



FARM & FOOD LAW:

A Guide for Lawyers in the Legal Food Hub Network

Connecticut Edition

Prepared by the Ludwig Center for Community &
Economic Development at Yale Law School for
Conservation Law Foundation



Yale Law School



LEGAL FOOD HUB

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Conservation Law Foundation

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LEGAL DISCLAIMER

The legal information contained herein does not constitute individualized legal advice upon which readers may rely. Readers should consult with an attorney for individualized legal advice and neither take nor refrain from action based on information in this Guide.

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INTRODUCTION Agriculture in Connecticut and throughout the United States is at a crossroads.

As a result of growing concerns about the environmental, economic, and health impacts of our food system, there is rising consumer interest in purchasing from local producers. A diverse group of farmers and food entrepreneurs, including many young and beginning farmers, have nimbly adjusted to the rising demand for fresh, local, and sustainably produced food.¹ However, farmers and food producers face a variety of laws, regulations, and business challenges. Many new, primarily small-scale, farmers and food entrepreneurs cannot afford legal assistance at the rates usually charged in Connecticut. In response, Conservation Law Foundation's (CLF) Legal Food Hub (Hub) has gathered members of the legal community who are interested in providing much-needed pro bono counsel to local, small-scale farmers and food entrepreneurs.

For some of these interested attorneys, serving farm and food clients may be a new endeavor. They may be unfamiliar with agriculture and food-specific laws, as well as the cultural and business realities of farm life. Although farm and food clients share much in common with other clients seeking business and legal advice, their distinctive characteristics present new and exciting opportunities to the legal community. By familiarizing themselves with

this nuanced industry, attorneys that do not specialize in food and agricultural law will most certainly feel better equipped to effectively advise or advocate for small-scale farmers and food entrepreneurs.

Only 10 percent of surveyed farmers used legal services; in contrast, nearly 70 percent of small businesses did so.

Source: Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013).

Similarly, many small-scale farmers and food entrepreneurs are unfamiliar with attorneys and the practice of law. Often, transactional legal counseling could significantly benefit farmers and their businesses, yet they commonly do not seek out legal services. Only 10 percent of surveyed farmers used legal services; in contrast, nearly 70 percent of small businesses did so.² When asked why they did not seek legal advice, farmers responded that they did not think attorneys understood the industry well enough to be of service or that they did not believe that attorneys could actually be of any help.³ This sentiment illustrates the disconnect that currently exists between the agricultural and the legal sectors. The extraordinarily high cost of legal services compounds this problem. In Connecticut, the 2012 annual average net cash income of farms was only \$4,278 (this includes all farms operating at a loss as well as those earning a profit).⁴ Agriculture is also an economically

¹ *News Release: 2012 Ag Census Reveals New Trends in Farming*, U.S. DEP'T OF AGRIC. (last modified May 25, 2017), http://www.agcensus.usda.gov/Newsroom/2014/05_02_2014.php; U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE, DEMOGRAPHICS OVERVIEW, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demographics/demographics.pdf.

² See Rachel Armstrong, *Business as Unusual: Building the New Food Movement with Business Law*, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013), <http://vimeo.com/80411482>. See also Endres, A. Bryan et.al., *The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey*, MONTANA L. REV. 71 (2010) (to better understand farmers' need for legal services and targeted educational programming, the authors, with the support of several cooperating organizations, conducted a family farm legal needs survey of Illinois farmers in 2007).

³ See Armstrong, *supra* note 2.

⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT STATE DATA, TABLE 5. NET CASH FARM INCOME OF THE OPERATIONS AND OPERATORS: 2012 AND 2007,

risky industry. Farmers make substantial financial investments whose returns depend on factors out of their control, such as the weather, natural disasters, and fluctuating local and global markets. This inherent vulnerability can have direct and often adverse effects on the income of small-scale farmers and food entrepreneurs. As a result, many farmers with businesses of the size and scale commonly found in Connecticut are unable to afford legal assistance.⁵

ABOUT THE LEGAL FOOD HUB Because of the lack of legal services for small-scale farmers and food entrepreneurs who participate in local and regional food systems, the CLF created the Legal Food Hub.⁶ The Hub brings together attorneys in Connecticut who want to provide pro bono legal assistance to farmers, food entrepreneurs, and food-justice oriented community organizations. The Hub not only serves to connect attorneys to clients, but through *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* also seeks to supply resources for attorneys as they provide legal counsel to this new group of clients. For up to date information on income eligibility for pro bono services offered by the Hub, visit www.legalfoodhub.org.

ABOUT THE CONSERVATION LAW FOUNDATION CLF is a non-profit environmental advocacy group based in New England.⁷ CLF believes that a thriving New England means a thriving local food system, as the region's communities, environment, and economy depend on it. CLF's Farm and Food Initiative is building on CLF's long track record of successful policy reform in New England by developing and advancing local, state, regional, and national policy reforms that better support farm and food enterprises and reduce legal hurdles for sustainable agricultural production in New England. CLF works with farmers, food entrepreneurs, consumers, and other stakeholders to provide the legal and policy scaffolding to construct a robust regional food system.

ABOUT THIS GUIDE The Ludwig Center for Community & Economic Development and the Environmental Protection Clinic, both housed at Yale Law School, collaborated with CLF to create the Connecticut Edition of *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network*. The purpose of this guide is to help attorneys build successful relationships with small-scale farmers and food entrepreneurs in Connecticut, as well as other food-related businesses, nonprofit organizations, and community groups. The Connecticut Edition builds off of the Maine and Massachusetts Editions of *Farm & Food Law*, created by the Harvard Food Law & Policy Clinic and the University of Maine School of Law, respectively. This guide provides a vocabulary and working knowledge of common legal issues encountered by participants in Connecticut's local food economy.

https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_004_005.pdf.

⁵ See Armstrong, *supra* note 2.

⁶ LEGAL FOOD HUB, <http://www.legalfoodhub.org>.

⁷ CONSERVATION LAW FOUNDATION, <http://www.clf.org>.

Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network is a work in progress and will be updated to include new chapters and respond to the needs of Hub attorneys. **The Connecticut Edition focuses primarily on the legal needs of farmers;** future editions will also focus on the legal needs of food entrepreneurs.

Using this Guide *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* is intended to serve as a reference for attorneys. Although *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* can be read in its entirety, each chapter is meant to be its own standalone document. Where appropriate, *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* directs the reader to other relevant chapters.

What's Inside? *Farm & Food Law: A Guide for Lawyers in the Legal Food Hub Network* includes nine chapters. Each chapter aims to describe small-scale farming and food business practices in Connecticut, identify relevant food and agricultural laws, and list references for more in-depth information. The Connecticut Edition contains the following chapters:

- **Chapter I: Connecticut Farming and Local Food Economy** This chapter provides the reader with demographic information about farmers and agriculture in Connecticut. Based on the United States Department of Agriculture's 2012 Census of Agriculture, this chapter helps attorneys understand the agricultural context in which they are working.
- **Chapter II: Business Structures** This chapter focuses on and evaluates the different business structures farmers may choose for their farm operations.
- **Chapter III: Food Safety** This chapter introduces the attorney to a few of the main food safety laws and standards governing the production and handling of produce in the United States. Although Hub attorneys may not be helping farmers with food safety compliance, the topic is on farmers' minds and attorneys need a working knowledge of the issues.
- **Chapter IV: Farm Transitions** This chapter discusses the farm transition process, which includes estate planning and farm transfer issues. This chapter highlights issues of concern common among farmers and provides solutions to address those concerns.
- **Chapter V: Farmland Acquisition** This chapter outlines how attorneys volunteering with the Hub can help farmers to evaluate farmland acquisition options, as well as the advantages and disadvantages of different options.
- **Chapter VI: Bankruptcy** This chapter, brand new to the *Farm & Food Law* series, examines farm-specific Chapter 12 bankruptcy and provides an overview of the various bankruptcy choices available to farm businesses.
- **Chapter VII: Taxation** This chapter highlights federal and state tax laws that apply uniquely or are especially relevant to farm businesses, and it discusses some common topics in farm taxes.
- **Chapter VIII: Intellectual Property** This chapter examines copyright, patent, and trademark issues that farmers may encounter, as well as unfair trade practices and trade secrets.

- **Chapter IX: Labor & Employment** Another new addition to the *Farm & Food Law* series, this chapter covers federal and state employment laws and includes a discussion about fair labor practices.

Small-scale farmers and food entrepreneurs in Connecticut are part of a robust movement to enrich their local food economies as well as their communities. In order to do this, new relationships must be established. Attorneys in Connecticut who wish to serve these clients can be part of this dynamic and truly homegrown initiative through the Legal Food Hub.

CHAPTER I: CONNECTICUT FARMING AND LOCAL FOOD ECONOMY

An understanding of the nature of Connecticut agriculture is necessary in order to effectively advise or advocate for small-scale farmers and food entrepreneurs, as well as other food-related businesses, non-profit organizations, and community groups. This chapter lays out some of the basic information relevant to farming and the local food economy in Connecticut.

OVERVIEW Attorneys who wish to serve farmers and food entrepreneurs in Connecticut should first understand the agricultural context in which they are working. This chapter discusses the location, size, demographics, and organization of Connecticut farms, including aquacultural operations. It also examines which agricultural products are grown and produced in Connecticut, and it touches on some of the farming techniques used to bring about those products. Finally, this chapter closes with a summary of the marketing and sales strategies that small-scale farmers and food entrepreneurs use.¹

1. Geographical and Social Structures Connecticut Farms This section provide a general overview of farms in Connecticut, such as their location, their size, their demographics, and their organization structures.

2. Agricultural Products and Farming Techniques This section provides a general overview of the scope and variety of common agricultural products and farming techniques that Connecticut producers use.

3. Marketing and Selling Agricultural Products This section provides an overview of the marketing and sales strategies Connecticut farmers use to connect their products with consumers.

GEOGRAPHICAL AND SOCIAL STRUCTURES OF CONNECTICUT FARMS

According to the 2012 Census of Agriculture, there are 5,977 farms² in Connecticut, spanning 436,539 acres and accounting for 12 percent of the state's total landmass.³ The average farm is seventy-three acres,⁴

¹ The United States Department of Agriculture (USDA) administers the Census of Agriculture every five years. The census provides a comprehensive, uniform record of every U.S. farm and ranch operation in the United States, containing information related to demographics, geography, finances, production practices, land use, and ownership. The most recent edition is the 2012 Census of Agriculture. The results were published in February 2014 and are the most recent data available. See U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, INTRODUCTION VIII (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usintro.pdf.

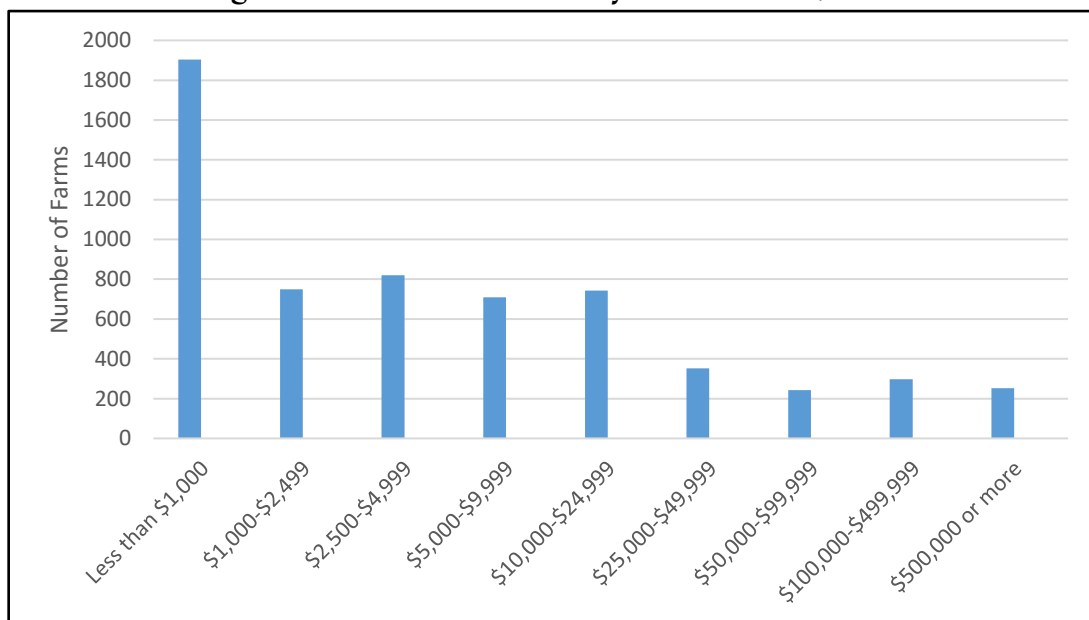
² The USDA defines "farm" on the census as "any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year." *Id.* Originally established in 1850, this definition has been updated nine times since then, with the current definition first used in the 1974 Census of Agriculture. *Id.*

³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 1: HISTORICAL DATA (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_01_001.pdf [hereinafter "CONNECTICUT HISTORICAL DATA"].

⁴ *Id.*

substantially smaller than the national average of 434 acres.⁵ About 30 percent (1,768) of Connecticut farms are between one and nine acres, and more than 40 percent (2,403) are between ten and forty-nine acres.⁶ Based on revenue alone, more than 92 percent of Connecticut farms classify as “small farms,” which are farms with annual sales of less than \$350,000.⁷ To be eligible for pro bono legal services through the Legal Food Hub (the Hub), a farmer or food entrepreneur must meet the following income criteria: (1) the farm or food enterprise’s net annual sales must not exceed \$30,000; **and** (2) the farmer or food entrepreneur’s annual household income must not exceed 400 percent of the Federal Poverty Level; **and** (3) the farm or food enterprise must have annual revenue of at least \$5,000 in the prior tax year **or** have started operating within the last three years. Of the state’s 5,977 farms, 82 percent (4,924) of them bring in less than \$25,000 in average annual sales.⁸

Figure 1. Connecticut Farms by Value of Sales, 2012⁹



Farms are operated throughout all of Connecticut, with the greatest number of them in Litchfield County (20.2 percent) and New London County (15.9 percent) and the fewest in Fairfield County (7.3 percent).¹⁰

Despite there being farmland across the entire state, it is becoming increasingly difficult for new and beginning farmers to gain access to that land. Connecticut farmland had an average real estate value of \$11,200 per acre

⁵ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, TABLE 1: HISTORICAL DATA 7 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf [hereinafter “U.S. HISTORICAL DATA”].

⁶ CONNECTICUT HISTORICAL DATA, *supra* note 3.

⁷ *Id.*; U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, U.S. DATA, FARM TYPOLOGY III (2014), http://agcensus.usda.gov/Publications/2012/Online_Resources/Typology/typology13.pdf (defining “small farm”).

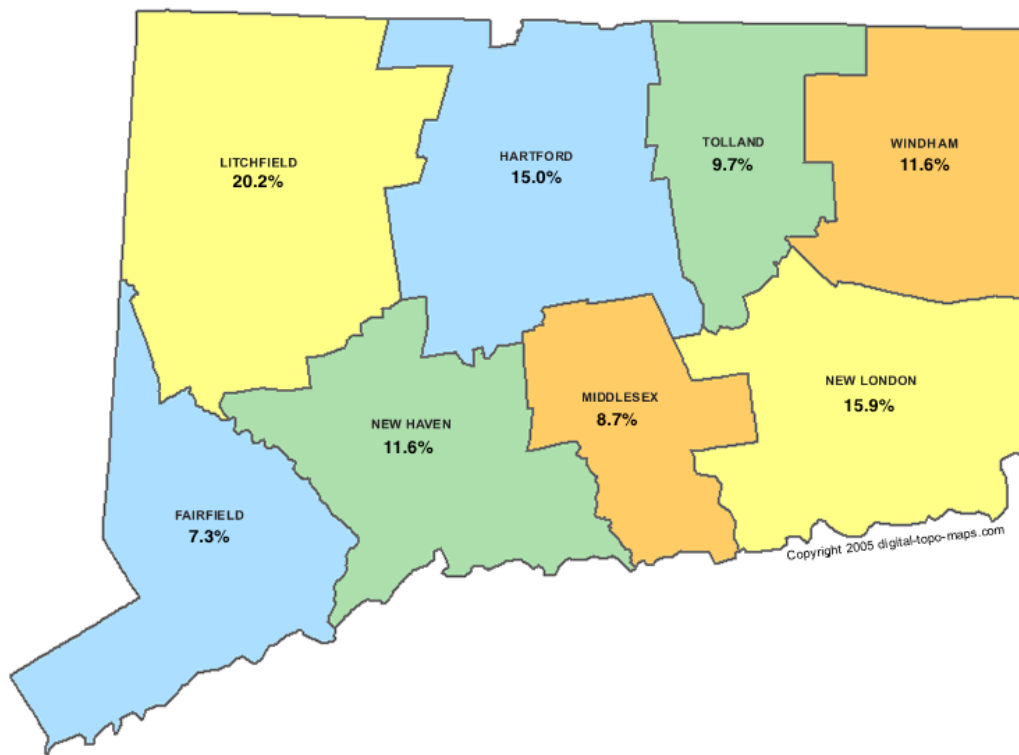
⁸ CONNECTICUT HISTORICAL DATA, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

in 2017, substantially higher than the national average (\$3,080) and third only Rhode Island (\$13,800) and New Jersey (\$12,800).¹¹ Notably, Connecticut farmland is also significantly more expensive than New England's average of \$7,577, an important consideration for young and beginning regional farmers.¹² Nevertheless, the regional average is still more than double the national average, and these steep prices have made it extremely difficult for new and beginning farmers to obtain farmland.¹³

Figure 2. Percentage of Farms in Connecticut by County, 2012¹⁴



These rising values continue as farmland becomes scarcer. In the past three decades, every New England state has seen at least a 10-percent reduction in farmland, with Connecticut and New Hampshire losing the most (13 percent).¹⁵ This has also coincided with a reduction in the size of farms. Between 2002 and 2012, the average size of farms dropped 14 percent, from eighty-five acres to seventy-three acres, resulting in rising farmland values as land once available for farming is lost to development or other uses.¹⁶

¹¹ U.S. DEP'T OF AGRIC., LAND VALUES 2017 SUMMARY 8–9 (Aug. 2017), <http://www.usda.gov/nass/PUBS/TODAYRPT/land0817.pdf> [hereinafter “USDA 2017 LAND VALUES”].

¹² *Id.*

¹³ American Farmland Trust et al., *New England Food Policy: Building a Sustainable Food System* 1 (Mar. 2014), http://www.clf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULL.pdf.

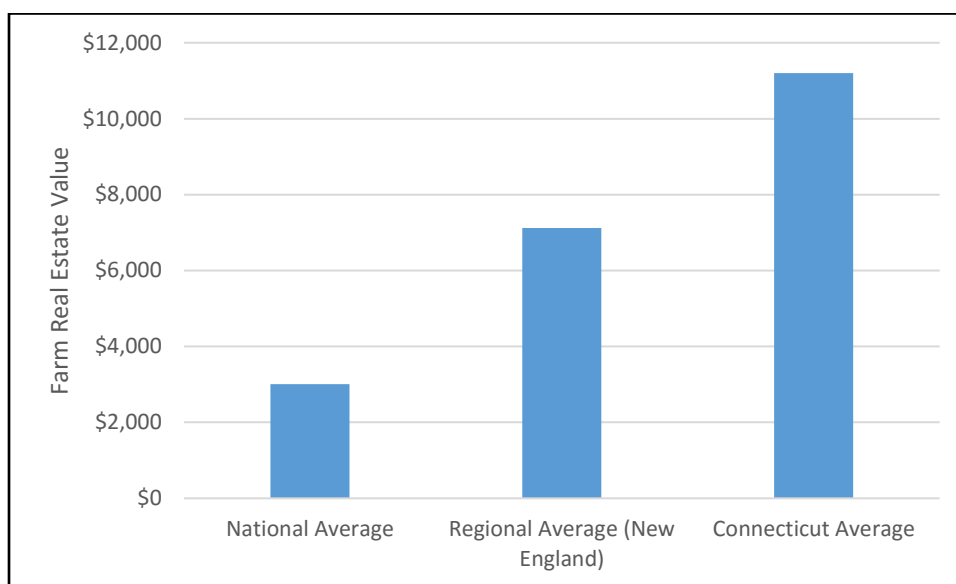
¹⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT COUNTY DATA, TABLE 1: COUNTY SUMMARY HIGHLIGHTS (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Connecticut/st09_2_001_001.pdf.

¹⁵ *Id.*

¹⁶ *Id.*; CONNECTICUT HISTORICAL DATA, *supra* note 3.

Conservation efforts have played an important role in preserving Connecticut farmland. Between 2007 and 2012, Connecticut farms may have become smaller, but the total amount of farmland increased by about 7 percent.¹⁷ The Connecticut Farmland Trust (CFT) is a land trust that partners with statewide organizations and governmental entities at all levels to protect family farms through agricultural conservation easements.¹⁸ It is Connecticut's only statewide farmland trust. Since its inception in 2002, CFT has managed to protect forty-two farms through its easement program.¹⁹ When CFT acquires an easement, it is able to sell the land to a young or beginning farmer at a reduced price.²⁰ There is an acute need for farm transfer planning in order to ensure that farmland remains in agricultural production. This topic is discussed in more depth in Chapter IV of the Guide.

Figure 3. Farm Real Estate Average Value per Acre, 2012²¹



Even with the rising costs to obtain increasingly scarce farmland, Connecticut has managed to grow its number of total farms. In 1997, Connecticut recorded 4,905 farms, and by 2012 it had recorded 5,977, an increase of 22 percent,²² which is well above New England's total average of 13 percent.²³ Meanwhile, across the United States, farms have been vanishing. During the same period, the country lost 5 percent of its

¹⁷ *Id.*

¹⁸ *Our Mission*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/about-2/mission>. For a map and list of these protected farms, see *What We Do*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/what-we-do-2>.

¹⁹ *Protected Farms*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/protected-farms>.

²⁰ *Preserving Connecticut's Working Lands*, CONN. FARMLAND TRUST, <http://ctfarmland.org/site/wp-content/uploads/2013/04/CFT-Brochure.pdf>.

²¹ USDA 2017 LAND VALUES, *supra* note 12.

²² CONNECTICUT HISTORICAL DATA, *supra* note 3.

²³ Maine grew by 10 percent, Massachusetts grew by 6 percent, New Hampshire grew by 12 percent, Rhode Island grew by 25 percent, and Vermont grew by 4 percent. See *2012 Census Publications: Census by State*, U.S. Dep't of Agric. (May 31, 2017), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Census_by_State (select an individual state, select "State," and then select "Table 1").

farms.²⁴ Thus, the New England region, especially Connecticut, has defied the national trend and seen a boost to its local farms. Given Connecticut's surge, the state will likely experience continued interest in farming opportunities.

About 75 percent of the 5,977 farm operators are male (4,472) and about 25 percent of them are female (1,505).²⁵ Of all 9,718 farm operators, the vast majority of them are white (99 percent),²⁶ and the average age of the principal operator is 58.7 years old, an increase of more than six years since 1982.²⁷ The principal farm operator is not necessarily the farm owner. Instead, that person may be the hired manager, cash tenant or share tenant, or a partner.²⁸ Although the USDA most recently began collecting information for up to three operators per farm, each respondent to the Census of Agriculture must identify the principal farm operator. Accordingly, the operator information in the Census of Agriculture generally reflects the demographics of the principal farm operator, but some information about all farm operators is available.²⁹

Nevertheless, it is evident that a growing number of farmers in Connecticut are classified by the USDA as "beginning" farmers. Beginning farmers are those who have operated a farm for ten years or fewer either by themselves or with others.³⁰ The 2012 Census of Agriculture reported that 1,252 principal farm operators had been operating any farm for fewer than ten years; thus, more than 20 percent of all farms in the state are operated by beginning farmers.³¹ Most principal operators have off-farm jobs, with nearly 54 percent reporting a non-farming primary occupation and 80 percent reporting earning less than 25 percent of their total household income from farming.³²

Most Connecticut farms operate as sole proprietorships owned by a family or an individual (78 percent).³³ A

²⁴ U.S. HISTORICAL DATA, *supra* note 5.

²⁵ U.S. DEP'T OF AGRIC., 2016 STATE AGRICULTURE OVERVIEW: CONNECTICUT (2016), http://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=CONNECTICUT.

²⁶ *Id.*

²⁷ CONNECTICUT HISTORICAL DATA, *supra* note 3.

²⁸ About 5 percent of principal farm operators are hired managers, about 7 percent are tenants, and about 16 percent are part owners. U.S. DEPT. OF AGRIC., 2012 CENSUS OF AGRICULTURE, TABLE 60: SELECTED FARM CHARACTERISTICS BY RACE OF PRINCIPAL OPERATOR (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_060_060.pdf.

²⁹ See *Farm Household Well-Being: Glossary*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. (Sept. 1, 2017), <http://www.ers.usda.gov/topics/farm-economy/farm-household-well-being/glossary>. For data related to non-principal farm operators, see U.S. DEPT. OF AGRIC., 2012 CENSUS OF AGRICULTURE, TABLE 55: SELECTED OPERATOR CHARACTERISTICS FOR PRINCIPAL, SECOND, AND THIRD OPERATOR (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_055_055.pdf.

³⁰ *Beginning and Disadvantaged Farmers: Background*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/farm-economy/beginning-disadvantaged-farmers/background>.

³¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT STATE DATA, TABLE 64: SUMMARY BY SIZE OF FARM (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_064_064.pdf.

³² *Id.*

³³ CONNECTICUT HISTORICAL DATA, *supra* note 3.

small proportion are partnerships (10 percent) or corporations (9 percent).³⁴ Cooperatives, estates, trusts, and institutional farms represent only 3 percent of all Connecticut farms.³⁵ This topic is discussed in more depth in Chapter II of the Guide.

Aquaculture also plays an important role in the state's food industry. In 2012, Connecticut's 39,559 acres of mollusk farms accounted for 29 percent of the total mollusk farming acreage in the United States, second only to Louisiana.³⁶ The Connecticut shellfish industry generates more than \$30 million in net revenue for the state and more than 300 statewide jobs.³⁷ By far, Connecticut aquaculture consists of saltwater, rather than freshwater, beds.³⁸ The vast majority (80 percent) of saltwater aquacultural farmers lease the land on which they farm.³⁹ The Connecticut Department of Agriculture administers a leasing program through which shellfish farmers may competitively bid to obtain underwater land on the shores of Long Island Sound for planting, cultivating, and harvesting shellfish.⁴⁰ In 1981, the Connecticut legislature amended the definition of "agriculture" to include aquacultural activities, thus granting shellfish farmers, as well as other aquacultural farmers, rights to the same benefits as land-based farmers.⁴¹

AGRICULTURAL PRODUCTS AND FARMING TECHNIQUES

Diversity is a defining characteristic of Connecticut agriculture. Farms grow and sell a variety of products, and small-scale farmers and food entrepreneurs typically engage in many different farming activities. Of all Connecticut farmland, 34.6 percent is in cropland, 33.1 percent is in woodland, 9.1 percent is in permanent pasture, and 23.2 percent is infrastructure such as farmsteads, buildings, livestock facilities, ponds, roads, and wasteland.⁴² About 63 percent of Connecticut farms contain croplands actually harvested, the greatest concentration of which are in farms with fewer than 50 acres (54 percent).⁴³ As such, the state's smallest farms maintain the state's most harvested croplands.

³⁴ *Id.*

³⁵ *Id.*

³⁶ U.S. DEP'T OF AGRIC., 2013 CENSUS OF AQUACULTURE, TABLE 12: METHODS USED FOR AQUACULTURE PRODUCTION 20 (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Aquaculture/Aqua.pdf [hereinafter "AQUACULTURE PRODUCTION METHODS"].

³⁷ *Connecticut Shell Fishing Industry Profile*, CONN. DEP'T OF AGRIC. (Jan. 10, 2011), <http://www.ct.gov/doag/cwp/view.asp?a=1369&q=316994>.

³⁸ In 2013, the state recorded three freshwater farms and twenty-five saltwater farms. U.S. DEP'T OF AGRIC., 2013 CENSUS OF AQUACULTURE, TABLE 10: FRESHWATER AND SALTWATER ACRES USED FOR AQUACULTURE PRODUCTION (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Aquaculture/Aqua.pdf.

³⁹ *Id.*

⁴⁰ *Id.*

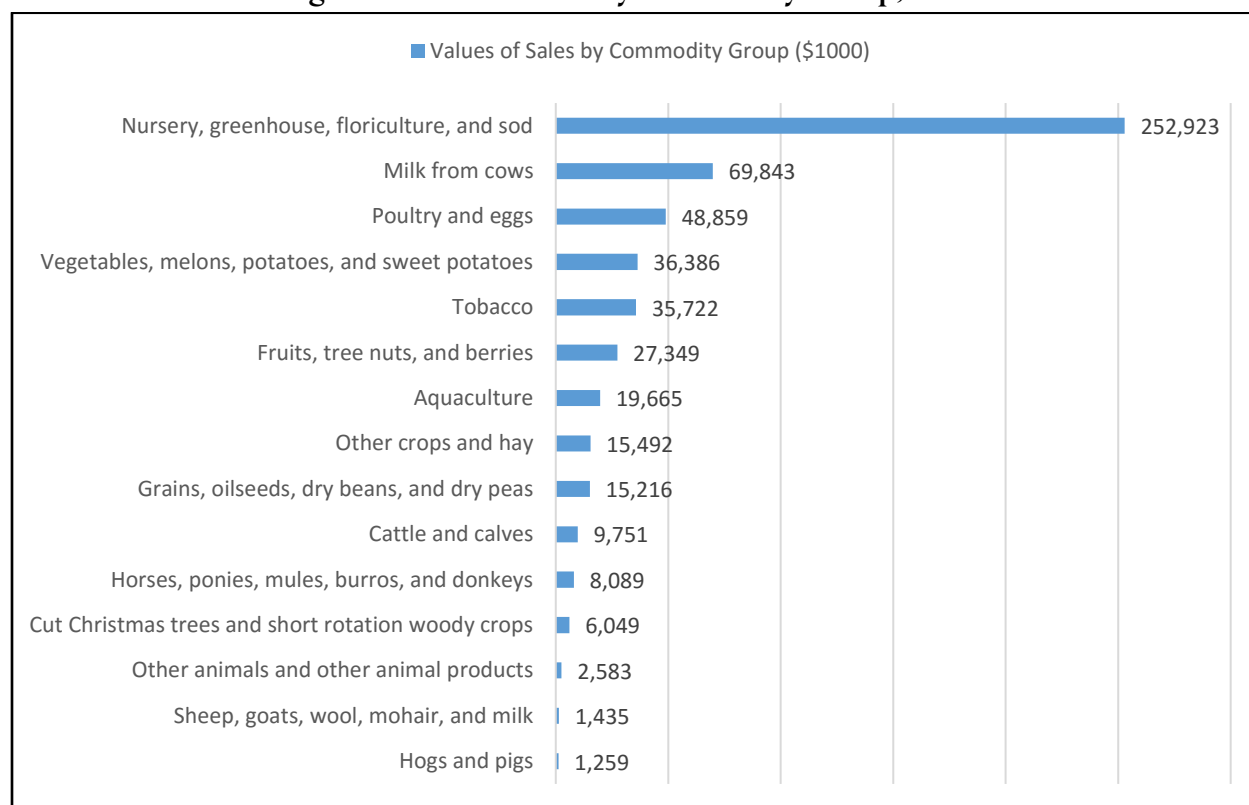
⁴¹ TESSA S. GETCHIS ET AL., A GUIDE TO MARINE AQUACULTURE PERMITTING IN CONNECTICUT § 1.1 (2008), <http://media.ctseagrant.uconn.edu/publications/aquaculture/permitguide.pdf>.

⁴² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 8: LAND (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_08_008.pdf.

⁴³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 65: SUMMARY BY MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_065_065.pdf [hereinafter "CONNECTICUT MARKET VALUE"]. For a definition of croplands, see U.S. DEP'T OF AGRIC., 2012 CENSUS

The top five crops, based on total acreage, are (1) hay, grass silage, and greenchop; (2) corn for silage; (3) vegetables; (4) corn for grain; and (5) cut Christmas trees.⁴⁴ Despite the amount of land devoted to these crops, these products do not necessarily generate the highest sales. Hay and other grass silage, for example, are produced on 31 percent of farms, making them the most commonly grown crop category in the state. While they have numerous uses on the farm and require much more acreage than other crops, the market value of these crops (“other crops and hay”) accounted for only 2.8 percent of the total market value of agricultural products sold.⁴⁵

Figure 4. Value of Sales by Commodity Group, 2012⁴⁶



OF AGRICULTURE, APPENDIX B: GENERAL EXPLANATION AND CENSUS OF AGRICULTURAL REPORT FORM 21 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf.

⁴⁴ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 37: SPECIFIED CROPS BY ACRES HARVESTED (2014),

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_037_037.pdf. For figures on cut Christmas trees, see U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 42: WOODLAND CROPS (2014),

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_042_042.pdf.

⁴⁵ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 2: MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING LANDLORD’S SALE AND DIRECT SALES (2014),

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_002_002.pdf [hereinafter “CONNECTICUT MARKET VALUE”].

⁴⁶ CONNECTICUT MARKET VALUE, *supra* note 49.

Based on total sales, the top five crops are (1) nursery, greenhouse, floriculture, and sod; (2) milk from cows; (3) poultry and eggs; (4) vegetables, melons, sweet potatoes, and potatoes; and (5) tobacco.⁴⁷ Unsurprisingly, Connecticut's total market value of agricultural products sold ranks forty-sixth in the country, although some crop categories are relevantly large, given the state's size. For example, the tobacco industry ranks eighth in the nation, and the nursery and greenhouse industry ranks seventeenth.⁴⁸ Nevertheless, Connecticut brings to market an abundant array of different crops. Typical locally grown crops include apples, peaches, dairy products, beans, corn, cucumbers, peppers, pumpkins, squash, and tomatoes, among many others.

Aquaculture was the seventh largest agricultural product by sales in 2012, and it has been growing since.⁴⁹ Of the 44 aquaculture farms in the state, nearly all of them grow mollusks, particularly hard clams and Eastern oysters.⁵⁰ Connecticut mollusk farmers have been especially productive in recent years. Total market value of mollusks jumped nearly 50 percent between 2012 and 2013, despite an overall reduction in the number of farms.⁵¹ Most mollusk farmers grow oysters and clams in beds on the seafloor, though a few grow them in floating trays, racks and bags, long lines, and rafts.⁵²

Only a handful of aquacultural farmers grow species other than hard clams and Eastern oysters. For example, three farmers have recorded growing trout, one of which also grew carp.⁵³ In 2005, at least one farmer was growing crustaceans, but by 2013 had appeared to stop doing so.⁵⁴ Sea vegetables and other mollusks, such as mussels and scallops, may eventually begin appearing in Connecticut seawater farms,⁵⁵ but, by and large, the state's aquaculture industry is still heavily dominated by clams and oysters.

Connecticut has been a pioneer in supporting food and agricultural interests at all levels of government. In 1997, the Connecticut legislature established the first statewide food policy council in the nation.⁵⁶ Local food policy councils in the state are active in Bridgeport, Hartford, New Haven, New London, and Northwest

⁴⁷ *Id.*

⁴⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, STATE PROFILE: CONNECTICUT (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Connecticut/cp99009.pdf

⁴⁹ *Id.*

⁵⁰ U.S. DEP'T OF AGRIC., 2013 CENSUS OF AQUACULTURE, TABLE 19: MOLLUSK SALES BY SPECIES (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Aquaculture/Aqua.pdf [hereinafter "U.S. MOLLUSK SALES"].

⁵¹ Sales from mollusk farms increased from \$19,665,000 to \$28,297,000 while the number of mollusk farms decreased from 28 to 25. CONNECTICUT HISTORICAL DATA, *supra* note 3 (2012 figure of all aquaculture); U.S. MOLLUSK SALES, *supra* note 52 (listing 2013 figure of all mollusk sales).

⁵² AQUACULTURE PRODUCTION METHODS, *supra* note 42.

⁵³ U.S. DEP'T OF AQUACULTURE, 2013 CENSUS OF AQUACULTURE, TABLE 13: FOOD FISH SALES BY SPECIES (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Aquaculture/Aqua.pdf.

⁵⁴ U.S. DEP'T OF AQUACULTURE, 2013 CENSUS OF AQUACULTURE, TABLE 18: CRUSTACEAN SALES BY SPECIES (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Aquaculture/Aqua.pdf.

⁵⁵ See, e.g., Gregory B. Hladky, *Connecticut's "Vertical Ocean Farmer" Wants to Change World's Food Supply System*, HARTFORD COURANT (Mar. 28, 2016), <http://www.courant.com/news/connecticut/hc-vertical-ocean-farming-20160328-story.html>.

⁵⁶ *Statement of Linda Drake, Chair of the CT Food Policy Council, Before the Appropriations Committee*, CONN. FOOD POLICY COUNCIL (Feb. 17, 2009), [http://www.cga.ct.gov/2009/appdata/tmy/2009HB-06365-R000217-CT%20Food%20Policy%20Council,%20Linda%20Drake%20regarding%20Dept%20of%20AG-TMY%20\(2\).PDF](http://www.cga.ct.gov/2009/appdata/tmy/2009HB-06365-R000217-CT%20Food%20Policy%20Council,%20Linda%20Drake%20regarding%20Dept%20of%20AG-TMY%20(2).PDF)

Connecticut.⁵⁷ These councils have various missions, including advocating for sustainable food systems, building coalitions among the community to cooperatively address food-related issues, and improving access to a variety of safe, nutritious, and affordable food for all residents.

With 104 organic farms totaling \$1.98 million in sales, Connecticut has a thriving organic agriculture sector. The majority (74 percent) of these sales is generated by small farms with net annual sales of less than \$5,000.⁵⁸ In 2016, fifty-seven farms were certified organic by the USDA National Organic Program (NOP),⁵⁹ and in 2015 nine farms were transitioning some acreage to organic certification.⁶⁰ The USDA regulates the labeling term “organic,” which refers to the production of agricultural products in accordance with the Organic Food Production Act and USDA regulations.⁶¹ Generally, organic crops must be produced without genetic engineering, radiation, or sewage sludge; produced using only allowed substances; and overseen by NOP.⁶²

The cost of certifying organic ranges from a few hundred to several thousand dollars, although the USDA may reimburse some of those costs through its cost-sharing programs, including one specifically for New England farmers.⁶³ Nevertheless, because of the potentially high costs and lengthy process associated with organic certification, many farmers are reluctant to seek it.⁶⁴ As such, some farmers use organic growing practices but choose not to get certified. Small farms, however, may permissibly describe their products as “organic” without USDA accreditation, with some limitations, so long as their annual revenue from farming is less than \$5,000 and otherwise following organic production methods.⁶⁵ Of note, women make up 43 percent of the principal operators of organic farms in Connecticut, compared with only 25 percent for all farms.⁶⁶

Urban agriculture is another important aspect of the Connecticut food system, and its presence is growing. Under a USDA grant, University of Connecticut Extension has partnered with farmers and nonprofit organizations to train urban residents in urban agriculture and collaborate with communities to address food

⁵⁷ See *Food Policy Council Map*, JOHNS HOPKINS CENTER FOR A LIVABLE FUTURE, <http://www.foodpolicynetworks.org/fpc-map>.

⁵⁸ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 54: ORGANIC AGRICULTURE (2016), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_053_054 [hereinafter “CONNECTICUT ORGANIC AGRICULTURE”].

⁵⁹ U.S. DEP’T OF AGRIC., CERTIFIED ORGANIC SURVEY 2016 SUMMARY, TABLE 1: FARMS, LAND, AND VALUE OF SALES CERTIFIED ORGANIC FARMS (2017), <http://usda.mannlib.cornell.edu/usda/nass/OrganicProduction//2010s/2017/OrganicProduction-09-20-2017.pdf>.

⁶⁰ U.S. DEP’T OF AGRIC., CERTIFIED ORGANIC SURVEY 2015 SUMMARY, TABLE 1: FARMS, LAND, AND VALUE OF SALES ON CERTIFIED ORGANIC FARMS (2015), <http://usda.mannlib.cornell.edu/usda/nass/OrganicProduction//2010s/2016/OrganicProduction-09-15-2016.pdf>.

⁶¹ 7 C.F.R. § 205.2 (2017) (definition of “Organic”).

⁶² See *Organic Labeling*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/rules-regulations/organic/labeling>.

⁶³ *Organic Certification of Farms and Businesses Producing Agricultural Products*, U.S. DEP’T OF AGRIC. 4 (Nov. 2012), http://www.ams.usda.gov/sites/default/files/media/Guide%20to%20Organic%20Certification_0.pdf; *Organic Certification Cost Share Programs*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/services/grants/ocsp>.

⁶⁴ See, e.g., *Community Supported Agriculture in New Haven, CT*, NEW HAVEN FARMS (2017), <http://www.newhavenfarms.org/new-haven-ct-csa> (“While our produce is not organic-certified (due to the cost of the certification process), we practice organic farming methods.”); *What Is a CSA, Anyway?*, RIVER CREST FARM (2017), <http://www.rivercrestfarm.com/csa> (“All our food is grown using organic methods . . . [but] we are not certified organic (we don’t want to spend the money or do the paperwork) . . .”).

⁶⁵ See 7 C.F.R. § 205.101(a).

⁶⁶ CONNECTICUT ORGANIC AGRICULTURE, *supra* note 66.

insecurity.⁶⁷ These efforts build on the work of many local organizations focused on community development through urban agriculture, such as New Haven Farms in New Haven and KNOX in Hartford. Urban farming is an active area of conversation and strategy-building within the food policy councils of New Haven and Hartford, both of which list urban agriculture among their top priorities.⁶⁸ In recognition of the growing interest in urban agriculture, the Hartford Planning and Zoning Commission amended the language in its city zoning regulations to legitimize urban farms and community gardens.⁶⁹

MARKETING AND SELLING AGRICULTURAL PRODUCTS

Connecticut farmers sell many products directly to consumers through farmers' markets, community-supported agriculture (CSA) operations, community-supported fisheries (CSFs), farm stands, and agritourism. Unlike many other regions in the country, direct-to-consumer food marketing is a defining characteristic of agriculture in Connecticut, and small-scale farmers and food entrepreneurs have had success with these ventures. In 2012, about 24 percent of Connecticut farms (1,420) sold more than \$30 million of agricultural products through direct sales to the public, encompassing 5.5 percent of total agricultural market value.⁷⁰ In addition, 10 percent of Connecticut farms market directly to retail outlets.⁷¹ Nationwide, Connecticut ranks thirteenth for total direct-to-consumer sales, despite being the third smallest state in the country.⁷² With the goal of encouraging state agricultural development, the Connecticut legislature has charged the Commissioner of Agriculture with promoting Connecticut farm products.⁷³ This includes marketing campaigns for "CT-Grown" products; a comprehensive Internet-based list of direct-to-consumer marketplaces, such as farmers' markets and farm stands; and efforts to connect farmers with institutional buyers, restaurants, and grocery stores.

Farmers' markets are central sites for farmers to sell directly to the public. Connecticut has over 100 farmers' markets, nearly all of which are classified as "Certified Farmers' Markets," meaning they only allow the sale of Connecticut-grown farm products.⁷⁴ The market organizers, sometimes called market masters, are separate entities that establish and manage each marketplace.⁷⁵ Fresh vegetables, fruit, eggs, meat, milk,

⁶⁷ *Advancing the Business of Farming in Connecticut*, UNIV. CONN. EXTENSION (Aug. 17, 2016), <http://blog.extension.uconn.edu/2016/08/17/advancing-the-business-of-farming-in-connecticut>.

⁶⁸ *Who We Are*, NEW HAVEN FOOD POLICY COUNCIL, <http://www.feednewhaven.org/vision-mission-and-goals>; *Grow Hartford Urban Farm*, HARTFORD FOOD SYSTEM (2017), <http://www.hartfordfood.org/programs/grow-hartford>.

⁶⁹ 2015 ANNUAL REPORT: RECOMMENDATIONS TO IMPROVE FOOD ACCESS AND FOOD SECURITY, CITY OF HARTFORD ADVISORY COMM'N ON FOOD POL. 5, http://www.hartfordfood.org/wp-content/uploads/2011/09/HACP_2015-Annual-Report_FINAL.pdf.

⁷⁰ CONNECTICUT MARKET VALUE, *supra* note 49.

⁷¹ Gary Keough, *Farming on the Rise in Connecticut*, U.S. DEP'T OF AGRIC. BLOG ARCHIVES (June 12, 2014), <http://www.usda.gov/media/blog/2014/06/12/farming-rise-connecticut>.

⁷² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, STATE DATA, TABLE 2: MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING DIRECT SALES (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_002_002.pdf.

⁷³ CONN. GEN. STAT. § 22-38a (2014).

⁷⁴ 2015 *Connecticut Farmers' Markets*, CONN. DEP'T OF AGRIC., http://ct.gov/doag/lib/doag/marketing_files/2015/fm_listing_for_webstie_04_21_2015.pdf.

⁷⁵ See *Connecticut's Farmers' Markets*, NE. ORGANIC FARMING ASS'N OF CONN. (2017), <http://ctnafa.org/FarmersMarkets.htm>.

honey, maple syrup, and seafood are examples of agricultural food products commonly seen at these markets. Some market organizers, depending on their rules, allow vendors to sell processed foods like breads, cheese, pastries, and jams, and non-agricultural products such as crafts. Food trucks and other mobile kitchens may also be permitted to serve market visitors. Ultimately, there is flexibility in how market organizers coordinate their farmers' markets, and since each market has its own rules, the variation between markets can be quite distinct.⁷⁶

The majority of farmers' markets in Connecticut are associated with the Women, Infant, and Children (WIC) and Senior Farmers' Market Nutrition Program (FMNP). Participating farmers can be certified by the Connecticut Department of Agriculture to accept vouchers from eligible users of these programs. The partnership between WIC and FMNP and farmers' markets serves to increase access to healthy food for low-income households.⁷⁷

CSA operations give the public an opportunity to invest in local agriculture by making a financial commitment to a farm in exchange for a share of the farm's harvest.⁷⁸ Typically, the farmer sells a share to a consumer before the season; in return, the consumer receives a set number of weekly boxes. These boxes can contain fresh produce, bread products (community supported bakery), meat, or fish (community supported fishery), depending on the agreement. CSA agreements provide farmers with necessary upfront capital and a reliable market, and the consumer shares in the risk associated with farming, such as pest outbreaks and variable seasons.⁷⁹ In 2016, Connecticut consumers paid an average of about \$31 per week for CSA boxes and about \$32 per week if the CSA boxes were USDA certified organic.⁸⁰

The content of the boxes varies based on what the farm harvests that week, based on the farm's seasonal output. During bountiful harvests, consumers get the satisfaction of supporting a local business and receiving fresh food, but consumers also assume the risk of receiving less during sparser years. CSA operations may include a volunteer opportunity or even offer work-shares to consumers. This allows consumers to provide in-kind farm help, but it can potentially expose the farmer to increased liability. For example, if a consumer is injured or causes another's injury while providing such help, the farmer may be liable for the resulting injuries.

Another outlet for direct sales to the Connecticut public is a farm-stand. Farm stands are on-farm or near-

⁷⁶ See, e.g., *Vendor Rules*, WETHERSFIELD FARMERS MARKET, <http://wfmarket.org/vendor-rules>; *Monroe Farmers' Market 2016 Regulations and Vendor Agreement*, FARMERS' MARKET MONROE, <http://mwww.monroefarmersmarket.org/uploads/2/6/9/5/26959625/mfm-vendor-rules-2016.pdf>; *2017 Voluntown Farmers' Market Rules & Regulations*, VOLUNTOWN ECON. DEV. COMM'N, <http://www.voluntown.biz/wp-content/uploads/2013/01/2017UPDATEDVoluntownFarmersRULES.pdf>.

⁷⁷ *Connecticut Farmers' Markets*, CONN. DEP'T OF AGRIC., <http://www.ct.gov/doag/cwp/view.asp?a=3260&q=398996>.

⁷⁸ *Connecticut Community Supported Agriculture Listing*, CONN. DEP'T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3243&Q=554296&PM=1>.

⁷⁹ See generally UNIV. CONN. EXTENSION & U.S. DEP'T OF AGRIC., *CSA TOOLKIT: STARTING AND OPERATING A CSA FARM BUSINESS* (2015), http://ctfarmrisk.uconn.edu/index_124_3365016065.pdf.

⁸⁰ Jiff Martin & Anne Page, *2016 Price Study of Community Supported Agriculture Operations in CT*, UNIV. CONN. EXTENSION (2016), http://newfarms.extension.uconn.edu/wp-content/uploads/sites/848/2015/11/2016-CSA-Price-Survey-FINAL_v2.pdf.

farm sale sites typically located along roads that border the farm. Nearby farmers may combine efforts in one farm stand, but generally each stand sells the products of a single farm. There are a multitude of farm stands in every county of Connecticut.⁸¹

Connecticut has many farms open to the public for a variety of attractions and activities, commonly known as agritourism. On-farm activities include pick-your-own fruits and vegetables, winery visits and tastings, hay rides, farm tours, farm dinners, corn mazes, and agricultural festivals, among others.⁸² According to the 2012 Census of Agriculture, 4 percent (237) of Connecticut farms participated in agritourism and recreational services, an increase of 135 percent from 2007, and the average sales resulting from these for each farm totaled \$40,073.⁸³ Thus, agritourism can be a vital revenue stream for many small farms.

