirements for payroll and possibly more, depending on the number of employees. You can find additional information about business records on the Massachusetts Attorney General's website at <http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/wage-and-hour/records.html>.

9.1 Payroll records

Every employer must retain payroll records, which include each employee's name, address, occupation, rates of pay, hours worked each day and each week, and amount paid each pay period, for at least 3 years.

9.2 Personnel records

Employers of 20 or more employees must maintain personnel records for each employee for 3 years after termination of employment. The personnel record must contain the following information regarding the employee:

- Name, address, date of birth, job title and description;
- Rate of pay and any other compensation paid to the employee;
- Starting date of employment;
- The job application of the employee;
- Resumes or other forms of employment inquiry submitted to the employer in response to his advertisement by the employee;
- All employee performance evaluations, including but not limited to, employee evaluation documents;
- Written warnings of substandard performance;
- Lists of probationary periods;
- Waivers signed by the employee;
- Copies of dated termination notices; and
- Any other documents relating to disciplinary action regarding the employee.

9.3 Records pertaining to discrimination statutes

Employers with 15 or more employees must maintain personnel or employment records, including requests for reasonable accommodation, application forms and other records regarding hiring, promotion, demotion, transfer, layoff, termination, rates of pay, and selection for training.

9.4 Employment Eligibility Verification (Form I-9)

All employers are required to maintain copies of Form I-9 (Employment Eligibility Verification), for 3 years after the date of hire or 1 year after termination, whichever is later.

10.0 Workers' Compensation Insurance Requirements

All farmers with any employees must comply with workers' compensation insurance requirements.

Workers' compensation insurance requirements

All employers, regardless of number of employees, must maintain workers' compensation insurance for all employees, regardless of the number of hours worked by the employee. In exchange for the employer's compliance with workers' compensation requirements, employees are barred from bringing suit in court for workplace injuries or illness, and the employer's liability is limited.

Owner-employee requirements

If an owner also serves as an employee of the company, the company is required to maintain workers' compensation insurance for the owner. But if an officer or director of a corporation owns at least 25 percent of stock of the corporation, s/he may petition the Massachusetts Department of Industrial Accidents (DIA) to be exempted from the requirement of purchasing workers' compensation insurance for him or herself.

Notification and enforcement

Employers are also required to notify employees of the name of their workers' compensation carrier, and are subject to a \$100 fine if they do not.

If the employer fails to maintain workers' compensation insurance, the MA DIA will issue a "Stop Work Order" and assess the employer a minimum fine of \$100 per day.

11.0 Employee Handbooks

Employee handbooks are not required by law. However, farms may find them useful. This section includes information about the benefits of creating an employee handbook.

What are the benefits of employee handbooks?

Employee handbooks are helpful resources for laying out the policies and practices of the farm. They may also help farms avoid future liability by obtaining employee assent to these on-farm protocols.

What should the handbook include?

Helpful items to include in an employee handbook include the following:

- Policies for missing work due to doctor appointments, child care, etc., time off/vacation, family and medical leave, and others;
- Dress and hygiene code;
- Policies for substance and alcohol use;
- Protocol for addressing harassment, discrimination, etc.;
- Payroll practices and compensation policy;
- Health and safety matters; and
- Confidentiality requirements.

What should an employer consider when drafting an employee handbook?

Best practices for creating and maintaining an employee handbook include the following:

- Include a statement indicating that nothing in the employee manual should be construed as a contract.
- Have the employee sign and date a statement in which they acknowledge that they have received and reviewed a copy of the employee handbook.
- Indicate that the employment relationship is entirely “at will,” which means that employment may be terminated for any reason.
- Ensure that the policies in the employee manual are properly worded so they are in full compliance with applicable laws, and have the manual reviewed by an attorney.
- Include a statement that the employer has the right to change the handbook at any time, without notice.
- Consider whether the handbook should be translated into other languages.

This document is a compilation of various topics, is intended as a general discussion of the topics covered, and does not constitute the rendering of legal advice or other professional advice by its authors. If any reader of this booklet has questions about the topics addressed in the document or other legal topics, s/he should seek the advice and counsel of their own attorney.