CONCLUSION

Connecticut's food system is interdependent and continues to become even more so. From highly varied farming operations to sophisticated consumers who are increasingly attracted to locally grown food, the Connecticut food system abounds with multifaceted relationships. With these relationships, though, comes risk. Understanding the recent trends in this food system, especially with respect to farming, can give an attorney who is unfamiliar with agriculture an informed foundation from which to work when advising or advocating for farmers, food entrepreneurs, or organizations dedicated to food or agriculture. By connecting attorneys to clients and by providing the resources necessary to build effective and sustainable relationships, the Hub seeks to encourage the growth of local-food economies and communities through pro bono legal services. By working with small-scale farmers and food entrepreneurs to tackle their legal challenges, the Hub and its attorney-volunteers contribute to the success of this community and directly support a thriving and resilient Connecticut food system.

RESOURCES

2012 Census of Agriculture, Connecticut State Data

http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/

2013 Census of Aquaculture, United States Data

http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Aquaculture/

⁸¹ *Farm Stand and Stores Listings by County*, CONN. DEP'T OF AGRIC., <http://www.ct.gov/doag/cwp/view.asp?a=3260&q=418062>.

⁸² *Agritourism – Farm Fun in Connecticut*, CONN. DEP'T OF AGRIC., <http://www.ct.gov/doag/cwp/view.asp?A=3260&Q=412796>.

⁸³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 7: INCOME FROM FARM-RELATED SOURCES (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_06_007.pdf.

CHAPTER II: BUSINESS STRUCTURES

Although most farms in Connecticut are sole proprietorships, farmers can benefit from a discussion about how different business structures may accomplish their goals. Depending on which business structure they choose, farmers may be able to limit their liability, reduce their tax burden, transfer their business to the next generation more easily, and increase their ability to access larger markets through co-operative practices.

OVERVIEW This chapter is meant to assist attorneys advising farmers with the business formation of their farms. It provides an overview of the different types of business structures and evaluates them from the perspective of a small-scale farm business.

1. Overview of Business Structures This section introduces the attorney to some of the main issues farmers face when formalizing their businesses, and it includes a discussion of how some of these issues are different from those faced by clients in other businesses.

2. Prevalence of Farm Business Structures in Connecticut and the United States The section provides an overview of the prevalence of various farm business structures available in Connecticut and the United States.

3. Getting Context: Initial Questions to Ask the Farmer This section highlights some questions an attorney should ask the farmer to understand the farmer's operation and to identify those issues that could be addressed by the choice of a particular business structure.

4. Major Factors in Evaluating Different Business Structures This section lists factors attorneys can use to evaluate the various business structures, including ease of formation and management, limiting liability, taxation, ease of transfer, life of entity, and ability to raise capital.

5. Choosing a Business Structure This section discusses the main business structures that farmers use, including sole proprietorships, partnerships, limited liability companies, corporations, and others. Each business structure is evaluated for its usefulness for farmers.

OVERVIEW OF BUSINESS STRUCTURES

There are 5,977 farms in Connecticut.¹ Attorneys often assist in the formation of legal business structures that help businesses thrive. Attorneys can play the same role for farmers. Farmers face issues similar to those faced by an attorney's more traditional business clients, including raising cash, limiting liability, and finding ways to facilitate business transfers. However, some farm issues differ from traditional business clients' concerns.

¹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 1: HISTORICAL HIGHLIGHTS (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_01_001.pdf [hereinafter "CONNECTICUT HISTORICAL DATA"].

For example, attorneys may be accustomed to working for clients whose income is entirely derived from their businesses. In contrast, many farmers use non-farm income to support their farms and households. In the United States, a majority (61 percent) of principal farm operators worked at least one day off the farm per year, and 40 percent of principal farm operators worked 200 days or more off the farm per year.² In 2012, 65 percent of principal farm operators in Connecticut worked at least some days off of the farm, and 42 percent of principal operators worked 200 days or more off of the farm.³ Moreover, 54 percent of Connecticut’s principal farm operators identified their primary occupation as something other than farming.⁴ The average size of a Connecticut farm has steadily decreased in the past thirty-five years, from 118 acres to seventy-three acres.⁵

In addition, the economic profile of farmers in the Legal Food Hub may not mirror an attorney’s traditional clients. For example, 88 percent of Connecticut farms had gross annual sales of less than \$50,000, though the majority of Connecticut farms still made less than \$10,000 in annual sales in 2012.⁶ Only fewer than 3 percent of Connecticut farms recorded gross annual sales of more than \$500,000.⁷ Thus, the risks and costs of various business structures may have different weight for many Connecticut farmers than other business clients.⁸

Finally, assets of farmers may have more protection from creditors than those of other clients. Connecticut exempts “farm animals and livestock feed, which are necessary to the [debtor] in the course of his or her occupation, profession or farming operation” from seizure by an unsecured creditor.⁹ In contrast to other business clients, farmers might have fewer assets solely for personal use because a farmer’s assets, such as vehicles and a residence, may also be used in the operation of the farm. If the farmer files for business

Risk Management on Farms

Farmers have a variety of risk management tools to choose from, including certain formalized business structures. Commodity agricultural operations (that is, those farms growing corn, soy, wheat, etc.) are eligible for an assortment of insurance options (often subsidized by the government), crop subsidies, and even disaster payments, should the weather be especially bad in a given year. However, in Connecticut, commodity crop operations are rare; less than 1 percent of farms report growing corn or wheat for grain. Many more produce livestock, foliage, or specialty crops (such as fruits, vegetables, and nuts). While insurance options and disaster payments are available for smaller-scale specialty crop producers, the programs are more limited and more expensive on a per-unit basis. Diversification of the farm operation (in terms of crops and market outlets) and smart business structure formation are important tools for these smaller-scale producers.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ To be eligible for pro bono legal services through the Legal Food Hub (the Hub), a farmer or food entrepreneur must meet the following income criteria: (1) the farm or food enterprise’s net annual sales must not exceed \$30,000; **and** (2) the farmer or food entrepreneur’s annual household income must not exceed 400 percent of the Federal Poverty Level; **and** (3) the farm or food enterprise must have annual revenue of at least \$5,000 in the prior tax year **or** have started operating within the last three years.

⁹ CONN. GEN. STAT. § 52-352b(b) (2015).

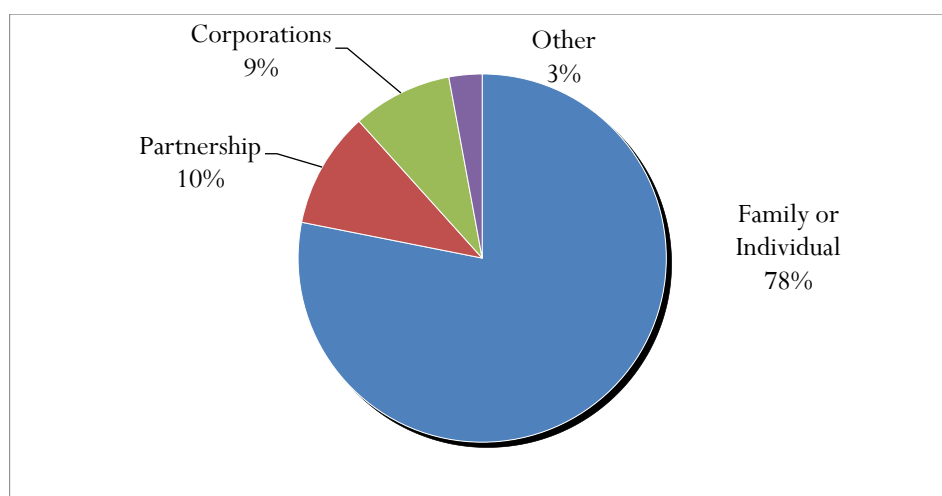
reorganization, the bankruptcy judge may avoid seizing those assets that the farmer needs to make a living. See the Chapter VI for more detail on this process.

Still, farmers have many reasons to formalize their business. First, formalized structures can help farmers transfer the farm to the next generation. For instance, the business may be structured to grant multiple farm operators control over the farming operation and thus allow assets, as well as knowledge, to more easily transfer between generations. A formalized business structure can also bring order to decision-making, compensation, and dissolution. Second, farmers may participate in a multi-farm endeavor and may wish to segregate various farms' assets. Third, farmers may use a variety of business structures to segregate assets within a single operation. For instance, farmers might be advised to hold land independently from the rest of their business. Additionally, given the diversified revenue sources on Connecticut farms, farmers may engage in non-production activities, such as agritourism, wholesale distribution, processing, or retail operations, and they may want to structure those higher-risk activities as separate businesses to limit various liabilities.

PREVALENCE OF FARM BUSINESS STRUCTURES IN CONNECTICUT AND THE UNITED STATES

The vast majority (87 percent) of farms in the United States operate as sole proprietorships.¹⁰ In Connecticut, 78 percent of farms are sole proprietorships—their legal status for tax purposes is family or individual.¹¹ As for the rest, 10 percent are taxed as partnerships, 9 percent are taxed as corporations, and 3 percent are taxed as others.¹² (The 2012 Census of Agriculture categorized farms as individual, partnership, corporation, or other. The data reported reflect those categories, though the Guide covers a wider range of structures.)

Figure 1. Connecticut Farms by Legal Status in 2012¹³



¹⁰ CONNECTICUT HISTORICAL DATA, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

| United States Farms by Legal Status ¹⁴ | | | |
|---------------------------------------------------|-------------------|-------------------|-------------------|
| | 2012 | 2007 | 2002 |
| Total Number of Farms | 2,109,303 | 2,204,792 | 2,128,982 |
| Family or Individual | 1,828,946 (86.7%) | 1,906,335 (86.5%) | 1,909,598 (89.7%) |
| Partnership | 137,987 (6.5%) | 174,247 (7.9%) | 129,593 (6.05%) |
| Corporations | 106,746 (5.1%) | 96,074 (4.3%) | 73,752 (3.5%) |
| Co-operative, Estate, or Trust | 35,654 (1.7%) | 28,136 (1.3%) | 16,039 (0.75%) |

GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE FARMER

The attorney's first task when serving farmers will often be to identify the most useful business structures. To provide informed advice, an attorney must understand the current business operation, including goals, challenges, and liabilities. A farmer's priorities may vary. Is the farmer's goal to limit the farm's potential liability? Does the farmer want to reduce taxes? Or, would the farmer like to expand the farm operation by selling to grocery stores or through a community support agriculture (CSA) operation? The attorney's questions and farmer's answers can serve two purposes. First, they increase the attorney's understanding of client's situation. Second, they help the farmer identify and organize their operational priorities.

Attorneys should ask farmers questions about the following topics. These questions may not always directly relate to structure formation; however, they provide an opportunity for attorneys to learn about the farm's risks and opportunities, which will help inform the attorney's guidance.

- **Ownership and Management:** Who will be participating in the management of the farm operation? Who owns the farm business? Who might gain or lose farm ownership in the future?
- **Land:** Who owns the land? Are there any mortgages or liens on the land? Does anyone lease or sub-lease the land? What are the terms of the leases and mortgages? Does the farmer hope to purchase land in the future? Are there any easements or other preservation restrictions on the land? Is the land owned by a farmland trust?
- **Employees:** Does the farmer have any employees? How many? Are the employees also family members of the farmer? Does the farmer consider any of the people working on the farm to be interns, volunteers, or independent contractors?
- **Collaborative Practices:** Does the farmer collaborate with other farmers? For example, does the farmer store other farmers' produce on her farm? Does the farmer share equipment with other farmers? Does the farmer sell the products of other farmers?
- **Agreements:** Does the farmer have any kind of oral or implied agreement with any other collaborators or third parties?
- **Sales:** Does the farmer sell any kind of good or service? If so, where and to whom does the farmer sell these goods or services?
- **Roadside Markets and Farmstands:** Does the farmer have, or want to have, a roadside market or farmstand? Is the roadside market or farmstand located on property owned or controlled by the

¹⁴ *Id.*

farmer? Is the farmer selling any goods he or she did not produce? Might the lease or mortgage allow or prohibit a farmstand structure? Do local zoning laws allow or prohibit a farmstand?

- **Wholesale Markets:** Does the farmer sell, or hope to sell, to wholesalers?
- **Value-Added Products:** Will the farmer sell products other than raw agricultural commodities (i.e., will the farmer process them in some way)?
- **Farmers' Markets:** Does the farmer sell, or want to sell, at a farmers' market? What requirements does the farmers' market set? For instance, does the farmers' market require particular insurance?
- **Community Supported Agriculture:** Does the farmer have, or want to have, a CSA? If so, will members of the CSA pick up their shares on the farm, or off the farm? Will the CSA members ever come on the farm for a tour, for a gathering, and/or to do work around the farm? Will the farmer include products grown at other farms? How will the farmer solicit membership shares, and what information will potential members receive?
- **Direct Sales to Restaurants and Other Institutions:** Does the farmer sell, or want to sell, directly to restaurants or other institutions? Does the restaurant or institution require a certain level of insurance? Does the restaurant or institution request or require compliance with food safety standards? Does the farmer do any processing (minimal or otherwise) to the product she sells to the restaurant or institution? Who would distribute the farmer's products?
- **Agritourism and Other Forms of On-Farm Recreation:** Does the farmer engage in, or want to engage in, agritourism activities or other forms of on-farm recreation? Does the lease or mortgage require preapproval for or prohibit certain activities?
- **Pick-Your-Own:** Does the farmer have, or want to have, a pick-your-own operation (i.e., does the public come on to the farmer's land to engage in agricultural activities)?
- **Permits:** What permits, if any, does the farm operation require?
- **Insurance:** What kind of insurance policy, if any, does the farmer hold? Does the insurance policy explicitly cover or exclude any activities that the farmer conducts (e.g., if the farmer allows members of the public to enter the farm)? Does the insurance policy cover or exclude liability arising from foodborne illness?
- **Other Professionals:** Does the farmer consult with any other business professionals, such as an accountant or tax preparer?
- **Financing:** How does the farmer fund the farm? Has the farmer received any grants or loans? Is the farmer interested in modifying or finding additional grants or loans?

MAJOR FACTORS IN EVALUATING DIFFERENT BUSINESS STRUCTURES

Once the attorney has an idea of the goals and needs of the farmer, the attorney will be better able to assist the farmer in choosing the best business structure for the operation. When helping farmers decide which structure to choose, an attorney should protect the farmer and the farmer's assets from unpredictable emergencies and unforeseen hardships.¹⁵ This section will familiarize the attorney with some factors that

¹⁵ See, e.g., *Natural Events and Disasters*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaagct/tned.html>.

might motivate farmers to choose one business structure over another. This section assumes a basic understanding of the various business formation options.

Attorneys should advise farmers to consider the **ease of formation and management**. Farming can be very time-intensive, especially for diversified and small-scale operations typical in Connecticut. Additionally, farmers have different preferences for management and administration. Some farmers may have flexible schedules or business training and thus lower administration costs. In other cases, management costs may make formation and upkeep of a formal business structure too expensive. Some business structures require fewer state and federal filings; others require organizational documents, registration, and on-going recordkeeping. The attorney and farmer should discuss administrative requirements, especially regarding which requirements are ongoing as opposed to one-time.

Second, the attorney should consider how the entity will be **taxed**. Businesses can create or limit tax liability. A “pass-through” entity, such as a partnership or S-corporation, is not itself subject to taxation; instead, the entity’s owners are taxed on their share of the business income.¹⁶ Pass-through entities are also eligible for the section 199A pass-through deduction.¹⁷ In contrast, “double-taxation” entities, mostly C-corporations, must pay taxes on the business’s profits, and then any profits distributed to owners are taxed as personal income.¹⁸ Because farmers eligible for Hub services must have gross sales of less than \$75,000, the formality costs may outweigh the corporate benefits for Hub clients.

Additionally, attorneys should help the farmer consider how to **limit liability**. Certain business structures limit the liability of some or all of the business’s owners, while others provide no protection. As with other businesses, there are many ways a farmer can incur liability. For example, the farmer could default on a loan; an employee or visitor could be injured on the farm; or, a business partner could incur a debt tied to the farm business. The attorney should identify potential liabilities and assess whether to suggest a limited liability business structure. Other risk-management tools, such as insurance, may address the farmer’s potential liabilities more cheaply. (See “Risk Management on Farms” text box).

Attorneys should also consider **ease of transfer** when discussing the business structure options with the farmer. Farmers may wish to keep the farm within the family or maintain ownership until much later in life; others may decide to transfer sooner or to persons outside of the family. Customizable business structures can smooth complicated transfers and carry out a farmer’s unique wishes.

Similarly, the **life of the entity** is an important factor to consider when selecting a business structure. The attorney and farmer should discuss whether the farm business will terminate when the farmer retires or whether the farm operation will continue beyond that. Chapter IV has more detail about farm transitions.

¹⁶ Annette M. Higby, *A Legal Guide to the Business of Farming in Vermont*, UNIV. OF VT. EXTENSION (2006), <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

¹⁷ I.R.C. § 199A.

¹⁸ Higby, *supra* note 16.

Finally, the attorney should help assess the importance of **outside investment**. Certain business structures facilitate investment, while others do not. If the farmer hopes to have non-operators financially support the farm, the farmer might consider a business structure that allows for outside investment. For example, if the farm operates as a non-profit, it may attract funding because its investors may be able to deduct contributions to the farm from their taxable income.

After considering these many factors with the farmer, the attorney will have a better understanding of the farmer's needs and will only then be able to assist the farmer in choosing the right business structure.

CHOOSING A BUSINESS STRUCTURE

Regardless of the farmer's business structure, if engaged in selling goods or services in Connecticut, the farmer must obtain a "sales and use" tax permit from the Department of Revenue Services.¹⁹ Every kind of business other than a sole proprietorship must also obtain an employer identification number (EIN) from the IRS.²⁰ Beyond these commonalities, however, the requirements for businesses vary greatly with the type of business. The sections below explain the differences and why they might matter to a farmer or other food business owner.

Sole Proprietorships A sole proprietorship is the most common form of farm business ownership. It is an unincorporated business owned and operated by one person. The owner is entitled to all profits and is also responsible for all the business's debts, losses, and liabilities.²¹ All income and expenses from the sole proprietorship are reported on the owner's personal tax return.²² It is good practice to choose a trade name and register it with the town hall of the city in which the business is located.²³ For more information on trade names, see Chapter VIII.

Connecticut Statutes

Uniform Partnership Act

C.G.S. § 34-300 *et seq.* (Ch. 614)

Uniform Limited Partnership Act

C.G.S. § 34-9 *et seq.* (Ch. 610)

Conn. Uniform LLC Act

C.G.S. § 34-243 *et seq.* (Ch. 613a)

Conn. Business Corp. Act

C.G.S. § 33-600 *et seq.* (Ch. 601)

Conn. Revised Nonstock Corp. Act

C.G.S. § 33-1000 *et seq.* (Ch. 602)

Worker Cooperative Corp. Act

C.G.S. § 33-418f *et seq.* (Ch. 599a)

²⁰ But a sole proprietorship that has employees and files excise or pension plan tax returns is required to obtain an EIN. *Form SS-4 & Employer Identification Number*, U.S. INTERNAL REVENUE SERV. (Aug. 16, 2017), <http://www.irs.gov/faqs/small-business-self-employed-other-business/form-ss-4-employer-identification-number-ein> [hereinafter "*EIN*"]. See also U.S. INTERNAL REVENUE SERV., PUBLICATION 1635: EMPLOYER IDENTIFICATION NUMBER: UNDERSTANDING YOUR EIN 3 (2014), <http://www.irs.gov/pub/irs-pdf/p1635.pdf> [hereinafter "*IRS PUBLICATION 1635*"].

²¹ *Choose a Business Structure*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/sole-proprietorship-0> [hereinafter "*Choose a Business Structure*"]. See also CONN. FARM RISK MGMT. AND CROP INS. PROGRAM, CONNECTICUT AGRICULTURAL BUSINESS MANAGEMENT GUIDE 12–13 (2010), http://www.ct.gov/doag/lib/doag/marketing_files/agbusinessguide_9_28_10%5B1%5D.pdf [hereinafter "*CONNECTICUT FARM BUSINESS GUIDE*"].

²² *Id.*

²³ See *Managing Registration Information*, CONN. DEP'T OF REVENUE SERVS. (2017), <http://www.ct.gov/drs/cwp/view.asp?a=1454&q=506772#dba>.

Pros for Farmers

- **Complete Control:** The sole owner has total control over all the decisions.²⁴
- **Ease of Formation and Dissolution:** Any person who starts a business without organizing or filing will be considered a sole proprietor.²⁵ A farmer, for example, does not need to file any legal documents or pay any fees unless the farmer wishes to operate under a trade name. Upon discontinuation of the business, there is no formal dissolution process.
- **Taxation:** The owner of a sole proprietorship is taxed on a personal level for all income and expenses for the business and is eligible for the pass-through deduction.²⁶ A sole proprietor without employees does not need to file for an EIN with the IRS.²⁷

Cons for Farmers

- **Limiting Liability:** A sole proprietorship is not distinct from its owners, so this business structure does not limit the owner's liability. As a result, business creditors, including tort claimants, can make claims on both the farmer's business and personal assets.²⁸
- **Entity Life:** A sole proprietorship terminates when the owner dies, unless an estate plan is in place.²⁹
- **Outside Investment:** Sole proprietorships do not allow the business owner to raise capital by selling equity interest in the business.³⁰ Thus, if a farmer or food business owner is interested in obtaining outside investments, a sole proprietorship may not be the best option.
- **Transfer:** Because sole proprietors have total control over their farming operation, they will have full rights to transfer assets to another party.³¹ However, because a sole proprietorship has no legal identity separate from its owner, it cannot be transferred as a business. Instead, each part of the farm business, such as land, structures, and equipment, must be conveyed separately. Transferring the business in this manner may increase transaction costs because the parties must include in the written sale each separate asset; if they forget to include an asset, it will not be transferred with the rest.³²

Partnerships A partnership is a single business owned by two or more people. A partner's contribution may consist of money, property, labor, and/or skill. In return for their contributions to the business, the

²⁴ *Choose a Business Structure*, *supra* note 20; CONNECTICUT FARM BUSINESS GUIDE, *supra* note 21, at 12.

²⁵ See EDWARD B. WHITTEMORE, KENNETH L. LEVINE & ALFRED R. CASELLA, CONNECTICUT FORMS OF ORGANIZATION 28 (LexMundi Pro Bono Found. 2013), <http://www.lexmundiprobono.org/Document.asp?MODE=DOWNLOAD&DocID=726> [hereinafter "CONNECTICUT BUSINESS ENTITIES"].

²⁶ CONNECTICUT FARM BUSINESS GUIDE, *supra* note 21.

²⁷ *EIN*, *supra* note 20.

²⁸ CONNECTICUT BUSINESS ENTITIES, *supra* note 24, at 28.

²⁹ CONNECTICUT FARM BUSINESS GUIDE, *supra* note 21, at 13.

³⁰ *Choose a Business Structure*, *supra* note 21.

³¹ *Close or Sell Your Business*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/transfer-ownership>.

³² Types of farm assets include (1) current farm assets, (2) intermediate farm assets, (3) long-term farm assets, and (4) nonfarm assets. See CONNECTICUT FARM BUSINESS GUIDE, *supra* note 21, at 29.

partners shares in the profits and losses of the business.³³ About 10 percent of farms in Connecticut are organized as partnerships.³⁴

General Partnerships A general partnership is an association of two or more persons to carry on, as co-owners, a for-profit business. Two persons associating as co-owners of a for-profit business may unintentionally form a partnership.³⁵ For example, two spouses operating a farm business together may, without their knowledge, be considered a partnership.³⁶ A partnership is an entity distinct from its partners.³⁷ Partnerships are governed by partnership agreements and, to the extent that no agreement exists or the partnership agreement does not provide governance, by Connecticut's Uniform Partnership Act.³⁸ A partnership agreement in Connecticut may be written, oral or implied,³⁹ although it is good practice to draft an agreement.⁴⁰ Such an agreement should contain the following:

- each partner's ownership interest;
- how profits and losses are shared;
- any obligation to contribute additional capital;
- how management and control are shared among the partners and how decisions are made;
- the ability to incur debt or other liabilities for the partnership;
- restrictions on transferring partnership interests;
- how to accept new partners and how current partners can withdraw from the partnership; and
- how and under what circumstances the partnership will terminate.

Gentleman's Agreements

Sometimes farmers enter into "gentleman's agreements" with neighbors or relatives to share in the profits from crops or to share some of the labor. Make sure to talk with the farmer about any gentleman's agreements the farmer may have made to see if the farmer has unintentionally formed a partnership.

In the absence of an agreement otherwise, each partner is entitled to an equal share of the partnership profits and, in many cases, is responsible for an equal share of the liabilities.⁴¹ Additionally, without a partnership agreement it will be difficult to wind up and dissolve the partnership effectively.

When drawing up a partnership agreement, it is important to note that farms in the Hub network are unlikely to have high profit margins. While it is important to decide how to divide profits, this means that the attorney should focus more attention on the other sections of the partnership agreement, such as the contributions of

³³ *Choose a Business Structure*, *supra* note 21.

³⁴ CONNECTICUT HISTORICAL DATA, *supra* note 1.

³⁵ CONN. GEN. STAT. § 34-314(a).

³⁶ See IRS PUBLICATION 1635, *supra* note 20, at 6.

³⁷ CONN. GEN. STAT. § 34-313.

³⁸ *Id.* § 34-303(a).

³⁹ *Id.* § 34-301(13).

⁴⁰ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 5:11 (2017).

⁴¹ CONN. GEN. STAT. § 34-335(b).

each partner to the partnership, the division of responsibility for potential risks, the authority of the partners to act on behalf of the partnership, the division of management duties, and the resolution process for disputes.

Pros for Farmers

- **Ease of Formation and Management:** If there are two farmers operating one farm, any form of agreement to jointly operate the farm for profit will create a general partnership. The ease of formation and maintenance of the business structure can be attractive to farmers.
- **Taxation:** Like a sole proprietorship, partnerships receive “pass-through” tax status. Partners pay income tax on any profits earned by the partnership and receive a pass-through deduction, while the partnership itself is not taxed. The partners, however, must file a Connecticut Composite Income Tax Return.⁴²
- **Raising Capital:** General partnerships allow for outside investments because there is no limit on the number of partners. Outside individuals can invest and become a general partner, though this would require amending the partnership agreement, an act requiring the consent of all partners.⁴³
- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time. (Note, however, that absent a written partnership agreement addressing dissolution and disassociation, the partners may disassociate at any time, leaving the remaining partner with an economic burden to buy out the departing partner.)⁴⁴

Cons for Farmers

- **Liability:** In the absence of an agreement otherwise, partners are jointly and severally liable for all business obligations, except those incurred before a person’s admission as a partner.⁴⁵
- **Ease of Transfer:** Absent a provision in the partnership agreement to the contrary, partners can only transfer their share of the profits, but not the right to participate in the management and conduct of the partnership business.⁴⁶ Such a transfer does not by itself cause the transferor’s disassociation or dissolution or winding up of the partnership business.⁴⁷
- **Raising Capital:** Joint and several liability of general partners may deter outside investment because all investors who become partners will be exposed to the business’s risks.⁴⁸

Limited Partnerships A limited partnership is formed by least two partners, including one or more general partners and one or more limited partners, under the provisions of Connecticut’s Uniform Limited Partnership Act.⁴⁹ The division between general and limited partners is the main difference between a general

⁴² *Partnerships*, CONN. DEP’T OF REVENUE SERVS., <http://www.ct.gov/drs/cwp/view.asp?a=1454&q=290362> [hereinafter “*Partnerships*”].

⁴³ CONN. GEN. STAT. § 34-335(j).

⁴⁴ *Id.* § 34-356.

⁴⁵ *Id.* § 34-327.

⁴⁶ *Id.* §§ 34-348(a)(3), (b)(1).

⁴⁷ *Id.* § 34-348(a)(2).

⁴⁸ *Id.* § 34-335(b).

⁴⁹ *Id.* § 34-9(13).

partnership and a limited partnership. A limited partner is not liable for the obligations of the partnership, unless that partner usually participates in the control of the business.⁵⁰ Liability, then, generally exists to the extent of the partner's investment. A general partner controls business management and operations and remains liable for all business obligations.⁵¹ If an investor were interested in buying an ownership share in a farm, but not interested in the management of the farm, the investor could form a limited partnership with the farmer, in which the farmer would be a general partner and the investor would be a limited partner. Like a general partnership, a limited partnership is governed by a partnership agreement, which may be written or oral.⁵² Just as in a general partnership, it is good practice to draft an agreement in a limited partnership.⁵³

To form a limited partnership, the partners must execute and file a partnership certificate.⁵⁴ The limited partnership is formed when the certificate of limited partnership is filed in the office of Connecticut's Secretary of State or at a later time specified in the certificate.⁵⁵ The name of a limited partnership must contain the unabbreviated words "limited partnership."⁵⁶ After the limited partnership is formed, it has an ongoing obligation to keep at its office, among other records, (1) a list of the names and business addresses of each partner; (2) a copy of the certificate of limited partnership and any amendments to it; (3) copies of the limited partnership's local, state, and federal income tax returns for the past three years; and (4) copies of the current partnership agreement and financial statements from the last three years.⁵⁷ In addition, a limited partnership must file an annual report with the Secretary of State.⁵⁸

Pros for Farmers

- **Taxation:** Like a sole proprietorship, partnerships receive "pass-through" tax status. Thus, partners pay income tax on any profits earned by the partnership and receive a pass-through deduction, while the partnership itself is not taxed. The partners, however, must file a Connecticut Composite Income Tax Return.⁵⁹
- **Limited Liability:** Limited partnerships protect limited partners' personal assets from business liabilities, but they prevent them from managing the day-to-day business operations.⁶⁰ This could be a benefit for a farmer who is looking for investors but wants to retain management and control over the farm.
- **Raising Capital:** In contrast to general partnerships, limited partnerships offer investors the opportunity to provide capital without incurring any liability by becoming limited partners.⁶¹ This protection is attractive to investors.

⁵⁰ *Id.* § 34-15(a).

⁵¹ *Id.* § 34-17.

⁵² *Id.* § 34-9(18).

⁵³ STEPHEN C. ALBERTY, 1 ADVISING SMALL BUSINESSES § 5:11 (2017).

⁵⁴ CONN. GEN. STAT. §§ 34-10, 34-10a.

⁵⁵ *Id.* § 34-10.

⁵⁶ *Id.* § 34-13.

⁵⁷ *Id.* § 34-13c.

⁵⁸ *Id.* § 34-420(a).

⁵⁹ *Partnerships*, *supra* note 42.

⁶⁰ CONN. GEN. STAT. § 34-15.

⁶¹ *Id.*

- **Ease of Transfer:** A limited partnership can be consolidated or merged with another business entity as long as all general partners and a supermajority of limited partners agree.⁶² Individual partnership interests in the distribution of the profits may be transferred, subject to limitations by the partnership agreement.⁶³
- **Life of Entity:** Farmers can have substantial control over the end of the limited partnership by including dissolution conditions in the partnership agreement.⁶⁴

Cons for Farmers

- **Ease of Formation:** As explained above, there are several formal steps and fees required to form a limited partnership.
- **Taxation:** A limited partnership must pay a \$250 Business Entity Tax every other year.⁶⁵
- **Liability:** General partners remain personally liable for any and all actions the partnership takes.⁶⁶

Limited Liability Partnerships A partner in a limited liability partnership (LLP), also known as a registered limited liability partnership or RLLP, is generally not personally liable for any debts, obligations, or liabilities of the partnership or of another partner, including that partner's negligence, arising from the course of the partnership's business.⁶⁷ In order to form an LLP, the partnership must file a certificate with Connecticut's Secretary of State.⁶⁸ The name of the LLP partnership must include a reference to its LLP status, which, unlike a limited partnership, may be signaled by abbreviations.⁶⁹ After the LLP is formed, it must then file an annual report with the Secretary of State.⁷⁰

Pros for Farmers

- **Taxation:** Like a sole proprietorship, partnerships receive "pass-through" tax status. Partners pay income tax on any profits earned by the partnership and receive pass-through deduction, while the partnership itself is not taxed. The partners, however, must file a Connecticut composite income tax return.⁷¹
- **Liability:** All partners are generally protected from the LLP's liabilities, except in the case of a partner's own negligence.⁷²
- **Raising Capital:** LLPs are able to accept investments from outside investors. As in a general partnership, any persons carrying on a business and sharing in the profits and losses will be considered partners. Thus, upon investment, the investor becomes a partner. In an LLP, the

⁶² *Id.* § 34-33.

⁶³ *Id.* §§ 34-33a, 34-33b, 34-33c.

⁶⁴ *Id.* § 34-28a.

⁶⁵ *Partnerships*, *supra* note 42.

⁶⁶ CONN. GEN. STAT § 34-17(b).

⁶⁷ *Id.* § 34-327(c).

⁶⁸ *Id.* § 34-411.

⁶⁹ *Id.* § 34-406(a).

⁷⁰ *Id.* § 34-420(a).

⁷¹ *Partnerships*, *supra* note 42.

⁷² CONN. GEN. STAT §§ 34-327(c), (d).

investor becomes a partner with authority over the management of the farm or food business. The LLP could be attractive to investors who are interested in farm or food-business management but want the protection of limited liability.

- **Life of Entity:** Partnerships can set explicit conditions for their dissolution, and partners can agree to dissolve the entity at any time.

Cons for Farmers

- **Taxation:** A limited liability partnership must pay a \$250 Business Entity Tax every other year.⁷³
- **Management:** As explained above, there are several formal steps required to form an LLP. In addition, there are various fees, which might be especially burdensome for beginning farmers.⁷⁴

Limited Liability Companies A limited liability company (LLC) is a hybrid type of legal structure that combines the limited liability features of a corporation with the relative ease of formation like a partnership, along with flexibility in ownership structure.⁷⁵ Unlike some other states, Connecticut allows LLCs to be created for more than just earning a profit or having a business purpose; they can exist to pursue a social mission, as well.⁷⁶ LLCs have flexible ownership and management requirements. They may be owned by a single member or by multiple members,⁷⁷ and they can be operated by their members, by one of their members acting as a manager, by a board of managers, or by an outside manager.⁷⁸ Unlike LLPs, LLCs may have just one member; in addition, that member need not be an individual, but may instead be an organization or business.⁷⁹ On the other hand, LLCs have more formal requirements than LLPs, though fewer requirements than corporations. LLC formation, operation, and dissolution are governed by the Connecticut Limited Liability Company Act.⁸⁰

Pros for Farmers

- **Combination of Features:** LLCs are attractive because of the combination of features they offer to a single-person business: pass-through tax status coupled with limited liability.
- **Control:** LLCs may be formed by a single person, allowing a farmer to retain control and profits like a sole proprietorship and meanwhile minimizing liability.⁸¹
- **Ease of Formation and Management:** Although there are some steps a farmer must take to create and maintain an LLC, these requirements are less onerous than those for corporations. To

⁷³ *Partnerships*, *supra* note 42.

⁷⁴ CONN. GEN. STAT. § 34-413.

⁷⁵ *Choose a Business Structure*, *supra* note 21.

⁷⁶ CONN. GEN. STAT. §§ 34-243g(b), 34-243h(b). For more on forming LLCs to pursue social missions, *see* CONNECTICUT BUSINESS ENTITIES, *supra* note 25, at 161–62.

⁷⁷ CONN. GEN. STAT. § 34-247(a).

⁷⁸ *Id.* § 34-255f.

⁷⁹ *Id.* § 34-101(23).

⁸⁰ Formerly housed in Chapter 613 of the Connecticut General Statutes, the updated Connecticut Uniform Limited Liability Company Act, now found in Chapter 613a, became effective on July 1, 2017.

⁸¹ CONN. GEN. STAT. § 34-243g(a).

form an LLC, organizers must deliver a certificate of organization to Connecticut's Secretary of State.⁸² The farmer or food business should also create an operating agreement that details how the LLC is to be governed.⁸³

- **Taxation:** LLCs in Connecticut are treated in the same manner as they elect to be treated under the federal income tax rates: either as pass-through entities or corporations.⁸⁴ Thus, a farm or food business organized as an LLC may avoid being “double taxed” like many corporations by electing “pass-through” taxation.
- **Limited Liability:** Debts, obligations, and other liabilities of an LLC are solely the liabilities of the company. No member or manager is personally liable for the company's liabilities.⁸⁵
- **Ease of Transfer:** LLCs allow for the transfer of interest in the distribution of the LLC to other parties, unless otherwise provided in the operating agreement.⁸⁶
- **Life of Entity:** Unless otherwise stated, an LLC has perpetual duration.⁸⁷
- **Raising Capital:** LLCs are an attractive type of business entity for the farmer if the farmer is interested in obtaining outside investments because a farmer can flexibly structure investor relationships.
- **Multi-farm CSAs:** LLCs allow multiple partners to share farm management and limit their liability, and thus may be useful to farmers forming a multi-farm CSA operation.
- **Multiple Business Ventures:** An LLC may be a good option for farmers who have different business ventures and want to keep them separate. For example, if the farmer hosts a fall festival and includes hay rides, the farmer may want to use an LLC for the agricultural operation and a separate LLC for the festival operation. Farmers may want to keep businesses separate if some are higher-risk. Farms that engage in higher-risk activities, such as fermenters, value-added operations, and agritourism, can use separate LLCs for those operations to protect the rest of their operation.

Percentage of Farms Operated as Corporations

Connecticut: 8.75%
Nationally: 5%

Cons for Farmers

- **Taxation:** An LLC must pay a \$250 Business Entity Tax every other year.⁸⁸
- **Paperwork:** An LLC is also not a good option for farmers who prefer not to bear paperwork or reporting burdens. An LLC must file an annual report with Connecticut's Secretary of State.⁸⁹

⁸² *Id.* § 34-247.

⁸³ *Id.* §§ 34-243d, 34-243e.

⁸⁴ *Id.* § 34-243v.

⁸⁵ *Id.* § 34-243g.

⁸⁶ *Id.* § 34-259a.

⁸⁷ *Id.* § 34-243g(c).

⁸⁸ *Partnerships*, *supra* note 42.

⁸⁹ CONN. GEN. STAT. § 34-247k.

- **Future Expansion:** If the farmer is interested in the business becoming a public company, an LLC is not a good option because the transfer of an interest in the company's dividends does not entitle the transferee to participate in governance and control of the company.⁹⁰
- **Personal Guaranties:** Banks may require farmers to personally guarantee their debts, in which case their liability is no longer limited.

Corporations A corporation is an independent legal entity owned by shareholders. This means that the corporation itself, not the shareholders that own it, is legally responsible for the actions of the business and debts it incurs.⁹¹ In 2012, there were 523 farms (9 percent) in Connecticut that identified as corporations, of which 439 identified as being family held.⁹² In Connecticut, a farm can organize as a C-corporation or an S-corporation. Within these designations, a corporation may further elect to be B-corporation or a nonstock/nonprofit corporation. Formation, operation, and dissolution of corporations are governed by the Connecticut Business Corporation Act.

To form a corporation, the incorporators must file a certificate of incorporation with the Secretary of State, which must set forth (1) the name of the corporation; (2) the number of shares the corporation is authorized to issue; (3) the corporation's office address; (4) the name of the corporation's registered agent at the office; and (5) the name and address of each incorporator. The certificate may contain other pertinent information, such as the corporation's purpose, the corporation's powers, and various sorts of corporate provisions.⁹³ A filing fee must also be paid.⁹⁴ The shareholders elect a board of directors to oversee the corporation's key policies and decisions.⁹⁵ Additionally, the board of directors or the incorporators must also adopt initial bylaws for the corporation.⁹⁶ The board of directors then elects officers to handle the day-to-day operations of the corporation.⁹⁷ Every year, the corporation must file an annual report with Connecticut's Secretary of State and hold a shareholders' meeting.⁹⁸

Pros for Farmers

- **Limited Liability:** A shareholder is not liable to the corporation or its creditors except to pay the consideration for which the shares were authorized to be issued. A shareholder of a corporation is not liable for the acts or debts of the corporation.⁹⁹

⁹⁰ *Id.* § 34-259a.

⁹¹ CONN. GEN. STAT. § 33-673.

⁹² U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 67: SUMMARY BY LEGAL STATUS FOR TAX PURPOSES (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_067_067.pdf.

⁹³ CONN. GEN. STAT. § 33-635–636.

⁹⁴ *Id.* § 33-617.

⁹⁵ *Id.* §§ 33-735–738.

⁹⁶ *Id.* § 33-640.

⁹⁷ *Id.* § 33-763–765.

⁹⁸ *Id.* § 33-953.

⁹⁹ *Id.* §§ 33-673, 33-695.

- **Ease of Transfer:** Subject to its certificate of incorporation, bylaws and shareholder agreement, shares are easily transferable from one shareholder to another.¹⁰⁰ This is particularly attractive for those businesses interested in long-term growth and issuance of securities.
- **Life of Entity:** Corporations can survive beyond the life of the shareholders, although a corporation can be terminated by a vote of its shareholders, by the Secretary of State, or by judicial action.¹⁰¹
- **Raising Capital:** Corporations are useful tools for raising funds because they offer to exchange outside investment for equity or debt. This applies, for example, to angel investors, venture capitalists, and initial public offerings.

Cons for Farmers

- **Ease of Formation and Management:** More formalities are required to form and manage a corporation than to form and manage other types of entities. Formalities include the requirement that the corporation have a board of directors, hold at least one annual shareholder meeting, and keep a distinct business bank account. These corporate formalities may differ from the farmer's current practices, and the cost of compliance will depend on the farmer's needs, preferences, and business administration skills.
- **Taxation:** An S-Corp must pay annual a \$250 business entity tax every other year.¹⁰² In addition, corporations are subject to the Connecticut Franchise Tax.¹⁰³

Types of Corporations When the incorporators form the incorporation, they must declare its type. Incorporators must choose between forming a C-corporation, an S-corporation, or a nonstock corporation. If incorporators choose to form a for-profit corporation, they may then elect to designate it a B-corporation, a worker co-operative, both, or none.

- A **C-corporation** is a for-profit corporation taxed as a separate legal entity, paying tax on its income at the corporate federal and state tax rates. There is no limit on the number of stockholders a C-corporation may have. The remaining profits are paid to the stockholders as taxable income in the form of dividends. This is known as “double-taxation” because income is taxed at both the corporate and individual income levels. Attorney's should take into account the annual income of existing farm corporations in assessing whether the corporate form should be maintained. Before 2018, corporations with annual income below \$50,000 were subject to a 15-percent corporate tax but will be subject to a 21-percent tax rate from 2018 and on.¹⁰⁴
- A small business or **S-corporation** is a for-profit corporation that has elected to be governed by Subchapter S of the Internal Revenue Code and is thus exempt from tax at the corporate level at both

¹⁰⁰ See *id.* § 33-672–678

¹⁰¹ *Id.* § 33-880–900.

¹⁰² *Partnerships*, *supra* note 42.

¹⁰³ CONN. GEN. STAT. § 33-618.

¹⁰⁴ I.R.C. § 11(b).

the state and federal levels.¹⁰⁵ There are, however, some limitations. An S-corporation must have less than 100 shareholders and can only have individuals as shareholders. Moreover, each shareholder must be either a U.S. citizen or a U.S. national.¹⁰⁶

- A **nonstock corporation** is a nonprofit corporation that does not make distributions to its members.¹⁰⁷ It retains the advantage that its members do not have personal liability for the actions of the corporation.¹⁰⁸ Nonprofit status may be beneficial to the farmer because of the tax advantages and the ability to receive charitable donations, although the organization must have an educational or charitable purpose.¹⁰⁹ Formation, management, and dissolution of nonstock corporations are governed by the Connecticut Revised Nonstock Corporation Act.
- A **benefit corporation** is a for-profit corporation, organized as a for-profit corporation under the Connecticut Business Corporation Act, that has a recognized purpose of creating a general public benefit and has chosen to be subject to the provisions of the Connecticut Benefit Corporation Act, CHS ch. 604.¹¹⁰ A benefit corporation's shareholders may bring a benefit enforcement action against the corporation if the corporation fails to pursue or create a general public benefit.¹¹¹ Thus, while a for-profit corporation *may* pursue a social mission, a benefit corporation *is required* to do so.¹¹² In Connecticut, a benefit corporation may adopt a legacy preservation provision so that, if dissolved, any remaining property will be distributed only to charitable organizations or other benefit corporations that have adopted a legacy preservation provision.¹¹³
- **Worker Cooperatives.** A worker cooperative is a for-profit corporation, organized under the Connecticut Business Corporation Act, that has elected to be governed by the Worker Cooperative Corporations Act, CGS ch. 599a.¹¹⁴ A worker cooperative requires that all members also be workers.¹¹⁵ Only full- or part-time employees of the cooperative may have voting shares as long as at least fifty percent of all employees have such voting shares.¹¹⁶ Each employee may own only one voting share.

¹⁰⁵ 26 U.S.C. § 1363 (2015); *Corporation Business Tax*, CONN. DEP'T OF REVENUE SERVS. (Feb. 3, 2017), <http://www.ct.gov/drs/cwp/view.asp?a=4847&q=583562>.

¹⁰⁶ 26 U.S.C. § 1361.

¹⁰⁷ CONN. GEN. STAT. § 33-1026(a).

¹⁰⁸ CONN. GEN. STAT. § 33-1058(a).

¹⁰⁹ See 26 U.S.C. § 501(c)(3). For more on educational purposes, see Treas. Reg. § 1.501(c)(3)-1(d)(3). For more on charitable purposes, see Treas. Reg. § 1.501(c)(3)-1(d)(2).

¹¹⁰ CONN. GEN. STAT. § 33-1351.

¹¹¹ *Id.* § 33-1362.

¹¹² For more on social missions of for-profit corporations, see CONNECTICUT BUSINESS ENTITIES, *supra* note 25, at 11.

¹¹³ CONN. GEN. STAT. § 33-1355.

¹¹⁴ *Id.* § 33-418f(a).

¹¹⁵ *Id.* § 33-418i(a).

¹¹⁶ *Id.* § 33-418i, 33-418j.

CONCLUSION

An attorney can offer a farmer or food business considerable business advice. However, the most meaningful information will come from the farmers or food businesses themselves. By drawing from the initial questions and highlighting the important factors to consider, attorneys can effectively work with farmers to accomplish their goals. This includes protecting their families and assets; creating thoughtful plans of action in case of unfortunate events; and building their businesses consistent with financial, social, environmental, and familial goals. In this way, attorneys can help farmers and food businesses continue to steward the land and grow the local economy.

RESOURCES

Connecticut Agricultural Business Management Guide

http://www.ct.gov/doag/lib/doag/marketing_files/agbusinessguide_9_28_10%5B1%5D.pdf.

New Farmer Bucket List

<http://www.newctfarmers.com/new-farmer-bucket-list>.

Farm Commons

<http://www.farmcommons.org>.

Sustainable Agriculture and Research Education Program

<http://www.sare.org/Learning-Center/Books/Building-a-Sustainable-Business>.

Growing A Food System for the Future: A Manual for Co-operative Enterprise Development

http://www.newenglandfarmersunion.org/pdfs_docs/NEFU_Co-opManualFINALweb.pdf.

CHAPTER III: FOOD SAFETY

The recent increase in food safety regulations with the enactment of the FSMA (defined below) has made food safety requirements a concern for many small-scale farmers and food entrepreneurs. The attorney should be prepared to identify farmers and food entrepreneurs in the Legal Food Hub (LFH) exempt from some of these requirements or walk through these requirements with the client.

OVERVIEW This chapter focuses primarily on two federal food-safety rules that affect farms across Connecticut. These rules—the Produce Safety Rule and the Preventive Controls Rule—are part of the comprehensive Food Safety Modernization Act (FSMA). In addition to FSMA, this chapter touches on voluntary certification schemes, which producers might adopt as preventative measures against food-borne illness. Finally, this chapter looks at Connecticut’s brand-new laws around cottage food and farm breweries.

1. Overview of Food Safety This section briefly explains the history of food safety regulations in the United States up to the passage of the Food Safety Modernization Act (FSMA) in 2010.

2. Understanding the Food Safety Modernization Act This section explains how the United States Food and Drug Administration defines certain terms for the purposes of any regulations promulgated under the FSMA. The FSMA gives rise to three food safety regimes that are of importance to farmers and food entrepreneurs. These include the regulations regarding the registration of food facilities, the Produce Safety Rule, and the Preventive Controls for Human Food Final Rule.

3. USDA Certifications This section explains the voluntary audits and certifications offered by the United States Department of Agriculture.

4. Cottage Food and Craft Beer Regulations in Connecticut This section describes the state regulations regarding the sale of homemade foods in Connecticut. The two main laws governing this issue are the Pickle Law and the Cottage Foods Law. In addition, this section summarizes recent legislation permitting farm breweries.

OVERVIEW OF FOOD SAFETY

Historically, food safety regulations in the United States have been highly fragmented among different agencies, especially the United States Department of Agriculture (USDA) and the United States Food and Drug Administration (FDA), as well as among the states and local municipalities. Moreover, food safety guidelines traditionally rested upon voluntary compliance mechanisms.¹ Until recently, farms were left largely unregulated. Outbreaks of food-borne illnesses linked to fresh produce, peanuts, dairy, and meat products prompted Congress to pass the Food Safety Modernization Act (FSMA) in 2010. The FSMA mandates compliance with federal food safety regulations, unless the entity qualifies for an exemption.

¹ RENEE JOHNSON, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 5–7 (2016) <http://fas.org/sgp/crs/misc/RS22600.pdf>.

UNDERSTANDING THE FOOD SAFETY MODERNIZATION ACT

The FSMA was the largest overhaul of the food safety legal framework in the United States since the 1930s, particularly when Congress passed the Federal Food, Drug, and Cosmetic Act (FDCA) in the 1930s.² It grants broad authority to the FDA to promulgate food safety rules for food facilities and farms. Congress gave the FDA power to enforce the new legislation, such as issuing mandatory food recalls and withdrawing the registration of operations in violation of the agency's regulations. Seven final rules have been promulgated pursuant to the FSMA, and the two most relevant for farmers and food entrepreneurs are the Produce Safety Rule and the Preventive Controls for Human Food Final Rule ("Preventive Controls Rule").

To understand what food safety regimes are applicable to the client, it is important that the attorney knows some specifics about the client's activities. Key questions include:

- If produce is grown, what kind is it?
- If there is any processing or manufacturing, what kind is it?
- Are produce or products sold to the general public?
- How much revenue does the client receive annually from the operation?

Manufacturing/Processing

The FDA defines manufacturing/processing as "making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or ingredients." This definition includes: "Baking, boiling, bottling, canning, cooking, cooling, cutting, distilling, drying/dehydrating raw agricultural commodities to create a distinct commodity (such as drying/dehydrating grapes to produce raisins), evaporating, eviscerating, extracting juice, formulating, freezing, grinding, homogenizing, irradiating, labeling, milling, mixing, packaging (including modified atmosphere packaging), pasteurizing, peeling, rendering, treating to manipulate ripening, trimming, washing, or waxing."

Source: 21 C.F.R. § 1.227

Knowing the answer to these questions and understanding the definitions used in the FSMA will equip the attorney to determine which rules apply to the client's business activities.

Definitions under the FSMA

"Farm"

The FSMA defines the term "farm" and, for many of the affiliated food safety regimes, falling into the category of farm exempts one from its regulations. The FSMA defines two types of farms:

Primary Production Farms are operations under one management dedicated to growing and harvesting, raising animals (including seafood), or a combination of these activities. Additionally, such a farm includes an operation that packs or holds raw agricultural products (produce) or holds or manufacturers/processes processed foods, provided that food is consumed on that farm or another farm

² *Id.* at 10.

under the same management.³ Specifically, the manufacturing/processing that is permitted includes, but is not limited to: 1) drying and dehydrating raw products to create a distinct commodity (e.g., turning grapes into raisins), 2) treating produce to enhance ripening (e.g., using ethylene gas), or 3) packaging and labeling the items, so long as no additional manufacturing/processing, such as slicing or irradiating, is done.⁴

Secondary Activities Farms are operations not located on the primary production farm, which are dedicated to harvesting, packing, or otherwise holding raw agricultural products. For example, an operation that hulls and dehydrates nuts grown off-site is a secondary production farm.⁵

If the operation falls into the category of either a primary production or secondary activities farm, it is exempt from the **Preventive Control Rule**. However, the farm may still be subject to the **Produce Safety Rule** if its activities involve produce. Moreover, some farms may have to register as food facilities if they conduct certain activities considered manufacturing/processing, such as treating milk or processing maple syrup, rather than only harvesting, such as milking cows or gathering sap from sugar maple trees.⁶ Such facilities that primarily carry out activities contained in the farm definition, but also some additional manufacturing/processing outside the definition of a farm, are considered *Mixed-Type Facilities*. As such they may be required to register.⁷

Produce Rarely Eaten Raw

The Produce Safety Rule exempts the following produce that the FDA has concluded is rarely consumed raw: asparagus; black beans, chickpeas, great Northern beans, kidney beans, lima beans, navy beans, and pinto beans; garden beets (roots and tops) and sugar beets; cashews; sour cherries; cocoa beans; coffee beans; collards; sweet corn; cranberries; dates; dill (seeds and weed); eggplants; figs; hazelnuts; horseradish; lentils; okra; peanuts; pecans; peppermint; potatoes; pumpkins; winter squash; sweet potatoes; and water chestnuts.

Source: 21 C.F.R. § 112.2(a)(1)

Food “Facility”

Under the definition set by the FDA, a food “facility” for the purposes of the FSMA is any operation under one management, either at one physical location or mobile and travelling to multiple locations, which manufactures/processes, packs, or holds food for consumption in the United States. Facilities operating out of a private residence and water bottling facilities are exempt from this definition.⁸

³ 21 C.F.R. § 1.227 (2017). See also U.S. FOOD & DRUG ADMIN., DRAFT GUIDANCE FOR INDUSTRY: QUESTIONS AND ANSWERS REGARDING FOOD FACILITY REGISTRATION 5 (7th ed. 2016),

<http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM332460.pdf> [hereinafter “FOOD FACILITY REGISTRATION”].

⁴ 21 CFR 1.227.

⁵ *Id.*

⁶ FOOD FACILITY REGISTRATION, *supra* note 3, at 9–11.

⁷ 21 C.F.R. § 1.227.

⁸ *Id.*

Produce Safety Rule

The Produce Safety Rule (PSR) established and promulgated science-based standards for the safe growing, harvesting, packing, and holding of produce for human consumption. It became effective in January 2016.⁹

Exemptions

While farms are generally subject to the PSR regulations, many of the farmers represented through the Legal Food Hub will qualify for an exemption. To begin with, the FDA identifies a list of produce it has determined is rarely consumed raw, all of which are exempt from the PSR.¹⁰ Also exempt are types of produce that are not raw agricultural commodities¹¹ as well as food grains, including barley, dent- or flint-corn, sorghum, oats, rice, rye, wheat, amaranth, quinoa, buckwheat, and oilseeds (e.g. cotton seed, flax seed, rapeseed, soybean, and sunflower seed).¹² If the farm deals solely with these products, then it is exempt from the PSR. Food for personal consumption either on-site or on another farm under the same management is not subject to this rule.¹³

There is also an income exemption for farms that have an average annual value of produce sold (averaged over three years) that is less than \$25,000.¹⁴ According to the 2012 Census of Agriculture, 82 percent of all farms in Connecticut had annual sale values of \$24,999 or less.¹⁵ It is highly likely that a farmer represented through the Legal Food Hub will fall below the income level required to be subject to the PSR.

Requirements

- **Agricultural Water:** Limits are placed on the level of *E. coli* permitted in agricultural water. Testing is not required for water that comes from public water systems.¹⁶
- **Biological Soil Amendments:** Raw manure must be applied so that it does not contact produce during its application and minimizes its contact after application.¹⁷
- **Sprouts:** Under the PSR, sprouts are singled out for intensive regulation due to their propensity to carry food-borne illnesses. This includes requirements for treating the seeds and beans used for sprouting; testing of spent sprout irrigation water or in-process sprouts from each production batch;

⁹ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 80 Fed. Reg. 74,533 (Nov. 27, 2015), <https://www.federalregister.gov/documents/2015/11/27/2015-28159/standards-for-the-growing-harvesting-packing-and-holding-of-produce-for-human-consumption>.

¹⁰ 21 C.F.R. § 112.2(a)(1).

¹¹ Section 201(r) of the Federal Food, Drug, and Cosmetic Act defines the term “raw agricultural commodity” to mean “any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.” 21 U.S.C. § 321(r) (2016).

¹² U.S. FOOD & DRUG ADMIN., KEY REQUIREMENTS: FINAL RULE ON PRODUCE SAFETY 5 (2015) <http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM472887.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 1: HISTORICAL HIGHLIGHTS (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_01_001.pdf.

¹⁶ *FSMA Final Rule on Produce Safety*, U.S. FOOD & DRUG ADMIN. (last updated Oct. 3, 2017), <http://www.fda.gov/food/guidanceregulation/fsma/ucm334114.htm>.

¹⁷ *Id.*

testing the growing, harvesting, packing, and holding facilities of sprouts for *Listeria* species or *Listeria monocytogenes*.¹⁸

- **Wild and Domesticated Animals:** The PSR requires farmers to take the necessary steps to prevent contamination of crops from wild and domestic animals, and to refrain from harvesting crops that might have been contaminated.¹⁹

Worker Training, Health, and Hygiene The PSR also requires farmers to take the necessary steps to prevent contamination of crops and food from people. Examples include telling personnel not to come into contact with food if they are ill and having toilet and hand-washing facilities available for visitors. Further, farm workers and supervisors must have training on the importance of health and hygiene.²⁰

Registration of Food Facilities

Food facilities have historically been subject to more regulation than farms. On December 12, 2003, the regulations required by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) went into effect.²¹ This law was designed to direct federal agencies to take steps to protect the public from food-related emergencies, such as those arising from a threatened or real terrorist attack. It mandated the registration of food facilities and required advance notice of the importation of foreign food.²²

When the FSMA was enacted, it amended Section 415 of the FDCA to require additional registration information be sent to the FDA and that registration be renewed every two years. The FDA also has the right to inspect registered facilities and to withdraw the registration of a food facility found in violation of regulatory standards.²³

The final rule was promulgated in 2016. Of interest is that the final rule expanded the definition of “retail food establishment” to include such operations as roadside stands, farmers’ markets, and community supported agriculture (CSA) programs.²⁴ The final rule also required registration be filed electronically and sets a compliance date of January 2020.²⁵

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Registration of Food Facilities*, U.S. FOOD & DRUG ADMIN. (last updated Apr. 28, 2017), <http://www.fda.gov/Food/GuidanceRegulation/FoodFacilityRegistration/default.htm> [hereinafter “*Registration of Food Facilities*”].

²² Letter from Joseph A. Levitt, Ctr. for Food Safety and Applied Nutrition, U.S. Food & Drug Admin. (July 17, 2002), http://www.fda.gov/ohrms/dockets/dailys/03/jul03/070303/02n-0277_emc-000029-04.htm.

²³ *Registration of Food Facilities*, *supra* note 21.

²⁴ Amendments to Registration of Food Facilities, 81 Fed. Reg. 45,911 (Jul. 14, 2016), <http://www.federalregister.gov/documents/2016/07/14/2016-16531/amendments-to-registration-of-food-facilities>.

²⁵ *FSMA Final Rule: Amendments to Registration of Food Facilities*, U.S. FOOD & DRUG ADMIN (last updated Dec. 5, 2016), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm440988.htm>.

Who Is Covered?²⁶

- **General:** Registration with the FDA is required for facilities engaged in manufacturing, processing, packing, or holding food for human or animal consumption in the United States. This includes mixed-type facilities, unless the facility qualifies for an exemption under 21 C.F.R. § 1.226.
- **Maple Syrup:** Certain types of maple syrup producers must register. Gathering the sap is considered harvesting and, as such, is exempt. But heating the sap to concentrate is considered manufacturing and requires registration.²⁷
- **Milk:** While milking cows and storing that milk does not require registration, processing the milk, such as through pasteurization, is considered manufacturing. Thus, the facility will have to register.²⁸

Who Is Exempt?²⁹

- **Farms:** Whether they are primary production, secondary activities, or a mixture of both, they are exempt from registration.³⁰
- **Retail Food Establishments:** Defined as operations whose primary source of income is derived from the sale of food or food products to consumers, retail food establishments are exempt. This exemption also encompasses the sale of produce or foods to consumers on the farm and off the farm at roadside stands, farmers' markets, and CSA programs.³¹
- **Restaurants:** Establishments that prepare and sell food directly to the consumer for immediate consumption, including cafeterias, lunchrooms, cafes, bars, taverns, saloons, catering facilities, and kitchens found in hospitals, daycares, and nursing homes, are exempt. Also included are facilities that prepare and serve food for animal consumption, such as pet shelters and kennels.³²
- **Nonprofit Food Establishments:** Charitable 501(c)(3) entities that prepare or serve food directly to the consumer are exempt. Included in this definition are central food banks, soup kitchens, and nonprofit food delivery services.³³

Preventive Controls Rule

The Preventive Controls Rule covers many facilities that manufacture, process, pack, or hold food for consumption in the United States.³⁴ Covered facilities are required to establish and implement a food safety system that includes a hazard and risk analysis pursuant to this rule.³⁵ A covered facility is any facility

²⁶ FOOD FACILITY REGISTRATION, *supra* note 3, at 4–22.

²⁷ *Id.* at 9.

²⁸ *Id.* at 11.

²⁹ See 21 C.F.R. §§ 1.226–1.227.

³⁰ *Id.* § 1.227.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* § 117.1(b).

³⁵ *FSMA Final Rule for Preventive Controls for Human Food*, U.S. FOOD & DRUG ADMIN. (last updated Oct. 2, 2017), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334115.htm>.

required to register with the Bioterrorism Act.³⁶ Given the array of exemptions from this rule, including farms, it is unlikely that an attorney with the Legal Food Hub will represent a client subject to this rule. In addition to farms being exempt,³⁷ many activities involving on-farm manufacturing/processing that would require registration with the FDA are exempt from the Preventive Controls Rule when conducted by a “small or very small business for distribution into commerce.”³⁸ These include making processed food items, such as baked goods, jams and acidified foods, candy, syrups, sugar, vinegar, and more.³⁹

Some facilities that process food, and otherwise exempt from the Preventive Controls Rule, must follow “Current Good Manufacturing Processes” (CGMPs). This updated rule established a new set of prevention-oriented food safety requirements known as the Hazard Analysis and Risk-Based Preventive Controls Rule (“HARPC”), found in Subpart A.⁴⁰ Unless specifically exempted by law, every food facility in the United States and abroad that is subject to the FDA’s Bioterrorism Facility Establishment registration is required to develop a HARPC plan.⁴¹ Certain types of facilities that have to follow CGMPs may be exempt from the HARPC requirements.⁴² Additionally, all facilities that process food and practicing CGMPs must also comply with the “General Provisions” of 21 C.F.R. § 117, Subpart B.⁴³ Finally, while a not-covered facility will not be required to comply with Subpart F’s record-keeping requirements, it is strongly recommended as a practical matter that the facility still keep records. In part, if it is ever called into question whether it is covered, or if some food safety issue arises, the facility will need to have adequate records to rely on in its response.⁴⁴ Those exempt from the rule could lose the exemption, and also, should the client be considered a covered facility under this rule, the client will have to practice CGMPs. Moreover, the client will have to draft and implement a Food Safety Plan in accordance with 21 C.F.R § 117, Subpart C.⁴⁵

USDA CERTIFICATIONS

The USDA offers two voluntary audits leading to certification in Good Agricultural Practices (GAP) and Good Handling Practices (GHP). Note that these certifications do not replace obligations under FSMA’s

³⁶ *Id.* (referring to Section 415 of the Food, Drug, and Cosmetic Act).

³⁷ *Id.*

³⁸ A “very small business” is defined as averaging less than \$1 million in annual sales during the three-year period “preceding the applicable calendar year in sales of human food plus the market value of human food manufactured, processed, packed, or held without sale (e.g., held for a fee).” 21 C.F.R. § 117.3. *See also* U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: SMALL ENTITY COMPLIANCE GUIDE 12–14 (Oct. 2016), <http://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/UCM499202.pdf> (covering various compliance issues for small and very small businesses).

³⁹ 21 C.F.R. 117.5(g)(3).

⁴⁰ NAT’L SUSTAINABLE AGRIC. COAL., UNDERSTANDING FDA’S FSMA RULE FOR FOOD FACILITIES 14–17 (Aug. 2016), <http://sustainableagriculture.net/wp-content/uploads/2008/08/FSMA-FACILITIES-FINAL-.pdf>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 21 C.F.R. §§ 117.1–117.9.

⁴⁴ *Id.* §§ 117.10–117.110.

⁴⁵ *Id.* §§ 117.126–117.136.

Produce Safety Rules.⁴⁶ GAP and GHP are voluntary food safety programs, whereas FSMA is law.⁴⁷ This means that while a farmer may be GAP or GHP compliant, in addition, the attorney would have to assess if the farmer is also FSMA compliant.⁴⁸ These certifications signal that the farmer follows what are regarded as the agriculture industry's best practices in ensuring food safety. However, it does not guarantee the farmer's produce to be microbial-free. There are commodity-specific GAP certifications available for mushrooms, tomatoes, and leafy greens.⁴⁹

Getting these certifications can be costly. They are user-funded and may require upgrades or modifications to one's farm. Unless working with large institutional purchasers, such as grocery stores, it is unlikely that such certifications will offer the client any benefit, given the cost and time investment involved.

COTTAGE FOOD & CRAFT BEER REGULATIONS IN CONNECTICUT

Cottage foods are those which are produced in a home kitchen. Before recent legislation, all food for sale was required to be prepared in a government-inspected commercial kitchen under Connecticut law.⁵⁰ This caused problems for farmers who wished to supplement their income through the sale of cottage foods. In response to such concerns, Connecticut passed laws permitting farmers and others to sell products prepared in residential kitchens under limited circumstances. Connecticut permitted maple syrup to be produced and sold from residential farms in 1995.⁵¹ In 2011, the state passed what is known as the Pickle Law, permitting the sale of certain acidified foods. This still did not permit the sale of such items as baked goods or goods produced in a non-farm kitchen. In 2018, however, the Connecticut Governor Malloy signed into law a new cottage food law, which will allow certain homemade foods to be sold to the public.

Pickle Law

The pickle law permits the sale of acidified foods, such as pickles, salsa, and hot sauce, jams, jellies, and preserves, that are produced in a residential-farm kitchen, so long as certain requirements are met. The product must be made from produce grown on the residential farm where it is being prepared, and the farm's water supply must either be from a public system or a tested private well. If preparing acidified foods, the pH levels of the product must be tested. Additionally, the preparer must show documentation of completing an examination in safe food processing and food handling. The final product must also be properly labeled to read in ten-point font: "Not prepared in a government inspected kitchen."⁵²

⁴⁶ Patricia Tripp, *Expert Tip: I'm GAPs Certified. Am I Also FSMA Compliant?*, CAROLINA FARM STEWARDSHIP ASS'N (2017), <http://www.carolinafarmstewards.org/expert-tip-im-gaps-certified-am-i-also-fsma-compliant>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ U.S. DEP'T OF AGRIC., GOOD AGRICULTURAL PRACTICES AND GOOD HANDLING PRACTICES AUDIT VERIFICATION PROGRAM: USER'S GUIDE 1 (2011),

http://www.ams.usda.gov/sites/default/files/media/GAPGHP_Audit_Program_User%27s_Guide%5B1%5D.pdf.

⁵⁰ Memorandum from James Orlando, Office of Legislative Research, Conn. General Assembly (June 18, 2012),

<http://www.cga.ct.gov/2012/rpt/2012-R-0241.htm>.

⁵¹ 1995 Conn. Acts 95-319-SB 495, *codified at* CONN. AGENCIES REGS. § 21a-24b (1996).

⁵² CONN. AGENCIES REGS. § 21a-24a.

Cottage Foods Law

The most recent statute permitting the sale of cottage foods is the Cottage Foods Law. It expands its coverage beyond food prepared on residential farms to cover residential food facilities. It also permits the sale of non-potentially hazardous foods, including baked goods. The following are some of the law's key provisions.⁵³

- **What Is Covered:** Cottage foods permitted for sale include non-potentially hazardous foods, such as baked goods, jams, and jellies, which are sold directly to the consumer at the site of production, farmers' markets, local fairs and festivals, and charitable organization functions.
- **Income Cap:** The total gross sales for the cottage food operation cannot exceed \$25,000 annually. If proceeds exceed that amount, the operation must either obtain a license as a food manufacturer or cease its activities.
- **Limited Marketplaces:** Cottage foods can only be sold directly to the consumer by the cottage-food producer. Consignment and wholesale sales, as well as sales through grocery stores, restaurants, long-term care facilities, group homes, day care facilities, and schools are prohibited.
- **Labeling:** All products must be pre-packaged and labelled with the product name, name and address of the producer, ingredients in descending order of predominance by weight or volume, net weight/volume, potential allergens, and a statement in at least ten-point font reading: "Made in a Cottage Food Operation that is not Subject to Routine Government Food Safety Inspection."
- **Licensing:** All cottage-food producers must obtain a cottage-food license from the Department of Consumer Protection before beginning operations. In order to obtain this license, the Department has the authority to inspect the home kitchen where the cottage foods will be made. The Department has further authority to continue to inspect the home kitchen after the license has been obtained. In addition, the cottage-food producer will have to complete a state-mandated food-safety training class in order to become licensed. This license must be displayed at the place where the cottage foods are sold. A cottage-food producer may only produce those foods specified on the cottage-food license. The cost of the license cannot exceed \$100.

NOTE: At the time of this guide's publication, the Cottage Food Law had not yet become effective. The Cottage Food Law is to become effective on **October 1, 2018**.

Connecticut Craft Beer: Manufacturer Permit for Farm Breweries

The recently passed Connecticut Craft Beer law expands what a farmer may pursue as an income-producing business activity.⁵⁴ This new law promises a new economic synergy between the beer industry, local farmers,

⁵³ An Act Concerning Revisions to the Department of Consumer Protection Statutes, Conn. Pub. Act No. 18-141 §§ 13–19 (2018), *to be codified in* CONN. GEN. STAT. § 21a *et seq.*, <http://cga.ct.gov/2018/ACT/pa/pdf/2018PA-00141-R00SB-00193-PA.pdf>.

⁵⁴ 2017 Conn. Acts 17-160 (amending CONN. GEN. STAT. §§ 30-16(f)–(g)).

and employers across the state.⁵⁵ H.B. 5928, codified by the Connecticut General Assembly as P.A. 17-160, establishes a manufacturer permit for a farm brewery.⁵⁶ A farm brewery is defined as “any place or premises that is located on a farm in the state in which beer is manufactured and sold.”⁵⁷ With these new permits, farmers are allowed to make, store, bottle, distribute, and sell up to, but not more than 75,000 gallons of beer per year, and, as long as the statutory requirements are met, they are allowed to advertise their products as “Connecticut Craft Beer.”⁵⁸

P.A. 17-160 sets out **five requirements** that a farmer must meet in order to be in full compliance with the statute:

- **Not More than 75,000 Gallons:** A farmer holding a manufacturer permit for a farm brewery is limited to producing 75,000 gallons of beer in a single calendar year.⁵⁹
- **Limited to Authorized Offerings:** A farm brewery permit is limited to the single principal premises of the farm brewery, and authorizes the following:
 - The sale of sealed bottles or other sealed containers of beer brewed on the premises of the holder of the permit;⁶⁰
 - The offering and tasting of free samples of beer manufactured by the farm brewery permittee, dispensed out of bottles or other sealed containers to visitors and prospective retail customers for consumption on the premises of the farm brewery permittee;⁶¹
 - Retail sales on the premises of not more than nine-liters of beer to any person per day, in sealed bottles or other sealed containers, for consumption on the premises;⁶² and
 - Retail sales of beer by the glass and bottle to visitors on the premises of the farm brewery permittee for consumption on the premises.⁶³
- **Not Less than 25 Percent:** In its first year, a farm brewery may not produce beer composed of fewer than 25 percent of hops, barley, cereal grains, honey, flowers, or other fermentables grown or malted within the state of Connecticut.⁶⁴ In its second year, a farm brewery may produce beer composed of fewer than 50 percent of a combination of the above listed fermentables.⁶⁵ In other words, the first year requires the farm brewery to produce beer using at least 25 percent Connecticut-grown ingredients, while the second year requires production with at least 50 percent Connecticut-grown ingredients.

⁵⁵ Darren Kramer, *New Connecticut Law Allows Farmers to Become Beer Brewers*, WTNH NEWS 8 (July 10, 2017), <http://wtnh.com/2017/07/10/new-connecticut-law-allows-farmers-to-become-beer-brewers> [hereinafter “*New Connecticut Beer Law*”].

⁵⁶ Conn. Gen. Ass. H.B. No. 5928 (2017).

⁵⁷ 2017 Conn. Acts 17-160.

⁵⁸ *New Connecticut Beer Law*, *supra* note 56.

⁵⁹ 2017 Conn. Acts 17-160.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

- **Sale of Beer at Farmers Markets:** A farmer holding a manufacturer permit may sell beer at a farmers' market (as defined in Section 22-6r) that is operated as a nonprofit enterprise or association, subject to the farmers' market inviting the farmer to sell beer at the farmers' market.⁶⁶
- **Annual Fee:** The annual fee for a farm brewery is \$300.⁶⁷

CONCLUSION

Farmers and food entrepreneurs represented by attorneys through the Legal Food Hub are likely to encounter some form of food safety regime. Interest in preventing food-borne illnesses has led to a wealth of federal regulations that might be applicable to the client. It is important that the attorney understand applicable rules and available exemptions in order to advise clients properly. Furthermore, regulations have been somewhat relaxed in Connecticut to permit the sale of cottage foods. If the attorney is representing a farmer or food entrepreneur selling cottage foods, it is important to know which goods can be sold, when the client might need to register as a food manufacturer, and the relevant labeling requirements.

RESOURCES

FDA Food Safety Modernization Act

<http://www.fda.gov/Food/GuidanceRegulation/FSMA>.

FSMA Rules & Guidance for Industry

<http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm253380.htm>.

FSMA Final Rule on Produce Safety

<https://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm>.

FSMA Final Rule for Preventive Controls for Human Food

<http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334115.htm>.

⁶⁶ *Id.*

⁶⁷ *Id.*

Chapter IV: FARM TRANSITIONS

This chapter provides an overview of farm transfers—the selling, bequeathing, or other transfer of one’s farm and assets to another, usually a cross-generational transition. This chapter explores the goals of a farm transition and ways in which an attorney can help a farmer to meet those goals.

OVERVIEW For decades, many family-owned farms have struggled to survive and compete with corporate farms. Recently, however, small farms have made a comeback across the United States, in part due to consumers’ increasing concerns about health and nutrition. According to the 2012 Census of Agriculture released by the federal government, Connecticut leads New England in farm growth, with the largest growth occurring among farms with fifty or fewer acres.¹ From 2007 to 2012, the number of farms in Connecticut increased by 22 percent, and the amount of total land being farmed (measured in acres) increased by 8 percent.² Owning a farm today requires the diligence and foresight to create a prudent estate plan that successfully transitions a farm at some point in the future. This section explores the various goals farmers may have in transitioning their farms and how lawyers may best prepare to understand and help farmers reach these goals.

1. Setting Goals for Farm Transitions The chapter begins by discussing the ways in which attorneys can go about understanding their clients’ goals for farm transition. Farmers can have personal, family, and business goals that need to be addressed during the transition process, and attorneys should tailor the transition process to these concerns. The section ends by highlighting key concerns that attorneys should be aware of when advising clients.

2. Methods of Farm Transitions The next section discusses the various methods of farm transition and the interplay between them. Farmers can transition their farms through a variety of means, including gift, asset sale, formation of a trust, or transfer of a business entity. Attorneys may want to inform their clients of additional considerations related to the transition process, including ways in which the farmer can advance conservation efforts and ways to supplement financial security for heirs.

3. Farm Transitions in Connecticut The discussion will turn to Connecticut and New England resources for the farm transition process. This section will first address programs implemented by the Connecticut Department of Agriculture that aid Connecticut farmers in the transition process and preserve Connecticut farmland. The discussion will then turn to support mechanisms from Connecticut partner organizations, focusing on organizations devoted to building a strong network of farmers. This section will provide guidance crucial to the various options farmers have when considering how to make the transition. Finally, the section will conclude with a discussion of New England area resources available to farmers and agricultural industry professionals navigating the farm transition process.

¹ Luther Turmelle, *Number of Farms in Connecticut Increasing at Fastest Pace in New England, Data Shows*, New Haven Register (2014), <http://www.nhregister.com/business/20140220/number-of-farms-in-connecticut-increasing-at-fastest-pace-in-new-england-data-shows>.

² *Id.*

SETTING GOALS FOR FARM TRANSITIONS

Generally, farmers will have both short-term and long-term goals pertaining to both their personal and business lives. An attorney should help each client realize his or her objectives, which will be affected by the client's goals and aspirations. In addition, the attorney and farmer will have to establish a timeframe for realizing these goals.

Personal Goals Farm owners are likely to take spouses, children, and future generations into account when devising their personal goals for transitioning the farm. These goals could be providing for future generations, keeping the farm in the family, or privately providing for a friend, beginning farmer, or surviving spouse. Some preliminary questions to consider asking in order to determine a farmer's personal goals include:

- Does the farmer own his or her land or share ownership with any family members?
- Do any non-family members hold an ownership interest in the land?

Business Goals Farm owners are likely to consider preserving or selling land, ensuring the direction of their business, and providing for a strong flow of future capital. Such business goals could be getting maximum dollar value from property sold, instilling sustainable farming practices, ensuring financial security in retirement, maintaining a healthy social security position, or donating the land to a nonprofit entity or land trust. These options are discussed in detail later in this chapter.

Initial Questions for a Proper Course of Action All farm clients need to consider transition issues. If a farmer waits until the occurrence of a major event to begin the planning process, the event may significantly limit transition choices or rush decision-making. Without a plan in place, the farmer's estate will enter into intestacy and will be divided according to state law. The farm business will be less likely to remain intact if this occurs.³

Farm clients have unique needs. Attorneys should encourage the farm owner and family members to have open and frequent conversations about farm transition plans. The importance of these conversations cannot be overstated. However, these conversations are often postponed or avoided altogether because they are difficult for families to have. Attorneys should carefully consider their legal obligations before participating directly in family discussions. It is important that an attorney equip each client with the resources to conduct these meetings and reach consensus with the family about how to proceed. Otherwise, the attorney's work may create contention.

³ See generally N.J. STATE AGRIC. DEV. COMMITTEE, FARM LINK PROGRAM, TRANSFERRING THE FAMILY FARM: WHAT WORKED, WHAT DIDN'T, FOR 10 NEW JERSEY FAMILIES, http://www.farmlandinfo.org/sites/default/files/FT9_NJSADC_Transferring%20the%20Family%20Farm.pdf.

The following section provides some suggested initial questions to frame discussions about farm transition plans between attorneys and farmers when discussing topics such as unrelated stakeholders, the future of the farm, and the distribution of farm assets.

Future of the Farm Farmers often have specific ideas for the future uses of their farms. Attorneys should work with farmers to identify their vision for the future of the farm with respect to land use, management, control, and any additional farm operations.

Family Ownership and Wealth

- Does the farmer own the land or share ownership with family members? Do any non-family members own the land?
- Will the farm be transferred within or outside of the family?
- If the farmer were to die or retire, would the farmer's family have enough financial resources to keep the land together or continue to farm?
- Will the farmer's spouse be able to live comfortably after the farmer's death?

Family Management

- Does a family member wish to manage the farm?
- Which family members want a say in farm management?
- Do those family members have the personal capacity to manage the farm?

Family Dynamics

- Has the farmer spoken with family members about his or her desires?
- Do family members have opinions about the farm transfer process?
- Who should care for the farmer's minor children or aging parents?
- Does a family member expect to take over the family business?
- Are family members apprehensive about losing their say in the business?

Outside Stakeholders Many individuals are affected by farm transitions. Attorneys should work with farmers to identify their vision for the future of their stakeholders with respect to ownership, management, wealth, and current relationships. The below questions can help identify farm stakeholders that may affect future generations of farm operators once the farm has transitioned:

Business Dependents

- Who does the current business support?
- Does the current business need to continue to support those people?

Current Customer Base

- Who are the farm's current customers?

- Do future customer opinions matter to the farmer?
- Does the farmer participate in a CSA operation? Is that a useful consideration for the future? That is, is this good for the future?

Business and Government Relationships

- Does the farm participate in farmers' markets or farm stands?
- Does the farm/farmer have contracts with other businesses?
- Does the farmer have crop insurance and/or USDA Farm Service Agency (FSA) loans?
- Does the farmer know of any liens on the farmer's land?

Employees and Tenants

- Does the farm have employees or tenants?
- How will the transfer affect farm employees or tenants?
- What is the quantity and quality of the employees or tenants?

Farm Assets Evaluating assets in an agricultural context can be particularly complex. Often a farmer's business and personal assets are indistinguishable. Additionally, the values of intangible assets, such as a spot at a local farmers' market or a good community reputation, are difficult to assess. Attorneys should work with farmers to identify all their potential assets and understand when and how they should be transferred. The below questions will help identify what the farmer feels are important assets to their operation and will help the attorney determine how to get the greatest value out of the transition for all parties:

Viability of the Farm

- Is the farm currently financially viable?
- Are there current threats to the farm's viability?
- Does the farmer own or lease the land?

Multiple Types of Assets

- What land-related assets does the farmer have?
- What is the quality of the land?
- What are the farm's ecological resources (e.g., water, soil, drainage)?
- What is the quality of the farm's ecological resources?
- What are the farmer's non-land farm assets (e.g., machinery, equipment, livestock)?
- What is the condition of these assets?
- Does the farmer want to transfer these assets? Have any been promised to anyone?
- Does the farmer have a house on the farm?
- Does the farmer have a barn or other farm structure used for farming purposes?

- What do you consider some intangible assets or operations valuable to the farm (e.g., goodwill, customer base, spot at local farmers' market, and relationships with other farmers, purchasers, restaurants, or institutions)?
- Does the farm have any intellectual property, such as trademarks, associated with it?
- What are the farmer's non-farm personal assets? Have any been promised to anyone?

Key Concerns Through a farm transition, farmers may want to ensure that their farms carry on into the future as successful business operations. Farmers may experience difficulty surrendering control of their livelihood and lifelong business.

Land Use Between 2015 and 2019, an estimated 10 percent of all farmland across the United States will be transferred.⁴ Across the Northeast region of the United States, the sale of land to a non-relative is estimated to be the most commonly used form of transfer method. Other methods include using a trust, selling to a relative, gifting, or transferring land through a testamentary transfer.⁵ Farmers generally have a significant interest in what happens to their farms after they leave them. Farmers are often emotionally attached to their farms and concerned about whether the farmland will continue to be used for agricultural purposes and, if so, what farming practices will be used.⁶ For example, farmers who have been diligent in conserving soil may wish to ensure that their successor use the same or better techniques so that the farmland is protected from erosion. Farmers have generally ensured their legacies by passing their farm on to non-relatives or family members with shared values.⁷ Whether the transfer is to family or outsiders, the farmer's preferences may conflict with those of the successor.⁸ Legal tools—many of which are discussed below—can help farmers share their values with the next generation and hold successors accountable to the transferor farmer's broader goals.

Farms can be extremely vulnerable to development. This is largely because farmland prices are low relative to the cost of land already zoned for development. Development pressure from urban growth and a burgeoning renewable energy sector can increase the value of land and gives owners a strong incentive to sell

⁴ Daniel Bigelow, *Visualizing U.S. Farmland Ownership, Tenure, and Transition*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV. (Mar. 2, 2017), <http://www.ers.usda.gov/data-products/data-visualizations/other-visualizations/visualizing-us-farmland-ownership-tenure-and-transition>.

⁵ *Id.*

⁶ See Bryan Schurle et al., *Transition Planning: 12 Steps To Keep The Family Farming*, KAN. STATE UNIV. AGRIC. EXPERIMENT STATION & COOP. EXTENSION SERV. (2012), <http://www.agmanager.info/farmmgt/planning/MF3074.pdf>.

⁷ MARSHA A. GOETTING ET. AL., TRANSFERRING YOUR FARM OR RANCH TO THE NEXT GENERATION: HOW TO COMBINE LEGAL, ECONOMIC AND SOCIAL DECISION-MAKING 5, MONTANA STATE UNIVERSITY, <http://msuextension.org/publications/FamilyFinancialManagement/EB0149.pdf> [hereinafter "TRANSFERRING YOUR FARM OR RANCH"]. Most New England Farmers appear adamant that their land stay in farming, even if that means transferring the land to a non-relative. AMERICAN FARMLAND TRUST & LAND FOR GOOD, KEEPING FARMERS ON THE LAND 5–6 (2016), http://www.farmlandinfo.org/sites/default/files/AFT_NE-FS_D_GainingInsights_GainingAccess.pdf [hereinafter "KEEPING FARMERS ON THE LAND"].

⁸ TRANSFERRING YOUR FARM OR RANCH, *supra* note 7, at 5; see also Jeanne Bernick, *Trust Worthy*, FARM J. LEGACY PROJECT (June 29, 2012), http://www.farmjournallegacyproject.com/article/legacy2012_trust_worthy.

their property.⁹ Furthermore, suburban farmland is likely to be much more valuable if used for housing or retail rather than for agricultural purposes.¹⁰ This is particularly true in southern and coastal parts of New England where the value of farmland rises to more than twice the national average.¹¹ As more land shifts from agricultural use, the value of the remaining undeveloped land increases.¹²

In 2016, the average value of farm real estate in Connecticut was \$11,200 per acre, well above the national average of \$3,080.¹³ In addition to pressure from developers, it may be difficult to keep farmland undivided and intact if the farmer has many heirs to whom he or she wants to bequeath the farm. In some cases, the desire to farm can conflict with interests of non-farming dependents, who may want to maximize the transfer value by selling farmland to the highest bidder. New farmers may not have the capital to purchase the land at market value from non-farming dependents, in part because the market value may exceed the use value of farmland. For new farmers, programs that pay landowners to protect farmland may be the only way a transition is economically feasible.¹⁴

“Farmland preservation has become increasingly endangered, as the market value of farmland is often higher for non-farm uses. Farmland is especially vulnerable to conversion pressures when passing from one owner to the next. For these reasons even families that plan to pass on the farm/ranch to the next generation can lose their land without sound estate planning. Good estate planning can help transfer both the land and the business from generation to generation.”

In order to help farmers promote goals of conservation, viability, and reinvestment, attorneys can leverage **State resources**, such as the Connecticut Department of Agriculture (e.g., Farm Transition Grant Program, Farm Viability Grant, and Farm Reinvestment Grant), Northeast Organic Farming Association (CT NOFA), Connecticut Farm Bureau, Connecticut FarmLink (discussed later in this chapter and in the Farmland Acquisition chapter), and the Connecticut Farmland Trust.¹⁵ **Federal resources** include the United States

⁹ *The Legal Guide for Direct Farm Marketing: Land Use and Property Law*, DRAKE AGRIC. L. CTR. (2011), <http://directmarketersforum.org/chapter-eight-land-use-and-property-law> [hereinafter “*Land Use and Property Law*”]; Gregory B. Hladky, *State Encouraging Solar Development at Expense of Farmland*, HARTFORD COURANT (Aug. 1, 2016), <http://www.courant.com/business/hc-solar-versus-farmland-20160801-story.html>.

¹⁰ *Land Use and Property Law*, *supra* note 9.

¹¹ AMERICAN FARMLAND TRUST, CONSERVATION L. FOUND., NE. SUSTAINABLE AGRIC. WORKING GROUP, NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 1 (2014), http://www.clf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULL.pdf.

¹² Dwight R. Lee, *Running Out of Agricultural Land*, FOUND. FOR ECON. EDUCATION (July 1, 2000), <http://fee.org/articles/running-out-of-agricultural-land>.

¹³ U.S. DEP’T OF AGRIC., LAND VALUES: 2017 SUMMARY 8–9 (2017), <http://www.usda.gov/nass/PUBS/TODAYRPT/land0817.pdf>.

¹⁴ NAT’L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 37–38 (2017), <http://www.youngfarmers.org/wp-content/uploads/2017/11/NYFC-Report-2017.pdf>.

¹⁵ *Programs, Services and Grant Opportunities*, CONN. DEP’T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=1366&q=258948&doagNav=|> (offering, among other products, state loan and grant programs to incentivize the continuance of affordable and sustainable agricultural practices); *About CT NOFA*, NE. ORGANIC

Department of Agriculture (e.g., Agricultural Conservation Easement Program), American Farmland Trust, Farmer Resource Network, and the National Young Farmers Coalition.¹⁶

Transferring Management and Control Transfers can occur in a variety of ways. For instance, a farmer might form a family partnership and gift farm assets, preserve the farmland (e.g., land trust, covenant, deed, or conservation), donate the land, or sell the land altogether. An attorney can help guide and advise clients on what the best options might be for them to reach their goals. In many cases, to ensure a successful farm transition, the successor needs an opportunity to develop experience managing the farm business.¹⁷ But because farmers are so deeply connected to their farms, they may struggle to relinquish control over farm operations. As a result, successors may not get sufficient opportunities to develop management skills before taking control of the farm.¹⁸

A plan that provides for a gradual transition over a period of several years can help the farmer and his or her successor(s) develop a trusting relationship.¹⁹ The successor can gain experience managing the farm while the farmer provides mentorship. Gradual transitions can also be accomplished by simulating an employer–employee relationship between the current owner and successor before the transition. Such a relationship could be a helpful indicator of whether the transition will be successful or not.

Transition plans can further help farmers maintain their quality of life. For instance, a gradual transition plan could allow a farmer to continue to live on his or her farm during retirement. A gradual transition may help the farmer address concerns about the future of the farm by allowing the farmer to reduce involvement in the farm operation over a longer period.

If a farmer plans to transfer the land to multiple children or family members, the attorney should advise the

FARMING ASS'N (2017), <http://ctnofa.org/About%20Us.htm> (a community of farmers and others specifically working towards viable organic farming in Connecticut), *Our Mission*, CONN. FARM BUREAU (2017), <http://www.cfba.org/whatisctfarmbureau.htm> (a member-driven organization that is a useful resource on topics such as land use, labor, and taxation); *Connecticut FarmLink*, CONN. FARMLINK (2017), <http://www.ctfarmlink.org> (connecting connects farmland owners and farm seekers to promote productive farmland transitions); *Our Mission*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/about-2/mission> (a statewide non-profit whose mission is to protect vulnerable farmland from threats of development by working with local farms to create protected land trusts).

¹⁶ *Agricultural Conservation Easement Program*, U.S. DEP'T OF AGRIC. (2017), <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep>; *Mission & History*, AMERICAN FARMLAND TRUST (2017), <http://www.farmland.org/mission-history> (a national coalition that focuses on protecting farmland by promoting sound farming practices); Farmer Resource Network Partners, FARMAID (2017), <https://www.farmaid.org/our-work/resources-for-farmers/farmer-resource-network/farm-aid-resource-network-resource-partners> (promoting local and family farm and food operations and providing a resource crisis hotline for immediate support for distressed farmers), <https://www.farmaid.org/our-work/resources-for-farmers/farmer-resource-network/farm-aid-resource-network-resource-partners>; *Land Access*, NAT'L YOUNG FARMERS COAL. (2017), <http://www.youngfarmers.org/policy/landaccess> (reaching out directly to young and future farmers to mobilize and educate the new wave of major food producers in the country).

¹⁷ See *KEEPING FARMERS ON THE LAND*, *supra* note 7, at 6.

¹⁸ Danny Klinefelter, *10 Lessons for Developing a Farm Successor to Manage and Lead*, Farm Journal Legacy Project (2011), http://www.farmjournallegacyproject.com/article/_report_2011_10_lessons_for_developing_a_farm_successor_to_manage_and_lead.

¹⁹ *Id.*

farmer to consider how best to transfer farm management. Passing the farm to multiple heirs can create tenuous joint farming situations, which can be difficult to maintain over the long term. Breaking up the farm to satisfy multiple heirs can destroy the farm operation. Thus, allocating the farm to one or many family members is an important element of transferring control. In addition, if a farmer does not anticipate including a non-farming member in the distribution, it may be beneficial to have that agreement in writing to avoid any future complications.

Protecting Involved Parties Many families spend a lifetime accruing wealth from their investments in their farms, and they are interested in passing the land down to the next generation. However, many families are not large enough to maintain these investments or simply not interested in continuing on in the agriculture industry.

Data from the most recent Census of Agriculture show that over five-year increments (2002, 2007, and 2012), the increase of principal operators 65 years and older has consistently outpaced that of operators 34 years and younger, even though the total number of farm operators has increased.²⁰ In addition, the amount of land owned by principal farm operators 65 and older has increased by 79 percent in the span of a decade.²¹ In New England, 92 percent of farmers above the age of 65 do not have a farm operator under the age of 45 working with them.²²

This data indicate that, while farmers may have farm transition plans, the futures of many farmers and their farm operations are uncertain. An attorney should understand the current farming climate in Connecticut in order to best advise clients on transitioning into and out of farming, so that all parties are protected no matter which direction a farm operation ultimately goes in.

- **Put It in Writing:** the farm transition plans and transfer agreements—like all business transfers—should be in writing.²³ Farm transitions can be emotionally charged and contingent on many factors. Parties should explicitly address in writing what must happen in the case of breach. For example, if a successor works for the farmer in return for the future transfer of the farm, how will that individual be compensated if the transfer never goes through?
- **Account for Finances:** the farm transition needs to address the farmer’s own monetary needs. Farm transitions are unique, in part, because the farmer’s assets are largely illiquid; tractors, harvesters, other equipment, and land may be essential for farm operation and constitute most of the farmer’s wealth. Gifting these assets to the next generation may be necessary for a successful farm operation but doing so

²⁰ *Connecticut Statistics*, FARMLAND INFO. CTR. (2017, <http://www.farmlandinfo.org/statistics/Connecticut>).

²¹ *Id.*

²² KEEPING FARMERS ON THE LAND, *supra* note 7, at 2.

²³ GARY A. HACHFELD, DAVID B. BAU, & C. ROBERT HOLCOMB, TREATMENT OF HEIRS IN THE TRANSFER PROCESS (Univ. of Minn. Extension ed. 2014), <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/trans-series-combined-82117.pdf> [hereinafter “TREATMENT OF HEIRS”].

may leave the older generation with very little retirement income.²⁴ Therefore, farmers may struggle to balance retirement needs and farm solvency.²⁵

- **Abilities of Successor:** the farm transition process needs to consider the successor's financial ability to take over the farm operation. Successors may not have enough capital to purchase the farm's assets outright. Gathering sufficient capital to obtain the farm assets can be even more difficult for farming families if the older generation suddenly passes away and the assets are distributed equally among the farmer's family and have to be bought back.²⁶ Successors need to take into consideration the farm's financial viability. It may not be in the successor's best interest to take over a farm that is not profitable or would require too much investment to become profitable.
- **Family Concerns:** the farm transition may need to take into account the impact of the transition on the farmer's family. When the farmer wants to transfer the farm business to a single child or family member, it can be difficult to reconcile this decision with other non-farming members of the family during the estate settlement process.²⁷ Keeping the farm in the family traditionally involved transferring control over all the farm's assets to a single member of the younger generation.²⁸ However, this method would exclude non-farming family members from receiving a portion of the estate. Finding an amicable solution for all parties (including non-farming family members) through means including but not limited to life insurance policies as discussed in the next section, are a key part of a farm transition.

Treating each family member fairly during the farm transition process may require distributing assets unequally.²⁹ For instance, the farmer's family members may have contributed unequally to the farm's growth over the years. Family members who worked on the farm or who have invested in the farm's development may be entitled to a larger share of the estate.³⁰ The apparent disparity in treatment, however, could produce resentment, and the farmer will likely want to ensure that his or her family members feel that the farm transition process is equitable. A successful transition plan can address common concerns, such as liquidity, retirement savings, and equitability between heirs.

²⁴ ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 34 (Univ. of VT. Extension ed. 2006), <http://www.uvm.edu/farmtransfer/LegalGuide.pdf>.

²⁵ *Id.*

²⁶ E-mail from Kevin Spafford, Succession Planning Expert, Farm Journal Legacy Project, to author (Mar. 17, 2014) (on file with author).

²⁷ Sara Schafer, *Matters of the Estate*, FARM J. LEGACY PROJECT (June 30, 2012), http://www.farmjournallegacyproject.com/article/legacy2012_matters_of_the_estate-sara-schafer.

²⁸ *Id.*

²⁹ David Goeller, *Putting A Value on Sweat Equity* (Univ. of Minn. Extension ed. 2017), <http://www.extension.umn.edu/agriculture/business/farm-transfer-estate-planning/docs/trans-series11-putting-a-value-on-sweat-equity.pdf>.

³⁰ *Id.*

METHODS FOR FARM TRANSITIONS

Farm transition can happen in a variety of ways, and it can be accomplished through one of the methods described below or through a combination of multiple methods. It is important to advise clients that some transition methods discussed here can be used in conjunction with another; in fact, sometimes a client's goals may be best achieved through pairing transition techniques, depending on the client's priorities for the transition.

This section will highlight different processes or tactics that can effectuate a farm transition, specifically sale, trust, conservation easement, business entity formation, life insurance, and land-linking programs. When consulting this section, it is important to remember that farm transition can be a highly individualized process that must account for the client's needs and wants. The mechanisms of farm transfer discussed below can and should be considered in relation to each other, and they are not always mutually exclusive from one another. Attorneys should work with their clients to find one or multiple mechanisms that best accomplish transition goals.

Gift Many Connecticut farmers cherish the connection they and their families have long enjoyed with their farms. Passing a farm onto the next generation can be a common method of transfer. Farmers who do not need to rely on retirement income from sale of the farm or whose children are ready to take over farm ownership may consider taking advantage of certain tax incentives designed to keep farmland in the hands of family farmers.

When a farmer passes away, that farmer's taxable estate may be subject to an estate tax, both at the federal and state levels. However, the taxable estate will not incur that tax if its value does not exceed the statutory exclusion amount. As of January 1, 2018, the federal exclusion amount is \$10 million (before accounting for inflation), which is twice the previous pre-inflation amount, although this amount is set to expire in 2026.³¹ In other words, if an estate is valued under this amount, then it will generally not be subject to the federal estate tax. Given this substantial exclusion, it is highly unlikely that any Legal Food Hub farmer-participant would incur a federal estate tax. To illustrate this, under the lesser exclusion amount of \$5 million, the United States Department of Agriculture estimated that only 1.7 percent of farm estates across the country would incur any federal estate tax.³² That number drops even further under the new expanded exclusion.

Connecticut's own exclusion amount, or exemption, is also increasing and is set to eventually match the federal exclusion amount. For decedents who pass away in 2018, the exemption is \$2.6 million, up from \$2 million; for those who die in 2019, the exemption increases to \$3.6 million; and for those who die in 2020 or later, the Connecticut exemption is set to match the federal exclusion amount.³³ This means that with each passing year, it will become more unlikely that a farmer-participant will be subject to the Connecticut estate

³¹ Tax Cut and Jobs Act, Pub. L. 115-97, § 11061 (Dec. 22, 2017) (to be codified at 26 U.S.C. § 2010).

³² *Overview*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV. (last updated Jan. 27, 2017), <http://www.ers.usda.gov/topics/farm-economy/federal-tax-issues>.

³³ 2017 CONN. ACTS 17-2 (Spec. Sess.).

tax. Based on the 2012 Census of Agriculture, 446 Connecticut farms (about 7 percent) had farmland valued at more than \$2 million.³⁴ Of course, this does not account for other non-real estate assets or liabilities.

Nevertheless, for purposes of succession planning, it is useful to understand some of the potential costs associated with farmland estates. As noted above, the federal exclusion amount for taxable estates is \$10 million, and the Connecticut estate-tax exemption amount is \$2.6 million. Connecticut's estate tax rates are progressive, ranging generally from 7.2 percent to 12 percent, and they gradually increase as the value of the estate increases.³⁵

Form CT-706/709 for Connecticut estate tax is due within six months of the decedent's death, unless an extension of time is granted.³⁶ To complete this form, it will be necessary to calculate the decedent's taxable estate. In Connecticut, the **taxable estate** is (1) the sum of the decedent's **gross estate** (as valued for federal estate tax purposes), *less* allowable federal estate-tax deductions (per Chapter 11 of the Internal Revenue Code), *plus* (2) the aggregate amount of all Connecticut taxable gifts made by the decedent during his or her lifetime during all calendar years on or after January 1, 2005 (other than Connecticut taxable gifts that are includable in the decedent's federal gross estate), *plus*; (3) the amount of any gift tax paid to Connecticut by the decedent or the decedent's estate on any gift made by the decedent or the decedent's spouse during the three-year period preceding the date of the decedent's death.³⁷

Connecticut uses the same definition for a **taxable gift** that the Internal Revenue Service (IRS) uses.³⁸ Under that definition, taxable gifts are the "total amount of gifts made during the calendar year, less the deductions provided"³⁹ For Connecticut residents, this includes real and tangible personal property located within Connecticut and intangible property located anywhere; for non-residents, the Connecticut gift tax applies only to personal and tangible property located within Connecticut.⁴⁰ This gift tax applies to all gifts made after 2005; thus, a farmer-decedent's Connecticut exemption amount will include the value of all taxable Connecticut gifts made in 2005 and later.⁴¹

At the federal level, not all gifts need to be reported to the IRS and do not affect the decedent's federal exclusion amount. If the total value of gifts to a donee in a calendar year exceeds the annual exclusion amount,

³⁴ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, CONNECTICUT DATA, TABLE 46: VALUE OF LAND AND BUILDINGS: 2012 AND 2007 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_045_048.pdf.

³⁵ CONN. GEN. STATS. § 12-391(g).

³⁶ *Form CT-706/709, Connecticut Estate and Gift Tax Return*, CONN. DEP'T OF REV. SERVS. (2018), <http://www.ct.gov/drs/cwp/view.asp?a=3750&q=441186>.

³⁷ CONN. GEN. STATS. § 12-391(c).

³⁸ *Id.* § 12-643(a).

³⁹ 26 U.S.C. § 2503(a).

⁴⁰ For more on the Connecticut gift tax, see 2017 FORM CT-706/709: CONNECTICUT ESTATE AND GIFT TAX RETURN AND INSTRUCTIONS, CONN. DEP'T OF REV. SERVS. 3, <http://www.ct.gov/drs/lib/drs/forms/1-2017/estate-gifttax/2017-ct-706-709booklet.pdf>.

⁴¹ *Id.*

then that difference may be subject to tax; otherwise, if the donor's gifts to that donee do not exceed the annual exclusion amount, then the donor will not need to report that gift.⁴² For 2018, the federal annual exclusion amount is \$15,000 (or \$30,000 for married couples).⁴³ This means that gifts to a single donee in 2018 totaling less than \$15,000 will not later subtract from the donor's exclusion amount.

For example, a single farmer's taxable estate could include the entire value of everything the farmer owns at the time of death, as well as the entire value of gifts that the farmer made on or after January 1, 2005, which exceeded the exclusion amount for that year. If that farmer made a \$5,000 gift to his grandson and a \$40,000 gift to his daughter in 2018, then the \$5,000 gift would be entirely tax-free; and the first \$15,000 of the daughter's gift would incur no tax, but the remaining \$25,000 of it would be subtracted from the farmer's federal exemption.

Special Valuation for Farmland Generally, real property that is includable in the gross estate is valued at the fair market value at the time of the decedent's death, which could result in a high value, especially in Connecticut.⁴⁴ However, both the IRS and Connecticut permit an alternative valuation for farmland. Rather than valuing the farmland at its potential use, such as for residential or commercial development, the IRS and Connecticut may use the farmland's agricultural use as the basis for valuation. This can result in substantial savings to the estate and potential avoidance from estate-tax liability.

Under Internal Revenue Code § 2032A, the executor of the farmer's estate can elect to use this valuation method.⁴⁵ The savings, however, are limited to \$750,000.⁴⁶ In order to be eligible, the farmland must be **qualified real property**. Qualified real property refers to U.S. land "acquired from or passed from the decedent to a qualified heir of the decedent and which, on the date of the decedent's death, was being used for a qualified use by the decedent or a member of the decedent's family."⁴⁷ A **qualified heir** means a member of the decedent-farmer's family—an ancestor, a spouse, a lineal descendant, or a spouse of a lineal descendant—who acquired the farmland.⁴⁸ A **qualified use** means devoting the farmland to either use as a farm for farming purposes or use in a trade or business other than that of farming.⁴⁹ Moreover, there are valuation and duration-of-use requirements for real property to qualify under this section.⁵⁰ If a qualified heir inherits the farmland and enjoys the benefits of this valuation method, but within ten years either disposes of the inherited real property interest or stops using the farmland for a qualified use, then that heir could be hit with an estate tax.⁵¹

⁴² 26 U.S.C. § 2503(b)(1).

⁴³ *Frequently Asked Questions*, INTERNAL REV. SERV. (last updated Oct. 23, 2017), <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes#5>.

⁴⁴ See CONN. GEN. STATS. § 12-349(a).

⁴⁵ 26 U.S.C. § 2032A.

⁴⁶ *Id.* § 2032A(a)(2).

⁴⁷ *Id.* § 2032A(b)(1).

⁴⁸ *Id.* § 2032A(e)(1).

⁴⁹ *Id.* § 2032A(b)(2).

⁵⁰ See *id.* § 2032(b)(1).

⁵¹ *Id.* § 2032A(c).

Connecticut's farmland valuation election is similar to the Internal Revenue Code's election. For real property to be eligible, it must be classified as farmland, pursuant to Conn. Gen. Stats. § 12-107c, at the time of the farmer-decedent's death.⁵² Connecticut requires that (1) the properly classified farmland was owned by the farmer-decedent (or certain beneficiaries or distributees) for no fewer than five years during the eight years immediately preceding the farmer-decedent's death; and (2) the farmer-decedent (or the beneficiary or distributee) engaged in active and substantial participation in farming or other agricultural operation directly related to the farmland.⁵³ Connecticut also allows partnerships, corporations, or trusts to take advantage of this election.⁵⁴ For more on that statute, or PA 490 more generally, refer to the website of the Connecticut Department of Agriculture.⁵⁵ To make this election, the executor will submit **Form CT-706/709**.

Also similar to the Internal Revenue Code's election, the Connecticut farmland election may impose a tax penalty on the new owner (e.g., the beneficiary or distributee) of the farmland if that owner transfers or changes the classification of the real property.⁵⁶ Specifically, that penalty equals the difference between the amount of tax paid under the farmland-valuation election and the amount of tax that would have been paid if the farmland had been assessed at a fair-market value.⁵⁷ Separate forms are available to report the fair-market value of the farmland: **Schedule CT-706 Farmland** (if reporting for value at date of gift) and **Schedule CT-709 Farmland** (if reporting for value at date of decedent's death).⁵⁸

Probate Fees Other costs associated with passing on the family farm may arise from probate proceedings. In Connecticut, the various probate fees and their methods of calculation are found in Conn. Gen. Stats. § 45a-107.

To determine the fees, one must first determine the **basis for fees**. The basis equals (1) the *greatest* of (a) the gross estate for tax purposes (as mentioned above), (b) inventory, (c) the Connecticut taxable estate (per Conn. Gen. Stats. § 12-391), or (d) the gross estate for succession tax purposes; *plus* (2) all damages recovered for injuries resulting in death; *minus* (3) any hospital

| Connecticut Probate Fees ⁵⁹ | |
|----------------------------------------|------------------------------------------------|
| Basis of Fees | Total Fee |
| \$0 – \$500 | \$25 |
| \$501 – \$1,000 | \$50 |
| \$1,001 – \$10,000 | \$50 + 1% of all in excess of \$1,000 |
| \$10,001 – \$500,000 | \$150 + 0.35% of all in excess of \$10,000 |
| \$500,001 – \$2,000,000 | \$1,865 + 0.25% of all in excess of \$500,000 |
| \$2,000,001 – \$8,877,000 | \$5,615 + 0.5% of all in excess of \$2,000,000 |
| \$8,877,000 and over | \$40,000 |

⁵² CONN. GEN. STATS. § 12-349(a)(1).

⁵³ *Id.* § 12-349(a)(1).

⁵⁴ *See id.* § 12-349(a)(2).

⁵⁵ *See Public Act 490 – The Basics*, CONN. DEP'T OF AGRIC. (2018), <http://www.ct.gov/doag/cwp/view.asp?a=1366&q=259834>.

⁵⁶ CONN. GEN. STATS. § 12-349(e)(1).

⁵⁷ *Id.* § 12-349(e)(1).

⁵⁸ *See Estate and Gift Tax*, CONN. DEP'T OF REV. SERVS. (2018), <http://www.ct.gov/drs/cwp/view.asp?a=1509&q=445162>.

⁵⁹ CONN. GEN. STATS. § 45a-107(b)(2).

or medical expenses for treatment of such injuries resulting in death and associated attorneys fees and other costs for recovery; and *minus* (4) 50 percent of property passing to the surviving spouse.⁶⁰

Other fees associated with probate may include reimbursing creditor fees for filing a claim (\$50 per claim), petitioning to open a safe deposit box (\$50), petitioning for the appointment of an estate examiner (\$50), or using mediation (\$350 per day).⁶¹ Additionally, fees not paid within thirty days of the date of the invoice from the probate court will bear interest at 0.5 percent per month until paid.⁶²

Automatic Liens Connecticut attaches statutory liens by way of estate taxes and probate fees to all Connecticut real estate a person owns at death. For farmland valued at its agricultural-use rate under the farmland-valuation election, this lien automatically attaches until (a) the expiration of ten years immediately following the death of the farmer-decedent, as long as no transfer or change in classification occurred; or (b) in the event the farmland is transferred or its classification changes, and subject to payment of additional taxes and fees.⁶³ For more on these statutory liens, refer to Conn. Gen. Stats. § 45a-107b and Conn. Agencies Regs. § 12-398-1.

Sale Selling a farm may be an attractive option for farmers wishing to transfer ownership and control to another party. Farmers who do not wish to dictate the future use of the farm and who do not wish to divide benefits among various parties in a more complicated way that, say, a trust could accomplish, may prefer the finality provided by a sale. That is, once the sale is finalized, the farmer-seller need not (indeed, cannot) continue to dictate land use or asset division.

Sales can be either outright or tailored. In an **outright sale**, the seller will convey all property rights and interests, including title, to the buyer; the buyer, in turn, agrees to pay the full negotiated price.⁶⁴ Outright sale can protect the farmer's interests during the transition. The farmer-seller can work with the buyer during the negotiation process to ensure her goals are met by the ensuing transition, but she will not retain any control over the land or assets after the sale is finalized.

On the other hand, a **tailored, or conditional, sale** does much of what an outright sale does, but it allows for different terms of the transition process. In a conditional sale, the purchaser receives possession and right of use of the farm on signing, but the seller retains title to the farm and its assets until contractual conditions are met.⁶⁵ These conditions may include options and installment provisions. Conditions grant the right to purchase the land and assets at a later date, and installment provisions allow for the sale price to be paid in smaller increments over time. Conditional sales may also allow for a gradual transfer of the farm and can include provisions establishing a mentor–mentee relationship between seller and buyer. This could protect a

⁶⁰ *Id.* § 45a-107(b)(1).

⁶¹ *See id.* §§ 45a-107(f)–(k).

⁶² *Id.* § 45a-107(m).

⁶³ *Id.* § 12-349(e)(2).

⁶⁴ Tony Guerra, *What Is an Outright Sale?*, SAPLING (June 5, 2011), <http://www.sapling.com/8545543/outright-sale>.

⁶⁵ *Conditional Sale*, WEX LEGAL DICTIONARY (Cornell L. Sch. ed. 2017), http://www.law.cornell.edu/wex/conditional_sale.

seller's desire to preserve farm practices and simultaneously empower a new farmer to learn the business from an experienced party.

Sales can be advantageous to farmers because they empower sellers to choose their successors. A farmer retains control over whom to sell the farm to. During negotiations, a farmer could also assess potential buyers and determine whether a buyer shares important values in common with the farmer. The gradual transition of a tailored sale may further empower the seller, in that items of great importance to the seller can be proposed as conditions of the final transfer of ownership. However, this control is limited, and does not typically extend after the sale (outright or tailored) has finalized.⁶⁶

Another advantage of selling a farm is that it provides liquid capital to the farmer-seller. That capital can then be used as the farmer-seller sees fit. The readily available capital provided by a sale may go to the seller's immediate benefit, or it could be divided among the seller's heirs as an inheritance in lieu of bequeathing the farm property itself.

The main disadvantage of selling a farm, as mentioned above, is the lack of control over future use. Whatever control may attach to the selection of a buyer ultimately disappears, since when the sale is finalized the seller can no longer dictate the use or future direction of the farm. For farmers wishing to preserve a farm identity after their tenure as owner, outright or tailored sales may not be preferred methods of farm transition.

Assisting with Sales: Land-Linking Farmers wishing to sell their farm but who do not yet have a buyer in mind may wish to take advantage of a **land-link** program when planning the sale. Land-link programs connect willing sellers and buyers to facilitate farm transfer, whether through sale, lease, or other arrangement. These programs can therefore be an attractive resource for farmers whose family members do not wish to, or are not capable of, taking over farm operations. And, because many land-link buyers are younger, aspiring farmers, the program can serve as a “clearinghouse . . . between generations of farmers” and can assure a seller that the next generation will maintain the agricultural use of the land.⁶⁷

A primary benefit of land-link programs is the matchmaking process. The farmer can be confident that the successor is actively interested in perpetuating the farm-use of the land, is committed to agriculture, and generally shares the seller's values. Land-link programs can also further mentorship between the aging or retiring farmer and the next generation. The programs also provide resources to educate and assist with respects to some of the steps in the transfer.

One drawback of land-link programs is that they are not standalone transition mechanisms. The program does not provide for a legally binding set of obligations and cannot guarantee that the successor will act in accordance with the seller's wishes. Nor can the program guarantee that the successor will continue to use

⁶⁶ While sales typically do not allow the seller to have a say in post-sale operation, a sale accompanied by a deed restriction (discussed below) may allow the farmer to control certain aspects of the land's use. Though, the extent of this control will depend on an identifiable beneficiary who is willing and able to enforce the deed restriction.

⁶⁷ *Connecticut FarmLink*, CONN. FARMLINK (2017), <http://www.ctfarmlink.org>.

the land for farming. However, by providing a large pool of potential buyers, the land-link program allows farmers to “screen” potential successors, ultimately mitigating this risk.

Connecticut’s land-linking program, Connecticut FarmLink, provides resources for sellers and new farmers on its website, and also hosts information on available farmland for purchase or lease.⁶⁸ The FarmLink website has case studies, checklists, and electronic tools for farm needs, such as soil surveys and webinar trainings sponsored by the University of Connecticut.

Trusts Trusts allow for a separation of management and benefit; the trustee as legal owner of the assets oversees the trust, while the beneficiary can simply receive benefits from the property without, for example, having to actually run the farm.⁶⁹ Thus, a farmer could use a trust to transfer the farm land to an interested or qualified owner while ensuring that the land’s productive uses benefit the farmer-seller’s remaining family members.

A farmer may wish to transition his farm and assets through a trust to maintain a higher degree of control over the transition and post-transition farm use. Trusts are formed through written documents and establish a relationship between the grantor (who gives the land or asset to be held in trust), the trustee (who is the legal owner of the land or asset held in trust⁷⁰), and the beneficiary (who benefits from the land or asset held in trust). In Connecticut, the trustee receives legal title to the farm property (or other trust asset). It will be important that the farmer-grantor chooses a trustee wisely, given the trustee’s authority over the operation of the trust. Connecticut law imposes requirements on trustees in certain situations. For example, trustees of testamentary trusts must be bonded, though the testator can waive this requirement in the will.⁷¹

Trusts can be revocable, where assets held in trust are still for the most part considered to be the grantor’s and the grantor can revoke the trust while still alive and capable,⁷² or irrevocable, where the assets are generally not considered the grantor’s and the grantor cannot revoke the trust.⁷³ Clients should be advised that tax liability turns on whether the trust is revocable or irrevocable. With an irrevocable trust, the client-grantor is no longer considered the owner of the trust assets, and therefore does not pay taxes on the assets (instead, the trust does). With a revocable trust, however, because the grantor can revoke the trust and

⁶⁸ *Estate Planning and Farm Transfer*, CONN. FARMLINK, <http://www.ctfarmlink.org/links-for-estate-planning-and-transfer>; *Farmland for Sale*, CONN. FARMLINK, <http://www.ctfarmlink.org/farmland-for-sale>.

⁶⁹ LEXISNEXIS PRACTICE GUIDE: CONNECTICUT ESTATE PLANNING 2017 EDITION § 4.03.

⁷⁰ *Id.* § 4.10 (“In Connecticut, legal title vests in the *trustee* of the trust, not the trust.”).

⁷¹ CONN. GEN. STAT. § 45a-473. Notwithstanding a testator’s waiver, a probate court may nonetheless require a bond from the trustee “upon the application of any person interested.” *See also* 1 LEXISNEXIS PRACTICE GUIDE: CONNECTICUT ESTATE PLANNING 2017 EDITION § 4.23.

⁷² 1 LEXISNEXIS PRACTICE GUIDE: CONNECTICUT ESTATE PLANNING 2017 EDITION § 4.05.

⁷³ *Id.* The question of whether the assets in trust are or are not considered the grantor’s (revocable or irrevocable trust, respectively) concerns the tax liability of the assets. With a revocable trust, the assets are held under the grantor’s social security number and are calculated into the grantor’s income tax returns. Under an irrevocable trust, the trust has its own tax identification number and files its own returns independent of the grantor. *Id.*

reclaim the assets, the grantor is treated as owner and taxed on the assets in trust.⁷⁴

Trusts may also be inter vivos (created while the grantor is living) or testamentary (created by a will and effected after one's death). An inter vivos trust takes the form of a contract between grantor and trustee, while a testamentary trust is laid out in a grantor's will.⁷⁵

Transitioning a farm through a trust provides some advantages over a sale. For instance, a trust allows the farmer to have more control over the fate of the farm through conditions on the use of the land and through controls on the duration of the trust (thereby protecting future generations and enabling subsequent transitions). Farmers creating a trust can also determine the appropriate distribution among beneficiaries of the benefits derived from trust assets. This can enable a farmer to reach a perceived fair distribution among heirs even if it is not an absolutely equal distribution.

Trusts may additionally help avoid some of the probate process, protect the privacy of the farm and farmer, and ensure smoother business continuity.⁷⁶ Because a trust establishes desired division of assets, a will may simply direct an executor to carry out the trust, thereby reducing the need for court intervention in the probate process. There is less need to divide the assets judicially when the trust already lays out the grantor's desires. Trusts may also shelter some of the trust assets from estate taxes on the grantor's death.⁷⁷

Yet, there may also be drawbacks to trusts. When using a trust to dictate the future of the farm, the farmer may insist on conditions that restrict future uses to such an extent that the successor is hampered from adequately responding to future changing needs. This might occur with conservation provisions. For instance, if a trust requires that a dairy farm continue to be operated in accordance with current dairy farming practices, this could prevent future operators from installing new technology in the future that may vastly improve productivity and sustainability.⁷⁸ Additionally, trusts empower trustees with substantial authority, and trustees may act outside the wishes of the farmer. Trustees' disagreements can lead to legal action (thereby incurring additional costs) to protect the farmers' interests.

Conservation and Farm Transition Farmers wishing to ensure their farmland and assets are used for conservation purposes in the future can tailor the transition process to meet these goals. Land conservation efforts may be achieved through a variety of means, including through trust formation and through conservation easements (deed restrictions) on the property.

⁷⁴ *Abusive Trust Tax Evasion Schemes – Questions and Answers*, INTERNAL REV. SERV. (Aug. 15, 2016)

<https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers>.

⁷⁵ 1 LEXISNEXIS PRACTICE GUIDE: CONNECTICUT ESTATE PLANNING 2017 EDITION § 4.04.

⁷⁶ Rich Dunn, *Do You Need a Trust? Really?*, FARM FUTURES (Sep. 26, 2014), <http://www.farmfutures.com/blogs-need-trust-really-8976>.

⁷⁷ OFF. OF THE PROBATE COURT ADMIN. STATE OF CONN., PROBATE COURT USER GUIDE: UNDERSTANDING TRUSTS, CONNECTICUT PROBATE COURTS 2 (2016), <http://www.ctprobate.gov/Documents/User%20Guide%20-%20Understanding%20Trusts.pdf>.

⁷⁸ See, e.g., *Farm Transitions: Conservation Financing – Avoid Overly Restrictive Provisions in a Trust*, LAND STEWARDSHIP PROJECT (2017) <http://landstewardshipproject.org/farmtransitionsconservationfinancingavoidoverlyrestrictiveprovisionsinatrust>.

Conservation Through Trusts Farmers wishing to conserve their land’s environmental status or use may choose to do so through trusts. As mentioned above, those who set up a trust can exercise control over the future operation of the trust by including conditions in the written formation documents. As also noted above, it will be important to draft conservation provisions of a trust carefully to allow for needed flexibility in the future. While a trust provision can dictate the general scope of conservation efforts on the land, the trust should seek to codify a “vision for the land, stated in fairly general terms.”⁷⁹ This will allow future operators to respond to changing social or environmental needs not readily foreseeable at the time of the trust’s creation. Farmers wishing to include more specific conservation requirements might choose instead to do so through separate, short-term contracts, such as re-negotiable lease agreements.⁸⁰

Deed Restrictions and Conservation Easements Deed restrictions on farm property can prevent successive owners from using the land for non-farm purposes.⁸¹ Thus, a farmer may deed his or her land to a recipient, transferring “all rights, title, and interest” to the recipient, while expressly providing for durable protection of conservation efforts on the land.⁸² Farmers may transfer their land with a deed restriction either through sale or through donation,⁸³ meaning that such restrictions are flexible and can be used in tandem with another transition strategy.

Conservation easements are like deed restrictions and limit the future use of the land to conservation purposes, but easements differ in a few respects. Conservation easements may qualify as charitable gifts for income tax purposes.⁸⁴ The Connecticut Land Conservation Council, in its website, also addresses the tax benefits of conservation easements.⁸⁵ And, conservation easements may be treated with greater deference by courts than deed restrictions,⁸⁶ making them a more attractive way of protecting land use for future generations.

When a farmer places a conservation easement on his or her land, certain rights to that land are surrendered, such as (but not limited to) the right to develop the land for commercial or residential purposes, the right to add structures onto the land, or, more broadly, the right to unfettered use of the land.⁸⁷ The easement is generally given to a nonprofit steward or government agency.⁸⁸ Additionally, the easement may not require

⁷⁹ *Farm Transitions: Conservation Financing – Revocable and Irrevocable Trusts*, LAND STEWARDSHIP PROJECT (2017) <http://landstewardshipproject.org/farmtransitionsconservationfinancingrevocableandirrevocabletrusts>.

⁸⁰ *Id.*

⁸¹ *Protect Your Land*, FARMLAND INFO. CTR. (2017), <http://www.farmlandinfo.org/landowner-options/protect-your-land>.

⁸² RACHEL PLawecki & TONY MECUM, PROTECTING THE LAND YOU LOVE 4 (Conn. Land Conservation Council ed.), http://www.ctconservation.org/sites/default/files/documents/CLCC%20Landowner%20Primer_Protecting%20the%20Land%20You%20Love_0.pdf.

⁸³ *Id.*

⁸⁴ KARIN F. MARCHETTI PONTE, CONSERVATION EASEMENT V. DEED RESTRICTION (Land Trust Alliance ed. 2001) http://conservationtools-production.s3.amazonaws.com/library_item_files/203/243/CE_v_DR.pdf.

⁸⁵ *Tax Considerations*, CONN. LAND CONSERVATION COUNCIL (2017), <http://www.ctconservation.org/taxconsiderations>.

⁸⁶ Connecticut courts should construe ambiguous deed restrictions “against rather than in favor of the covenant.” *Morgenbesser v. Aquarion Water Co.*, 276 Conn. 825, 829 (Conn. 2006) (internal citations omitted).

⁸⁷ ARTHUR H. HOWLAND & ASSOCIATES, P.C., WHY SHOULD I PLACE A CONSERVATION EASEMENT ON MY PROPERTY? (2011) <http://ahhowland.com/assets/docs/conservation-easement/why-should-i-serve-my-property.pdf>.

⁸⁸ *Id.*

the farmer to give up title to the land; the easement imposes use restrictions but does not need to accompany a sale or donation.⁸⁹ Easements may provide for prohibitions of non-farm development and restrictions on subdivision of the land. Moreover, through easements, farmers may authorize third party actors, like environmental groups or government agencies, to ensure compliance with the easement's requirements.⁹⁰

However, some farmers may choose to create a conservation easement in tandem with a donation to a steward. The steward will receive and hold the land and use it in accordance with the easement's restrictions. In Connecticut, about 15 percent of the state's land area is held in conservation by the state or stewardship partners.⁹¹ Often, grantors will donate them to local non-profit land trusts and organizations that are dedicated to conservation efforts.⁹² Farmers can also convey the easement to the state, such as through the Department of Energy and Environmental Protection (DEEP).⁹³ In 2014, DEEP acquired 367 acres of land through conservation easements as a part of the Recreation and Natural Trust Heritage Program.⁹⁴ Generally, sellers contact DEEP to initiate a sale or donation, but the Department or conservation groups may also initiate transfer conversations.⁹⁵ Interested landowners can fill out an application (available on DEEP's website) to begin the process.

A major advantage of conservation easements is that they allow farmers to ensure their land will continue to be used for agricultural purposes. Easements are legally binding on successors, so they may prove better at controlling future use than a trust, which may allow for more discretion in the trustee.⁹⁶ Additionally, if a farmer chooses to donate a conservation easement, she may be eligible for tax advantages by claiming the grant as a charitable gift or by claiming a tax deduction for the grant.⁹⁷ Further, farmers can retain ownership

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ TONY MECUM & RACHEL PLawecki, LAND CONSERVATION IN CONNECTICUT: A PRIMER (CONN. LAND CONSERVATION COUNCIL ed. June 13, 2017), <http://www.ctconservation.org/sites/default/files/CLCC%202017%20Legislative%20Primer%20on%20Conservation%20as%20of%206.19.17.pdf> [hereinafter "MECUM & PLawecki"]..

⁹² The Connecticut Land Conservation Council links to local land trusts on its website. See *Land Trusts by Town*, CONN. LAND CONSERVATION COUNCIL (2017), <http://www.ctconservation.org/land-trusts-by-town>.

⁹³ DEEP also operates the Open Space and Watershed Land Acquisition Program, which awards funds to municipalities and nonprofit conservation groups to, among other things, acquire land for conservation purposes. In exchange for the grant money, DEEP receives conservation and public access easements on the land. CONN. DEP'T OF ENERGY & ENVTL. PROTECTION, LAND CONSERVATION IN CONNECTICUT: 2014 ANNUAL REPORT 4, 8, http://www.ct.gov/deep/lib/deep/open_space/2014_Annual_Report.pdf.

⁹⁴ *Id.* at 4.

⁹⁵ See *The Recreation and Natural Heritage Trust Program*, CONN. DEP'T OF ENERGY & ENVTL. PROTECTION (Nov. 20, 2013) <http://www.ct.gov/deep/cwp/view.asp?a=2706&q=323840>.

⁹⁶ FARMLAND INFO. CTR., AGRICULTURAL CONSERVATION EASEMENTS (Jan. 2016), http://www.farmlandinfo.org/sites/default/files/Agricultural_Conservation_Easements_AFT_FIC_01-2016.pdf [hereinafter "AGRICULTURAL CONSERVATION EASEMENTS"].

⁹⁷ *Id.* However, for conservation easements to be tax deductible, they must be granted in perpetuity, be conservation-oriented, and must be overseen by "qualified organization[s]." UNIV. OF MARYLAND COLLEGE OF AGRIC. & NATURAL RESOURCES DEP'T OF AGRIC. & RESOURCE ECON., AREC FACT SHEET NO. FS-974: CONSERVATION EASEMENTS: A USEFUL TOOL FOR FARM TRANSITION AND ESTATE PLANNING, (Oct. 2016), <http://drum.lib.umd.edu/bitstream/handle/1903/18842/lynch%20goeringer%20ume%20fs%20974.pdf>.

rights to the land after granting a conservation easement, making it an attractive complement to another transition tool, such as sale.⁹⁸

Connecticut law provides for certain procedural requirements and protections for conservation easements. Importantly, under Connecticut law, both the grantor and the recipient must sign the easement document when conveying the land to a nonprofit steward, otherwise the document may be voidable.⁹⁹ Moreover, conservation easements held by the state or nonprofit land trusts are protected in case of encroachment by statute; courts are empowered to compel the wrongdoer to restore the conservation land to its previous condition, or, alternatively, to pay the landowner the cost of restoring the land.¹⁰⁰

Yet, farmers may find there are also disadvantages to conservation easements. Unlike trusts or tailored sales, conservation easements do not provide opportunities for mentorship between the farmer-seller and the new farmer-buyer. If this is important to the client, attorneys may want to advise that the farmer use an alternative transition tool either instead of or in conjunction with a conservation easement.

Additionally, while conservation easements can be appealing options to preserving the agricultural use of land after the transition, attorneys and farmers should be aware that easements restricting development may lower property values. Restrictions on use may limit the market of willing buyers. Alternatively, farmers may find this negative effect from lower property values is offset by a corresponding decrease in property and estate taxes on the property.¹⁰¹ The decline in property value may be mitigated through the Agricultural Conservation Easement Program, which compensates farmers for placing easements on their land.¹⁰² The program is open to landowners of “cropland, rangeland, grassland, pastureland and nonindustrial private forest land,” and it prioritizes applicants who express an interest in conservation values.¹⁰³ Interested farmers can visit the program’s website to learn more and apply.

Related Considerations The following two sections describe additional considerations attorneys may wish to discuss with their clients when contemplating a farm transition. These considerations are likely not standalone transition mechanisms and can likely be used alongside or in combination with the other techniques described above. They are nonetheless important aspects of farm transition to consider when planning a farm transfer.

Life Insurance While life insurance is not a means for transferring ownership of the farm from one party to another, it may be a helpful addition to any transition strategy. If a farmer wishes to benefit family members while selling or otherwise transferring the farm to a non-family buyer, then the farmer may choose to

⁹⁸ AGRICULTURAL CONSERVATION EASEMENTS, *supra* note 63.

⁹⁹ CONN. GEN. STAT. § 47-6b.

¹⁰⁰ *Id.* § 52-560a.

¹⁰¹ *Cf.* MECUM & PLAWEKCI, *supra* note 91.

¹⁰² *Agricultural Conservation Easement Program*, U.S. Dep’t of Agric. Natural Resources Conservation Serv. Conn., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/ct/programs/easements/acep>.

¹⁰³ *Id.*

purchase a life insurance policy and designate family members as beneficiaries. Thus, even though a family member does not wish to receive ownership or control over the farm, that individual (or individuals) will nonetheless receive financial benefit.¹⁰⁴ The proceeds from a policy can be used to either pay estate taxes, create an inheritance, fund the purchase and sale process of a farm, or help balance out an estate between heirs wishing to remain with the farm and heirs not interested in the farm.¹⁰⁵

While life insurance can ensure compensation to surviving family members upon the policyholder's passing, attorneys should advise their clients to use additional farm transition strategies together with insurance policy beneficiary designations.¹⁰⁶ For example, if a farmer wishes to sell her farm but cannot provide financial benefit to enough family members through the sale proceeds, the attorney might discuss the possibility of a life insurance policy to cover any remaining desired beneficiaries.

Furthermore, attorneys should consider the specifics of desired policies and the tax implications of the desired policies. Throughout the process, the attorney should keep in mind the farmer's goals of the transition and should consider that sometimes a life insurance policy may not best serve those goals. For instance, if immediate financial liquidity is a concern, a life insurance policy might not be an adequate remedy, given the inherent time constraints. After all, the policy will pay out only after the policyholder (i.e. farmer) passes away.

Entity Formation Farmers might also be interested in creating a business entity to effectuate some or all of the farm transition. Business entities, such as limited partnerships, limited liability companies, or sole proprietorships, can allow for varying degrees of control over the farm's operations. The type of entity will also dictate the farmer-owner's personal liability for business operations. Attorneys may want to consult the Business Structures chapter of this guide for a detailed description of the types of entities one may form with regards to the farm, as each carries its own advantages and drawbacks. Different business entities will carry different tax structures, as well, which could affect a farmer's decision. The choice of entity structure can also affect the types of government payments the farm can receive.¹⁰⁷

Creating a business entity may achieve several of the farmer's goals for transition. A business partnership, for instance, can empower family members who do not wish to actively run the farm to nonetheless take ownership of the property and maintain control of the business while hiring others to work the farm.¹⁰⁸ Organizing the farm as a business entity can ensure the continuation of conservation efforts, since members

¹⁰⁴ TREATMENT OF HEIRS, *supra* note 23.

¹⁰⁵ KYNDA CURTIS, ESTATE AND FARM TRANSITION PLANNING FOR AGRICULTURAL PRODUCERS, 36TH W. ALFALFA & FORAGING SYMPOSIUM, U.C. DAVIS (2006), <http://alfalfa.ucdavis.edu/+symposium/proceedings/2006/06-285.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ Kelvin Leibold, *Business Entities*, IOWA STATE UNIV. EXTENSION & OUTREACH AG DECISION MAKER, <https://www.extension.iastate.edu/agdm/wholefarm/html/c4-52.html>.

¹⁰⁸ JANE GRIMSBO JEWETT ET AL., FARM TRANSITIONS TOOLKIT 27 (Sept. 2013), <http://misadocuments.info/FarmTransitions.pdf>.

or managers of the entity (if the chosen entity allows for such roles) may decide as a business practice to continue efforts put in place before the transition took place.¹⁰⁹

FARM TRANSITIONS IN CONNECTICUT

Farmers may take advantage of many programs offered directly by the state or through state designated organizations. Additionally, New England organizations provide several resources for farm transition and preservation, creating a helpful network for farm operators and those counselling farmers. The below information is aimed at assisting farm operators looking to transition their farm into the next generation and background for potential farm entrepreneurs thinking about entering the industry.

Connecticut Department of Agriculture Connecticut offers direct services to farm operators looking to transition their farm or preserve their land for future generations.

- **Farmland Preservation Program:** Attempting to establish a “food-and-fiber producing land resource base,” the Department of Agriculture has implemented a program in which it acquires development rights to agricultural properties and ensures that the land remains available only for agricultural use in perpetuity.¹¹⁰ Through this program, Connecticut places a permanent restriction on non-agricultural use on the deed of the property, however the farmer remains the private owner and pays local property tax. This program is meant to ensure that the land will be used strictly for agricultural purposes even after the farm operator leaves the land.
- **Agricultural Viability Grant Program:** In an effort to “strengthen the economic viability of Connecticut farmers and agricultural cooperatives,” the state has implemented the Farm Transition Grant Program.¹¹¹ The purpose of this program is to provide farmers and cooperatives with funds for “[1] the diversification of existing farm operations, [2] transitioning to value-added agricultural production and sales, and [3] developing farmers’ markets and other venues in which a majority of products sold are grown in the state.”¹¹² State programs also aim to help preserve farmland by transferring farms between generations. Producers and agriculture cooperatives applying for this grant may be awarded up to \$49,999 in matching funds.
- **FarmLink:** The Connecticut Department of Agriculture also operates a FarmLink program that registers “Farmland Seekers” and matches them with individuals or entities trying to sell or lease their farmland.¹¹³

¹⁰⁹ *Id.* at 27–32.

¹¹⁰ *Farmland Preservation Program Overview*, CONN. DEP’T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3260&q=399016#programoverview>.

¹¹¹ *Farm Transition Grant*, Conn. Dep’t of Agric. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3260&q=419410>; CONN. GEN. STAT. § 22-26j;.

¹¹² CONN. DEP’T OF AGRIC., GRANT APPLICATION GUIDELINES AND FORMS 4 (2016), http://www.ct.gov/doag/lib/doag/marketing_files/2016/transition_grant_guidelines_and_forms_final.pdf.

¹¹³ Connecticut FarmLink, CONN. FARMLINK, <http://www.ctfarmlink.org>.

FarmLink also acts as a “clearinghouse” that assists those looking for land with the transition process and business planning stages.¹¹⁴

Connecticut Partner Organizations Connecticut partners with many organizations that help farmers outside of their direct support mechanisms with farm transitions.

- **Connecticut Farmland Trust:** The Farmland Trust is a statewide, nationally accredited, nonprofit organization with a mission of protecting farmland from non-agricultural development. Its goal is “to make working lands available to Connecticut farmers for the indefinite future.”¹¹⁵ The Farmland Trust offers several valuable resources, such as publications, newsletters, and model agricultural easement agreements.¹¹⁶
- **Connecticut Farm Energy Program:** For farmers looking to transition their farm and bring to their land sources of renewable energy, the CT Farm Energy Program is an outlet that will help with the grant writing process (including the Connecticut Viability Grant).¹¹⁷
- **The New Connecticut Farmer Alliance:** The Alliance is a statewide network of farmers and growers that brings together emerging farmers to identify and develop a successful and diverse agricultural landscape for the state.¹¹⁸ It may be used to identify potential farm operators from a younger generation interested in connecting with farmers who are considering transitioning.
- **University of Connecticut:** The University of Connecticut, or UConn, especially through its agriculture extension office, offers several programs to assist new farmers transitioning into farmland ownership and experienced farmers looking to relinquish stewardship of their land.¹¹⁹ For example, in association with American Farmland Trust, UConn has created a guide for towns, institutions, and land trusts that are using or leasing farmlands.¹²⁰ This guide, *Farmland ConneCTions*, “provides land access training, outreach, linking, matchmaking, and site assessment services” with a goal of preserving productive farmland.¹²¹
- **Connecticut Agricultural Mediation Program:** The Center on Dispute Resolution at Quinnipiac School of Law works with Connecticut farmers and the rural community to mediate and resolve farm-

¹¹⁴ *Id.*

¹¹⁵ *Our Mission*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/about-2/mission>.

¹¹⁶ *See Resources*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/resources>; *Model Agricultural Easement*, CONN. FARMLAND TRUST (2017), <http://ctfarmland.org/site/resources/model-agricultural-easement>.

¹¹⁷ *Grants, Incentives & Financing*, CONN. FARM ENERGY PROGRAM, <http://www.ctfarmenergy.org/Grants.html>.

¹¹⁸ *The New CT Farmer Alliance*, THE NEW CT FARMER ALLIANCE, <http://newctfarmers.com>.

¹¹⁹ *New Farms and Farmers*, UNIV. OF CONN. EXTENSION, <http://newfarms.extension.uconn.edu>.

¹²⁰ AMERICAN FARMLAND TRUST & UNIV. OF CONN. COLLEGE OF AGRIC. & NATURAL RESOURCES, *FARMLAND CONNECTIONS: A GUIDE FOR CONNECTICUT TOWNS, INSTITUTIONS AND LAND TRUSTS USING OR LEASING FARMLAND*, (2011), http://www.extension.uconn.edu/documents/CT_Farmland_Connections_FINAL.pdf.

¹²¹ *New Farms and Farmers: Case Studies*, UNIV. OF CONN. EXTENSION, <http://newfarms.extension.uconn.edu/farmland>.

related issues. Specifically, this program can assist farmers and farm families with disagreements arising out of family farm succession. In addition, it occasionally offers trainings and workshops in farmland transitions. These services may be provided with reduced or no costs. The program is certified by the United States Department of Agriculture.¹²²

Transition Resources for Farmers in New England There are many resources for farmers in the New England region who are looking to implement an effective transition.

- **Farm Transfer Network of New England:** The Farm Transfer Network connects professionals assisting with farm transfers, farmers, and farm seekers in the New England area.¹²³ Farmers can find resources to help with a farm transition, list their farm, and view vetted farm transition professionals such as lawyers, tax planners, land use planners, and various others.¹²⁴ Additionally, farmers may use Farm Transfer Network services, such as farm transfer planning, business structure planning, and family communication and goal setting best practices.¹²⁵
- **Land for Good – New England Farm Succession School:** Land for Good is a non-profit organization based in New Hampshire that seeks “to ensure the future of farming in New England by putting more farmers more securely on more land.”¹²⁶ Land for Good supports an array of strategies with the goal of ensuring that established farmers will make land available, affordable, appropriate, and equitable when transferring land to the next generation of farmers.¹²⁷ Land for Good also has “field agents” in each New England state and has started a “Succession School,” a touring organization that assists farm seniors with the farm transition process.¹²⁸ The Succession School covers topics like goal setting, estate planning, retirement planning, taxes, and bringing on a successor to smoothly transition the farm.¹²⁹

¹²² *What We Do*, CONN. AGRIC. MEDIATION PROG., <http://ctagmediation.org/what-we-do>.

¹²³ *Farm Transfer Network of New England*, FARM TRANSFER NETWORK OF NEW ENGLAND (2017), <http://farmtransfernewengland.org>.

¹²⁴ *About Us*, FARM TRANSFER NETWORK OF NEW ENGLAND (2017), <http://farmtransfernewengland.org/about>.

¹²⁵ *Id.*

¹²⁶ *About*, LAND FOR GOOD (2015), <http://landforgood.org/about>.

¹²⁷ *Id.* Land for Good frames “Appropriate” as land that is “for farming and related uses; providing security, housing, [and] infrastructure.” *Id.*

¹²⁸ NEW ENGLAND FARM SUCCESSION SCHOOL, LAND FOR GOOD (2017), <http://landforgood.org/wp-content/uploads/LFG-Farm-Succession-School-2016-Flyer.pdf>.

¹²⁹ *Id.*

CONCLUSION

Transition planning can be complex and becomes more complex the closer a farmer is to the actual transition events. Fortunately, resources are in place for farmers and farm counselors. Connecticut has made a concerted effort to help farmers with their transition and there are many organizations willing and capable of supporting the transition process. Goals and processes should be clearly identified at the beginning of the lawyer-client relationship.

RESOURCES

Farm Land Information Center: Model Connecticut Agricultural Easement with Commentary

<http://www.farmlandinfo.org/connecticut-model-easement>.

Connecticut Farmland Trust, *Conservation Options for Connecticut Farmland*

http://www.ct.gov/doag/lib/doag/farmland_preservation_/aft_conservation_options_for_ct_farmland-lo-06-2015.pdf.

Connecticut Department of Agriculture: Farmland Restoration Program

<http://www.ct.gov/doag/cwp/view.asp?a=3260&Q=498322&PM=1>.

Connecticut Department of Agriculture Grants

<http://www.ct.gov/doag/cwp/view.asp?a=1366&q=499192>.

Land for Good, *A Team Approach to Farm Transfer Planning Assistance*

<http://landforgood.org/wp-content/uploads/LFG-Team-Approach-To-Farm-Transfer-Planning.pdf>.

New England Farm Leasing Online Tutorial

<http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial>.

CHAPTER V: FARMLAND ACQUISITION

Farmers have particular needs that must be considered when acquiring land. It is important that their attorneys have a good understanding of their client's needs and limitations and how they relate to a variety of considerations that emerge when the land is being used for primarily agricultural purposes. These concerns emerge in the selection of a parcel of land and the decision whether to purchase or lease. This chapter is designed to introduce these concerns to attorneys volunteering with the Legal Food Hub.

OVERVIEW Farmers may seek legal help when it comes to selecting farmland. Sometimes a farmer will already have a particular parcel or several in mind and it is important for the attorney to evaluate the farmer's needs, goals, and limitations. Moreover, the attorney should explain to the farmer all available options for purchasing or leasing the land. This chapter seeks to highlight to attorneys volunteering with the Legal Food Hub the particular considerations in Connecticut that need to be weighed in helping a farmer acquire a plot of land.

1. Land Selection This section discusses some of the state and local issues related to choosing farmland, including zoning considerations, community support, and the use of conservation easements.

2. Evaluating the Farmer's Needs and Situation This section assists the attorney in helping identify the farmer's needs by highlighting certain considerations, such as finances and tax exemptions.

3. Purchasing Farmland This section provides an overview of the choice to purchase farmland, particularly the types of farmland purchases.

4. Leasing Farmland This section covers the process of and options of leasing farmland, including the different types of leases and important lease provisions.

LAND SELECTION It is important that the land acquired be suitable for the farmer's interests. After getting a sense of what uses, in both the short-term and the long-term, the farmer intends to make of the land, there are a number of considerations that legal counsel might wish to bring to the farmer's attention. These include the municipality's zoning regulations, any environmental restrictions or concerns, any potential nuisance issues, and the availability of support in the community. Additionally, some farmland in Connecticut is subject to pre-existing conservation easements. If the land does not have an easement, the farmer might be interested in selling the development rights to the land to make its acquisition more affordable and ensure preservation as farmland.

Understanding Farmland Selection in Connecticut It is helpful for the attorney to be aware of the overlapping state and local regulatory regimes to which a parcel is subject. In Connecticut, any municipality may "adopt and amend a charter which shall be its organic law and shall supersede any existing charter"¹ This is particularly true when it comes to zoning regulations, as each of the state's 169

¹ CONN. GEN. STAT. § 7-188(a) (2015).

municipalities adopts its own zoning regulations in addition to the state laws regarding zoning.² Given this complexity, it is important to know which state and municipal regulations the farmer would be subject to for any parcel of land. Some zoning considerations that the farmer and attorney might want to be aware of include:

- **Minimum Lot Sizes:** Municipalities often set minimum lot sizes for land to be used for the growing and harvesting of crops. Additionally, there may be separate minimum lot requirements for the keeping of livestock.
- **Setbacks:** Evaluate any setback requirements the municipality imposes on farm buildings, fencing, manure storage areas, temporary structures, and other anticipated uses of the property. Ask the farmer if they have any plans to further develop the property to ensure that there is the needed acreage for growth.
- **Signage:** Will the farmer want signage for the farm? Many municipalities impose a variety of restrictions on signage, whether on the property itself or off the property to show directions.
- **Special Permits:** Does the farmer plan on using the property for any complementary non-agricultural uses to supplement income, such as agritourism or hosting events? Will the general public be invited onto the land? The municipality in which the lot is located may require special permits for such uses, such as retail sales.³

Connecticut Farm Link

The Connecticut General Statutes delegated to the state Department of Agriculture the task of creating and keeping a database of farmers seeking land and landowners of agricultural land looking to sell their parcels called the Farm Link Program.

Farmers in the process of selecting land to acquire may connect with landowners using the program's website: www.ctfarmlink.org.

Source: Conn. Gen. Stat. § 22-261.

Evaluating Community Support Some municipalities are particularly welcoming and supportive of their farming community. It is worth checking to see what support systems are in place in the municipality where the farmer's land is located. This can come from particular statutes the locality has enacted to encourage agriculture or community networks that advocate for the farming community's interests.

- **Right to Farm Statutes:** Connecticut has a so-called Right to Farm Statute, which applies state-wide. Under this statute, so long as a farm is following accepted agricultural practices, has been in operation for at least one year, and has not substantially changed, the circumstances in which the farmer can be held liable for a nuisance are limited. Note, however, that this does not preempt local zoning regulations.⁴ Some municipalities also have local Right to Farm provisions, but these are largely policy statements that mirror the state statute.⁵ The state statute applies regardless of whether

² See *id.* § 8-2.

³ *Zoning Regulations*, CONN. FARM BUREAU ASS'N (2014), http://www.cfba.org/images/resources/zoning_regulations.pdf.

⁴ CONN. GEN. STAT. § 19a-341.

⁵ *Local Right to Farm Ordinances*, CONN. FARM BUREAU ASS'N (2014),

a municipality has adopted it as a local ordinance.⁶ Still, the adoption of a local Right to Farm statute can signal to the farmer that the community intends to support and welcome their business.

- **Representation:** A further signal of support for agriculture is the presence of a dedicated Agricultural Commission (AgCom) to represent the interests of the farming community to the municipality. These bodies, set up by municipal ordinance, often provide additional support services to local farmers.⁷ They may help resolve farmer–neighbor conflicts, set up farmers’ markets, and provide a network to share information about state and federal programs. Not all municipalities have AgComs, but there are other ways in which agricultural interests may be represented at the local level. For example, some municipalities have agricultural advisory boards, while others may have individual representatives dedicated to advocating for the interests of local farmers.⁸

Understanding Conservation Easements A conservation easement is a deed restriction that limits the development rights on the land. An agricultural easement is an easement specifically limiting development to keep the land in agricultural use. Since the development rights of the land have been sold to the state, municipality, or conservation trust, the value of the land is lower than market rate. It may be more affordable for a farmer to acquire farmland encumbered by an easement through purchase or lease.⁹

- **Limitations to Development:** Land with a conservation or agricultural easement has had its development rights sold away to prevent its conversion to more intensive uses. As such, easements prohibit uses that could compromise the property’s agricultural potential, such as residential and commercial development. Most easements permit limited development when it is related to the operation of the farm. Nevertheless, no such permission should be implied without it being put in explicit terms. Some common examples of often permitted development include fencing, irrigation systems, and manure storage facilities. Approval is sometimes required for more permanent structures, and part of the property may be preserved for housing. If existing farm buildings or residences are included in the easement, improvements and reconstruction of the structures may be permitted.¹⁰
- **Selling an Easement:** If the land does not already have an easement, the landowner may consider

http://www.cfba.org/images/resources/local_rtf_ordinances.pdf.

⁶ *Id.*

⁷ CONN. GEN. STAT. § 7-131v.

⁸ *Agricultural Commissions*, PLANNING FOR AGRICULTURE: A GUIDE FOR CONNECTICUT MUNICIPALITIES (2014), <http://www.ctplanningforagriculture.com/agro-commissions.php>.

⁹ See generally KRISTINA LORIA ET AL., AFFORDING OURLAND: A FINANCE LITERACY GUIDEBOOK FOR YOUNG FARMERS (AND ALL FARMERS) (2013), <http://www.farmlandinfo.org/sites/default/files/AFFORDING-OURLAND-5-23-13.pdf> [hereinafter “AFFORDING OURLAND”].

¹⁰ See CONSERVATION OPTIONS FOR CONNECTICUT FARMLAND: A GUIDE FOR LANDOWNERS, LAND TRUSTS & MUNICIPALITIES, AMERICAN FARMLAND TRUST & CONN. FARMLAND TRUST (2015), http://www.cfba.org/images/resources/conservation_options_for_ct_farmland-lo-res_june_2015.pdf [hereinafter “CONSERVATION OPTIONS”].

selling the development rights to the property as a source of capital. Note that the proceeds from the sale of an easement are subject to federal and state capital gains taxes as the IRS views the transaction as a sale of real estate interest.¹¹ In addition, while combining the purchase of land with the sale of an easement can make land more affordable, the process of selling the easement can take up to a few years, and it often requires short-term bridge financing and some expensive payments on behalf of the farmer.¹²

EVALUATING THE FARMER'S NEEDS AND LIMITATIONS

Acquiring farmland is a big decision for a farmer and involves numerous considerations, in addition to the location or size of the farm. A few of the most notable ones include:

- **Finances:** The attorney should get a sense of the farmer's finances. What are their resources? How much funding can they receive from lenders?
- **Potential Loans and Grants:** Can the farmer take advantage of any loans or grants available at the federal, state, or local level? If the farmer is just beginning, then a Beginning Farmers and Ranchers Loan administered by the Farm Service Agency of the USDA may be available.¹³ The USDA also administers various grants, including for promoting local food and farmers' markets, developing rural businesses, and more.¹⁴ At the state level, the Connecticut Department of Agriculture offers a number of grant programs to promote farmland restoration and viability, as well as block grants for specialty crops, a sustainable milk producer grant, and cost-sharing for organic certification.¹⁵
- **Potential Tax Exemptions:** Connecticut has a variety of tax exemptions for, among other agricultural assets, farm equipment and horses. Check with the municipality to see if it has enacted additional exemptions for certain farm machinery, livestock, or buildings.¹⁶ Municipalities may also elect to offer property tax abatements on various types of farms.¹⁷
- **PA 490:** Connecticut enacted PA 490 with the explicit goal of preventing the conversion of farmland,

¹¹ *Id.* at 6.

¹² AFFORDING OUR LAND, *supra* note 9. The entire application process can take around eighteen months. CONSERVATION OPTIONS, *supra* note 10, at 11.

¹³ *Beginning Farmers and Ranchers Loans*, USDA FARM SERVICE AGENCY, <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/beginning-farmers-and-ranchers-loans/>.

¹⁴ *See Grants and Loans*, U.S. Dep't of Agric. (2017), <http://www.usda.gov/topics/farming/grants-and-loans>.

¹⁵ More information on these grants is available through the Connecticut Department of Agriculture website at <http://www.ct.gov/doag/cwp/view.asp?a=1366&q=499192>. University of Connecticut maintains a website dedicated to helping Connecticut farmers find grants. *See Helpful Websites for Finding Grants*, U. CONN. COLLEGE OF AGRIC., HEALTH & NATURAL RESOURCES, http://ctfarmrisk.uconn.edu/grant_links.php.

¹⁶ CONN. GEN. STAT. § 12-91.

¹⁷ *Id.* § 12-81m. The municipality may abate up to 50 percent of the property taxes for "(1) Dairy farm, (2) fruit orchard, including a vineyard for the growing of grapes for wine, (3) vegetable farm, (4) nursery farm, (5) any farm which employs nontraditional farming methods, including, but not limited to, hydroponic farming, (6) tobacco farms, or (7) commercial lobstering businesses operated on maritime heritage land, as defined in section 12-107b."

forest land, and open space into more intensive, development-heavy usage due to market pressures.¹⁸ This statewide law enables landowners to pay tax on certain classified land at its current use value, rather than the land's higher market value. There are no minimum acreage or income requirements for this classification.¹⁹ To get classification, the farmer should file Form M-29 "Application to the Assessor For Classification of Land as Farmland." This form is available at the municipality's assessor's office. Applications must be made between September 1st and October 31st. Annual application and renewal are not required unless the land is sold or transferred.²⁰

- **Investment in the Property:** To assess the farmer's needs, it is key to have a sense of both the farmer's immediate goals and long-term plans. If the farmer intends to develop the property over time, the land needs to be large enough to handle such development and development must not be impeded by the existence of any conservation easements. The farmer's overall plan for the use of the property can also affect what type of purchase or leasing options are most suitable. Also affecting such a decision are questions related to the farmer's ability and willingness to maintain the property.

PURCHASING FARMLAND Once the farmer and the attorney understand the extent of the farmer's goals and financial circumstances, the major decision will be choosing whether to purchase or lease farmland. Often a farmer represented by the Legal Food Hub will already have made the decision to purchase or lease. The attorney representing the farmer should help the farmer evaluate how best to proceed with a purchase or lease agreement. As of August 2017, Connecticut agricultural land values were the third highest in the nation, amounting to \$11,200 per acre.²¹ This will put an outright purchase of land out of reach for many farmers. However, a number of financing options are available that might alleviate this burden.

Types of Purchases For farmers able to make the step of purchasing farmland, this section describes some of the most common methods available.

Fee Simple Purchase with Conventional Financing This is the most traditional way of purchasing farmland. The farmer finds the property and buys it using a loan secured by a mortgage on the property. The benefit to this is that the farmer will own the land, offering the greatest flexibility in how to utilize it and potentially develop it further. Unfortunately, this is also the most expensive option, and financing can be difficult to procure, especially for a beginning farmer who lacks an established track record and cash flow projections.²²

¹⁸ *Id.* § 12-107a.

¹⁹ PUBLIC ACT 490: A PRACTICAL GUIDE AND OVERVIEW FOR LANDOWNERS, ASSESSORS AND GOVERNMENT OFFICIALS, CONN. FARM BUREAU ASS'N 11 (2015), http://www.cfba.org/images/resources/ct_farm_bureau490_sm4web.pdf.

²⁰ *Id.* at 41.

²¹ LAND VALUES: 2017 SUMMARY, U.S. DEP'T OF AGRIC. 8 (2017), <http://www.usda.gov/nass/PUBS/TODAYRPT/land0817.pdf>.

²² *Getting on Solid Ground: An Overview of 15 Ways to Secure Land*, CAL. FARMLINK (2008), http://www.farmlandinfo.org/sites/default/files/FA8_CA%20Farmlink_15%20ways%20to%20secure%20land.pdf [hereinafter "*Getting on Solid Ground*"].

Small Acreage Variant on Fee Simple Purchase with Conventional Financing If the farm is small (up to twenty acres) and contains the farmer's primary residence, the farmer may qualify for a residential loan, as opposed to a typical business loan.²³ The benefit of this would be that the farmer need not have proof of projected income.²⁴

Fee Simple Purchase with Sweat Equity In this situation a flexible seller, usually a retiring farmer, is willing to let the farmer pay of some or all of the purchase price through labor.²⁵

Fee Simple Purchase with Seller Financing Also known as a "land contract sale," this is where the buyer and seller agree that the seller will provide the needed financing after negotiating a purchase price and payment arrangement. This is an optimal arrangement for beginning farmers who are unable to obtain traditional financing on their own. Transaction costs are kept low and the payment arrangement can be kept flexible. The seller benefits from potentially limiting capital gains and income tax liability, as these would be paid over time in accordance with the payment schedule, as opposed to being due all the outset such as in the case of a traditional sale.²⁶

This type of financing typically requires that the buyer and seller have a good pre-existing relationship. The seller bears most of the risk that the buyer cannot make payments, so trust is key to starting this type of financing. The seller can always repossess the property if buyer fails to make payments or otherwise breaches the agreement.²⁷

Fee Simple Purchase with Conservation Agricultural Easements This option is similar to a fee simple purchase with conventional financing; however, the purchase price of the land is substantially reduced due to the presence of an easement on the land. The trade-off for this is that the easement restricts further development of the land, making it less appealing to farmers looking to develop the land unhindered. Still, a farmer concerned with land conservation and no plans for the prohibited development might find this option appealing, since it benefits the community in the long-run by preventing agricultural lands from converting to more intensive uses.²⁸

²³ Dan Sullivan, *Financing Your Small Farm*, PENN. STATE EXTENSION (Aug. 8, 2017), <http://extension.psu.edu/business/start-farming/capital/small-farm-financing>.

²⁴ *Id.*

²⁵ *Getting on Solid Ground*, *supra* note 22.

²⁶ Anthony Iarrapino & Elizabeth Spellman, *Owner-Financed Sales and Land Contracts*, in GUIDE TO FINANCING THE COMMUNITY SUPPORTED FARM: WAYS FOR FARMS TO ACQUIRE CAPITAL WITHIN COMMUNITIES, UNIV. VT. CTR. FOR SUSTAINABLE AGRIC. 11 (2012), http://www.uvm.edu/newfarmer/business/finance-guide/Guide%20to%20Financing%20the%20Community%20Supported%20Farm_March2012.pdf.

²⁷ AFFORDING OURLAND, *supra* note 9, at 22.

²⁸ *Finding Land to Farm: Six Ways to Secure Farmland*, NAT'L SUSTAINABLE AGRIC. INFO. SERV. 2, <http://162.242.222.244/documents/FindingLandtoFarmATTRA.pdf>.

LEASING FARMLAND

Due to the expense and difficulty a small or beginning farmer may have in purchasing farmland, leasing such land may be a more attractive alternative. In Connecticut, 23 percent of farmers rely wholly or in part on lease agreements.²⁹ An attorney representing the farmer should go over with their client the variety of types of leases available, emphasizing the term of the lease and the different payment arrangements. Additionally,

Get It in Writing

Whether purchasing or leasing land, it is important to get all documentation of the agreement in writing. In Connecticut, all deeds for land must be in writing to be valid and enforceable. A simple oral agreement or handshake will not be valid under the law. Getting the deed in writing is therefore crucial to protecting the interests of the farmer, and the attorney should ensure receipt of such documentation. Lease agreements of one year or more are also required to be in writing and require the filing of a notice of lease to be legally enforceable against third-parties.

Source: Conn. Gen. Stat. § 47-5;
Conn. Gen. Stat. § 52-550

there are some farm-specific terms that need to be considered when drafting the lease agreement with the lessor. Once a lease is formed, the attorney should assist the farmer in filing a notice of lease to have it be effective against third-parties.

Types of Leases In this section, the main differences between types of leases are discussed. These types can be combined in a variety of ways to provide greater flexibility to the parties to the lease.

Short-Term Leases These leases last for between one and three years, often with options for renewal at the end of the term. They are the most common form of farmland lease, offering the greatest flexibility for the parties. Having a short-term lease can act as a trial period for the parties involved, since the commitment is lower than it is in a long-term lease, thus alleviating some concerns the lessor might have about a beginning farmer or one who will be engaged in experimental practices.³⁰ The disadvantage

to a short-term lease is that there is little incentive for the farmer to invest further in the property, whether through development or conservation practices. After all, any effort may be lost upon termination of the lease.³¹ Moreover, it can become more difficult to secure creditor lending and financing for farm assets when one is in a short-term lease.³²

²⁹ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: TABLE 70: SUMMARY BY TENURE OF PRINCIPAL OPERATOR AND BY OPERATORS ON FARM: 2012 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_070_070.pdf.

³⁰ A LANDOWNER'S GUIDE TO LEASING LAND FOR FARMING, LAND FOR GOOD 18–19 (2012), <http://landforgood.org/wp-content/uploads/LFG-Landowners-Guide-To-Leasing-To-A-Farmer-Handbook.pdf> [hereinafter "LANDOWNER'S GUIDE TO LEASING"].

³¹ FARMLAND CONNECTIONS: A GUIDE FOR CONNECTICUT TOWNS, INSTITUTIONS AND LAND TRUSTS USING OR LEASING FARMLAND, AMERICAN FARMLAND TRUST & UNIV. CONN. COLLEGE OF AGRIC. & NATURAL RESOURCES 8 (2011), http://www.extension.uconn.edu/documents/CT_Farmland_Connections_FINAL.pdf [hereinafter "FARMLAND CONNECTIONS"].

³² LANDOWNER'S GUIDE TO LEASING, *supra* note 30, at 19.

Long-Term Leases Long-term leases provide for terms of five to ninety-eight years. Note that ninety-eight is sometimes considered the maximum in Connecticut, and leases of ninety-nine years or more are considered realty.³³ If the lease agreement is treated as a sale of real property, it is subject to conveyance tax.³⁴ Long-term leases are less common than short-term leases due to the level of complexity and commitment.³⁵ Careful drafting of the lease can help preserve some flexibility.³⁶ For example, some long-term leases are drafted to provide times when the terms of the lease may be modified by the parties.³⁷

Rolling Leases Rolling leases have the feature of automatic annual renewal. At the end of each year, the lease renews for the full length of the term. For example, a seven-year rolling lease starting in 2018 will renew at the end of 2018, 2019, 2020, and every year after that for the duration of the lease, unless either the landlord or tenant communicates an intent to exit the lease at the end of the remaining term. Since the lease renews annually, in a seven-year rolling lease the parties will effectively have at least six years notice before the termination of the lease.³⁸

Rolling leases share the benefits of long-term leases in that they offer some measure of stability and incentive for investment and conservation of the land. They also provide clear exit procedures for both parties, alleviating some of the commitment of a long-term lease. How much commitment is alleviated is a function of the term of the rolling lease. A seven-year rolling lease will reflect a greater commitment than a two-year rolling lease. However, the two-year rolling lease lacks the stability of a long-term rolling lease because the parties will have less notice of termination should it be invoked.³⁹

Fixed and Flexible Cash Leases Farmers can pay either a fixed or variable sum to the landlord as rent. Fixed price leases set a rent amount and payment schedule, giving a level of predictability. However, the burden is on the farmer to meet the rent payment regardless of crop yield or prices. If that is a concern of the farmer, the attorney might consider some form of flexible cash lease. Here, the payment is variable, being determined by a percentage of the annual crop revenue. The profit share can compose the entire payment or be in addition to a “base rent” that is lower than would be due in a fixed-cash lease. In this way, the landlord and tenant share in the risk of the farm’s profitability.⁴⁰ However, the added level of variability can make it difficult for the farmer to calculate a budget and break-even profit. To protect the farmer, some leases stipulate a maximum rent.⁴¹

³³ CONN. AGENCIES REGS. § 12-494-1(b)(2) (2015).

³⁴ CONN. GEN. STAT. § 12-494.

³⁵ FARMLAND CONNECTIONS, *supra* note 31, at 8.

³⁶ *Id.*

³⁷ LANDOWNER’S GUIDE TO LEASING, *supra* note 30, at 19.

³⁸ FARMLAND CONNECTIONS, *supra* note 31, at 9.

³⁹ LANDOWNER’S GUIDE TO LEASING, *supra* note 30, at 19.

⁴⁰ AFFORDING OURLAND, *supra* note 9, at 22.

⁴¹ Steven D. Johnson, *Flexible Cash Farm Lease Considerations*, IOWA STATE UNIV. EXTENSION & OUTREACH (Mar. 2009), <http://www.extension.iastate.edu/agdm/articles/others/JohMar09.html>.

Crop-Share Lease In this type of lease, the landlord receives a percentage of the crop yield in exchange for use of the land.⁴² Crop-share leases are flexible and can be tailored to meet the needs of both parties. For example, the lease may stipulate a minimum and maximum threshold for the landlord's portion to account for variability in crop price and yield.⁴³ This option is particularly good for beginning farmers who are short on startup capital and want the risks of the contract to be shared with the landlord.

Ground Leases In a ground lease, the tenant leases the property but owns the structures and improvements to the land. This usually includes longer-term leases, lasting for at least forty years (ten years longer than a long-term mortgage).⁴⁴ When the lease terminates, the tenant is entitled to recoup any equity investments by selling the structures and improvements to the landlord or to the next tenant.⁴⁵ Often the lease is drafted to include a perpetual affordability clause, requiring that any investments the tenant makes in the land that would be recoverable be kept within a certain price range to ensure that it is affordable for the next tenant or landlord to cover.⁴⁶ Ground leases tend to be complex to negotiate, as the rights and responsibilities of the parties are unclear without careful and specific drafting.⁴⁷

Leases with Option to Purchase These types of leases provide a point in time after a “triggering event” at which the tenant has the option to purchase the land. This occurs either after a determined period of time (known as the straight option) or after the landlord decides to sell the property (right of first refusal). In the latter type, it is stipulated that the landlord cannot sell the property without first offering it to the tenant at a price comparable to that offered by a third-party. It may be stated in the lease provisions that a portion of the rent paid prior to the option to purchase will convert into credit toward the purchase of the land.⁴⁸ The lease agreement should be carefully drafted to explicitly state when the option to purchase arises and anything that may affect the price at which the tenant can purchase the land. If these provisions are unclear in the terms of the lease, the option to purchase will be rendered invalid and the landlord will have no duty to sell to the tenant.⁴⁹

Forming a Lease Under Connecticut law, a lease of one year or more must be in writing in order to be considered valid. An oral agreement or handshake will not be enforceable, nor will a simple Memorandum of Understanding suffice.⁵⁰ The formation of the lease is not only critical for validity, but to properly foreclose future misunderstandings. Negotiation will be key to dividing up the risks and responsibilities of both parties.

⁴² *Getting on Solid Ground*, *supra* note 22.

⁴³ E.G. Stoneberg & Kelvin Leibold, *Improving Your Farm Lease Contract*, IOWA STATE UNIV. EXTENSION & OUTREACH (last updated May 2017), <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-01.html>.

⁴⁴ *Getting on Solid Ground*, *supra* note 22.

⁴⁵ LANDOWNER'S GUIDE TO LEASING, *supra* note 30, at 19.

⁴⁶ Bob Bernstein et al., *New England Farm Leasing Tutorial*, LAND FOR GOOD, <http://landforgood.org/wp-content/uploads/LFG-New-England-Farm-Leasing-Tutorial.pdf>.

⁴⁷ *Id.*

⁴⁸ LANDOWNER'S GUIDE TO LEASING, *supra* note 30, at 19–20.

⁴⁹ *See id.* at 13, 19–20.

⁵⁰ CONN. GEN. STAT. § 52-550.

Another benefit to having the lease in writing is that it can act as documentation to the IRS or financial institutions.⁵¹

Lease Provisions In drafting a lease for agricultural land, there are a number of provisions that merit particular attention:

- **Description of the Property:** The description of the property in the lease should be specific and include maps for clarity. This is particularly important when only part of the property is being leased or there is an option to purchase.⁵² Note that if there is a residence, the lease is subject to statutory landlord–tenant relations, such as maintaining habitability, which cannot be contracted away.⁵³ For this reason, it is worth considering drafting a separate residential lease in addition to the lease for the land.⁵⁴
- **Duration:** In addition to the standard durational lease terms of start date, end date, and options for renewal, there are other terms that should be written into the lease. If it is a **long-term lease**, there should be provisions providing for periodic review of the lease terms by the landlord and tenant farmer. If it is a **rolling lease**, this needs to be specified. It is also advisable that there be a provision for the lease to terminate in the event the property is abandoned for a certain period of time.⁵⁵
- **Rent:** A schedule of payments should accompany the amount of rent. Depending on the lease type, this can be a fixed sum of money, variable share of the farm’s profits, or a mixture of both. If payment is to be made in non-monetary form, such as through a crop share or labor, the type of consideration given must be specified in the lease.⁵⁶
- **Permitted Uses of Land and Property:** The lease should specify clearly and thoroughly what uses of the land and property are permitted and what uses are prohibited. It is not enough for it to permit “agricultural uses” without detailing what the parties consider “agricultural uses.”⁵⁷ Crop production, livestock keeping or slaughtering, aquaculture, and agritourism are just some of the uses that may be permitted. The lease should also specify if the general public is allowed on the land.⁵⁸

⁵¹ Roger McEowen, *Lease Termination and Other Legal Considerations for Lease Contracts*, AG DECISION MAKER 1 (Aug. 2007), <http://www.extension.iastate.edu/iowa/sites/www.extension.iastate.edu/files/iowa/Termination%20and%20Other%20Legal%20Considerations%20for%20Lease%20Contracts.pdf>.

⁵² LANDOWNER’S GUIDE TO LEASING, *supra* note 30, at 13.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ FARMLAND CONNECTIONS, *supra* note 31, at 14.

⁵⁶ *Id.*

⁵⁷ BECCA WEAVER ET AL., FINDING, ASSESSING, AND SECURING FARMLAND: A PLAIN LANGUAGE GUIDE FROM THE NEW ENTRY SUSTAINABLE FARMING PROJECT 18, 32 (2012), http://nesfp.nutrition.tufts.edu/sites/default/files/uploads/pl_farmland.pdf.

⁵⁸ LANDOWNER’S GUIDE TO LEASING, *supra* note 30, at 14.

- **Stewardship:** Some leases will have “stewardship clauses.” These put a responsibility on the tenant to ensure the long-term quality of the land. This may require that the tenant engage in conservation and soil-nutrient management practices, for instance.⁵⁹ It may also require the tenant to get organic certification, with specifications as to whether the costs of certification will be shared. Provisions limiting the use and frequency of pesticide applications may be included.⁶⁰
- **Maintenance and Repairs:** The lease should be clear about who is responsible for the maintenance and repairs of the land and property. It should also specify who is responsible for keeping the land and property safe and clean. Typically, the tenant is responsible for non-skilled labor repairs and general upkeep to prevent deterioration, such as making sure the buildings are painted. The landlord usually bears responsibility for major repairs, rehabilitation, and replacement of farm systems such as water and sewage.⁶¹
- **Structures:** If there is a farmhouse on the property, the lease should state whether or not its use is included. Since Connecticut law has specific provisions applying to residential landlord–tenant relationships, sometimes a separate residential lease is drafted.⁶² It should also be stipulated in the lease whether there any limitations as to the what structures the farmer can build on the property.⁶³
- **Alterations and Improvements:** If the farmer has plans for improving the land, the lease should state which types of improvements are permitted or prohibited along with any possible approval process. It should be stipulated if the landlord has any responsibility to reimburse the farmer for the costs, either during or at the end of the lease term. If any of the improvements are mobile, it should be indicated whether the tenant may keep them at the lease’s end.⁶⁴
- **Communication:** If desired, the lease should provide for when communication should occur between the parties. Some might require that the tenant communicate with the landlord before planting season and after harvest. Occasionally, additional reporting on conservation or nutrient management practices is required.⁶⁵
- **Emergency Provisions:** The lease should specify what happens in the event the property is condemned, destroyed by fire or another casualty. Does the landowner have the right to terminate the lease? How are insurance proceeds shared?⁶⁶

⁵⁹ FARMLAND CONNECTIONS, *supra* note 31, at 14.

⁶⁰ LANDOWNER’S GUIDE TO LEASING, *supra* note 30, at 32.

⁶¹ *Id.* at 14–15.

⁶² *Id.* at 22.

⁶³ *Id.* at 16.

⁶⁴ *Id.*

⁶⁵ *Id.* at 11.

⁶⁶ *Id.* at 13, 46.

- **Termination:** Particular to farmers, the lease should specify what happens to unharvested crops in the event of termination. The tenant should either be compensated by the landlord for the value of the crops or be allowed to sell the crops directly to the next tenant.⁶⁷
- **Entry:** It should be clear in the lease provisions if and when the landlord may come onto the property. Must the tenant be present? How much notice should be given?⁶⁸
- **Taxes, Utilities, and Insurance:** It should be made clear in the lease whose duty it is to pay the taxes, utilities, and insurance payments on the property.⁶⁹
- **Additional Restrictions and Provisions:** Depending on the interests of the parties to the lease, other provisions might be included in the lease. For example, the landlord may wish to ban certain practices or crops. If livestock is to be kept on the property, the amount, type, and location of the animals may be specified.⁷⁰

Notice of Lease Tenants with leases of one year or more should consider recording a notice of lease on the land record to have their lease be legally effectual against third-parties, particularly potential buyers and lenders considering making a loan to the property's lender. The Connecticut General Statutes require the following information to be set forth in the notice of lease: (1) the names and addresses of the parties to the lease; (2) reference to the lease and its date of execution; (3) the lease's durational term, including the date of commencement and the date of termination; (4) a description of the property contained in the lease; (5) whether a right of extension or renewal can be exercised; (6) whether there is an option to purchase, and, if so, the date by which such option must be exercised; and (7) reference to a place where the lease is to be on file.⁷¹

CONCLUSION

When representing a farmer with a farmland acquisition matter through the Legal Food Hub, there are several concerns that an attorney must address. The attorney should first get a sense of the farmer's needs, wants, and limitations. This information will be helpful in determining what financing options are available and if the farmer is eligible for any loans, grants, or tax credits. Knowing the farmer's plans for the future growth of the farm can affect which parcel of land is best suited for the farmer's interests. Special concerns regarding land selection include zoning regulations, support in the local community, and environmental restrictions. Once a parcel of land is chosen for acquisition, the attorney should walk the farmer through all available acquisition options including various types of purchase options and leases. If the farmer chooses to lease, there are some agriculture-specific provisions that an attorney may want to include, such as

⁶⁷ *Id.* at 17, 46.

⁶⁸ *Id.* at 14, 46; FARMLAND CONNECTIONS, *supra* note 31, at 14.

⁶⁹ LANDOWNER'S GUIDE TO LEASING, *supra* note 30, at 13, 17.

⁷⁰ *Id.* at 17.

⁷¹ CONN. GEN. STAT. § 47-19.

stipulating what will happen to unharvested crops in the event of early termination. When representing the farmer-client, the attorney should be mindful of how the practical concerns of farmers may differ from those of a non-farmer and how the law and regulations may treat agricultural land differently from other real estate.

RESOURCES

Connecticut FarmLink

<http://www.ctfarmlink.org>.

Land for Good

<http://www.landforgood.org>.

New England Farmland Finder

<http://www.newenglandfarmlandfinder.org>.

Connecticut Farmland Trust

<http://www.ctfarmland.org>.

Connecticut Department of Agriculture: Farmland Transition Grant Program

<http://www.ct.gov/doag/cwp/view.asp?a=3260&q=419410>.

University of Connecticut, *Farmland Leasing Checklist*

<http://newfarms.extension.uconn.edu/wp-content/uploads/sites/848/2015/08/Farmland-Leasing-Checklist.pdf>.

CHAPTER VI: BANKRUPTCY

This guide assumes that potential clients include farmers, food entrepreneurs, and nonprofit organizations whose primary constituency or membership base is farmers or food entrepreneurs, and community groups whose mission is to address social justice issues related to the food system. It also assumes the reader is an attorney experienced with non-farm bankruptcy matters.

OVERVIEW This chapter explores bankruptcy options available to farm businesses. It begins by providing attorneys with various considerations and questions to ask the farm business to determine the appropriateness of pursuing bankruptcy. Later, it focuses on explaining farm-specific Chapter 12 bankruptcy and compares Chapter 12 bankruptcy with other bankruptcy options.¹

1. Overview of Debt Liquidation and Restructuring Options
2. Getting Context: Initial Questions to Ask the Debtor
3. Comparison: Debt Liquidation and Restructuring Options
4. Chapter 12: Farm-Specific Bankruptcy
5. Chapter 12 vs. Other Bankruptcy Options
6. Connecticut Law and Programs Relevant to Farmer-Debtors
7. Note on Nonprofits

OVERVIEW OF DEBT LIQUIDATION AND RESTRUCTURING OPTIONS

Debt liquidation or restructuring can significantly benefit debtors in a variety of ways. Filing for bankruptcy protects a debtor from collection activity. Filing for Chapter 7 bankruptcy results in the discharge of most debts, giving the former debtor a fresh start. Filing for Chapter 11, 12, or 13 bankruptcy can protect a debtor from mortgage foreclosure or repossession of important assets. Chapter 13 is limited to natural persons; Chapter 11 aims at being helpful for businesses. Chapter 12 is limited to farmers. Non-bankruptcy options can allow debtors to restructure their debts with less publicity and at a lower cost, though these agreements may be hard to negotiate.

GETTING CONTEXT: INITIAL QUESTIONS TO ASK THE DEBTOR

- **What kind of entity is the debtor? Individual? Partnership? Corporation?** Corporations are not eligible for Chapter 13 bankruptcy,² and non-family corporations are not eligible for Chapter 12 bankruptcy.³ The entity type will also determine whether individual owners are liable for the company's debts.

¹ Special thanks to Stephen Carpenter of the Farmers' Legal Action Group for sharing his time and expertise in this area of law.

² 11 U.S.C. § 109(e) (2016).

³ *Id.* § 101(18).

- **How much debt is there to be resolved? How much debt is secured? How much debt is unsecured?** Chapters 12 and 13 have limits on how much total debt and secured debt a debtor can discharge.⁴
- **Does the debtor have income? If so, is it regular?** A debtor must have a steady income in order to file for Chapter 12 or Chapter 13.⁵
- **What are the sources of the debtor's income?** A debtor must receive a certain percentage of income from farming operations in order to be eligible for Chapter 12.⁶
- **Does the debtor have co-debtors?** Co-debtors are protected by the automatic stay in most circumstances if a debtor files for Chapter 12 or Chapter 13 bankruptcy.⁷ Co-debtors are only protected by the automatic stay at the court's discretion in Chapters 7 and 11.⁸
- **What are the client's goals? Is the client interested in liquidating the business (i.e., selling off assets) or rehabilitating it (i.e., restructuring and continuing to run the business or keep the assets)?** If the debtor is interested in restructuring and continuing to run a business, Chapters 11 and Chapters 12 are most appropriate. If the debtor is interested in keeping his or her assets, Chapters 12 and 13 are most appropriate if the debtor is eligible, though Chapter 11 may also be appropriate. Otherwise, Chapter 7 is a good option to provide the debtor with a fresh start. It may be helpful to remind the debtor that bankruptcy is an option provided for in the U.S. Constitution⁹ and one that many people use.
- **Who are the debtor's creditors? Do they include the USDA Farm Service Agency (FSA) or the Farm Credit System (FCS)?** FSA borrowers may have additional debtor-friendly options. The FSA notifies borrowers who are more than ninety days late on payments and invites them to apply for restructuring. The FSA writes, "Borrowers who . . . apply . . . are considered for restructuring of the debt – rescheduling, re-amortization, consolidation, deferral, or write-down of the amount owed – as long as FSA will receive an equal or greater net return than it would realize through foreclosure."¹⁰ FCS lenders similarly notify borrowers whose loans have been identified as distressed and inform them of their right to request restructuring of the loan. A lender must send a second notice before the lender proceeds to foreclosure.¹¹

⁴ *Id.* §§ 101(18), 109(e).

⁵ *Id.* §§ 109(e), 101(19).

⁶ *Id.* § 101(18)(A).

⁷ *Id.* §§ 1201(a), 1301(a).

⁸ *Id.* § 105.

⁹ U.S. CONST., art. I, § 6, cl. 4.

¹⁰ *Primary and Presentation Loan Servicing for Delinquent FSA Borrowers, Farm Loans Fact Sheet*, U.S. DEP'T OF AGRIC. FARM SERV. AGENCY (March 2016), http://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2016/Primary_and_Preservation_Loan_Servicing_for_Delinquent_FSA_Borrowers.pdf

¹¹ *FAQs about Borrower Rights*, FARM CREDIT ADMIN. (2013), <http://www.fca.gov/about/BorrowerRightsFAQs.html>.

- **With what collateral did the debtor secure her secured debts? Has any of the collateral been sold? If so, where did the proceeds go?** Conversion¹² can be a problem in farmer bankruptcy.¹³ Given the transparency requirements of the bankruptcy process, if conversion has occurred, the debtor should seriously consider other methods of resolving his or her debt.¹⁴
- **What is the relationship like between the debtor and the creditors? What kind of collection efforts, if any, are the creditors using?** If the debtor and creditors have a good relationship, then it may make sense for the debtor to pursue a non-bankruptcy option, like an assignment for the benefit of creditors or a composition of creditors. These may be cheaper, less public, and more flexible than a bankruptcy option.¹⁵
- **Is the debtor interested in the possibility of mediation or participating in mediation?** Connecticut offers an agricultural mediation program through Quinnipiac Law School, which may be a good option for the farmer-debtor. These agreements are binding.
- **Has the debtor made any recent (within the past ninety days) payments to any of its creditors?** Debtors may have certain creditors that they want to pay, either because of the credit's special importance to the farm business or because of personal ties. These payments, however, may be avoidable preferences¹⁶ under bankruptcy law and so subject to claw-back.
- **Has the debtor filed for bankruptcy before? How recently? How far did the previous bankruptcy case progress?** The debtor is not eligible for Chapter 7 or Chapter 13 if the debtor has received a discharge through Chapter 7 within the past eight years, or through Chapters 12 or 13 within the past six years.¹⁷

¹² Conversion is "The wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." BLACK'S LAW DICTIONARY (10th ed. 2014). Here, conversion is the sale of collateral.

¹³ Telephone Interview with Stephen Carpenter, Deputy Director and Senior Staff Attorney, Farmers' Legal Action Group, Inc. (April 10, 2017).

¹⁴ MICHAEL GUIERSON, EFFECTIVE EVALUATION AND PLAN STRATEGIES FOR CHAPTER 12 BANKRUPTCY ATTORNEYS AND THEIR CLIENTS (Aspatore ed. 2014).

¹⁵ Alternatives to Franchisee Bankruptcy: Workouts, Compositions of Creditors, Assignments for the Benefit of Creditors, and Receiverships. Sharyn B. Zuch. Franchise Law Journal, Vol. 33, No. 3, Winter 2014.
http://www.wiggin.com/files/28103_FLJ%2033-3_03Zuch.pdf

¹⁶ 11 U.S.C. § 547(b).

¹⁷ *Id.* §§ 727(a)(8), 727(a)(9).

COMPARISON: DEBT LIQUIDATION AND RESTRUCTURING OPTIONS

Brief Comparison of Bankruptcy and Non-Bankruptcy Alternatives

| | Bankruptcy | Non-Bankruptcy Alternative |
|--------------------------------------------|--------------------------------------------------------------------------------------------------------|-----------------------------------|
| Collection effort relief | Automatic stay upon filing of petition | Must be negotiated with creditors |
| Cost | More expensive (trustees' and other lawyers' fees) | Less expensive |
| Discharge of all debts¹⁸ | Yes | Must be negotiated |
| Procedure | Must adhere to procedures laid out in Bankruptcy Code | Can be negotiated with creditors |
| Publicity | Bankruptcies stay on individual credit reports for 10 years and may be publicly reported in other ways | May be more private. |

Brief Comparison of Bankruptcy Chapters*

| | Chapter 7 | Chapter 11 | Chapter 12 | Chapter 13 |
|-------------------------------------------|---------------------------------------|-----------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| Goal | Liquidation | Reorganization (liquidation in some cases) | Reorganization (keep property) | Reorganization (keep property) |
| Eligibility: income/type of income | All incomes below state median | All incomes | Family farmer with regular income | Regular income |
| Eligibility: Debt limit? | No | No | Yes, around \$4,000,000 | Yes, around \$1,500,000 |
| Automatic stay for co-debtors? | No | No | Yes | Yes |
| Discharge for corporations? | No | Yes | Yes | No |
| Pre-petition property? | All non-exempt property is liquidated | Can restructure obligations. Must pay creditors fully to keep property, absent their consent. | Can restructure obligations. Can keep property without complete payment to creditors. | Can restructure obligations. Can keep property without complete payment to creditors. |
| Post-petition wages? | Kept by former debtor | Depends on the reorganization plan and type of debtor | All projected disposable post-petition income must be applied to payments for duration of plan | All projected disposable post-petition income must be applied to payments for duration of plan |

¹⁸ Excluding non-dischargeable debts. *See id.* § 523.

Note: It is possible to convert most bankruptcy cases from one chapter to another chapter for which the debtor is eligible.

CHAPTER 12: FARM-SPECIFIC BANKRUPTCY

Chapter 12 was added to the Bankruptcy Code in 1986 by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. A combination of high interest rates, high production costs, low commodity prices and low value of farmland led many farmers to fall behind on their debt payments in the 1980s, which in turn led to the Act's emergency enactment.¹⁹ Written to expire on October 1, 1993, the Act was extended a number of times until the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act made Chapter 12 a permanent part of the Bankruptcy Code.²⁰

Eligibility In order to be eligible for Chapter 12 bankruptcy, a debtor must be a “family farmer with regular income.”²¹ The criteria for being a “family farmer” depend on the type of entity. If the debtor is an individual or married couple, the debtor must receive more than 50 percent of his or her gross income from a farming operation he or she owned or operated²² for either the year preceding the year in which the petition is filed, or the second and third years preceding the year in which the petition is filed.²³ Gross income is “all income from whatever source derived.”²⁴

If the debtor is a corporation or partnership, more than 50 percent of outstanding stock or equity must be held by one family or one family and relatives, and stock cannot be publicly traded.²⁵ The controlling family must conduct the farming operation, and more than 80 percent of the corporation's or partnership's assets must consist of assets related to farming.²⁶ Regardless of the debtor's entity type, at least 50 percent of the debtor's debts must arise out of the farming operation.²⁷ The total amount of debt must be less than \$4,155,150.²⁸ Finally, the debtor's annual income must be stable and regular enough to make payments on a reorganization plan.²⁹ The debt used to determine whether a debtor meets this standard includes all debt (a) resulting from events that occurred before the commencement of the bankruptcy case (b) that is also susceptible to ready calculation.³⁰

¹⁹ *Chapter 12: Bankruptcy Relief for Family Farmers*, National Bankruptcy Review Commission Archive, <http://govinfo.library.unt.edu/nbrc/report/23chapte.html>.

²⁰ *Id.*

²¹ 11 USC § 109(f).

²² *See In re Pierce*, 175 B.R. 153 (Bankr. D. Conn. 1994) (counting income from partnership counts as family farming income, even though farm partnership suffered a loss and debtor's partner contributed to partners' capital accounts, from which debtor received her partnership income.)

²³ 11 USC § 101(18)(A).

²⁴ 26 U.S.C. § 61. *See also In re Pierce*, 175 B.R. 153 (Bankr. D. Conn. 1994) (income from partnership counts as family farming)

²⁵ 11 USC § 101(18)(B).

²⁶ *Id.*

²⁷ *Id.* § 101(18) (2016).

²⁸ *Id.* § 101(18). This number is adjusted every three years to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

²⁹ *Id.* § 101(19).

³⁰ *In re Haarmann*, 387 B.R. 216 (Bankr. S.D. Ill. 2008).

In addition, Chapter 12 filers must meet the generic federal bankruptcy eligibility requirements. The debtor must be a person who is a resident, has a domicile, conducts business or owns property in the United States.³¹ This covers individuals, partnerships, and corporations. If the debtor is an individual or family farmer, the debtor must not have filed for bankruptcy in the past 180 days and either (a) had the case dismissed because of willful uncooperative behavior or (b) requested and obtained a voluntary dismissal of the case after a creditor's application for relief from stay.³² If the debtor is an individual, the debtor may not file for bankruptcy unless she has received a briefing from an approved nonprofit budget and credit-counseling agency during the 180 days preceding the petition, subject to some exceptions.³³

Chapter 12 bankruptcies must be voluntary.³⁴ An involuntary case under chapter 7 or 11 cannot be filed against a family farmer.³⁵

Filing Like other bankruptcies, Chapter 12 bankruptcies begin with the filing of a Chapter 12 petition with the bankruptcy court.³⁶ This petition must be filed by the debtor; creditors cannot begin involuntary bankruptcy proceedings against “a farmer [or] a family farmer.”³⁷ Two things happen upon filing. First, an automatic stay is created, temporarily barring further collection activities,³⁸ including foreclosure actions.³⁹ Second, the estate is created.⁴⁰

There are two advantages of the Chapter 12 automatic stay. First, the Chapter 12 automatic stay protects co-debtors in most circumstances.⁴¹ Second, Chapter 12 debtors have additional methods of providing adequate protection for security interests and therefore preventing the lifting of the automatic stay. Specifically, debtors can provide adequate protection for security interests in land by paying “reasonable rent” for the land.⁴² Thus, it is easier to prevent foreclosure of encumbered land.

The Chapter 12 estate is composed of all interests of the debtor in property as of the commencement of the case, with a few limited exceptions.⁴³ Property of the estate also includes all property (as defined in section

³¹ 11 U.S.C. § 109(a).

³² *Id.* § 109(g).

³³ *Id.* § 109(h).

³⁴ *Id.* § 303(a).

³⁵ *Id.*

³⁶ *Id.* § 301.

³⁷ *Id.* § 303.

³⁸ *Id.* § 362(a).

³⁹ *Id.* § 362(a)(5); Roy v. Beilin, Superior Court, Judicial District of Danbury, No. 31 50 57, 1997 WL 583838 (Sep. 8, 1997) .

⁴⁰ 11 U.S.C. § 541.

⁴¹ *Id.* § 1201(a).

⁴² *Id.* § 1205.

⁴³ *Id.* § 541.

541) acquired and all earnings from services performed by the debtor up to the time the case is closed, dismissed, or converted.⁴⁴

The Plan The debtor must file a plan for reorganization within ninety days of filing a Chapter 12 petition, unless the debtor requests an extension and it is granted.⁴⁵ The debtor must obtain court approval or “confirmation” of the plan.⁴⁶ Creditors do not vote on the plan; they may only raise objections to it in court.⁴⁷ The plan is confirmed if it complies with the Code requirements.⁴⁸ As with plans in other chapters, the plan must be feasible and proposed in good faith.⁴⁹ Additional key provisions are reviewed below.

A plan may treat a **secured creditor** in one of the following ways. First, if the debtor obtains the secured creditor’s agreement, the secured creditor’s debt can be modified in any way.⁵⁰ Second, the debtor may keep the collateral securing the claim if the plan also allows the secured creditor to retain its lien securing its claim and provides for payments equal to the present value of the collateral.⁵¹ Third, the debtor may surrender the collateral to the secured claim holder.⁵² The advantage of bankruptcy is that the debtor is only obligated to pay the fair market value of the property securing a secured debt; any remaining debt is unsecured and so may not need to be repaid. This is known as bifurcation, “**cramdown**,” or “stripping the lien down.” As in Chapter 11, the court can create a new interest rate and term to repay the crammed down secured debt.⁵³ The formula for determining the cramdown interest rate is determined by *Till v. SCS Credit Corp* and may result in a below-market interest rate.⁵⁴

Another advantage of bankruptcy is that it may allow debtors to extend the payment period to secured creditors. As reviewed above, unlike Chapter 13, Chapter 12 allows bifurcation and payment-period-modification of claims secured solely by the debtor’s residence.⁵⁵ Chapter 12 payments to secured creditors, moreover, may extend beyond the five-year duration of the plan, making it easier to pay off mortgages and expensive farm equipment.⁵⁶

The plan must provide for full payment of all section 507 priority claims⁵⁷ unless the claim is for taxes related to a sale of a farm asset or the holder of the claim agrees to a different treatment.⁵⁸

⁴⁴ *Id.* § 1207.

⁴⁵ *Id.* § 1221.

⁴⁶ *Id.* § 1225.

⁴⁷ *Id.* § 1227(c).

⁴⁸ *Id.* § 1225.

⁴⁹ *Id.* § 1225(6).

⁵⁰ *Id.* § 1225(a)(5)(A).

⁵¹ *Id.* § 1225(a)(5)(B).

⁵² *Id.* § 1225(a)(5)(C).

⁵³ *Id.* § 1222(b).

⁵⁴ *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004)

⁵⁵ Compare 11 U.S.C. § 1322(b)(2) with *id.* § 1325(a)(9).

⁵⁶ *Id.* § 1222(b)(9).

⁵⁷ *Id.* § 507 (listing priority unsecured claims, including domestic support obligations, administrative expenses, and wage claims).

⁵⁸ *Id.* § 1222.

The plan must provide for payments to general **unsecured claims** at least equal to the present value of what claimants would have received at liquidation.⁵⁹ This requirement mirrors the Chapter 13 liquidation test.⁶⁰ Importantly, there is no absolute priority rule in Chapter 12, and so an owner can retain assets, exempt or not, even if all other unsecured debt has not been repaid in full or consented to take less than full repayment.

Payments to the plan are funded by disposable income from future earnings.⁶¹ Property of the estate may also be sold to generate funds or be surrendered to satisfy creditor claims. An important caveat on the property sale strategy is that the Supreme Court has recently ruled that the capital gain arising from the post-petition sale of farm assets is not dischargeable.⁶² Thus, farmers selling property in order to fund their bankruptcy may face a one-time large jump in taxes that may be difficult to repay.⁶³ All projected disposable income received during the period of the plan—including non-farm income—must be applied to plan payments.⁶⁴ Projected disposable income is defined in Chapter 12 as income which is not “reasonably necessary” for supporting the debtor and dependents or for the continued operation of the debtor’s business.⁶⁵

Confirmation Except as otherwise provided in the plan, confirmation of the plan vests all property of the estate in the debtor, free and clear of any claim or interest of any creditor provided for by the plan.⁶⁶

Trustee and Debtor in Possession The debtor remains in possession of the estate property while the case is pending.⁶⁷ A trustee is also appointed.⁶⁸ Like debtors-in-possession in other chapters, a chapter 12 debtor-in-possession generally has the right to use, sell, or lease non-cash-collateral estate property in the ordinary course of business without court approval.⁶⁹ However, Section 1206 seems to suggest that debtors can only sell property free and clear of secured creditors interests if the trustee approves the sale.⁷⁰

Discharge Upon finishing all payments under the plan, except for those whose last payment is due after the final date of the plan, the debtor is discharged of all debts other than the aforementioned payments and those specified in section 523(a) of the Bankruptcy Code.⁷¹ Chapter 12 discharges are not denied on the basis of the debtor’s previous discharges.

⁵⁹ *Id.* § 1225(a)(4).

⁶⁰ *Id.* § 1325(a)(4).

⁶¹ *Id.* § 1222.

⁶² *Hall v. United States*, 566 U.S. 506 (2012).

⁶³ See Telephone Interview with Stephen Carpenter, Deputy Director and Senior Staff Attorney, Farmers’ Legal Action Group, Inc. (April 10, 2017) (describing farmer-debtor’s difficulty repaying increased taxes).

⁶⁴ 11 U.S.C. § 1225(b)(1).

⁶⁵ *Id.* § 1225(b)(2).

⁶⁶ *Id.* § 1227.

⁶⁷ *Id.* § 1203.

⁶⁸ *Id.* § 1202.

⁶⁹ *Id.* § 363(c).

⁷⁰ *Id.* § 1206.

⁷¹ *Id.* § 1228.

Canceled debt—debt that is forgiven or discharged for less than the full amount one owns—is generally considered ordinary income.⁷² However, the Internal Revenue Service then excludes the discharge of indebtedness income if the discharge occurs in a Chapter 11 case, the discharge occurs when the debtor is insolvent, the indebtedness discharged is qualified farm indebtedness or qualified real property business indebtedness.⁷³ If the discharge of indebtedness is excluded, however, then the amount excluded is applied to reduce the tax attributes of the debtor.⁷⁴ Tax attributes subject to reduction include net operating loss, general business credit, minimum tax credit, capital loss carryovers, and basis reduction.⁷⁵

It is important to consider tax consequences when choosing a bankruptcy plan, and it may be wise to consult with an accountant or a tax lawyer on these issues. Many farmers do not have the income margin to absorb a large increase in taxes and poor tax planning is a key contributor to farmer bankruptcy failure.⁷⁶

CHAPTER 12 VS. OTHER BANKRUPTCY OPTIONS

Chapter 12 Compared with Chapter 13 Chapter 12 was modeled on Chapter 13, so the chapters are similar.

Pros of Chapter 12 compared with Chapter 13

- Corporations cannot file under Chapter 13.
- The Chapter 13 debt limit for eligibility is lower (\$1,184,200 in 2016) than under Chapter 12.⁷⁷
- The maximum payment period is five years under Chapter 13, so Chapter 13 offers less flexibility in the timing of debt payment.⁷⁸
- The Chapter 13 debtor has fewer methods of providing adequate protection for security interests in land, so it is harder for her to prevent foreclosure of encumbered land.⁷⁹
- Secured loans on the debtor's residence can be modified in Chapter 12 bankruptcy, but not in Chapter 13 bankruptcy.⁸⁰
- Debtors remain eligible even if they have received a discharge through Chapter 7 or Chapter 13 bankruptcy in the previous eight (8) years.⁸¹

⁷² 26 U.S.C. § 108.

⁷³ *Id.* § 108(a)(1).

⁷⁴ *Id.* § 108(b)(1).

⁷⁵ *Id.* § 108(b)(2).

⁷⁶ Telephone Interview with Stephen Carpenter, Deputy Director and Senior Staff Attorney at Farmers' Legal Action Group, Inc. (April 10, 2017).

⁷⁷ 11 U.S.C. § 109(e).

⁷⁸ Compare *id.* § 1222(b)(9) with *id.* § 1322.

⁷⁹ Compare *id.* § 361 with *id.* § 1205.

⁸⁰ *Id.* § 1322(b)(2).

⁸¹ *Id.* § 727(a)(8).

- All Chapter 12 bankruptcy cases are subject to the same projected disposable income test.⁸² In Chapter 13, debtors with household income above their state's median are subject to a different disposable income test, one that labels all income above the state median disposable.⁸³

Cons of Chapter 12 compared with Chapter 13

- Chapter 13 is not limited to family farmers.

Chapter 12 Compared with Chapter 7

Pros of Chapter 12 compared with Chapter 7

- The debtor can keep his or her property and continue his or her business.
 - Confirmation of the plan re-vests estate property in the debtor.⁸⁴
 - Debtor is able to cure default and restructure secured obligations.⁸⁵
 - On the other hand, Connecticut's extensive exemptions for farm tools and homesteads mean that debtors are unlikely to lose everything—at least to unsecured creditors.
- A family farm corporation can receive a discharge.⁸⁶
- In Chapter 12, unlike in Chapter 7, the automatic stay protects co-debtors in most circumstances.⁸⁷
- Debtors have additional methods of providing adequate protection for security interests. Specifically, adequate protection for security interests in land may be provided by paying "reasonable rent" for the land.⁸⁸ Thus, it is easier to prevent foreclosure of encumbered land.
- Debtors remain eligible even if they have received a discharge through Chapter 7 or Chapter 13 bankruptcy in the previous 8 years.⁸⁹

Cons of Chapter 12 compared with Chapter 7

- Debtors remain eligible for Chapter 7 regardless of their aggregate debt total.
- Debtors do not have to be family farmers in order to be eligible for Chapter 7.
- In a Chapter 7 case, property of the estate consists only of the debtor's property at the timing of the petition; in a Chapter 12 case, the estate consists of both pre-petition and post-petition property.⁹⁰

⁸² *Id.* § 1225(b)(2).

⁸³ *Id.* § 1225(b)(3).

⁸⁴ *Id.* § 1227(b).

⁸⁵ *Id.* § 1222.

⁸⁶ *Id.* § 1228.

⁸⁷ *Id.* § 1201(a).

⁸⁸ *Id.* § 1205.

⁸⁹ *Id.* § 727(a)(8).

⁹⁰ *Id.* § 1222.

- The duration of the case is relatively short, since property is realized and proceeds are distributed as expeditiously as possible.⁹¹
- There is no minimum level of payment to unsecured creditors prescribed in a Chapter 7 case; there is a minimum level of payment to priority unsecured creditors in a Chapter 12 case.

Chapter 12 Compared with Chapter 11

Pros of Chapter 12 compared with Chapter 11

- In contrast to Chapter 12, Chapter 11 has an absolute priority rule.⁹² This means that if the debtor does not pay off all of her creditors, then she will lose her ownership interest.
- In contrast to Chapter 12, in Chapter 11 creditors vote on the plan and debtor needs a prescribed level of creditor approval to get the plan confirmed.⁹³
- Chapter 11 is more complex,⁹⁴ and therefore may be more expensive and time-intensive for the debtor to file under.
- In contrast to Chapter 12, in Chapter 11 the automatic stay only protects co-debtors at the court's discretion.⁹⁵
- In Chapter 11, the debtor has fewer methods of providing adequate protection for security interests in land, making it harder to prevent foreclosure of encumbered land.⁹⁶

Cons of Chapter 12 compared with Chapter 11

- More entities are eligible. Chapter 11 has no debt limit and is not limited to family farmers.
- In a Chapter 11 corporate case, property of the estate consists only of the debtor's property at the timing of the petition; in a Chapter 12 case, the estate consists of both pre-petition and post-petition property.⁹⁷
- Debtors have more flexibility in terms of sources of funding for plan payments under Chapter 11.⁹⁸
- There is no statutory limit to the duration of a Chapter 11 plan.⁹⁹
- Unlike in a Chapter 11 case, under Chapter 12 a farmer may have cancellation of indebtedness income for federal tax purposes.¹⁰⁰

⁹¹ *Id.* § 704.

⁹² *Id.* § 1129(b)(2)(B)(ii).

⁹³ *Id.* §§ 1103, 1121, 1125, 1126, 1129. The level of creditor approval needed depends on whether the debtor is undertaking a plan under 11 U.S.C. §§ 1129(a) or (b).

⁹⁴ *See, e.g., id.* § 1129.

⁹⁵ *Id.* § 105.

⁹⁶ *Compare id.* § 361 *with id.* § 1205.

⁹⁷ *Compare id.* § 1151 *with id.* § 1207.

⁹⁸ *Id.* § 1123.

⁹⁹ *Id.* § 1129(a)(15).

¹⁰⁰ I.R.C. § 108(a).

CONNECTICUT LAW AND PROGRAMS RELEVANT TO FARMER DEBTORS

Statutory Liens Created by the Connecticut General Statutes A statutory lien is a lien that is created by statute, rather than through a court judgment. Farmers often have more statutory liens than other debtors.¹⁰¹ For example, in addition to land subject to mortgages and equipment and building structures subject to mechanics' liens,¹⁰² farm debtors may also have animals subject to keep liens¹⁰³ and land subject to private water company liens¹⁰⁴ under Connecticut law.

Mediation Farmers in Connecticut are eligible to participate in the Connecticut Agricultural Mediation Program (CTMAP) offered by the Center for Dispute Resolution at the Quinnipiac University School of Law.¹⁰⁵ The goal of the program is to help farmers and agricultural lenders, whether USDA or commercial lenders, resolve disputes and agree on solutions in a cost-effective and efficient manner. Note that agreements as a result of mediation are binding.

Rights under State Law Three rights under state law may be especially relevant for farm debtors: (1) limits on repossession; (2) exemptions from repossession; and (3) foreclosure protections. First, collateral cannot be repossessed by self-help measures if doing so would create a "breach of the peace."¹⁰⁶ If self-help repossession would breach the peace, the good must be retaken by legal process. Second, Connecticut has a list of property exempt from seizure by unsecured creditors. Some items are especially relevant for farmers. These include the following:

- **"Tools, books, instruments, farm animals and livestock feed which are necessary to the exemptioner in the completion of his or her occupation, profession or farming operation."**¹⁰⁷ Note especially that Connecticut does not put a dollar limit on the amount of property that is exempt.
- **"The homestead of the exemptioner to the value of seventy-five thousand dollars, or, in the case of a money judgment arising out of services provided at a hospital, to the value of one hundred twenty-five thousand dollars, provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it."**¹⁰⁸

¹⁰¹ Telephone Interview with Stephen Carpenter, Deputy Director and Senior Staff Attorney, Farmers' Legal Action Group, Inc. (April 10, 2017).

¹⁰² CONN. GEN. STAT. § 49-33 (2016).

¹⁰³ *Id.* § 49-70.

¹⁰⁴ *Id.* § 49-72.

¹⁰⁵ See *CT Agricultural Mediation Program: About*, QUINNIPIAC SCH. OF LAW CTR. OF DISPUTE RESOLUTION, <http://www.qulawdisputeresolution.org/ctamp>.

¹⁰⁶ CONN. GEN. STAT. §§ 36(a)-785, 42a-9-609.

¹⁰⁷ *Id.* § 52-352b(b).

¹⁰⁸ *Id.* § 52-352b(t).

Finally, the farm debtor may have additional protections against foreclosure. If a debtor's farm is his or her primary residence and the debtor is underemployed or unemployed, the debtor may be eligible for protection from foreclosure action. This protection requires the debt to be restructured and prevents the debtor's creditors from foreclosing on the property.¹⁰⁹

NOTE ON NONPROFITS

While nonprofits do not have their own bankruptcy chapter, they do receive some protections that for-profit corporations do not receive. A nonprofit debtor must consent to any liquidation of its assets. Creditors cannot commence an involuntary bankruptcy case against a "corporation that is not a moneyed business or commercial corporation."¹¹⁰ Similarly, a bankruptcy court must have a nonprofit debtor's consent before converting a nonprofit debtor's Chapter 11 case into a Chapter 7 case.¹¹¹

These protections, however, come with a limitation. Regardless of whether they are associated with bankruptcy proceedings, transfers of property by nonprofit debtors are subject to applicable state law and other restrictions on nonprofits.¹¹² In Connecticut, this means that any assets received by a corporation subject to limitations permitting their use only for charitable, benevolent, educational or similar purposes must be transferred to a corporation or organization engaged in activities similar to those of the nonprofit if the nonprofit liquidates.¹¹³

RESOURCES

Farmers' Legal Action Group

<http://www.flaginc.org>.

Connecticut Agricultural Mediation Program

<http://www.ctagmediation.org>.

Susan A. Schneider, *An Introduction to Chapter 12 Bankruptcy: Restructuring the Family Farm*

<http://www.flaginc.org/wp-content/uploads/2013/07/J01-Intro-to-Chap-12-Bkrcty-Restructuring-Family-Farm-SAS-2005.pdf>.

Connecticut Judiciary: Prejudgment Proceedings in Connecticut Mortgage Foreclosures

- https://jud.ct.gov/lawlib/Notebooks/Pathfinders/Foreclosure_Prejudgment.pdf.

¹⁰⁹ *Id.* §§ 49-31d-49-31j.

¹¹⁰ 11 U.S.C. § 303.

¹¹¹ *Id.* § 1112(c).

¹¹² *Id.* §§ 363(d)(1); 1129(a)(16); 541(c), (d), (f). *See also* Butner v. United States, 440 U.S. 48 (979).

¹¹³ CONN. GEN. STAT. § 33-1176.

CHAPTER VII: TAXATION

Farmers, just like all U.S. citizens, are subject to local, state, and federal taxes. And while a good deal of tax law governing businesses likewise governs farm businesses, there are myriad provisions in the federal statutes and regulations, as well as some Connecticut state tax laws, that apply uniquely to farm businesses. In order to fully and competently advise a farmer on potential tax matters, attorneys must consider all of the rules and exceptions.

OVERVIEW This chapter on farm business taxation will highlight tax provisions that apply specifically to farmers, and in addition, will describe tax laws that are especially relevant in the context of farming.¹ Similar to its federal counterpart, section 1-1(q) of the Connecticut General Statutes defines “agriculture” and “farming” broadly, including activities such as dairying, raising livestock, harvesting lumber, and raising bees; additionally, “aquaculture” is defined as “farming of the waters” and, as such, is equivalent to “agriculture” for tax purposes.² Attorneys serving farmers in Connecticut will need to consider these definitions when advising clients on tax issues related to farming activities. This chapter explores federal and state tax laws that apply within the definition of farming to farmers, including filing income taxes, choosing an accounting method, and capitalizing or deducting expenses. Additionally, this chapter highlights federal and state tax laws that apply specifically to farmers in Connecticut.

- 1. Overview of Connecticut Farms** This section identifies the features of Connecticut farms that may be relevant to tax planning.
- 2. General Tax Issues for Connecticut Farmers** This section provides a list of tax challenges and some of the options on how farmers may face such challenges, also, this section proposes ways that attorneys can help farmers understand his or her tax environment more effectively.
- 3. Federal Tax Concerns for Farmers** This section describes federal tax provisions unique to farm businesses or highly relevant to farmers, including features of income and employment taxes.
- 4. Connecticut Tax Concerns for Farmers** This section covers Connecticut state tax laws that pertain to farmers.

OVERVIEW OF CONNECTICUT FARMS

Farmers, like all business owners, are subject to federal and state tax liability. However, the Internal Revenue Code (IRC) contains a large number of provisions unique to farming businesses. In fact, the IRC provides

¹ 26 U.S.C. § 1 *et seq.* (2012); This summary is based upon provisions of the Internal Revenue Code (I.R.C.) of 1986, as amended, applicable U.S. Treasury regulations promulgated thereunder, published rulings and judicial decisions, Connecticut General Laws and administrative interpretations thereof, all as in effect as of the date of publication. Those authorities may be changed, perhaps retroactively, or may be subject to differing interpretations, which could result in federal and state income tax consequences different from those discussed below. This summary does not address all aspects of federal or Connecticut state income taxation and does not deal with all tax considerations that may be relevant to farmers in light of their personal circumstances.

² CONN. GEN. STAT. § 1-1(q) (2013).

farmers with a farm-specific schedule to report income: Schedule F (Form 1040) Profit or Loss from Farming (Schedule F).

There are characteristics of Connecticut farms that have a significant bearing on tax liability, especially for farmers that qualify for Legal Food Hub (LFH) assistance. Some of these characteristics are the following:

- **Non-Farm Income:** More than 75 percent of farmers also have non-farm income.³ According to the most recent Census of Agriculture, the majority of Connecticut farmers (approximately 95 percent) support themselves on both farm and non-farm income, and approximately 69 percent work 200 days or more not on a farm each year, meaning that for those days, they derive their income from somewhere other than their farms.⁴ Less than half of farmers (46 percent) consider farming their primary occupations.⁵
- **Farm Income and Expenses Are Small:** The majority of Connecticut farms are very small, as measured by revenue.⁶ More than 50 percent of farms have sales of less than \$2,500 per year, and 70 percent have sales of less than \$10,000 per year.⁷ In contrast, expenses tend to be somewhat higher.⁸ Just 18 percent of farmers have expenses of \$5,000 or less per year, and 69 percent have expenses of \$25,000 or less per year, while nearly 14 percent have expenses of \$100,000 or greater per year.⁹
- **Most Farms Have Net Losses:** In 2012, over two-thirds of Connecticut farms reported net losses, meaning total farm expenses exceeded total farm income for the year; 53 percent reported net losses in 2007.¹⁰
- **Connecticut Does Not Primarily Farm Commodity Crops:** In Connecticut, 4 percent of farms account for 85 percent of gross sales, with only 12 percent of farms grossing \$50,000 or more. As illustrated in the chart below, the bulk of these sales are coming from the greenhouse and nursery

³ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: CONNECTICUT DATA, TABLE 67: SUMMARY BY LEGAL STATUS FOR TAX PURPOSES: 2012 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_067_067.pdf.

⁴ *Id.*

⁵ *Id.*

⁶ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: CONNECTICUT DATA, TABLE 2: MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD INCLUDING LANDLORD'S SHARE AND DIRECT SALES: 2012 AND 2007 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_002_002.pdf.

⁷ *Id.*

⁸ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: CONNECTICUT DATA, TABLE 4: FARM PRODUCTION EXPENSES: 2012 AND 2007 (2014), http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_004_005.pdf.

⁹ *Id.*

¹⁰ *Id.*

sector, most likely due to the fact that 56 percent of the state is forested.¹¹ In 2012, only about 8 percent of Connecticut farmers received any form of payment from the federal government, such as subsidies or conservation payments.¹²

An attorney serving a client in Connecticut should be familiar with Connecticut Public Act 490 (“PA 490”) and land classification procedure (discussed later in this chapter), as there is a strong likelihood that a farmer will have some business activities in the greenhouse and nursery sector. Local property taxes play a major role in municipal budgets. Because farmers depend on large amounts of land, buildings, and equipment, they can face substantial property tax bills. The Connecticut Department of Agriculture has enacted PA 490, which, for purposes of local property taxes, assesses farmland at its use value, rather than its “highest and best” or “fair market value” to shield farmers from higher tax rates tied to usually increasing land values throughout the state.¹³

Thus, Connecticut farmers face a different tax landscape than the one commonly faced by large commodity crop farmers elsewhere. Often, a farmer’s tax planning decisions may have more to do with simplifying administration than minimizing income tax, as the farmer may not owe any income tax.¹⁴

Record Keeping Good record keeping from the outset is imperative to running a successful business, and it can be instrumental in obtaining government loan and grant funds.

Accounting Methods Accounting methods are inextricably linked to any discussion on tax planning. An attorney should advise his or her client of the costs that are usually incurred upon a change of accounting methods, as it requires approval from the IRS.¹⁵

According to section 12-708-6(a) of the Connecticut Agencies Regulation, taxpayers must use the same method of accounting for state income tax purposes as is used for federal income tax purposes.¹⁶ The method of accounting must “clearly reflect income,” and will be interpreted by the IRS as clearly reflecting a taxpayer’s income if the method “consistently applies generally accepted accounting principles in a particular trade or business.”¹⁷

All farms with gross receipts of under \$25,000,000 per year may freely choose between the cash and accrual

¹¹ *PA 490 Talking Points*, CONN. FARM BUREAU ASS’N (Jan. 2016), http://www.cfba.org/images/resources/490_talking_points_on_letterhead.pdf [hereinafter “*PA 490 Talking Points*”].

¹² *Quick Stats*, U.S. DEP’T OF AGRIC., NAT’L AGRIC. STAT. SERV., <https://quickstats.nass.usda.gov/results/013A07EA-577D-3B8A-BECE-58FDF433A802>.

¹³ *Public Act 490 — The Basics*, CONN. DEP’T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=1366&q=259834>.

¹⁴ *PA 490 Talking Points*, *supra* note 11.

¹⁵ *Form 3115: Application for Change in Accounting Method*, U.S. Internal Rev. Serv. (last revised Dec. 2015), <http://www.irs.gov/pub/irs-pdf/f3115.pdf>. See also Treas. Reg. 1.446-1.

¹⁶ CONN. AGENCIES REGS. § 12-708-6. See also CONN. GEN. STAT. §§ 12-708-6, 12-740(a); I.R.C. § 446 (discussing acceptable methods of accounting which include cash and accrual, as well as other methods that clearly reflect income which include the crop method and the combination method).

¹⁷ CONN. AGENCIES REGS. § 12-708-6; see also CONN. GEN. STAT. §§ 12-708-6, 12-740(a).

methods, regardless of its type of business entity structure.¹⁸

Advantages of the Cash Method Many farmers may prefer the cash method for simplicity or for advantageous tax implications when raising and selling livestock.

Deferral of Income: Cash-method farmer must only recognize income when actually paid for the goods sold. In some instances, this can be later than the farmer would have recognized the income under the accrual method. If this is the case, this means that the tax on the income is due in a later year. Because of the time-value of money, later recognition of income is beneficial to the taxpayer.¹⁹

Simpler Bookkeeping: The cash method does not require the farmer to keep an inventory (a detailed, itemized record of all farm products to be sold).²⁰ Therefore, bookkeeping will generally be simpler than under the accrual method, which does require the farmer to keep and maintain an up-to-date and accurate inventory.²¹

Cash Method Because of the ease of bookkeeping, the cash method is intuitively used by most farmers. The cash method is simply this: a farmer reports income and deducts expenses in the fiscal year or particular period during which the expenses were paid. Advantages of this method include the deferral of income not actually recognized, an increased likelihood of liquidity, deductions related to livestock, and estate planning related advantages.

Accrual Method In contrast to the cash method, farmers using the accrual method will generally report income and deduct or capitalize expenses in the year that they are incurred. While the cash method fares better at reflecting a taxpayer's true cash position, the accrual method more accurately reflects income from ordinary farm operations because costs incurred from products not yet sold can be carried over to be offset when the sale is made. Advantages of this method include reflecting income without distortions and special inventory valuation.

Sources: IRS Pub. 225 (2014); 1-1 Farm Income Tax Manual Section 1.07(1)-(3).

Increased Liquidity: Because income is only counted when the farmer has actually received payment under the cash method, the farmer will not owe taxes on money not yet received. This, in turn, increases the probability that the farmer will have cash available to pay taxes.²²

Livestock Tax Advantage: For farmers who raise livestock and have income from the sale of livestock for

¹⁸ I.R.C. § 448(b) (explaining that farms required to use accrual accounting are family corporations that had over \$25,000,000 in gross receipts in any taxable year after 1985, and partnerships and corporations (other than family corporations) with over \$1,000,000 in gross receipts in any tax year after 1975); U.S. INTERNAL REV. SERV., PUBLICATION 225: FARMER'S TAX GUIDE 6-7 (Oct. 19, 2017), <http://www.irs.gov/pub/irs-pdf/p225.pdf> (noting that the farmer will make the official election when they file his or her first tax return that includes Schedule F) [hereinafter "IRS FARMER'S TAX GUIDE"].

¹⁹ IRS FARMER'S TAX GUIDE, *supra* note 18. See also Paul Neiffer, *The Three Levels of Accounting* (2011) (illustrating that the concept of "time value of money" is based on the assumption that money earned now with the possibility of earning interest is worth more than money earned at a later point).

²⁰ NEIL E. HARL, 4-25 AGRICULTURAL LAW § 25.05 (MATHEW BENDER ed. 2017).

²¹ *Id.* See also IRS FARMER'S TAX GUIDE, *supra* note 18, at 55.

²² HARL, *supra* note 20. See also IRS FARMER'S TAX GUIDE, *supra* note 18, at 55.

draft, breeding, or dairy purposes, they may have a significant tax advantage if using the cash method.²³ Under the cash method, the cost of raising livestock may be fully deducted each year; the income from the future sale of the livestock is characterized as capital gain, and thus taxed at preferential capital gains tax rates.²⁴ Farmers using the accrual method, however, are required to include livestock in their inventory, capitalize and depreciate the costs associated with raising the livestock, and treat some of the subsequent gain from sale as ordinary income due to recovery rules.²⁵ Ultimately, farmers raising and selling livestock are able to take earlier deductions on their present costs while being taxed at the lower, preferential capital gains tax rates on the future sale of their livestock under the cash method.²⁶

Advantages of the Accrual Method The accrual method has advantages as well, some of which may be especially relevant to start-up farmers.

Accurately Reflects Income: For purposes of tax reporting, the accrual method more accurately reflects income and expenses without some of the distortions created by the cash method. Distortions occur because payments in the real world are not always made or received in a timely fashion. For example, if a farmer made sales throughout the year, but many of the payments are outstanding until December, then on paper the farm may appear unprofitable for much of the year if it uses the cash method. Because the accrual method may get more income on the books sooner, it may also enable a new farmer to take greater advantage of deductions.

Lower Tax Burden on Sales: A farmer using the accrual method is generally less restricted when it comes to executing transactions in accordance with reporting requirements. Cash-basis farmers might find themselves foregoing a promising market in their attempts to avoid distorting income results arising from income tax reporting requirements.²⁷ An excerpt from section 1.07 of the *Farmer's Income Tax Manual* by Neil E. Harl provides an especially useful illustration of this somewhat abstract concept.

*The accrual-basis farmer has less concern with the time of sale of inventoried items. When hogs are ready for market and the price is right, they can be sold. The taxpayer is less inhibited by the thought that last year's pigs were sold after the first of January and the cash return from two pig crops will have to be reported on the current return. This relatively lower tax burden on sales might be of great importance to the farmer who must outguess enough economic and weather factors without also having to outguess the effect of a particular transaction on income tax liability. All too often, the cash-basis farmer finds that the attempt to avoid a distorted income results in loss of an advantageous market, that feed costs in retaining livestock beyond a tax deadline have more than canceled the tax saving sought, or that animals fed out for sale are over finished.*²⁸

²³ HARL, *supra* note 20. See also CONN. FARM RISK MANAGEMENT AND CROP INS. PROGRAM, CONNECTICUT AGRICULTURAL BUSINESS MANAGEMENT GUIDE 12 (Jan. 21 2015), http://www.ctfarmrisk.uconn.edu/index_43_3097177875.pdf [hereinafter "AGRICULTURE BUSINESS GUIDE"].

²⁴ HARL, *supra* note 20. See also AGRICULTURE BUSINESS GUIDE, *supra* note 23, at 12.

²⁵ HARL, *supra* note 20. See also AGRICULTURE BUSINESS GUIDE, *supra* note 23, at 12.

²⁶ NEIL E. HARL, 1-1 FARM INCOME TAX MANUAL § 1.07(3)(b)(i) (LEXISNEXIS MATHEW BENDER ed. 2017).

²⁷ *Id.*

²⁸ *Id.*

GENERAL TAX ISSUES FOR CONNECTICUT FARMERS

Farmers face a variety of complex tax decisions whether they are just starting out or running a longstanding sophisticated farm operation. The decisions discussed in this section can have consequences at both state and federal levels. This section discusses some of the general tax issues that farmers in Connecticut are likely to encounter, and it offers some suggestions to the attorney about how to frame the tax analysis.

Choice of Business Entity An attorney should work carefully with a client to pick the appropriate business entity structure and develop a business plan that is the most advantageous to the farmer's needs.

Sole Proprietorship This is generally the most common type of business formation.²⁹ A sole proprietor owns all of the assets of the business, as well as any profits, debts, or liabilities generated.³⁰ A sole proprietorship is not taxed at the state or the federal level because the business is seen as the same as the individual who owns it.³¹ Therefore, when it is time to report, all income and expenses will be reported on the sole proprietor's personal tax return, on a Schedule F for a Farm.³² This is the least administratively burdensome option in regards to taxation, but the individual would be liable for all business obligations. The Tax Cuts and Jobs Act of 2017 permits individuals operating a pass-through business to take a deduction for 20 percent, subject to certain limitations, on their business income through December 31, 2025.³³ This applies to all pass-through businesses.³⁴

Consider Asking the Client

- How simple do they want his or her operation to be?
- How much control would they like to have over the business?
- What are his or her expected profits or losses?
- Will they be reinvesting his or her earnings back into his or her business?
- What is his or her need to access cash out of the business for themselves?
- Does his or her taxable income exceed \$157,500 (\$315,000 in the case of a joint return)? This is relevant for the section 199A pass-through deduction.

Partnership Similar to a sole proprietorship, income and losses "pass through" to the partners, and they are taxed at the owner's respective income tax rates, subject to self-employment tax.³⁵ Each partner is expected to make some type of capital contribution upon formation of the partnership.³⁶ In general, the amount of the administrative burden corresponds to the level of complexity of the partnership agreement.

²⁹ AGRICULTURE BUSINESS GUIDE, *supra* note 23, at 12.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ I.R.C. § 199A.

³⁴ *Id.*

³⁵ AGRICULTURE BUSINESS GUIDE, *supra* note 23, at 12.

³⁶ Dennis Masino, *Differences Between Sole Proprietorship, Partnership, & Corporation*, LEGALZOOM, <http://info.legalzoom.com/differences-between-sole-proprietorship-partnership-corporation-24338.html>.

Limited Liability Company (LLC)

Commonly referred to as a partnership-corporation hybrid, an LLC entity can both shield a business owner from the risks of unlimited liability and streamline tax efficiencies. Its largest advantage comes from providing limited liability with pass-through taxation.³⁷

S-Corporations & Election

Businesses that file as S-Corporations (including LLCs that elect S-Corporation tax treatment) may enable the owners to pay less in income and self-employment taxes by using dividends.³⁸ In addition to personal income tax, owners of sole proprietorships and partnerships must pay self-employment taxes on the net income earned from the business at a rate of 15.3 percent (as of 2015).³⁹ S-Corporations can transfer profits to their owners using dividends, which are not subject to self-employment taxes and may be subject to a lower income tax rate than the tax rate applicable to wages.⁴⁰

Current LLC Law in Connecticut (as of Aug. 2017)

- (1) Under Treasury Regulation Section 301.7701-2(a) and CT Gen. Stat. Section 34-101(9) as amended by 1997 CT PA 70 Section 2, the Check-the-Box rules recognize single member limited liability companies (SMLLCs).
- (2) SMLLCs can elect treatment as sole proprietorships (not required to file Form CT-1065).
- (3) Federal income tax treatment will determine the treatment of the business for state income tax purposes (e.g., if an LLC with 2+ members is classified as a partnership for federal income tax purposes, then it will be treated as a partnership for Connecticut income tax purposes).

Source: State of Connecticut Department of Revenue Services, SN 99(3),
<http://www.ct.gov/drs/cwp/view.asp?a=1514&q=268790>

For example, a farmer who earns \$50,000 from a sole proprietorship will pay \$7,650 in self-employment tax; but, a farmer who receives a salary of \$30,000 and a dividend of \$20,000 will only incur \$4,590 in employment tax (paid, in part, by the corporation and, in part, by the farmer as employee)—a savings of \$3,060.⁴¹ It is important to highlight that the IRS mandates that owners of S-Corporations earn a “reasonable salary” (defined as what other businesses would pay for similar services), and the IRS heavily scrutinizes dividend payments that could suggest tax avoidance.⁴²

C-Corporation A C-Corporation does not enjoy the benefit of pass-through taxation and is taxed as a

³⁷ U.S. INTERNAL REV. SERV. PUBLICATION 3402: TAXATION OF LIMITED LIABILITY COMPANIES (June 2016), <http://www.irs.gov/publications/p3402/ar02.html>.

³⁸ I.R.C. §§ 1361, 1362 (2017).

³⁹ *Id.* §§ 1361, 1362 (2017).

⁴⁰ *Id.* §§ 1402; *id.* § 1401 (although generally lower than self-employment taxes, certain employment taxes apply to wages paid by S-corporations and C-corporations to his or her employees. The corporation is also required to pay its share of payroll taxes); see also *The S-Corporation Election: Advantages and Disadvantages*, Nat'l Soc'y of Accountants (2015), https://www.irs.gov/pub/irs-utl/2015_NTF_Advantages_Disadvantages_S-Corp.pdf.

⁴¹ I.R.C. § 1402(a) (dividends not subject to self-employment tax); a 15.3-percent employment tax rate is derived from current withholding rates, that when broken down amount to 6.2 percent for both social security and employee (12.4 percent) plus the current Medicare withholding rate of 1.45 percent, attributable to both the employer and the employee (2.9 percent). See *Topic No. 751 Social Security and Medicare Withholding Rates*, U.S. DEP'T OF TREAS., INTERNAL REV. SERV. (Sept. 21, 2017), <http://www.irs.gov/taxtopics/tc751>. See also U.S. INTERNAL REV. SERV., PUBLICATION 15: (CIRCULAR E), EMPLOYER'S TAX GUIDE (2017), <http://www.irs.gov/publications/p15>; IRS FARMER'S TAX GUIDE, *supra* note 18.

⁴² *S Corporation Compensation and Medical Insurance Issues*, U.S. DEP'T OF TREAS., INTERNAL REV. SERV. (Aug. 17, 2017), <http://www.irs.gov/businesses/small-businesses-self-employed/s-corporation-compensation-and-medical-insurance-issues>.

distinct and separate entity.⁴³ Substantially more administrative work is required for this formation because these corporations are monitored by federal, state, and local agencies, for compliance with all of the regulations and disclosure requirements.⁴⁴ In addition, while the corporate tax rate on dividend payouts and capital gain (preferential rate) is generally lower than ordinary income-tax rates, C-Corporations can be subject to a “double-taxation” regime, the first tax being on annual corporate earnings, and the second on nondeductible dividends paid out to shareholders.⁴⁵ The passage of the Tax Cuts and Jobs Act of 2017 created a 21-percent flat corporate tax, eliminating the old graduated rate.⁴⁶ While the new tax rate lowers the corporate tax level for many corporations, the tax rate for some farm corporations will increase. Before 2018, corporations with annual income below \$50,000 were subject to a 15-percent corporate tax rate, but effective January 1, 2018, these small corporations will be subject to a 21-percent tax rate.⁴⁷

The 199A Pass-Through Deduction

- **Warning:** Section 199A was passed as part of the 2017 Tax Cut and Jobs Act a month before publication of this article, and as such, the IRS has yet to issue any guidance on 199A. Therefore, an attorney should be careful to confirm the currency of this section.
- **The Basic Deduction:** The pass-through deduction is calculated differently depending on the income level of the taxpayer. If a farmer has taxable income under \$157,500 (\$315,000 in the case of a joint return) the farmer can take a deduction of the *lesser of* (1) 20 percent of the farmer’s business income or (2) 20 percent of the farmer’s taxable income (minus capital gains and cooperative dividends).

Example: If Fred, a single farmer, has taxable income of \$100,000 (\$40,000 from wages and \$60,000 in qualified business income from farming operations) he will be able to take a deduction of the lesser of (1) \$12,000 (\$60,000 x 20%) or (2) \$20,000 (\$100,000 x 20%).

- **Deduction for Members of Farmer Cooperatives:** In addition to the basic 199A deduction, farms that are members of a producer cooperative may take an additional deduction regardless of the farmer’s income level. Subject to some limitations, a cooperative member farmer can take a deduction of the lesser of (1) 20 percent of dividends received from the cooperative or (2) his taxable income (minus net capital gain).

Example: If a farmer, who is a member of a cooperative, receives \$300,000 from the cooperative for the sale of grain and has \$20,000 in taxable income, the farmer could take an additional deduction of the lesser of (1) \$60,000 (\$300,000 x 20%) or (2) \$120,000.

⁴³ AGRICULTURE BUSINESS GUIDE, *supra* note 23, at 14.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ I.R.C. § 11(b).

⁴⁷ *Id.*

Benefit Corporation Benefit corporations are taxed as C-Corporations.⁴⁸ A benefit corporation cannot claim tax exempt-status.⁴⁹

Connecticut is the first of all fifty states in which benefit corporation legislation was passed to allow a “legacy preservation provision,” which amends the certificate of incorporation to allow the corporation’s founders to prevent the corporation from reverting back to a for-profit business structure at the will of its shareholders.⁵⁰

Is Your Farm For-Profit? Only farmers engaged in a for-profit farming operation are able to utilize the tax benefits described throughout this chapter. If a farm falls under the IRS designation of “hobby,” then the farmer’s ability to deduct expenses will be limited under provisions within the Internal Revenue Code.⁵¹ The Tax Cut and Jobs Act of 2017 suspended the deduction of hobby losses through December 31, 2025.⁵² In order to determine whether a farm qualifies for “for-profit” status, the IRS reviews farm profitability over the preceding five years and uses a more nuanced nine-factor test in cases where a farm would not otherwise qualify based on a profitable track record.⁵³

Spouses Who Operate Partnerships It is not uncommon for spouses to operate a business together, and it is foreseeable that in a state like Connecticut, where small farms account for the majority of farms, spouses may operate a farming business together as a partnership. If this situation arises, an attorney will need to be aware that, pursuant to section 761(f) of the IRC, if deemed a “qualified joint venture” subject to the qualifications in section 761(f)(2) of the IRC, a partnership operated by spouses may elect to have its respective share of income, gain, losses, and deductions treated as a trade or business conducted by each spouse as a sole proprietor.⁵⁴

**Nine Factor Test for
Determining if an Activity is
Engaged in For Profit**

1. The manner in which the taxpayer carries on the activity.
2. The expertise of the taxpayer or his advisors.
3. The time and effort expended by the taxpayer in carrying on the activity.
4. Expectation that assets used in the activity may appreciate in value.
5. The success of the taxpayer in carrying on other similar or dissimilar activities.
6. The taxpayer’s history of income or losses with respect to the activity.
7. The amount of occasional profit, if any, which are earned.
8. The financial status of the taxpayer.
9. Elements of personal pleasure or recreation.

⁴⁸ CT Corporation Staff, *Benefit Corporation FAQs*, WOLTERS KLUWER (Jan. 7, 2016), <http://ct.wolterskluwer.com/resource-center/articles/benefit-corporations-faqs>.

⁴⁹ *Id.*

⁵⁰ CONN. GEN. STAT. § 33-1355 (2014); Miranda Zhang, *Connecticut Gets Its First Benefit Corporations as New Law Takes Effect*, HARTFORD COURANT (Oct. 1, 2014), <http://www.courant.com/business/hc-social-enterprise-bill-1001-20141001-story.html> (summarizing the legacy preservation provision).

⁵¹ I.R.C. § 183; *see also Is Your Hobby a For-Profit Endeavor?*, U.S. DEP’T OF TREAS., INTERNAL REV. SERV. (June 2008), <http://www.irs.gov/uac/is-your-hobby-a-for-profit-endeavor>.

⁵² I.R.C. § 67(g).

⁵³ Treas. Reg. § 1.183-2(b).

⁵⁴ I.R.C. § 761(f)(1) (2017).

What is a Qualified Joint Venture?

- (1) The members are exclusively a “husband and wife”;⁵⁵
- (2) Both spouses materially participate⁵⁶ in the trade or business; and
- (3) Both spouses elect for sole proprietor treatment.⁵⁷

* Valid same-sex marriages under state law are also eligible for qualified joint venture classification.⁵⁸

Business Expenses All businesses, including Connecticut farm operations, are allowed under federal law to deduct all “ordinary and necessary business expenses” from their gross income.⁵⁹ The law errs on the side of construing section 162(a) business expenses broadly, and the result has been a generally pro-taxpayer result.⁶⁰

| Part II Farm Expenses—Cash and Accrual Method. Do not include personal or living expenses (see instructions). | | | |
|----------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|------------|----------------------------------------------------------|
| 10 | Car and truck expenses (see instructions). Also attach Form 4562 | 10 | |
| 11 | Chemicals | 11 | |
| 12 | Conservation expenses (see instructions) | 12 | |
| 13 | Custom hire (machine work) . | 13 | |
| 14 | Depreciation and section 179 expense (see instructions) . | 14 | |
| 15 | Employee benefit programs other than on line 23 | 15 | |
| 16 | Feed | 16 | |
| 17 | Fertilizers and lime | 17 | |
| 18 | Freight and trucking | 18 | |
| 19 | Gasoline, fuel, and oil . . . | 19 | |
| 20 | Insurance (other than health) | 20 | |
| 21 | Interest: | | |
| 21a | Mortgage (paid to banks, etc.) | 21a | |
| 21b | Other | 21b | |
| 22 | Labor hired (less employment credits) | 22 | |
| 23 | Pension and profit-sharing plans | 23 | |
| 24 | Rent or lease (see instructions): | | |
| a | Vehicles, machinery, equipment | 24a | |
| b | Other (land, animals, etc.) . . | 24b | |
| 25 | Repairs and maintenance . . | 25 | |
| 26 | Seeds and plants | 26 | |
| 27 | Storage and warehousing . . | 27 | |
| 28 | Supplies | 28 | |
| 29 | Taxes | 29 | |
| 30 | Utilities | 30 | |
| 31 | Veterinary, breeding, and medicine | 31 | |
| 32 | Other expenses (specify): | | |
| a | _____ | 32a | |
| b | _____ | 32b | |
| c | _____ | 32c | |
| d | _____ | 32d | |
| e | _____ | 32e | |
| f | _____ | 32f | |
| 33 | Total expenses. Add lines 10 through 32f. If line 32f is negative, see instructions | 33 | |
| 34 | Net farm profit or (loss). Subtract line 33 from line 9 | 34 | |
| If a profit, stop here and see instructions for where to report. If a loss, complete lines 35 and 36. | | | |
| 35 | Did you receive an applicable subsidy in 2016? (see instructions) | | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| 36 | Check the box that describes your investment in this activity and see instructions for where to report your loss. | | |
| a | <input type="checkbox"/> All investment is at risk. | b | <input type="checkbox"/> Some investment is not at risk. |

For Paperwork Reduction Act Notice, see the separate instructions.

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Schedule F (Form 1040) 2016

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Individuals are not allowed, however, to deduct any personal expenses they incur.⁶² Many of the concepts

⁵⁵ See Margot L. Crandall-Hollick et al., *The Federal Tax Treatment of Married Same-Sex Couples*, Cong. Research Serv. (July 30, 2015), <http://www.fas.org/sgp/crs/misc/R43157.pdf> (discussing the tax implications of spouses following *United States v. Windsor*, 133 S. Ct. 2675 (2013)). See also Rev. Rul. 2013-17 (2013).

⁵⁶ I.R.C. § 761(f)(2)(B) (2017). See also *id.* § 469(h) (2017) (defining “materially participate” as regular, continuous, and substantial involvement in the operations of the activity).

⁵⁷ *Id.* § 761(f)(2)(C) (2017).

⁵⁸ *United States v. Windsor*, 133 S. Ct. 2675 (2013). See also Rev. Rul. 2013-17 (2013).

⁵⁹ I.R.C. § 162(a) (2017).

⁶⁰ *Id.*

⁶¹ *Schedule F (Form 1040)*, U.S. INTERNAL REV. SERV. (2017), <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

⁶² *Id.*

discussed earlier ultimately will be reported in Schedule F (Form 1040). The portion of Schedule F that deals with ordinary and necessary business expenses is illustrated below; however, the general rule is that in order for an expense to qualify as an ordinary and necessary business expense, the expense must be related to the actual carrying on of the business of farming.⁶³

And while a farmer should keep careful records in order to be as accurate as possible when reporting, it is important to note that the IRS does allow estimates of deductible expenses.

Personal Expenses Because personal expenses are disallowed deductions under section 262(a) of the IRC, it is important to understand the difference, for deduction purposes, between a personal expense and a business expense.⁶⁴ When a farmer also lives on his or her farm, it can become more difficult to discern what amounts will be allowed as deductions. Below are situations common to farms which also serve as partial residences.

- **Growing for Personal Consumption:** A farmer **may not deduct at all** the expense of food grown or raised for the farmer's personal consumption, even if the food is grown alongside farm product that the farmer will sell for profit.⁶⁵
- **Utilities:** A farmer may deduct the **proportionate part** of heating and electricity costs for farm property that includes the farmer's home. The farmer must use "best efforts" to estimate the deductible proportion consumed by the farm.⁶⁶
- **Home Business Purpose:** A farmer may deduct expenses including, but not limited to, rent, electricity, and maintenance for a room or part of a home used exclusively for business purposes, such as an office (but expenses for parts of the home not exclusively used for business, such as a kitchen used for home cooking and to make fruit preserves that the farmer sells, cannot be deducted at all).⁶⁷
- **Vehicle Use:** A farmer may deduct a proportionate part of the cost of vehicles used for both business and personal use.⁶⁸
- **Labor:** A farmer may not deduct the cost of domestic or household labor, even if performed by a farm employee.⁶⁹

Safe Harbor for Residential Deductions Because the process of keeping track of all business expenses in the home can be difficult, the IRS created a federal safe-harbor provision for residential deductions.⁷⁰ To use the safe-harbor provision, the farmer takes the square footage of the part of the home used for business purposes and multiplies it by a prescribed rate, taking the product as an itemized

⁶³ 26 C.F.R. 1.162-12 (2016).

⁶⁴ I.R.C. § 262(a) (2017).

⁶⁵ IRS FARMER'S TAX GUIDE, *supra* note 18.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ NEIL E. HARL, 4-28 AGRICULTURAL LAW § 28.02 (MATHEW BENDER ed. 2017).

⁶⁹ *Id.*

⁷⁰ Rev. Proc. 2013-13, 2013-1 CB 478.

deduction.⁷¹ If the farmer elects to use the safe-harbor provision, then he or she is not allowed to deduct any itemized business expenses relating to the use of the home for that year.⁷²

Special Tax Treatment for Dedicated Farmers A majority of Connecticut farmers work off of a farm for a substantial portion of the year (and thus accruing non-farm income). Accordingly, most farmers have some non-farm income that they will need to report. Additionally, income from a sub-enterprise, such as a farm gift shop or a bed and breakfast, is non-farm income, even if it operates on the farm premises (see the definition of what constitutes a “farming business” at the beginning of the next section). An attorney needs to be aware that the farmer’s eligibility for certain tax allowances and deductions depends on the taxpayer’s relative amount of farm income and non-farm income. For example, note the farm income percentage requirements for the following options, which are discussed in more detail in later sections.

- **Income averaging:** is only available for farmers who make at least 66.7 percent of their income from farming.⁷³
- **Relaxed estimated tax reporting requirements:** only available to farmers who make at least 66.7 percent of gross income from farming.⁷⁴
- **Discharge of qualified farm debt income exception:** requires that at least 50 percent of the farmer’s gross revenue over the past three years to be from farming.⁷⁵
- **Qualified conservation contribution deduction:** applies differently to people who receive 50% or more of his or her income from farming.⁷⁶
- **Farming loss deductions:** limited to the lesser of (1) net operating losses from the farm business, or (2) total net operating losses. Note that these deductions are only relevant for purposes of the farming loss two-year carryback.⁷⁷
- **Deferring income:** from crop insurance, federal disaster payments, or the sale of livestock due to extreme weather conditions is only allowed when farming is the individual’s primary business.⁷⁸

FEDERAL TAX CONCERNS FOR FARMERS

When defining a farming business, the IRS, has generally construed the term liberally and intuitively. The IRS considers a business operation a farming business if the owner is “in the business of farming; if you cultivate, operate, or manage a farm for profit, either as owner or tenant. A farm includes livestock, dairy, poultry, fish, fruit, and truck farms (produce vegetables for market).”⁷⁹ It also includes “plantations, ranches,

⁷¹ *Id.*

⁷² *Id.*

⁷³ I.R.C. § 1301(b)(1)(A)(i).

⁷⁴ *Id.* § 6654(i).

⁷⁵ *Id.* § 108(g)(3).

⁷⁶ *Id.* § 170(b)(1)(e).

⁷⁷ *Id.* § 172(b).

⁷⁸ *Id.* § 451(d) (2014). *See also* Treas. Reg. § 1.451-6(a)(1).

⁷⁹ IRS FARMER’S TAX GUIDE, *supra* note 18, at 27.

ranges and orchards.”⁸⁰ In other words, the IRS considers the for-profit production of farm goods—plants and livestock—to be the business of farming. Sometimes, depending on the specific provision in the IRC, the definition is more expansive and may include nurseries or tree farms. Because such a large portion of Connecticut farming is based on some type of nursery or greenhouse business activity, an attorney should be more inclusive than not when establishing the parameters or boundaries for the activities that would be deemed a farming business under the IRC definitions.

Federal Income Taxes Although there is overlap between standard business tax and farming tax provisions, there are specific IRC provisions that provide unique rules and exceptions for farmers.

Ordinary Income Farming businesses are required to report to the IRS all business income derived from all sources.⁸¹ Common sources of ordinary business income for a farmer might include the sale of crops and livestock, including shares from community supported agriculture operations, and potentially income derived from agritourism. Less common sources of income also required to be reported include in-kind payments to the farmer, government payments, and crop insurance and federal disaster payments.⁸²

Capital Assets Produce Capital Gain Capital gains or losses involve the sale of capital assets. Capital gains can be characterized as short-term capital gains or long-term capital gains depending on how long the taxpayer held the assets. Generally, a farmer’s capital assets include most of those things a farmer owns and uses for personal purposes, pleasure, or investment; a noncapital asset, on the other hand, typically includes inventory and depreciable property used in a trade or business.⁸³ Specifically, capital assets may include the farmer’s personal residence, personal vehicles, and investment assets.⁸⁴ Gains from the sale of these capital assets held for more than one year are taxed at a preferential capital gains rates, subject to certain limitation regarding deductibility.⁸⁵

Section 1231 Property Section 1231 of the IRC provides favorable tax treatment for certain property used in a trade or business as long as the taxpayer meets the minimum holding requirement of one calendar year (twelve months).⁸⁶ It is of particular importance to farmers that the IRS has expressly characterized certain livestock as section 1231 property, subject to the rules and regulations iterated in the code section.⁸⁷

⁸⁰ I.R.C. § 1.175-3 (2017). See also IRS FARMER’S TAX GUIDE, *supra* note 18.

⁸¹ I.R.C. § 61 (2017).

⁸² *Id.* (defining an in-kind payment as the acceptance of goods and services in lieu of money. Any in-kind payment received by the farmer is required to be included at its fair-market value in the farmer’s reported income). See also *id.* § 451(d) (2017); Treas. Reg. § 1.61-4 (explaining that portions of certain government payments for specific conservation programs determined by the Secretary of Agriculture (e.g., a rural clean water program) are not included in gross income); *Connecticut Farm Risk Management and Crop Insurance Program*, CONN. DEP’T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3243&q=399564> (the USDA has identified Connecticut as a state that has benefited less from crop insurance than many major agricultural producing states; thus, it is less likely for a farmer in Connecticut to have crop insurance).

⁸³ IRS FARMER’S TAX GUIDE, *supra* note 18, at 49–50.

⁸⁴ *Id.*

⁸⁵ I.R.C. § 1(h) (2017). See also IRS FARMER’S TAX GUIDE, *supra* note 18, at 49–50.

⁸⁶ I.R.C. § 1231 (2017).

⁸⁷ *Id.*

Section 1231 property must only be netted against other section 1231 property.⁸⁸ If the total section 1231 property for the year produces a net gain, it is treated as long-term capital gain, allowing the taxpayer to take advantage of the preferential tax rate.⁸⁹ However, before the taxpayer recognizes any gain, he or she must recapture any previous section 1231 losses for the past five years, which will be treated as ordinary gain, with any excess receiving the favorable long-term capital gain treatment.⁹⁰ If the total section 1231 property for the year produces a net loss, it is treated as ordinary loss.⁹¹ When dealing with section 1231 property, an attorney should also reference the subsections of sections 1231, 1245 and 1250 of the IRC.

Deferring Disaster Income The IRS gives cash-method farmers the option to defer the inclusion of some types of income related to disasters.⁹² The Risk Management Agency offers, through private insurance companies, federally subsidized crop insurance. This crop insurance covers natural disasters, including drought, hail, frost, hurricanes, excessive moisture, fire, insects and plant disease, and wildfires.⁹³ Crop insurance payments and federal disaster payments, as compensation for destroyed crops, may be deferred to the next tax year.⁹⁴ This is an either/or election; the farmer cannot split the income from the insurance payments between the current year and the next year.⁹⁵ Income from the sale of livestock because of extreme weather conditions may also be deferred to the following tax year, but the requirements under the law are much more stringent.⁹⁶ Primarily, the geographic area must be designated for deferral assistance by the government;⁹⁷ the farmer must prove that the livestock would not have been sold “but for” the extreme weather;⁹⁸ and the amount of income deferred is limited to sales in excess of “usual business practice.”⁹⁹ In other words, a farmer can only defer whatever disaster income is incurred past any income that the farmer would normally incur during the course of business.

Exclusion and Non-recognition of Income Farmers can exclude certain income and gains from gross income:

⁸⁸ *Id.*; *Ordinary or Capital Gain or Loss for Business Property*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/publications/p544#en_US_2016_publink100072546.

⁸⁹ I.R.C. § 1231 (2017); *Ordinary or Capital Gain or Loss for Business Property*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/publications/p544#en_US_2016_publink100072546. *See also* I.R.C. § 1222 (2017) (providing definitions related to capital gains and losses, and among them, the definition of long-term capital gain).

⁹⁰ *Id.* § 1231 (2017); *Ordinary or Capital Gain or Loss for Business Property*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/publications/p544#en_US_2016_publink100072546.

⁹¹ I.R.C. § 1231 (2017); *Ordinary or Capital Gain or Loss for Business Property*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/publications/p544#en_US_2016_publink100072546.

⁹² I.R.C. § 451(d) (2017). *See also* IRS FARMER’S TAX GUIDE, *supra* note 18.

⁹³ *Connecticut Farm Risk Management and Crop Insurance Program*, CONN. DEP’T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3243&q=399564>.

⁹⁴ I.R.C. § 451(d) (2017); Treas. Reg. § 1.451-6(a)(1).

⁹⁵ Rev. Rul. 74-145, 1974-1 CB 113.

⁹⁶ I.R.C. § 451(c) (2017).

⁹⁷ Treas. Reg. § 1.451-7(a) (1999).

⁹⁸ *Id.* § 1.451-7(b) (1999).

⁹⁹ *Id.* § 1.451-7(a) (1999).

- **Commodities Consumed by the Farmer:** Any crops or livestock raised for consumption by the farmer and her household should not be included in gross income.¹⁰⁰ (The flipside of this is that the costs associated with this production may not be deducted, as discussed above.)
- **Discharge of Qualified Farm Debt:** If qualified farm debt is discharged, the income from the discharge is not included in a farmer's gross income, subject to some limitations.¹⁰¹
- **Portions of Conservation Payments:** Some federal conservation programs have excludable portions that are not included in gross income.¹⁰²
- **Like-Kind Exchanges:** Like-kind exchanges of real business property are not recognized as income under section 1031 of the IRC.¹⁰³ For example, if a farmer exchanges a plot of land with her neighbor, even if her neighbor's plot of land is worth more, the IRS does not recognize any income to the farmer. But whether property is "like-kind" is not always obvious. Attorneys should note that, as of January 1, 2018, like-kind exchanges of assets other than real property, including livestock, are no longer available.¹⁰⁴

When Should a Farmer Capitalize an Asset?

When a taxpayer capitalizes an asset, the taxpayer recovers the cost of the asset through depreciation deductions over a period of time (typically over the lifespan of the asset), until the taxpayer has fully depreciated the item.¹⁰⁵ Capitalizing an asset makes the most sense for a farmer who is in a situation with high costs and low income, that is, where taking deductions would be significantly limited by the lack of income. This situation is common among start-up farms.¹⁰⁶

Key Questions an Attorney Should ask the Client

- What is the current income from the farmer's business? Is there enough income to offset effectively with deductions?
- At what point in time will depreciation deductions from capitalizing be the most beneficial to the client (based on client's projected future income)?

¹⁰⁰ IRS FARMER'S TAX GUIDE, *supra* note 18.

¹⁰¹ I.R.C. §§ 108(a)(1)(C), 108(g) (2017) (defining qualified farm debt as debt that's incurred directly in operating a farming business and owed to a qualified person, which includes the government or government agencies, such as the USDA. Only farmers who have made at least 50 percent of his or her gross income from farming over the past three years are eligible for the qualified farm debt exemption).

¹⁰² *Id.* § 126.

¹⁰³ *Id.* § 1031.

¹⁰⁴ *Id.*

¹⁰⁵ IRS FARMER'S TAX GUIDE, *supra* note 18.

¹⁰⁶ *Id.*

When Should a Farmer Take a Deduction? Because of the time value of money, a deduction is more valuable for a farmer to take immediately, rather than capitalizing an asset over a period of time. A farmer with strong current income will benefit from taking deductions immediately, rather than amortizing the assets.¹⁰⁷

Nursery and Greenhouse Business Activity The IRS has stated that “income received from operating a nursery, which specializes in growing ornamental plants, is considered to be income from farming.”¹⁰⁸ Note that the IRS does not define “ornamental plants,” but does define timber and ornamental trees in section 448(d)(1)(B) of the IRC as “the raising, harvesting, or growing of trees” within the scope of section 263A(c)(5) of the IRC.¹⁰⁹ Thus, when advising a client engaged in a nursery or greenhouse business, an attorney should gather very specific information regarding the activity in order to consider all relevant IRC sections.

Expenses & Deductions Farmers are allowed to deduct all “ordinary and necessary” business expenses from his or her income each year.¹¹⁰ Many of the commonly allowed deductible farm expenses are included in Part II of Schedule F.¹¹¹ Farmers are generally required to capitalize and depreciate expenditures on “wasting assets” (assets whose economic value tends to decrease over time) that will be held for a one year period or longer (e.g., farm buildings, machinery and equipment, fences, cattle, hogs, horses).¹¹² However, there are many exceptions to the capitalization requirements for farmers.

Capital Expenses and Depreciation Under the uniform capitalization rules of Section 263A of the IRC, generally, but subject to specified exceptions, farmers are required to capitalize all expenses relating to wasting assets with a useful life of one year or more.¹¹³ The most common expenses that farmers must capitalize are the costs of acquiring buildings, vehicles, machinery, equipment, and improvements to land and buildings.¹¹⁴ In addition, plants with a pre-productive period of more than two years are also generally capitalized.¹¹⁵ A pre-productive period is the amount of time direct and indirect costs are incurred in preparation to grow a specific crop. This includes preparation costs, such as irrigation, pruning, frost protection, spraying, and harvesting.¹¹⁶ Common crops in Connecticut with multi-year pre-productive periods include apples, blueberries, peaches, and pears.¹¹⁷

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ I.R.C. § 448(d)(1)(B) (2017).

¹¹⁰ *Id.* § 162(a).

¹¹¹ *Schedule F (Form 1040): Profit or Loss from Farming*, U.S. INTERNAL REV. SERV. (2017), <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

¹¹² IRS FARMER’S TAX GUIDE, *supra* note 18, at 56.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ I.R.C. § 263(d). *See also* IRS FARMER’S TAX GUIDE, *supra* note 18, at 56.

¹¹⁶ *Id.* at 43 (2016).

¹¹⁷ *Connecticut Grown Crop Availability Calendar*, CONN. DEP’T OF AGRIC., http://www.ct.gov/doag/lib/doag/marketing_files/crop_calendar.pdf. *See also* IRS FARMER’S TAX GUIDE, *supra* note 18, at 56.

Farmers generally use the Modified Accelerated Cost Recovery System to calculate proper depreciation deductions for property. A table of common farm property recovery periods may be found in Publication 225 of the IRC.¹¹⁸ However, there are some notable restrictions and exceptions for farmers:

- **Restriction to 150-percent declining balance depreciation:** Most business property with a useful life of ten years or less may be depreciated under the 200-percent “double declining balance” method.¹¹⁹
- **Certain requirements to use the alternative depreciation method:** Prior to the enactment of the 2017 Tax Cut and Jobs Act, a farm could deduct 100 percent of business interest. Starting in 2018, the business interest deduction will be capped at roughly 30 percent of the farmers taxable income.¹²⁰ Farmers may make an irrevocable election out of this limitation but will then be required to use the alternative depreciation method for certain assets.¹²¹
- **Listed property exception for farm vehicles:** Most vehicles are considered listed property by the IRS.¹²² Listed property that is used 50 percent or less for a business purpose must be depreciated under the Alternative Depreciation System.¹²³ Tractors and other special-purpose farm vehicles are exempted from listed property.¹²⁴ Depreciation generally begins when the property is “placed in service.”¹²⁵ For plants, depreciation begins when the plants reach the income-producing stage.¹²⁶ For example, an orange tree may be depreciated when it starts bearing fruit. For livestock, depreciation begins when it reaches the age of maturity; for example, a milk cow can be depreciated when an animal can be milked.¹²⁷

Special Deductions for Farmers The IRC contains deductions specifically available to farmers, including exceptions to the uniform capitalization rules found in section 263A.¹²⁸ These provisions allow farmers to elect to immediately deduct expenses that would generally require capitalization and depreciation over a number of years. These provisions present farmers with the opportunity for substantial tax savings.¹²⁹ For farmers that use the cash method of accounting (most farmers do),¹³⁰ there are exceptions to section 263A that allow costs to be deducted rather than depreciated over time. Some of these costs include the following:

¹¹⁸ *Id.* at 43.

¹¹⁹ I.R.C. § 168(b); IRS FARMER’S TAX GUIDE, *supra* note 18, at 42.

¹²⁰ I.R.C. § 162(j)(1).

¹²¹ *Id.* § 162(j)(7); 168(g)(1).

¹²² Treas. Reg. 1.280F-6(b); IRS FARMER’S TAX GUIDE, *supra* note 18, at 44.

¹²³ I.R.C. § 280F(b); IRS FARMER’S TAX GUIDE, *supra* note 18, at 41.

¹²⁴ I.R.S. Announcement 85-15, 1985-4 I.R.B. 43 (1985); IRS FARMER’S TAX GUIDE, *supra* note 18, at 44.

¹²⁵ Treas. Reg. 1.167(a)-10(b).

¹²⁶ IRS FARMER’S TAX GUIDE, *supra* note 18, at 36.

¹²⁷ *Id.*

¹²⁸ I.R.C. § 263A(d)-(e)

¹²⁹ *Id.* § 263A(d).

¹³⁰ IRS FARMER’S TAX GUIDE, *supra* note 18, at 5.

- **Animals:** Farmers may deduct the costs of raising animals.¹³¹ All costs associated with raising animals may be immediately deducted, including the animal's purchase price, its feed, veterinary treatment, pasture maintenance, and repair of buildings and equipment used to care for the animals.¹³²
- **Plants with Pre-productive Period of Two Years or Fewer:**¹³³ Farmers may deduct the costs of growing plants with a pre-productive period of two years or fewer.¹³⁴ The pre-productive period for a plant is based on the nationwide weighted average for that plant, which the IRS provides in section 263A.¹³⁵ All costs associated with growing the specified crops may be deducted immediately, including the purchase of the seeds, irrigation expenses, harvesting costs, and storage and handling expenses.¹³⁶
- **Plants with Pre-productive Period of More than Two Years:**¹³⁷ Farmers may also elect to deduct the costs of plants with a pre-productive period of more than two years. However, unlike the above, a farmer who makes this election is required to use the Alternative Depreciation System (the straight-line method) for all other farm business property as opposed to following the uniform capitalization rules.¹³⁸ This is a less advantageous method of depreciation than the 150-percent declining balance method, which the farmer will usually be using. The farmer should thus carefully analyze whether the benefits of immediately deducting the pre-productive plant costs are outweighed by the benefits of the depreciation treatment of the farmer's other assets. The overall benefit of this election amounts to reducing the farmer's original cost basis in the farmer's assets.¹³⁹

Deductions All Farmers May Qualify for, Regardless of Accounting Method

- ✓ **Fertilizer and Other Land-Enrichment Supplies:** Farmers may elect to deduct expenses for land enrichment supplies—fertilizer, lime, ground limestone, and marl.¹⁴⁰
- ✓ **Prepaid Farming Supplies:** Farmers may deduct the cost of prepaid farming supplies, such as seeds and fertilizer—and, somewhat surprisingly, some poultry—not used or divested within the year they are purchased.¹⁴¹ These deductions may be limited to 50 percent of all of the farmer's other

¹³¹ I.R.C. § 263A(d)(1)(A).

¹³² 26 C.F.R. § 1.263A-4(b)(ii) (providing a more detailed description).

¹³³ I.R.C. § 263A(d)(1)(A).

¹³⁴ *Id.* § 263A(d)(1)(A).

¹³⁵ *Id.* § 263A(e)(3).

¹³⁶ Treas. Reg. § 1.263A-4(b)(i).

¹³⁷ I.R.C. § 263A(d)(3); Treas. Reg. § 1.263A-4(d).

¹³⁸ I.R.C. § 263A(e)(2).

¹³⁹ IRS FARMER'S TAX GUIDE, *supra* note 18, at 43.

¹⁴⁰ I.R.C. § 180(a).

¹⁴¹ IRS FARMER'S TAX GUIDE, *supra* note 18, at 45–46.

deductible expenses for the year, if the farmer uses the cash method of accounting and is not a “qualified farm-related taxpayer.”¹⁴²

- ✓ **Bonus Deduction for Business Investment:** Through 2022, farmers will be able to immediately write off 100% of new business investment in qualified property.¹⁴³ After 2022, this percentage reduces by 20% each year, until the bonus depreciation is eliminated in 2027.¹⁴⁴ The depreciation bonus includes new and used property purchased or constructed, and to plants that bear fruits and nuts for a period of more than two years.¹⁴⁵
- ✓ **Replanting Costs for Plant Casualties:** A farmer who loses plants as a result of extreme weather conditions, disease, pests, or casualty can deduct the replanting costs instead of capitalizing them.¹⁴⁶ The farmer must replant the same type of crop that was lost, but the replanting need not be on the same parcel of land.¹⁴⁷
- ✓ **Conservation Expenses:** Farmers may take a deduction for money spent on soil or water conservation, prevention of erosion, and endangered-species recovery costs.¹⁴⁸ These deductions may be particularly relevant to clients who are trying to farm sustainably. To qualify for the deduction, the plan must be “consistent with” soil-conservation or endangered-species recovery plans as defined by the federal government (through the Soil Conservation Service or the Endangered Species Act).¹⁴⁹ This deduction is limited to 25 percent of the income derived from farming in any single year, but the excess may carry over to future years.¹⁵⁰ In addition, payments from many federal cost-share conservation programs can be excluded from income, but only if those payments are not otherwise deductible.¹⁵¹

Other Relevant Deductions There are some deductions that are not restricted to farming businesses, but are otherwise relevant to the interests of the farmer, that the attorney should keep in mind:

- ✓ **Section 179 Expense Deduction:** With certain amount limitations, many farm assets qualify as deductible property under section 179 of the IRC, including single-purpose agricultural or horticultural structures (like a greenhouse), farm machinery and equipment, storage tanks, and livestock.¹⁵² For the purposes of this section, livestock includes poultry.¹⁵³

¹⁴² I.R.C. § 464(d); IRS FARMER’S TAX GUIDE, *supra* note 18, at 19.

¹⁴³ I.R.C. § 168(k).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 263A(d)(2).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 175(a).

¹⁴⁹ *Id.* § 175(c)(3).

¹⁵⁰ *Id.* § 175(b).

¹⁵¹ IRS FARMER’S TAX GUIDE, *supra* note 18, at 11.

¹⁵² I.R.C. §§ 179(a)–(d); IRS FARMER’S TAX GUIDE, *supra* note 18, at 37–38.

¹⁵³ *Id.* at 38.

- ✓ **Start-Up Costs Deduction:** Those starting a new business, including new farmers, ordinarily must capitalize start-up expenses, but the IRS allows a deduction of up to \$5,000 of start-up costs.¹⁵⁴ If the farmer is starting a corporation, the corporation may deduct up to \$5,000 of organizational costs as well.¹⁵⁵ Both of these deductions are reduced by the amount that start-up costs exceed \$50,000.¹⁵⁶ As with all deductions, this election is only useful if the farmer has income to offset in the first years of business, so some analysis of expected income may be required when deciding whether to make this election. The remainder of the capitalized start-up costs can be deducted ratably over fifteen years.

Employment Taxes

Farmers with employees are generally required to pay the federal employment taxes, comprising Social Security and Medicare.¹⁵⁷ In addition, as per the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), employers are required to withhold federal income taxes from employee wages.¹⁵⁸ Finally, most farmers are also required to pay self-employment taxes on the farmer's own earnings.¹⁵⁹ However, there are exceptions to these rules.

Exceptions

- **\$150 or \$2,500 Test:** Wages paid to employees for farm work are subject to employment taxes under FICA and withholding requirements under FUTA, if the employer (1) pays cash wages to the employee of \$150 or more in a calendar year for farm work, or (2) the total paid (including both cash and noncash payments) for the farm work to all employees (one or greater) is equal to or greater than the sum of \$2,500.¹⁶⁰
- **Laborers Not Considered Employees by FICA and FUTA:**
 - **Foreign agricultural workers** temporarily admitted into the U.S. on H-2A visas.¹⁶¹
 - **Crop share tenants** (if the landlord does not “materially participate”):¹⁶² A crop share tenant is a farmer who pays a share of the crops grown, instead of cash, as rent.¹⁶³
 - **Farm-workers employed by a crew leader:** A crew leader is a person who provides and pays (either on her own behalf or on behalf of the farm operator) workers to do farm work for the farm operator, but who is not employed by the farmer.¹⁶⁴

¹⁵⁴ *Id.* § 195(b)(1).

¹⁵⁵ *Id.* § 248(a).

¹⁵⁶ *Id.* §§ 195(b)(1)(A)(ii), 248(a)(1)(B).

¹⁵⁷ IRS FARMER'S TAX GUIDE, *supra* note 18, at 11.

¹⁵⁸ *Id.* at 1.

¹⁵⁹ I.R.C. § 312(a)(8). *See also* U.S. INTERNAL REV. SERV., PUBLICATION 51: (CIRCULAR A), AGRICULTURAL EMPLOYER'S TAX 8-11 (2017), <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

¹⁶⁰ I.R.C. § 312(a)(8). *See also* U.S. INTERNAL REV. SERV., PUBLICATION 51: (CIRCULAR A), AGRICULTURAL EMPLOYER'S TAX 8-11 (2017), <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

¹⁶¹ *Id.*

¹⁶² I.R.C. § 3121(b)(1).

¹⁶³ *Id.* § 3121(b)(16).

¹⁶⁴ IRS FARMER'S TAX GUIDE, *supra* note 18, at 9.

- **Certain Family Labor in Sole Proprietorships**
 - Payments to minor children (under 18) working for one or both of his or her parents are exempt from all Social Security, Medicare, and FUTA taxes.¹⁶⁵
 - Payments to spouses are subject to federal income tax withholding and Social Security and Medicare tax, but not to FUTA tax.¹⁶⁶
- **In-Kind Payments to Employees:** In-kind payments do not fall under the broadly defined term “wages” set out in the IRC, and therefore, in-kind payments for agricultural labor are excluded from wages for purposes of FICA, FUTA, and federal tax withholding.¹⁶⁷ Small farms are more likely to engage in in-kind payment activity, or include community supported agriculture (CSA) shares as part of an employee’s wage. In Connecticut, approximately fifty CSA farms are currently in operation.¹⁶⁸ One concern with paying an employee through in-kind payments is that it has the potential to reduce or eliminate an employee’s social security benefits, so this option should be considered carefully and with full understanding by the client before being pursued.

Self-Employment Taxes Farmers do not have to pay self-employment taxes on most capital gains or rental income.¹⁶⁹ Farmers who operate a sole proprietorship are not required to pay self-employment taxes if the net income derived from his or her self-employment is less than \$400.¹⁷⁰ There is one important exception to this rule. If a landlord materially participates in the production or management of farmland being leased, any income received from the operation is included in self-employment income, even if the income is capital gain or rental income.¹⁷¹ Material participation is not concretely defined. However, as a general rule, if a farmer leases farmland to a tenant and is very involved in the operations of the farm, then that farmer may fall within this exception.¹⁷²

Low-Income Farmer Options Farmers with a low income may take advantage of a special income-reporting option for self-employment tax known as the Farm Optional Method.¹⁷³ A farmer may elect to use the Farm Optional Method of accounting if (1) annual gross farm income is \$7,560 or less, or (2) net annual farm profits are less than \$5,457.¹⁷⁴ These numbers are adjusted annually to account for inflation, so an attorney should make sure to consult the most current IRS publication for up-to-date numbers. This option

¹⁶⁵ I.R.C. §§ 3121(b)(3), 3306(c)(5). *See also* U.S. INTERNAL REV. SERV., PUBLICATION 51: (CIRCULAR A), AGRICULTURAL EMPLOYER’S TAX 21 (2017), <http://www.irs.gov/pub/irs-pdf/p51.pdf>.

¹⁶⁶ I.R.C. § 3306(c)(5). *See also* U.S. INTERNAL REV. SERV., PUBLICATION 51: (CIRCULAR A), AGRICULTURAL EMPLOYER’S TAX 21 (2017), <http://www.irs.gov/pub/irs-pdf/p51.pdf>. This exception does not apply to corporations and partnerships, unless the required relationship exists between the employer and each partner. *See* Treas. Reg. § 31.3121(b)(3)-1(c).

¹⁶⁷ I.R.C. §§ 3121(a)(8)(A), 3306(b)(11), 3401(a)(2).

¹⁶⁸ *Connecticut Community Supported Agriculture Listing*, CONN. DEP’T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3243&Q=554296>.

¹⁶⁹ I.R.C. § 1402(a)(1).

¹⁷⁰ *Id.* § 1402(b)(2).

¹⁷¹ *Id.* § 1402(a)(1).

¹⁷² *Id.* *See also* IRS FARMER’S TAX GUIDE, *supra* note 18, at 71.

¹⁷³ *Id.* at 73–74.

¹⁷⁴ *Id.* (stating the current annual gross and net income amounts to qualify for the farm optional method. These numbers are updated annually in this publication).

may increase the amount of self-employment tax, but it may also increase social security disability or retirement benefits.¹⁷⁵

Federal Tax Reporting The following forms apply specifically to farm businesses:

- Form 1040, Schedule F Profit or Loss from Farming,¹⁷⁶
- Form 1040, Schedule J Income Averaging for Farmers and Fishermen,¹⁷⁷ and
- Form 4835 Farm Rental Income and Expenses.¹⁷⁸

Additional forms that a farmer may need to file can be found using the instructions to Schedule F.¹⁷⁹

Three-Year Income Averaging Election This election allows a farmer to divide his taxable farming income for the current year into thirds, and multiply each third by the tax rate that applied in one of the previous three years.¹⁸⁰ In farming, where annual income may fluctuate from year to year, even for experienced farmers, this election could benefit farmers because it can reduce or even eliminate the amount of income taxed in a higher income bracket.¹⁸¹ A farmer will use the federal tax form Schedule J (Form 1040) to apply for eligibility for the three-year income averaging election.¹⁸²

Estimated Tax Rules/Qualified Farmer While most businesses are required to estimate their income quarterly, section 6654(i) of the IRC allows qualified farmers and fishermen to estimate their income only once a year.¹⁸³ This provision reduces the burden of tax reporting on farmers. Section 6654(i)(2) of the IRC requires that at least 66.66 percent of an individual's total gross income for any taxable year be derived from farming or fishing (including oyster farming, a sizeable Connecticut industry),¹⁸⁴ or that an individual's tax return for the preceding year shows that the person's income was at least 66.66 percent derived from farming or fishing activity for that year.¹⁸⁵

¹⁷⁵ NEIL E. HARL, 5-36 AGRICULTURAL LAW § 36.02 (MATHEW BENDER ed. 2017).

¹⁷⁶ *Schedule F (Form 1040): Profit or Loss from Farming*, U.S. INTERNAL REV. SERV. (2017), <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

¹⁷⁷ *Schedule J (Form 1040): Income Averaging for Farmers and Fisherman*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/pub/irs-access/f1040sj_accessible.pdf.

¹⁷⁸ *Form 4835: Farm Rental Income and Expenses*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/pub/irs-access/f4835_accessible.pdf.

¹⁷⁹ *Schedule F (Form 1040): Profit or Loss from Farming*, U.S. INTERNAL REV. SERV. (2017), <http://www.irs.gov/pub/irs-pdf/f1040sf.pdf>.

¹⁸⁰ IRS FARMER'S TAX GUIDE, *supra* note 18, at 17.

¹⁸¹ *Id.*

¹⁸² *Id.* at 8. See also *Schedule J (Form 1040): Income Averaging for Farmers and Fisherman*, U.S. INTERNAL REV. SERV. (2017), http://www.irs.gov/pub/irs-access/f1040sj_accessible.pdf.

¹⁸³ I.R.C. § 6654(i).

¹⁸⁴ *Id.* § 6654(i)(2)(A); see also *Economic Benefit of Connecticut's Oyster Farming Industry*, CONN. DEP'T OF AGRIC. (2017) (stating that Connecticut's oyster farming industry provides over 300 jobs and more than \$15 million in annual farm-gate sales).

¹⁸⁵ I.R.C. § 6654(i)(2)(B).

CONNECTICUT TAX CONCERNS FOR FARMERS

Alongside their federal obligations, farmers are required to file Connecticut state taxes. Connecticut farmers may qualify for a lower property tax rate or full property tax exemption, are exempt from many excise and sales taxes, and may qualify for various other reductions and credits, including property tax abatement and additional tax exemptions on buildings and horses based on the provisions adopted by their local municipalities.¹⁸⁶

Income Taxes Connecticut has a corporate business tax that, unlike personal income, which is taxed at a progressive rate, is taxed at a flat rate currently set at 7.5 percent, with a floor minimum set at \$250 annually.¹⁸⁷ Businesses will pay whichever amount is calculated to be higher.¹⁸⁸ However, in contrast to many other states, tax returns for businesses are due on the first day of the first month after a corporation's federal tax return is due. This means that for businesses following the calendar year, their tax returns are due on April 1st.¹⁸⁹ The amount paid in state income tax is deductible from federal income tax owed.¹⁹⁰

Controlling Interest Transfer Tax Connecticut, like most states, imposes a tax on the transfer of a controlling interest of real property owned directly or indirectly by a legally recognized business entity.¹⁹¹ Consistent with many jurisdictions, the threshold in Connecticut to constitute a transfer of control is more than 50 percent of the total voting power, capital, profits, or interest in the entity.¹⁹² The current controlling interest transfer tax rate is a fixed 1.11 percent of the “present true and actual value of the interest in real property.”¹⁹³ Particularly relevant to farmers, an additional transfer tax on top of the 1.11 percent will be imposed if a controlling interest has been classified as “farm land, forest land, maritime heritage land, or open space land,”¹⁹⁴ and is transferred within a period of ten years.¹⁹⁵ There are two state-recognized exemptions to the controlling interest transfer tax. The first excludes property in a municipality designated as an enterprise zone (defined in section 32-70 of the Connecticut General Statutes).¹⁹⁶ The second excludes

¹⁸⁶ *Tax Reduction Programs for Connecticut Farmers — A Summary*, CONN. FARM BUREAU ASS'N (2014), http://www.cfba.org/images/resources/tax_reduction_programs_for_farmers_-_summary.pdf.

¹⁸⁷ David M. Steingold, *Connecticut State Business Income Tax: What Kind of Tax Will You Owe on Connecticut Business Income?*, NOLO (Jan. 2013), <http://www.nolo.com/legal-encyclopedia/connecticut-state-business-income-tax.html>.

¹⁸⁸ IP 2014(21): BUSINESS TAXES, CONN. DEP'T OF REV. SERVS. 2 (2014), [http://www.ct.gov/drs/lib/drs/publications/pubsip/2014/ip_2014\(21\).pdf](http://www.ct.gov/drs/lib/drs/publications/pubsip/2014/ip_2014(21).pdf) [hereinafter “CONN. BUSINESS TAXES”].

¹⁸⁹ Steingold, *supra* note 180.

¹⁹⁰ I.R.C. § 164(a)(3) (2017).

¹⁹¹ Michele Randall & Joseph Gurney, *Controlling-Interest Real Estate Transfer Taxes: The Potential State Tax Trap in Mergers and Acquisitions*, 888 ANALYSIS & PERSPECTIVE 1, 4 (No. 3 2011), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-controlling-interest-real-estate-transfer-taxes-050214.pdf>; *see also* CONN. GEN. STAT. §§ 12-638a, 12-638b(a)(1)-(3) (2012) (providing the full definition for what business transactions will be taxed under the controlling interest transfer tax).

¹⁹² *Id.* § 12-638a (2013); *see also id.* § 12-638b(a)(1) (2012) (explaining that the controlling interest transfer tax will only apply if the present true and actual value of the property is equal to or greater than \$2,000); Randall & Gurney, *supra* note 184.

¹⁹³ CONN. BUSINESS TAXES, *supra* note 181.

¹⁹⁴ CONN. GEN. STAT. § 12-638l(a) (1989) (citing definitions for “open space” and “maritime heritage land” in section 12-107e and section 12-107g respectively of the Connecticut General Statutes).

¹⁹⁵ *Id.* § 12-638l(b) (1989) (defining the tax rate structure over the ten-year period of inclusion. The tax rate drops by 1 percent per annum).

¹⁹⁶ *Id.* § 32-70 (2012).

transfers of a controlling interest that are merely a change in identity or form of ownership and where no change has occurred in the beneficial ownership.¹⁹⁷

Property Taxes In Connecticut, there are both mandatory exemptions and municipality optional tax exemptions available for farmers. Connecticut is unique in how it administers property taxes. Instead of the counties being responsible, the cities and towns within each county set the rates and collect property taxes.¹⁹⁸ The state has no oversight over this process.

Conn. Gen. Stat. § 12-81 Mandatory State Property Tax Exemptions

- **(38) Farm Tools** used in the business of farming, up to \$500.¹⁹⁹
- **(39) Farm-Grown Products**, including colts, calves and lambs, while owned by the producer or by a cooperative marketing corporation.²⁰⁰
- **(40) Sheep, Goats, Swine** kept within the state of Connecticut.²⁰¹
- **(41) Dairy and Beef Cattle, Oxen, Asses and Mules** kept within the state of Connecticut.²⁰²
- **(42) Poultry** kept within the state of Connecticut.²⁰³
- **(44) Nursery Products** or products growing in any nursery, and any shrub and any forest, ornamental or fruit growing trees in a nursery are tax exempt.²⁰⁴
- **(68) All Livestock, Horses and Ponies** owned and kept in this state, up to the **assessed value of \$1,000**, are exempt from taxation. Horses and ponies used in agriculture are tax exempt under section 12-91 of the Connecticut General Statutes for qualifying farmers.²⁰⁵
- **(73) Temporary Devices or Structures** for seasonal production, storage or production of plants and plant material, including but not limited to, hoop houses, poly houses, high tunnels, overwintering structures and shade houses are tax exempt.²⁰⁶

Conn. Gen. Stat. § 12-91(a) Mandatory State Property Tax Exemption

- **Farm Machinery, Horses or Ponies** up to the first \$100,000 of assessed value is exempt from personal property tax.²⁰⁷

PA 490 Connecticut has historically had high property tax rates, which ultimately led to the enactment of PA 490, codified in sections 12-107(a)–(f) of the Connecticut General Statutes.²⁰⁸ This law shields farmers

¹⁹⁷ *Id.* § 12-638n (1989) (stating transfers not subject to tax under 12-638l); *see* Conn. Gen. Stat. § 12-638b(b) (2012).

¹⁹⁸ *Id.* §§ 12-107(a)–(f) (1963).

¹⁹⁹ *Id.* § 12-81(38) (2015).

²⁰⁰ *Id.* § 12-81(39).

²⁰¹ *Id.* § 12-81(40).

²⁰² *Id.* § 12-81(41).

²⁰³ *Id.* § 12-81(42).

²⁰⁴ *Id.* § 12-81(44).

²⁰⁵ *Id.* § 12-81(68).

²⁰⁶ *Id.* § 12-81(73).

²⁰⁷ *Id.* § 12-91(a) (2013).

²⁰⁸ *Id.* § 12-107(a)–(f) (1963).

who qualify for PA 490 classification from paying “highest and best use” or “fair market” value taxes on real property; instead, PA 490 allows farmers to pay property taxes based on land assessments at its use value.²⁰⁹

Attorneys need to understand PA 490 eligibility now more than ever because of the increased pressure from urban development and rising property taxes. In general, the recommended approach is that every farmer should apply for this tax treatment. An applicant may fill out and submit a Form M-29 to the Assessor between September 1 and December 30.²¹⁰

Employment Taxes In general, Connecticut law follows the federal law in determining what income is subject to withholding taxes.²¹¹ As such, all new employees should fill out a Form W-4 to determine federal withholdings and allowances.²¹² Employers need to submit a W-2 for federal purposes, and either a CT-W3 or CT-1096 (subject to the number of employees) to the Connecticut Department of Revenue Services.²¹³ Farmers must withhold state income tax from employees’ wages.²¹⁴

Exemptions In order to promote farming and land preservation, Connecticut generally offers farmers tax exemptions and credits from time to time. In order for farmers to take advantage of any property or sales and use tax exemptions, they will need to apply through Forms M-28 and M-15 respectively, or the local equivalent, and submit the application to the town assessor.²¹⁵ However, currently there are no available tax credits in Connecticut that farmers can utilize.

Sales & Use Tax Exemptions

- **Farmer Tax Exemption Permit:** This permit allows a farmer to purchase tangible personal property and motor vehicle fuels used exclusively in the agricultural production process (e.g., farm tractor, truck, refrigeration equipment) without being subject to Connecticut sales and use taxes.²¹⁶ To apply for this exemption, a farmer would file Form REG-8 with the Connecticut Department of Revenue Services.²¹⁷

²⁰⁹ *Id.* § 12-107(a)-(f) (1963).

²¹⁰ PUBLIC ACT 490: A PRACTICAL GUIDE AND OVERVIEW FOR LANDOWNERS, ASSESSORS AND GOVERNMENT OFFICIALS, CONN. FARM BUREAU ASS’N 11–12 (2015), http://www.cfba.org/images/resources/ct_farm_bureaup490_sm4web.pdf.

²¹¹ CONNECTICUT INCOME TAX WITHHOLDING REQUIREMENTS, CONN. DEP’T OF REV. SERVS. (Dec. 30, 2015), <http://www.ct.gov/drs/lib/drs/publications/pubsip/2016/ip2016-1.pdf>.

²¹² U.S. INTERNAL REV. SERV., PUBLICATION 15: (CIRCULAR E), EMPLOYER’S TAX GUIDE (2017), <http://www.irs.gov/pub/irs-pdf/p15.pdf>.

²¹³ *Withholding Information*, CONN. DEP’T OF REV. SERVS. (2017), <http://www.ct.gov/drs/cwp/view.asp?a=1479&q=269984>

²¹⁴ CONNECTICUT INCOME TAX WITHHOLDING REQUIREMENTS, CONN. DEP’T OF REV. SERVS. (Dec. 30, 2015), <http://www.ct.gov/drs/lib/drs/publications/pubsip/2016/ip2016-1.pdf>.

²¹⁵ AGRICULTURE BUSINESS GUIDE, *supra* note 23, at 32.

²¹⁶ CONN. GEN STAT. § 12-412(63). *See also* FORM REG-8: APPLICATION FOR FARMER’S TAX EXEMPTION PERMIT, CONN. DEP’T OF REV. SERVS. (2014), <http://www.ct.gov/drs/lib/drs/forms/2014forms/applications/reg-8.pdf>.

²¹⁷ CONN. GEN STAT. § 12-412(63). *See also* FORM REG-8: APPLICATION FOR FARMER’S TAX EXEMPTION PERMIT, CONN. DEP’T OF REV. SERVS. (2014), <http://www.ct.gov/drs/lib/drs/forms/2014forms/applications/reg-8.pdf>.

- **Connecticut Farm Plates Exemption (Conn. Gen. Stat. § 14-49(q)):** Mileage, emissions, out of state travel, and farm tractors are all exempt from tax on vehicles with farm plates. The statute sets out three requirements that all must be met in order for a farmer to take advantage to the farm plates tax exemption:
 - (1) The vehicle must be used exclusively in agricultural production;²¹⁸
 - (2) An agricultural sales tax exemption permit must be issued by the Department of Revenue Services;²¹⁹ and
 - (3) Gross farm income in the preceding calendar year was not less than \$2,500. Farm plated vehicles are prohibited from transporting goods for hire (i.e., transporting products of others for pay).²²⁰

Municipality Specific Tax Provisions Local municipalities in Connecticut rely largely on collecting property taxes in order to raise revenue. This means that without any special tax treatment, most farmers would not be able to afford to pay the property taxes at the standard rates. However, because farming and farm business may enjoy certain exemptions, municipalities have the option of voting on additional tax exemptions to further reduce the tax burden on farmers. Some examples include:

- **Optional Property Tax Abatement:** Municipalities may vote to allow agricultural businesses to abate up to 50 percent of their property taxes. These agricultural businesses include dairy farms, fruit orchards, vineyards, vegetable farms, nurseries, and any farm that employs nontraditional farming methods such as hydroponics, tobacco farms,²²¹ or commercial lobstering farms operated on maritime heritage land.²²²
- **Additional \$100,000 Exemption for Farm Machinery:** Municipalities may vote to provide this additional exemption up to \$100,000 on top of the state-mandated \$100,000 exemption.²²³
- **Comprehensive Property Tax Exemption for Horses and Ponies:** Upon passing PA 14-33, effective 2014, a municipality may vote to give horses and ponies of any value full exempt status.²²⁴

²¹⁸ *Connecticut Motor Vehicle Farm License Plates*, CONN. DEP'T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=1366&q=258976>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ CONN. GEN. STAT. § 12-81m (2007) (highlighting that “tobacco farm” has never been elaborated on by the Connecticut General Assembly, nor is it discussed in the statutory history of § 12-81m. However, note that tobacco farm varieties throughout history in Connecticut have included Havana, Broadleaf, and Shade tobacco).

²²² *Id.*

²²³ *Id.* § 12-91(b) (1959).

²²⁴ *Id.* § 12-81gg (2014).

- **\$100,000 Exemption for Farm Buildings Exclusively Used for Farming:** Municipalities may vote to provide this additional exemption up to \$100,000.²²⁵

State and Federal Government Subsidies Starting or continuing a farm business can be costly, and there may be special grant and loan programs available to farmers. Many farmers either are not aware or do not take advantage of these loan and grant programs. In 2012, only 8.7 percent of Connecticut farmers received federal grant or loan assistance.²²⁶ State and federal grants currently available and particularly relevant to Connecticut farmers include, but are not limited to, the following:

State Level Grants Due to the current state budget uncertainties, it is unclear whether these programs will be reduced or eliminated.

- Farm Transition Grant Program
- Farm Reinvestment Grant
- Farm Viability Grant²²⁷

Federal Level Grants (USDA) Because the 2014 Farm Bill is expiring, and the USDA is undergoing several organizational changes, it is unclear whether these programs will be reduced or eliminated.

- Organic Related Programs
- Rural Development Loan and Grant Assistance²²⁸
- Beginning Farmers and Ranchers
- Specialty Crop Block Grant Program
- The Farmers Market Promotion Program
- Livestock Indemnity Program
- Livestock Forage Disaster Program
- Tree Assistance Program

The Future of Farm Taxation in Connecticut

Strive for Consistency Across Municipalities Farm allies, including the American Farmland Trust and Connecticut Conference of Municipalities, are advocating for the expansion of the definition of

²²⁵ *Id.* § 12-91(c) (1959).

²²⁶ U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: CONNECTICUT DATA, TABLE 3: ECONOMIC CLASS OF FARMS BY MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD AND GOVERNMENT PAYMENTS: 2012 AND 2007 (2014), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/st09_1_03_003.pdf.

²²⁷ *Farm Viability Grant*, CONN. DEP'T OF AGRIC. (2017), <http://www.ct.gov/doag/cwp/view.asp?a=3260&q=419408>; *see also* CONN. GEN. STAT. § 22-26j; An Act Concerning Farm Land Preservation, Land Protection, Affordable Housing and Historic Preservation, Conn. Pub. Act 05-228 (2005).

²²⁸ *Grants and Loans*, U.S. DEP'T OF AGRIC. (2017), <http://www.usda.gov/topics/farming/grants-and-loans>.

“farming”²²⁹ on a municipality level, in order to incorporate modern farming business activities, such as retail and value-added processing (e.g., bakeries, wineries, kitchens, canneries).²³⁰ Giving farm businesses added flexibility to adapt to future markets and trends will help farmers in Connecticut overcome traditional tax challenges associated with farming such as properly classifying farming and non-farming income..

Expand Definition of a “Tax-Exempt Structure” Because of the unique nature of each farm, farm buildings and structures can encounter unique challenges related to tax exemption and zoning. In Connecticut, farm structures, such as greenhouses and hoop houses, are commonplace because of the large nursery and greenhouse sector present within the state. By including greenhouses and hoop houses (already in the current definition of “farm”) into the definition of “other farm buildings and structures,” many farmers in Connecticut could be eligible for additional tax exemptions, contingent upon their local municipality voting on and approving the corresponding amendment.²³¹

RESOURCES

U.S. Code Title 26 – Internal Revenue Code

<https://www.law.cornell.edu/uscode/text/26>.

Internal Revenue Service, *Publication 225 Farmer’s Tax Guide (2016)*

<https://www.irs.gov/pub/irs-pdf/p225.pdf>.

Internal Revenue Service, *Publication 51 Agricultural Employer’s Tax Guide (2016)*

<https://www.irs.gov/pub/irs-pdf/p51.pdf>.

Internal Revenue Service, *Publication 15 Employer’s Tax Guide (2016)*

<https://www.irs.gov/pub/irs-pdf/p15.pdf>.

General Statutes of Connecticut Title 12 – Taxation

https://www.cga.ct.gov/current/pub/title_12.html.

Connecticut Farm Bureau Association, *Connecticut Agricultural Business Management Guide*

http://www.ct.gov/doag/lib/doag/marketing_files/agbusinessguide_9_28_10%5B1%5D.pdf.

²²⁹ AM. FARMLAND TRUST & CONN. CONFERENCE OF MUNICIPALITIES, PLANNING FOR AGRICULTURE: A GUIDE FOR CONNECTICUT MUNICIPALITIES 24, (2012), http://www.ct.gov/doag/lib/doag/farmland_preservation_/2012_planning_for_ag.pdf.

²³⁰ *Id.*

²³¹ *Id.*

CHAPTER VIII: INTELLECTUAL PROPERTY

This chapter provides an overview of the issues related to intellectual property law that would be of interest to attorneys advising Connecticut farmers and food entrepreneurs. Understanding these issues will allow these peoples to better protect their brand identities as they conduct their farm and food businesses.

OVERVIEW This chapter describes intellectual property issues that would interest attorneys advising farmers and food organizations that are developing products or ideas. While much of the intellectual property landscape is federal, relevant Connecticut laws have been included and highlighted (e.g. state laws on trademarks and trade practices). The chapter discusses copyright, patent, and trademark law, and it then concludes with a brief spotlight on Connecticut unfair practice and trade secret law.

1. Copyright Law This section provides a brief overview of U.S. copyright law and the ways in which Connecticut farmers and food entrepreneurs may confront such issues.

2. Patent Law This section explores patent law, generally, and discusses its relevance to farmers' needs.

3. Trademark Law This section discusses both Connecticut and federal trademark law with case examples and offers insight as to how attorneys may appropriately advise farmers and food organizations in protecting their trademarks.

4. Connecticut: Unfair Trade Practices and Trade Secrets This section highlights the Connecticut Unfair Trade Practice Act and Connecticut protections of trade secrets.

COPYRIGHT LAW

Copyright law protects intellectual property rights in “original works of authorship fixed in any tangible medium of expression.”¹ This includes, but is not limited to, literary, musical, or dramatic works; pictures and graphic works, and audiovisual and sound works.² Copyright protects the author’s ability to reproduce, create derivatives of, sell, lease, or preserve the value of the work being performed.³

For farmers and food organizations, copyrightable materials may include informational pamphlets, books or manuals, pictures, websites, or videos. Copyright protection attaches only to works actually produced; it does not protect ideas, processes, systems, or discoveries⁴—though, some of these ideas or concepts may be protected under patent law.

¹ 17 U.S.C. § 102(a) (2012).

² *Id.* §§ 102(a)(1)–(8).

³ *Id.* § 106.

⁴ *Id.* § 102(b).

Definition For a work to be an “original work of authorship,” it must originate from the author, that is, it must be “independently created rather than copied from other works.”⁵ Further, there must be some “minimal degree of creativity” to the work, such that it is new and not merely derivative.⁶ While the originality requirement may be more lenient than, say, the “new and useful” standard of patent law,⁷ it is nonetheless important to ensure copyright claimants can substantiate a claim of originality. The constitutional underpinning of the copyright authority “presuppose[s] a degree of originality,” and the standard “remains the touchstone of copyright protection.”⁸

A work of authorship is an intentionally vague category,⁹ but it covers eight categories of works as defined by statute,¹⁰ as well as scientific and technical developments.¹¹ The standard is broad, but not unlimited, and allows for the expansion of copyright protection as needs require.

That a work be fixed in tangible form means copyrightable works must be tangible, perceivable, reproducible, or otherwise communicable.¹² Thus, ideas, thoughts, and otherwise nontangible forms of intellectual property are generally barred from copyright protection. Some courts have considered whether oral conversations may be copyrightable, but there is no broad consensus that they are protectable.¹³

Registration A farmer or food entrepreneur wanting to protect a written or other work may wish to register a copyright in the work. While registration is not necessary to protect a work,¹⁴ it is generally recommended that copyright-holders nonetheless register with the copyright office. Doing so provides additional remedial measures if an owner chooses to claim a use infringement. Registration also serves as a public record of one’s copyright.

A claim for use infringement allows a claimant to do the following:

- Bring suit for infringement and seek statutory damages and attorney’s fees if successful, so long as the copyright is registered within three months of publishing the work, or three months prior

⁵ MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.01[A] (MATTHEW BENDER, REV. ED. 2017). *See also* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

⁶ *Id.*

⁷ *See, e.g.*, 1 NIMMER ON COPYRIGHT, *supra* note 5, at § 2.01[B][1] (“[T]his standard does not include requirements of novelty, ingenuity, or esthetic merit.”).

⁸ Feist Publications, 499 U.S. at 346–47 (citing *The Trade-Mark Cases*, 100 U.S. 82 (1879), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)).

⁹ *See, e.g.*, H. Rep. No. 94-1476, at 51 (1976) (“The phrase “original works of authorship, which is purposely left undefined, is intended to incorporate without change the standard . . . established . . . under [the 1909] copyright statute.”).

¹⁰ The eight statutory categories are: literary, musical, dramatic, choreographic, pictorial or graphic, audiovisual, sound, and architectural works. 17 U.S.C. § 102(a).

¹¹ *Id.* *See also* 1 NIMMER ON COPYRIGHT, *supra* note 5, at § 2.03[A].

¹² 17 U.S.C. § 102 (a) (2012); 1 NIMMER ON COPYRIGHT § 2.03[B].

¹³ *See, e.g.*, *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250 (N.Y. 1968).

¹⁴ CIRCULAR 1: COPYRIGHT BASICS, U.S. COPYRIGHT OFFICE 2 (May 2012), <http://www.copyright.gov/circls/circ01.pdf>.

to an infringement;¹⁵ and

- Enjoin the import of foreign goods infringing on the work, if the copyright is registered with the U.S. Customs Service.¹⁶

Registering a copyright is separate from providing notice of a copyright. Copyright holders may provide notice on their protected works through, for example, use of the © symbol. The author's name and the year of first publication should also accompany the © symbol. However, clients should know that providing such notice is not required for registration with the Copyright Office¹⁷ and that those who register a copyright may use the ® symbol to denote the registered status.

The Copyright Office oversees the copyright registration process. The various forms, used for different types of work to be registered, are available on its website.¹⁸ Registrants must submit a completed form, a fee, and a deposit copy of the work being registered to the Copyright Office.¹⁹ The deposited copies remain on file with the Copyright Office. Registrants can submit their materials online or through the mail.²⁰

Under the Copyright Act, authors of copyrighted works must submit two copies of their work to the Copyright Office within three months of first publication.²¹ Failure to do so can result in fines.²² However, there are several exemptions to this provision,²³ and farmers and food organizations may not be required to submit copies of their works. For instance, works exclusively published online, scientific models or diagrams, and catalogs and print advertising materials are exempt from the two-copy deposit requirement.²⁴

Copyright Infringement Copyright owners are entitled to sue for copyright infringement if anyone violates their exclusive rights to the value of their work.²⁵ To bring suit, the copyright must be registered.²⁶ A copyright holder can produce evidence of registration as “prima facie” evidence of the validity of the copyright.²⁷ Successful claims may result in actual and/or statutory damages, the seizure of the infringing works, and an injunction against the infringing party.²⁸

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Note, however, that this applies only to works produced *after* 1989; pre-1989 works may require notice for statutory protections.

¹⁸ *Forms*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/forms>.

¹⁹ CIRCULAR 1, *supra* note 14, at 7.

²⁰ *Id.* Note that you may wish to advise clients that they will only receive confirmation that the Copyright Office has received their application if they use the online process.

²¹ 17 U.S.C. § 407(a).

²² *Id.* § 407(d) (2012).

²³ 37 C.F.R. § 202.19(c).

²⁴ *Id.*

²⁵ 17 U.S.C. § 501.

²⁶ CIRCULAR 1, *supra* note 14, at 5.

²⁷ 17 U.S.C. § 410(c).

²⁸ *Id.* §§ 502–505.

Additionally, farmers and food organizations will need to ensure that they are not infringing on the copyrights held by another. For instance, in recent years, there was controversy over whether farmers could repair farm vehicles, such as tractors that had software components.²⁹ Under the Digital Millennium Copyright Act (DMCA), manufacturers held copyrights to the software that enabled certain features on, among other things, tractors and farm equipment. When farmers sought to open the hood and repair these machines themselves, the manufacturers claimed infringement.³⁰

Fortunately for farmers, the Copyright Office approved a new exemption—Class 21—to the DMCA that allows for self-repair of farm equipment containing otherwise protected software.³¹ This means that farmers can circumvent certain copyrighted software of their vehicles or equipment “for purposes of lawful diagnosis and repair, or aftermarket personalization, modification, or other improvement” without incurring any penalties under the DMCA.³² While this exemption may limit copyright infringement claims, some manufacturers incorporate contractual prohibitions to equipment self-repair in their user agreements and put farmers at risk of violating contractual provisions.³³ Farmers should be aware that the new Class 21 exemption only prevents manufacturers from bringing a DMCA claim against them. If farmers decide to repair their own equipment that contains copyrighted software, they will want to get advice on the contractual implications (i.e., waivers).

Fair Use An important exception to copyright protection is the fair use doctrine, which allows people other than the copyright holder to use (and reproduce) copyrighted work for any of the following purposes:

- Criticism
- Comment
- News or reporting
- Teaching (“including multiple copies for classroom use”)
- Research and scholarship³⁴

Fair use is “one of the most important and well-established limitations on the exclusive right of copyright

²⁹ See, e.g., Kyle Wiens, *We Can’t Let John Deere Destroy the Very Idea of Ownership*, WIRED (Apr. 21, 2015), <http://www.wired.com/2015/04/dmca-ownership-john-deere>.

³⁰ Kyle Wiens, *Before I Can Fix This Tractor, We Have to Fix Copyright Law*, SLATE: FUTURE TENSE (Jan. 13, 2016), http://www.slate.com/blogs/future_tense/2016/01/13/copyright_law_shouldn_t_keep_me_from_fixing_a_tractor.html.

³¹ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Docket No. 2014-07, U.S. Copyright Office (Oct. 20, 2015), <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf>.

³² 37 C.F.R. § 201.40(6). The rule was finalized on October 28, 2015, per 80 Fed. Reg. 65944.

³³ Grant Gerlock, *Farmers Look for Ways to Circumvent Tractor Software Locks*, NPR: ALL TECH CONSIDERED (Apr. 9, 2017), <http://www.npr.org/sections/alltechconsidered/2017/04/09/523024776/farmers-look-for-ways-to-circumvent-tractor-software-locks>.

³⁴ 17 U.S.C. § 107.

owners,”³⁵ and can be asserted as a defense against infringement claims regarding published and unpublished copyrighted works.³⁶ A fair use determination is highly context-dependent, and courts consider a number of factors, including the commercial or noncommercial nature of the use, amount of the work used, and any impact on the market for or value of the copyrighted work.³⁷

Attorneys working with farmers and food entrepreneurs will want to note that fair use can either provide a defense against an infringement claim against a client or prevent clients from bringing suit against someone using or benefitting from their intellectual property.

Section 301 and Common Law Copyright Before 1976, creators and authors could assert rights to their intellectual property through either state law (common law copyright) or federal law. However, section 301 of the Copyright Act of 1976 explicitly preempts any state protections that “are equivalent to any of the exclusive rights within the general scope of copyright” under sections 102 and 106 of the Act.³⁸ While this preemption covers most copyright claims today—meaning that farmers and food organizations will likely only deal with federal copyright law—certain types of works are still protected by state (common law) copyrights. These would include audio recordings made before 1972 and unpublished works, such as manuscripts.³⁹

In general, section 301 brings most copyright claims under federal purview. Its preemption is broad, and it has even barred state claims of unfair competition⁴⁰ and of tortious interference with contractual relations.⁴¹ In Connecticut, for example, a conversion claim under state law was found to be preempted by the Copyright Act because the complaint alleged reproduction and wrongful use of certain materials.⁴² Because these latter claims were similar to issues often addressed by copyright law, the federal district court held that they were preempted by section 301. Therefore, while it may be helpful to be aware of state protections, most clients will likely pursue copyright claims in federal court under federal law.

³⁵ H. Rep. No. 94-1476, at 65 (1976)

³⁶ 17 U.S.C. § 107.

³⁷ *Id.* See also MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05[A][4] (MATTHEW BENDER, REV. ED. 2017) (noting that this factor of a fair use defense “looks to adverse impact only by reason of usurpation of the demand for [the copyrighted] work”).

³⁸ 17 U.S.C. § 301.

³⁹ PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS 4–5 (Sept. 2009), <http://www.clir.org/wp-content/uploads/sites/6/pub146.pdf>.

⁴⁰ See, e.g., *RBC Nice Bearings, Inc. v. Peer Bearing Co.*, 676 F. Supp. 2d 9 (D. Conn. 2009); *A Slice of Pie Prods., LLC v. Wayans Bros. Entertainment*, 392 F. Supp. 2d 297 (D. Conn. 2005).

⁴¹ *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65 (D. Conn. 1997).

⁴² *Frontier Group, Inc. v. Nw. Drafting & Design, Inc.*, 493 F. Supp. 2d 291 (D. Conn. 2007).

PATENT LAW

Patents grant to inventors of “new and useful” things the right to exclude others from making or using that product or design.⁴³ Patents are controlled by federal law and overseen by the U.S. Patent and Trademark Office (USPTO).⁴⁴ Connecticut farmers and food entrepreneurs will need to be advised of the protections available under, and limitations imposed by, federal patent law.

The USPTO issues three main types of patents: utility, design, and plant. A utility patent provides rights to the inventor of a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”⁴⁵ Thus, new farm equipment or farming techniques, innovative processes, and new chemical fertilizers⁴⁶ could all be protected with a utility patent. Securing a utility patent is more difficult than securing other forms of patents, but utility patents may also provide greater protection against patent infringement.⁴⁷

Design patents are issued to protect new or novel designs—esthetic, surface ornamentations of manufactured articles.⁴⁸ These patents only cover the “visual characteristics” of a work.⁴⁹

Plant patents protect discovery of “distinct and new variet[ies] of plant[s]” when those plants are successfully asexually reproduced.⁵⁰ Plant patents arise under the Plant Patent Act of 1930⁵¹ and do not apply to sexually-reproduced or tuber-propagated plants (e.g. potatoes).⁵² However, subsequent statutory protections under the Plant Variety Protection Act (PVPA) and amendments have afforded patent-like protection to discoverers and inventors of new types of such plants.⁵³ Plant patents and PVPA certificates also protect seeds.

While some farmers and food organizations may discover new plant varieties and seek patents on them, the majority of their interaction with patent law will likely come in the form of buying, using, or selling

⁴³ *General Information Concerning Patents*, U.S. PATENT & TRADEMARK OFFICE (Oct. 2015) <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents>.

⁴⁴ *See, e.g.*, 35 U.S.C. § 1 *et seq.*

⁴⁵ *Id.* § 101.

⁴⁶ *U.S. Patent Classification System – Classification Definitions: Class 071: Chemistry: Fertilizers*, U.S. PATENT AND TRADEMARK OFFICE INFO. PRODS. DIVISION (Oct. 2000), <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/def/071.htm>.

⁴⁷ Wen Zhou, *The Patent Landscape of Genetically Modified Organisms*, HARV. GRADUATE SCHOOL OF ARTS & SCIENCES: SCIENCE IN THE NEWS (Aug. 10, 2015), <http://sitn.hms.harvard.edu/flash/2015/the-patent-landscape-of-genetically-modified-organisms>.

⁴⁸ DONALD S. CHISUM, 1-23 CHISUM ON PATENTS § 23.01 (Matthew Bender ed. 2017). *See also* 35 U.S.C. § 171; U.S. PATENT AND TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 1502 (9th ed. 2015) <http://www.uspto.gov/web/offices/pac/mpep/mpep-1500.pdf>.

⁴⁹ 1-23 CHISUM ON PATENTS, *supra* note 48, at § 23.03.

⁵⁰ DONALD S. CHISUM, 8-24 CHISUM ON PATENTS § 24.01 (Matthew Bender ed. 2017).

⁵¹ Pub. L. No. 71-245, 46 Stat. 376 (May 23, 1930), *as amended and codified at* 35 U.S.C. §§ 161 *et seq.* (2012). *See also* Plant Patents Amendment Act of 1997, Pub. L. No. 105-289, 112 Stat. 2780.

⁵² 8-24 CHISUM ON PATENTS, *supra* note 50, at § 24.01.

⁵³ Pub. L. No. 91-577, 84 Stat. 1542 (Dec. 24, 1970), *as amended by* the Plant Variety Protection Act Amendments of 1994, Pub. L. No. 103-349, 108 Stat. 3136. *See also* 8 CHISUM ON PATENTS §§ 24.02, 24.03.

patented seeds. This is all the more prevalent with the rise of genetically modified seeds and conglomerates, such as Monsanto and DuPont.⁵⁴

Protection under the PVPA allows the certificate-holder to prevent others from selling or marketing, importing or exporting, sexually reproducing (or tuber-propagating), hybridizing, or using the seeds of any protected plant variety.⁵⁵ While this can prove tricky for farmers, there are exemptions that allow for (1) the saving of patented seed and using of saved seed to replant one's own lands⁵⁶ and (2) research and development and plant breeding involving protected seeds.⁵⁷ However, farmers should be aware of the protection afforded to the seeds they are using. If a manufacturer has patented the seeds, farmers cannot save the seed for resale or replanting. If a manufacturer has protected the seeds under the PVPA, farmers can save seeds for replanting for personal use only.⁵⁸

Though it is important to understand plant patents and PVPA protections, many plant and seed manufacturers do not obtain plant patents, but instead opt for *utility* patents.⁵⁹ Utility patents allow for the protection not just of the plant variety, but of particular “uniquely designed” DNA sequencing in the seeds; this allows for the patenting of genetically modified organisms, also called GMOs.⁶⁰

The reliance on utility patents to protect intellectual property in plants is evidenced by an important recent case, *Bowman v. Monsanto Co.*⁶¹ Bowman, a farmer from Indiana, purchased Roundup Ready soybean seeds. Monsanto owned a utility patent on genetic sequencing in these seeds that makes the plants better able to survive against herbicides. Bowman purchased the seeds through a special licensing agreement that permitted only one season of planting and prohibited any saving of seeds for replanting in future crops.⁶² For later crops, however, Bowman purchased “commodity” seeds from a grain elevator, knowing that much of the bulk seed would also be Roundup Ready.⁶³ Bowman continued to save and replant seed from each of these crops, producing new pesticide-resistant soybean crops.⁶⁴

Monsanto sued, claiming that Bowman had infringed on its patent by recreating the patented product,

⁵⁴ See generally Zhou, *supra* note 47.

⁵⁵ 7 U.S.C. §§ 2541 (a) (1)–(10)).

⁵⁶ *Id.* § 2543.

⁵⁷ *Id.* § 2544.

⁵⁸ *Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003). See also *Intellectual Property Rights in Plant Breeding*, JOHNNY'S SELECTED SEEDS (Mar. 8, 2017) <http://www.johnnyseeds.com/about-us/about-our-seed/understanding-utility-patents-and-pvp.html>.

⁵⁹ Zhou, *supra* note 47.

⁶⁰ *Id.* Zhou notes that this is what was at issue in *Bowman*: Monsanto owned patents on DNA sequencing that gave rise to resistance to particular pesticides.

⁶¹ 133 S. Ct. 1761 (2013).

⁶² *Id.* at 1764.

⁶³ *Id.* at 1765.

⁶⁴ *Id.* (“Each year, that is, he planted saved seed from the year before (sometimes adding more soybeans bought from the grain elevator), sprayed his fields with glyphosate to kill weeds (and any non-resistant plants), and produced a new crop of glyphosate-resistant—i.e., Roundup Ready—soybeans”).

that is, growing a new, herbicide-resistant soybean crop, without Monsanto's consent.⁶⁵ The Supreme Court agreed, finding that Bowman's replanting with bulk seed created an impermissible run-around of Monsanto's patent. Bowman's defense of patent exhaustion, which generally terminates a patent-holder's control of another's use of the product after an "initial authorized sale," was unsuccessful. Patent exhaustion, the Court held, would allow Bowman to sell the Roundup Ready soybeans from the grain elevator to another, to consume them or to feed them to animals. But it does not allow Bowman to create new patented seeds without Monsanto's consent.⁶⁶

The replanting and growing of new crops violated the patent on the seeds, and thus Bowman was liable for damages.⁶⁷ Attorneys advising farmers will want to be aware of the distinctions at play in *Bowman* and will want to ensure their clients do not knowingly or unknowingly take actions that violate a seed patent.

Seed and utility patents are relevant to Connecticut farmers given the prominence of corn in the state. Corn is the second-most produced crop in Connecticut by acreage,⁶⁸ and one of the crops most often genetically modified.⁶⁹ However, given that the top crop in the state by far is hay, forage land, and greenchop, which account for nearly 62 percent of total acreage, and nearly 49 percent of total value of sales,⁷⁰ Connecticut farmers may face fewer issues with seed patents than farmers in other states.

TRADEMARK LAW

Farmers will likely find that much of their interactions with intellectual property come through trademark law. A trademark identifies the owner or origin of a product and protects the owner from unfair competition.⁷¹ Attorneys advising Connecticut farmers and food organizations will want to be familiar with both state and federal trademark laws; though the two are similar, there are a few differences in the qualifications for, and protections of, the two trademark regimes.

The federal and state definitions of "trademark" closely resemble each other, and they highlight important features of trademarks. Importantly:

⁶⁵ *Id.* at 1766–68.

⁶⁶ *Id.* at 1766.

⁶⁷ *Id.* at 1768–69. Monsanto's patent on the soybeans at issue in the case expired in 2014, and the beans have since become "agricultural biotechnology's equivalent of a generic drug." Andrew Pollack, *As Patent Ends, a Seed's Use Will Survive*, N.Y. TIMES (Dec. 17, 2009), <http://www.nytimes.com/2009/12/18/business/18seed.html>.

⁶⁸ 2016 *State Agriculture Overview: Connecticut*, U.S. DEP'T AGRIC. NAT'L AGRIC. STAT. SERV., https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=CONNECTICUT.

⁶⁹ *What is GMO?*, NON-GMO PROJECT (2016), <http://www.nongmoproject.org/gmo-facts/what-is-gmo>. The GMO Project ranks corn as "high-risk," which is the Non-GMO Project's own classification referring to products that are "derived from, contain[] derivatives of, or [are] produced through a process involving organisms . . . known to be genetically modified and commercially produced." *High-Risk Crops and Inputs*, NON-GMO PROJECT (2016), <http://www.nongmoproject.org/gmo-facts/high-risk>.

⁷⁰ *Id.* (includes "nursery, greenhouse, floriculture and sod" figures in sales calculation).

⁷¹ ANNE GILSON LALONDE, 1-1 GILSON ON TRADEMARKS §§ 1.02–1.03 (Matthew Bender ed. 2017).

- **Trademarks need not be words:** Symbols, icons, and proper names can all possibly be trademarked;
- **Trademarks must be used in commerce:** A federal mark is available only for those goods or services used in interstate commerce, while a state mark protects goods and services sold within Connecticut; a trademark cannot be used merely to “reserve” the name for future use; and
- **Trademarks identify the source:** Whether the owner or origin, trademarks identify the source of goods and services to distinguish one good from a competing good; thus, a farmer’s trademark can be vital to ensuring there is no confusion among consumers whose products they are buying.

A notable distinction, despite the close similarity of the statutes, is that the federal statute allows one to register a mark before it has actually been used, so long as the registrant has “a bona fide intention to use” the mark in interstate commerce. In contrast, the Connecticut statute does not have an “intent” clause, and only provides for the registration of trademarks actually in use.

What Is a Trademark?

| FEDERAL | CONNECTICUT |
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| <p>The term “trademark” includes any word, name, symbol, or device, or any combination thereof—</p> <p>(1) used by a person, or</p> <p>(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,</p> <p>to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.</p> <p>15 U.S.C. § 1127 (2012).</p> | <p>(1) The term “trademark” means any word, name, symbol or device or any combination thereof used by a person to identify and distinguish the goods of such person, including a unique product, from those goods made or sold by others, and to indicate the source of the goods, even if that source is unknown.</p> <p>...</p> <p>(8) The term “use” means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark</p> <p>CONN. GEN. STAT. § 35-11A.</p> |

Why Have a Trademark? Trademarks provide farmers and food organizations with brand recognizability and exclusive use of the mark to represent their goods and services. Registering a trademark on either the Connecticut or federal register may provide added benefits. However, a farmer is not required to register a trademark.⁷²

⁷² See, e.g., ANNE GILSON LALONDE, 1-3 GILSON ON TRADEMARKS §§ 3.02 (MATTHEW BENDER ed. 2017) (acknowledging that “[a]ctual use of most kinds of trademarks, without more, establishes protectable trademark rights under common law”).

Trademarks provide for the exclusive use of a name, symbol, or icon to identify the mark owner's good or service. Farmers may wish to trademark their farm logo or brand, especially if used on packaging for products they sell within or across state lines, or as part of their Internet branding, such as on their websites or in social media. Trademark rights, either common law or statutory, may be asserted either offensively or defensively by farmers and food organizations in suits for trademark infringement against competitors with confusingly similar marks or who are using the identical mark without permission.

Common law trademark rights accrue through actual use of the mark in commerce. Courts generally construe this to require such use be "sufficiently open" so that the public could reasonably associate the mark with the user's good or service.⁷³ Common law trademark rights protect the mark user's exclusive right to sell a good or service under that mark, though only in a specific geographic area (e.g. a state).⁷⁴ Common law rights may even prevent a competing use of a trademark by a party who seeks federal registration of the mark, so long as the common law mark-holder was the first to use the trademark in commerce.⁷⁵

Though not required, federal registration of a mark used in interstate commerce is advisable, as it remains "the cornerstone of any program protecting the rights of a trademark owner."⁷⁶ Registration establishes ownership rights, allows for federal jurisdiction of trademark infringement suits, is "prima facie evidence" of one's right to use the trademark, and may be incontestable under some conditions.⁷⁷ Yet, these are added statutory benefits⁷⁸ and do not affect the common law rights protecting a farmer or food organization's right to use a mark in commerce.

In Connecticut, mark owners are protected by common law rights, such as those establishing trademark ownership through first and actual use and the right to exclude others from using a mark, without registering on the state register. However, if farmers or food organizations fail to register their marks, they run the risk of competitors using the same marks.⁷⁹ Failure to register a mark in Connecticut may also preclude remedy for trademark infringement under section 35-11 of the Connecticut General Statutes, the state counterpart to the Lanham Act.

⁷³ *Id.* at § 3.02[2].

⁷⁴ Jane Haskins, *What are Common Law Trademark Rights?*, LEGALZOOM (Aug. 2016), <http://www.legalzoom.com/articles/what-are-common-law-trademark-rights>.

⁷⁵ PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION, U.S. PATENT & TRADEMARK OFFICE 9 (May 2016), <http://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf>.

⁷⁶ ANNE GILSON LALONDE, 1-4 GILSON ON TRADEMARKS § 4.01 (MATTHEW BENDER ed. 2017).

⁷⁷ *Id.* (noting also that registering a mark on the principal register constitutes "constructive notice," and may allow for an exercise of rights against international imports bearing similar marks).

⁷⁸ See generally The Lanham Act, Pub. L. No. 79-489, 60 Stat. 417 (1949), *codified as amended at* 15 U.S.C. § 1051 *et seq.*

⁷⁹ *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493, 499 (1993) ("If a trade or service mark owner elects not to register a mark, the only risk is exposure to use of the mark by a competitor.").

Federal Trademark Law Almost any word, icon, or symbol may be registered as a federal trademark. However, under the Lanham Act, **a mark that does any of the following may not be registered:**

- Consists of or comprises **immoral, deceptive, or scandalous matter**;⁸⁰ or **matter which may disparage or falsely suggest a connection** with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used . . .; or
- Consists of or comprises the **flag or coat of arms or other insignia** of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof; or
- Consists of or comprises a **name, portrait, or signature identifying a particular living individual** except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow; or
- Consists of or comprises a mark which so **resembles a mark registered** in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive; or
- Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin . . . [or] is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.⁸¹

A trademark first must be distinctive; it must distinguish the origin of the good or service from other competing goods or services. If a mark is not distinctive, it cannot be registered. A distinctive mark “stands out from the clutter and points the consumer directly to the source of the products.”⁸² Generic names and names that were once distinctive but have become common parlance, are not protectable as trademarks.⁸³ Clients may wish to use bright colors, bold designs, or stark contrasts from other marks in their industry to ensure their proposed mark is distinctive enough to lead the consumer to *their* product over others.

Proposed marks fall along a spectrum of distinctiveness: generic, descriptive, suggestive, or arbitrary or fanciful.⁸⁴ The category a mark falls in determines the level of protection afforded. Generic and

⁸⁰ This provision has been recently struck down as unconstitutional. *See Matal v. Tam*, 137 S. Ct. 1744 (2017).

⁸¹ 15 U.S.C. §§ 1052(a)–(e).

⁸² ANNE GILSON LALONDE, 1-2 GILSON ON TRADEMARKS § 2.01 (Matthew Bender ed. 2017).

⁸³ *Id.*

⁸⁴ *See id.* at § 2.01, n.22 and accompanying text.

descriptive marks are inherently not distinctive and are not protected. When trademarks are too generic or descriptive, they serve merely to identify what a product is or does. Descriptive terms do not denote the origin source or manufacturer of a good, and thus “do not, in their primary meaning, perform the essential trademark function.”⁸⁵

Arbitrary or fanciful marks receive the greatest protection (i.e., they may be trademarked), while generic marks receive the least (i.e., they cannot be trademarked).⁸⁶ Arbitrary marks are those that have a plain meaning different from their meaning in context of the mark.⁸⁷ For instance, the mark “Apple” is arbitrary when referring to computers, as is “Camel” when referring to cigarettes. Fanciful marks are those that are created specifically for the brand at issue, and are not words otherwise found in the dictionary.⁸⁸ Examples of fanciful marks include “Kodak” for the imaging and camera company and “Exxon” for the oil corporation. If farmers or food organizations can use one of these two types of marks, they are more likely to receive greater protection under federal law.

Federal courts have addressed section 1052, and their decisions provide guidance as to what is or is not deceptive, descriptive, or otherwise questionable for trademark registration. For instance, the mark “Danish Maid,” of Danish Maid Cultured Products, was found to be deceptive for giving the false impression to consumers that the goods were made in Denmark.⁸⁹ The Trademark Trial and Appeal Board found that “Danish Maid” too closely resembled “Danish-made,” and was not likely to evince the desired image of a milkmaid from Denmark.⁹⁰ Similarly, the trademark “LOVEE LAMB” for car seat covers was found to be deceptive because the mark gave the impression that the products contained lambskin though the car seat covers were entirely synthetic.⁹¹

As described below, federal trademark law resembles Connecticut law in many respects. However, federal trademark law includes more criteria for registration. This includes section 1052(c)’s provision against using the likeness of a deceased president without consent of the widow, and section 1054(a)’s provision against geographic indications on wine or other alcoholic products (as this is covered by a WTO treaty).

Applicants for federal trademark registration should begin by searching both the federal and supplemental registers. The federal register is the principal place for trademarks approved by the USPTO. The supplemental register contains marks not registerable on the principal register. It is important to search both because a proposed trademark may be denied registration if it is “confusingly similar” to a mark on the supplemental register. Applicants should search the registers prior to applying for registration to spot any potential conflicts that might arise.

⁸⁵ *Id.* at § 2.03.

⁸⁶ *Id.* at § 2.01.

⁸⁷ *Id.* at § 2.04. Gilson illustrates this with the examples of Apple computers, Camel cigarettes, and Amazon online retail.

⁸⁸ *Id.* Examples include Exxon, Google, and Kodak.

⁸⁹ *In re Danish Maid Cultured Products, Inc.*, 156 U.S.P.Q. (BNA) 430 (1967).

⁹⁰ *Id.* at 3.

⁹¹ *In re Budge Mfg. Co.*, 857 F.2d 773 (Fed. Cir. 1988).

To apply for federal registration of a trademark, applicants must submit forms, information on the mark and associated product(s), and a fee.⁹² Applicants must also demonstrate either *actual use* of the mark in interstate commerce, or a *bona fide intention to use* the mark in interstate commerce. This constitutes the applicant's basis for filing.⁹³ The USPTO has an overview of the entire process on its website and also provides an online application.⁹⁴ While individuals may proceed through the process by themselves, the USPTO advises consulting with an attorney familiar with the process.

Connecticut Trademark Law (Conn. Gen. Stat. § 35-11) Any word, symbol, or icon may be registered on the state register, so long as it distinguishes goods and services from those of competitors. However, **a mark that does the following may not be registered:**

- Consists of or comprises **immoral, deceptive or scandalous matter**;⁹⁵ or
- Consists of or comprises matter which may **disparage or falsely suggest a connection** with persons, living or dead, institutions, beliefs or national symbols, or which may bring them into contempt or disrepute; or
- Consists of or comprises the **flag or coat of arms or other insignia** of the United States, or of any state or municipality, or of any foreign nation, or of the United Nations, or any simulation thereof; or
- Consists of or comprises the **name, signature or portrait identifying a particular living individual**, except with the individual's written consent; or
- Consists of a mark which . . . is merely descriptive or deceptively misdescriptive of them or . . . is primarily geographically descriptive or deceptively misdescriptive of them, or . . . is primarily merely a surname, provided nothing in this subsection shall prevent the registration of a mark used in this state by the applicant which has become distinctive of the applicant's goods or services . . . ; or
- Consists of or comprises a mark which so **resembles a mark registered** in this state or . . . used in this state by another prior to the use by the applicant and not abandoned, as to be likely . . . to cause confusion or to cause mistake or to deceive purchasers; or
- Consists of or comprises a mark which so **resembles a mark previously registered** in the United States Patent and Trademark Office . . . as to be likely . . . to cause confusion or to cause mistake or to deceive purchasers.⁹⁶

⁹² 15 U.S.C. § 1051.

⁹³ *Basis for Filing*, U.S. PATENT & TRADEMARK OFFICE (last updated Jan. 13, 2017), <http://www.uspto.gov/trademarks-getting-started/trademark-basics/basis-filing>.

⁹⁴ *Trademark Process*, U.S. PATENT & TRADEMARK OFFICE (last updated Oct. 18, 2017), <http://www.uspto.gov/trademarks-getting-started/trademark-process>.

⁹⁵ Given the *Tam* decision noted above in note 80, it is likely that the Connecticut provision here is also void. Farmers and their advisors will want to follow new court decisions closely to see the impact of the ruling on trademark litigation.

⁹⁶ CONN. GEN. STAT. § 35-11b.

Much of Connecticut's trademark law closely tracks the federal statute. Common elements of both regimes include a requirement of distinctiveness, a prohibition on the use of an individual's likeness without written consent, a prohibition on the use of national or state flags, and a prohibition on confusingly similar marks.

Clients hoping to use the national or regional flag in their logo might be advised against doing so, to preserve protection under state trademark law. Clients hoping to use an individual's likeness should first obtain *written* consent from the individual.

A sticking point of trademark registration might emerge with provisions 35-11b (5), (6), and (7) above, and these are likely to feature in trademark infringement suits should conflicts arise. As with federal law, trademarks in Connecticut cannot solely be descriptive of the good or service. They must be distinctive. A farm stand that sells only rhubarb likely could not trademark the name "RHUBARB" because the name merely describes the product being sold and would not distinguish *this* stand from another stand that may also sell rhubarb. Yet, context is crucial to the descriptiveness inquiry.⁹⁷ While the farm stand may not be able to trademark the name "RHUBARB," a restaurant might because one could plausibly assume a restaurant sells more than just rhubarb; thus, the name is not merely descriptive of the product.⁹⁸

Similarly, farmers and food organizations will want to be careful not to use geographical terms that are too descriptive of their product. For instance, "CONNECTICUT FARM" may not be distinctive enough to distinguish Farm A (in Connecticut) from Farms B, C, and D (also in Connecticut, and who may advertise on their products that they are Connecticut farms).⁹⁹ This may vary from the federal trademark regime, which carries an exemption for "indications of regional origin."¹⁰⁰ However, it will likely still be good practice to advise clients to choose a more distinctive trademark.

Family farms and other food organizations may wish to incorporate their family name or initials into their business name and trademark. While such use is permitted in the business name, names or initials cannot generally be registered as trademarks.¹⁰¹ For a personal name or surname to be registered as a trademark, it must acquire some secondary meaning that distinguishes the associated product from competitor goods.¹⁰² This is a heavy burden to meet.¹⁰³ Attorneys should talk with their clients to understand the client's goals. If a client puts greater value in having a person's name or initials as part of the business name, then the client should be aware that such a business name cannot be trademarked.

⁹⁷ 1-2 GILSON ON TRADEMARKS, *supra* note 82, at § 2.03.

⁹⁸ *Id.* ("For example, STEREO is descriptive of a particular type of sound system but not of canned peaches.")

⁹⁹ *Id.*

¹⁰⁰ See 15 U.S.C. § 1054. There does not appear to be a similar rule under Connecticut law.

¹⁰¹ Instead, farmers or food organizations may be able to continue using their names in their business names, notwithstanding a conflicting trademark or prior use. See *Yale Towne & Mfg. Co. v. Rose*, 120 Conn. 373 (1935); 1-2 GILSON ON TRADEMARKS, *supra* note 82, at § 2.03.

¹⁰² *Id.*

¹⁰³ *Id.* ("[F]or personal names and other descriptive terms, it is difficult to prove secondary meaning in federal court.")

Others with a similar name may also be able to use the name in their own business. If, however, a client values having a distinctive name protected by trademark law, it is likely a safer course to advise that client to choose a different mark that does not include a person's name or initials.

Attorneys advising farmers and food organizations should advise their clients to search the Connecticut register before continuing with applications for trademark protection. Forms to do so can be found on the Secretary of the State's website.¹⁰⁴ Searching the register before completing an application can flag potential conflicts at the outset and may allow clients to change or alter their marks early on to avoid costly dispute resolution in the future. Clients may also wish to search the federal register (USPTO database) to find any potential conflicts with federal marks.¹⁰⁵

The application for Connecticut trademark registration requires the filing of an application form, information on the mark and associated goods, and a non-refundable fee of fifty dollars.¹⁰⁶ If approved, registration grants trademark rights for five years and may be renewed in five-year increments upon filing a renewal application and a fee of one-hundred dollars.¹⁰⁷ Renewal applications require showing that the mark is still used by the applicant in association with the good or product in Connecticut.¹⁰⁸

Connecticut Case Law While Connecticut courts have addressed the issue of trademark infringement, they have not done so often, and even less so in the context of food or farming. Yet, the cases raise issues that farmers and food organizations may encounter in their respective industries.

Trademarks or trade names that are merely the reversed order of another mark are not distinct enough to be registerable. A Connecticut court held that "Doctor Drain" was too confusingly similar to "Drain Doctor," which had been registered first. "Doctor Drain" was therefore an infringement under section 35-11 and the Connecticut Unfair Trade Practices Act.¹⁰⁹ The court also acknowledged that there is no hard and fast rule for determining where the line of "confusingly similar" lies.¹¹⁰ Farmers and food organizations should be aware that the "confusingly similar" standard is often context-dependent, but they can mitigate some of the risk by choosing unique and distinctive marks.

Another Connecticut case emphasizes the importance of context in infringement suits. Cloud 9 Massage Therapy, LLC, was denied a temporary injunction against Cloud 9 Day Spa because, in part, it was not clear that the two marks were "confusingly similar."¹¹¹ Because the two businesses did not engage in the

¹⁰⁴ *Trade and Service Mark Forms*, CONN. OFFICE OF SEC'Y OF THE STATE (2017), <http://portal.ct.gov/SOTS/Commercial-Recording/Commercial-Recording/Commercial-Recording-Divisions-Forms-Index-Content#trade>.

¹⁰⁵ *Search Trademark Database*, U.S. PATENT & TRADEMARK OFFICE (last updated Sept. 22, 2017), <http://www.uspto.gov/trademarks-application-process/search-trademark-database>.

¹⁰⁶ CONN. GEN. STAT. § 35-11c.

¹⁰⁷ *Id.* § 35-11e.

¹⁰⁸ *Id.*

¹⁰⁹ *Drain Doctor, Inc. v. Zeligzon*, 2005 Conn. Super. LEXIS 3252, at *1 (Nov. 3, 2005) (unreported).

¹¹⁰ *Id.* at *4.

¹¹¹ *Manfredi v. Blamire*, 2009 Conn. Super. LEXIS 1730, at *1 (June 26, 2009) (unreported).

same services and were in different, albeit neighboring, towns, there was a context-dependent inquiry to be had before an injunction could be issued.

Connecticut courts have recognized the rights of business owners to use their names and initials in their business names, regardless of prior use. These decisions reinforce the notion that names and initials ordinarily cannot be trademarked. Thus, for instance, the owner of a hardware store was permitted to name his business “Yale’s Hardware Store” against the complaint of “Yale Towne and Manufacturing,” because there was “no dishonest purpose or ulterior motive.”¹¹² Similarly, Jeremy Tomaszewsky was permitted to use “JT Landscaping” over the complaint of “JT Landscape and Design” despite the latter’s claim of prior use.¹¹³

Ultimately, the requirements for federal and Connecticut registration of a trademark are quite similar and follow the same broad themes—requirements of distinctiveness and actual use, and prohibitions on marks that too closely resemble other marks already in use. Attorneys will want to work with their clients to understand their intentions and needs before identifying the best course, whether state or federal, to follow.

CONNECTICUT: UNFAIR TRADE PRACTICES AND TRADE SECRETS

Connecticut law also protects intellectual property through laws prohibiting unfair business practices and laws protecting trade secrets.

Unfair Trade Practices The Connecticut Unfair Trade Practice Act (CUTPA)¹¹⁴ prohibits businesses and individuals from engaging “in unfair methods of competition and unfair or deceptive acts” and adopts the Federal Trade Commission’s (FTC) definition of an unfair practice.¹¹⁵ Connecticut courts have adhered to the FTC’s “Cigarette Rule,”¹¹⁶ first elaborated in 1964, as a benchmark of what constitutes an unfair practice in the state.¹¹⁷ The FTC Rule establishes three criteria for an unfair practice:

- Whether the practice, even if not before considered unlawful, offends public policy;
- Whether the practice is immoral, unethical, oppressive, or unscrupulous; and
- Whether the practice causes substantial injuries to consumers, competitors, or others.¹¹⁸

¹¹² Yale Towne & Mfg. Co., 120 Conn. at 384.

¹¹³ Treat v. Tomaszewsky, 2007 Conn. Super. LEXIS 150, at *1 (Jan. 11, 2007) (unreported).

¹¹⁴ CONN. GEN. STAT. § 42-110a *et seq.*

¹¹⁵ *Id.* §§ 42-110b(a), (b).

¹¹⁶ Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8355 (1964) (“Cigarette Rule”).

¹¹⁷ See, e.g., Calandro v. Allstate Ins. Co., 63 Conn. App. 602, 607 (2001) (“In determining whether a practice violates CUTPA we have adopted the . . . cigarette rule . . .”); Thames River Recycling v. Gallo, 50 Conn. App. 767, 785 (1998) (same).

¹¹⁸ *Id.* at 785-86.

The FTC Rule does not require all three criteria to be present for a cause of action to lie.¹¹⁹

CUTPA is different from unfair practice legislation in other states in that it allows for punitive damages and attorney fees for successful plaintiffs.¹²⁰ However, many claims arising under CUTPA have been dismissed as preempted by federal law (for instance, section 301, discussed above) when they touch on traditional copyright and patent issues. Unfair practices involving copyright infringement should be litigated in federal court under federal law.¹²¹ Federal *trademark* law, however, does not preempt CUTPA claims, and plaintiffs have alleged trademark infringement as an unfair practice.¹²² For instance, Diageo, the manufacturer of Johnnie Walker Black Label whisky, sued the maker of Johnny Barker Black Label, a product for dogs, alleging that the competing use infringed federal trademark law and therefore constituted an unfair practice under CUTPA.¹²³ Diageo alleged that use of the confusingly similar name and mark was a “deceptive act or practice[]” that was injurious to Diageo and the Johnnie Walker brand.¹²⁴

Trade Secrets Connecticut law also provides protection for trade secrets—information, patterns, formulas, programs, techniques, or processes that create economic value from their secretiveness and that companies or individuals act to keep secret.¹²⁵ Plaintiffs may sue for actual or threatened misappropriation of a trade secret and may seek injunctions against unauthorized use.¹²⁶ Successful plaintiffs may receive actual damages for loss sustained¹²⁷ and in some cases may also receive punitive damages against wrongdoers.¹²⁸

Farmers may confront trade secret problems when it comes to agricultural data relating to food production and sustainability.¹²⁹ These data may “include land records, seed receipts, weigh tickets, and yield monitors.”¹³⁰ Farmers will likely share their data to benefit from improved analytics, but only if they can be confident that it will not be used against them.¹³¹ Some have suggested that protecting output data as trade secrets, thereby invoking state-law protection in an area where no federal protection exists,¹³² can resolve this dilemma.

¹¹⁹ *Id.*

¹²⁰ Eric C. Osterberg, *Connecticut Unfair Trade Practices Preempted*, LEXOLOGY (Jan. 11, 2010), <http://www.lexology.com/library/detail.aspx?g=e74f47d8-9ed5-41b8-aa6d-8bf337e7d1e7>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Diageo Brands B.V. v. Vineyards*, No. 3:09CV02002, Dec. 9, 2009 (D. Conn.).

¹²⁴ Complaint, at ¶ 14, *Diageo Brands B.V. v. Vineyards*, No. 3:2009CV02002, Dec. 9, 2009 (D. Conn.).

¹²⁵ CONN. GEN. STAT. § 35-51(d). The above list of things that may be trade secrets is not exclusive.

¹²⁶ *Id.* § 35-52(a).

¹²⁷ *Id.* § 35-53(a).

¹²⁸ *Id.* § 35-53(b). Punitive damages are available only against “willful and malicious misappropriation.”

¹²⁹ Robert Parkhurst, *How to Overcome Big Data’s Barriers*, ENV’T’L DEFENSE FUND (Oct. 7, 2015), <http://blogs.edf.org/growingreturns/2015/10/07/how-to-overcome-big-datas-barriers>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Robert Parkhurst, *Who Will Protect Farmers’ Privacy in the Big Data Boom?*, ENV’T’L DEFENSE FUND (Nov. 10, 2015), <http://blogs.edf.org/growingreturns/2015/11/10/who-will-protect-farmers-privacy-in-the-big-data-boom>.

CONCLUSION

It is a good idea to ensure farmers and food organizations are familiar with the basics of intellectual property protections. Trademarks and copyrights can help protect brands and publications, securing to farms and organizations rights against others. Attorneys can help navigate registration and application, and they can ensure that clients face as smooth a process as possible to protect their intellectual property.

RESOURCES

U.S. Copyright Office – Compendium of Copyright Office Practices

<https://www.copyright.gov/comp3>.

U.S. Copyright Office – Forms for Registering a Copyright

<https://www.copyright.gov/forms>.

U.S. Patent and Trademark Office – General Information Concerning Patents

<https://www.uspto.gov/patents-getting-started/general-information-concerning-patents>.

U.S. Patent and Trademark Office – Patent Process Overview

<https://www.uspto.gov/patents-getting-started/patent-process-overview>.

Secretary of State of Connecticut – Form for Registering a Trademark

http://www.ct.gov/sots/lib/sots/commercialrecording/allforms/tradeservicemarks/app_for_a_cert_of_reg_of_trade_or_serv_mark.pdf.

Secretary of State of Connecticut – Other Useful Trademark Links

<http://www.sots.ct.gov/sots/cwp/view.asp?a=3177&q=472426#trade>.

U.S. Patent and Trademark Office – Trademark Basics

<https://www.uspto.gov/trademarks-getting-started/trademark-basics>.

CHAPTER IX: LABOR & EMPLOYMENT

Attorneys often assist business owners in their capacity as employers. Principal farm operators, as employers, face issues like those faced by an attorney's more traditional business clients, such as becoming a registered employer with the IRS, establishing worker classifications, navigating regulatory labor compliance, and establishing employment best practices. While similar, farm employers also must consider distinct exceptions and requirements.

OVERVIEW This chapter is meant to assist attorneys advising farmers with labor and employment issues. Several federal and Connecticut laws address labor and employment issues in general and in the agricultural context specifically. This chapter provides an overview of fair labor standards, migrant and seasonal worker protections, occupational health and safety on farms, and general employment best practices.

1. Becoming an Employer The chapter begins with the preliminary steps an individual or business must take to become an employer. This section will address how to structure a farm operation to be prepared for the onboarding of new workers or employees.

2. Worker Classification The chapter then progresses into a background on worker classification. First exploring a background in the more common areas of worker classification, such as an employee versus an independent contractor, the section then progresses into the distinctions relevant to farm operators. This section discusses the differences between agricultural and non-agricultural workers as well as intricacies in using volunteers, interns, apprentices, and crew leaders.

3. Federal Employment Provisions The discussion will then turn to how these classifications and accompanying federal provisions interact with employer requirements and labor compliance. This section will focus on federal standards that require fair labor practices, protections for certain classifications of employees or workers, and health and safety obligations that employers must meet.

4. Connecticut Employment Provisions Like the federal provisions section, this section will discuss requirements implemented by Connecticut and how such requirements will affect farm operators and their workers and other employees.

5. Labor & Employment Best Practices The chapter concludes by exploring best practices and common industry procedures that help farmers navigate employer responsibilities.



BECOMING AN EMPLOYER

To become an employer, a farm operator may apply for a Federal Employer Identification Number (EIN) with the Internal Revenue Service (IRS).¹ For the withholding of taxes from employees, farmers register with the Connecticut Department of Revenue Services, using REG-1.² Employers then establish a payroll system to calculate and administer paychecks and withholdings.³ Next, employers must create personnel files for the recordkeeping of documents, such as the form I-9,⁴ W-4,⁵ CT-W4,⁶ and W-2,⁷ as well as job descriptions, job applications, and related documents.⁸ As discussed below, employers may wish to establish best practices, such as compiling and providing an employee handbook or administering a sign-up for employee benefits.⁹

WORKER CLASSIFICATION

Workers will be paid and will have access to benefits according to their classification status. However, the

Distinguishing Workers

Onboarding a worker as an **independent contractor** could reduce administrative and operational costs because the employer would not be required to withhold income taxes, pay taxes such as Social Security and Medicare, or provide other, sometimes costly, employee benefits (e.g., insurance, 401K-Matching, etc.). Also, many state and federal employment laws do not apply to independent contractors. Categorizing a worker as an **employee** would mean subjecting the employer to such employment laws and taxation requirements. Beware, however, of **misclassification**.

¹ A farmer may have already been assigned an EIN if the farmer has formed a partnership, LLC, or corporation. The farmer may have this number on hand or retrieve it from the farm's accountant or directly from the IRS. For more on the EIN, *see Apply for an Employer Identification Number (EIN) Online*, U.S. INTERNAL REV. SERV. (LAST UPDATED NOV. 21, 2017), <http://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online>.

² *Registration Options*, CONN. DEP'T OF REV. SERVS. (LAST UPDATED APR. 2015), <http://www.ct.gov/drs/cwp/view.asp?a=1509&q=266240>.

³ *See* CONN. FARM RISK MGMT & CROP INS. PROG., Connecticut Agricultural Business Management Guide 56 (Mar. 14, 2016), http://ctfarmrisk.uconn.edu/index_106_306926045.pdf [hereinafter "Connecticut Farm BUSINESS GUIDE"].

⁴ The "Form I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must ensure proper completion of Form I-9 for each individual they hire for employment in the United States." *I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (LAST UPDATED JULY 17, 2017), <http://www.uscis.gov/i-9>.

⁵ The Form W-4 is used by employees to make elections for federal tax withholdings. Depending on how a W-4 is completed, employers will withhold the correct federal income tax from an employee's pay. W-4s should be completed anew each year and when personal or financial situations change. *See generally Form W-4, Employee's Withholding Allowance Certificate*, U.S. DEP'T OF INTERNAL REV. SERVS. (last updated Oct. 17, 2017), <http://www.irs.gov/uac/about-form-w4>.

⁶ The Form CT-W4 is used by employees to make elections for state tax withholdings. Like the Form W-4, employers will withhold taxes based on the elections made on the CT-W4. The CT-W4 should also be completed anew each year and when personal or financial situations change. *See generally FORM CT-W4: EMPLOYEE'S WITHHOLDING CERTIFICATE*, CONN. DEP'T OF REV. SERVS. (Jan. 1, 2017), <http://ct.gov/drs/lib/drs/forms/1-2017/wth/ct-w4.pdf>.

⁷ The IRS requires employers to report wage and salary information for employees on the Form W-2. A W-2 also reports the amount of federal, state and other taxes withheld from an employee paycheck. As an employee, the information on your W-2 is extremely important when preparing your tax return. *See Form W-2, Wage and Tax Statement*, U.S. INTERNAL REV. SERV. (LAST UPDATED NOV. 15, 2017), <https://www.irs.gov/uac/about-form-w2>. Independent contractors have a similar reporting form known as the 1099. *See About Form 1099-MISC, Miscellaneous Income (Info Copy Only)*, U.S. INTERNAL REV. SERV. (LAST UPDATED DEC. 14, 2017), <http://www.irs.gov/uac/about-form-1099misc>.

⁸ *See* CONNECTICUT FARM BUSINESS GUIDE, *supra* note 3, at 56.

⁹ *Id.*

classification of a worker depends on the facts of the relationship, not what the parties agree to call the relationship.¹⁰ As in other areas of business, the classification of a farmer's worker as an independent contractor or as an employee may result in a varying administrative burden (e.g., human resource management) or an additional financial burden to the employer (e.g., taxes). An employee misclassification may result in potential litigation by workers and governmental agencies, a requirement to pay back certain expenses, or a requirement to offer certain benefits.¹¹ All employers and their counsel should be aware of the classification of a worker as a volunteer, intern, or apprentice. Farm employers and their attorneys must also be aware of the distinction between agricultural employees and non-agricultural employees because of certain federal and state requirements, as well as exceptions, depending on this status.¹² Finally, farmers and lawyers should be aware of rules regarding the hiring of distinct types of agricultural workers: migrant and seasonal workers, immigrant workers, "crew leaders," and Farm Labor Contractors.

Independent Contractors and Employees Small businesses, including many farms in Connecticut, may prefer to contractually classify workers as "Independent Contractors." However, as mentioned, contractually classifying someone a contractor does not necessarily make them one. If a labor, tax, or judicial authority determines that the person has been misclassified, there may be requirements to pay back payroll taxes, unemployment taxes, or other related expenses.¹³ These authorities will base their determinations on many different factors, none of which is controlling and all of which are weighed according to individual circumstances.¹⁴ As such, employers should be aware of both federal and state regulatory requirements for worker classification, as well as the common law¹⁵ requirements authorities use to establish the appropriate status of a person as either an employee or a contractor. An overview of these factors is provided below:¹⁶

- **Common Law and the IRS 20-Factor Test:** A worker is an employee when the employer for which the services are performed has the right to "direct and control" the worker who performs the

¹⁰ *Independent Contractor (Self-employed) or Employee?*, U.S. INTERNAL REV. SERV. (last updated Nov. 30, 2017), <http://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

¹¹ See *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LABOR WAGE & HOUR DIV., <http://www.dol.gov/whd/workers/misclassification>.

¹² Connecticut Farm BUSINESS GUIDE, *supra* note 3, at 55.

¹³ *Id.* at 53.

¹⁴ *Id.* at 54.

¹⁵ *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) ("[T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles.")

¹⁶ These factors are by no means exhaustive, and the factors are meant to be broad sweeping. See JOINT COMMITTEE ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES 3 (May 7, 2007), <http://www.irs.gov/pub/irs-utl/x-26-07.pdf> ("The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed; factors other than the listed 20 factors may also be relevant.").

services.¹⁷ The IRS has identified twenty factors considered to determine the extent of the “right to control”, which are not exhaustive, but help guide worker classifications.¹⁸

- **Connecticut Department of Labor’s “ABC Test”:** Under Connecticut law, to be appropriately classified as an independent contractor, the independent contractor must (A) be free from control and direction by the employer; (B) perform a service outside the employer’s ordinary course of business or outside all of the employer’s places of business; and (C) be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.¹⁹

While a majority of Connecticut principal farm operators do not consider farming their primary occupation, the relationship with their workers may still be classified “employer–employee” under the common law “right to control” analysis. This is particularly true as principal farm operators may wish to instruct, train, and set the hours of workers. This is one reason farmers tend to hire “crew bosses” or “crew leaders” who then subcontract a staff of workers under their supervision, rather than under the direct supervision of the principal farm operator.

A crew leader is a person who furnishes and pays workers to do farm-work for the principal farm operator. If you are a crew leader, you are an employer of farmworkers. If there is no written agreement between the principal farm operator and an individual overseeing other workers, and if the individual (not the principal farm operator) pays other workers under them directly, then that individual will likely be considered a crew leader.²⁰ Some states have ruled that farm supervisors (or “crew leaders”), while holding a managerial role, may be considered independent contractors under the “right to control” analysis, and the IRS has made this distinction, as well.²¹ Attorneys should note that crew leaders may be different from Farm Labor Contractors, described below.

¹⁷ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–323 (1992); *Form 1099-MISC & Independent Contractors 1*, U.S. INTERNAL REV. SERV. (LAST UPDATED DEC. 4, 2017), <http://www.irs.gov/help-resources/tools-faqs/faqs-for-individuals/frequently-asked-tax-questions-answers/small-business-self-employed-other-business/form-1099-misc-independent-contractors/form-1099-misc-independent-contractors-1>.

¹⁸ See CONNECTICUT FARM BUSINESS GUIDE, *supra* note 3, at 56–58.. Attorneys may also wish to advise clients of the ability to request an IRS determination by filing Form SS-8. See *About Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, U.S. INTERNAL REV. SERV. (last updated Dec. 12, 2017), <http://www.irs.gov/uac/about-form-ss8>).

¹⁹ *Worker/Employer Misclassifications FAQs*, CONN. DEP’T OF LABOR (2017), <http://www.ctdol.state.ct.us/wgwkstnd/JEC/JEC-FAQs.htm>. Different Connecticut agencies use different rules and tests. For example, the Department of Revenue Services uses “common law rules” to determine worker classification. See *Standard Oil of Conn., Inc. v. Administrator*, 320 Conn. 611, 623–34 (2016); *Joint Enforcement Commission for Worker Misclassification*, CONN. DEP’T OF LABOR (2017), <http://www.ctdol.state.ct.us/wgwkstnd/JEC/JEC.htm>.

²⁰ PUBLICATION 51 (2017), (CIRCULAR A), AGRICULTURAL EMPLOYER’S TAX GUIDE, U.S. INTERNAL REV. SERV. (last updated Sept. 11, 2017), <http://www.irs.gov/publications/p51/ar02.html> [hereinafter “IRS PUBLICATION 51”].

²¹ *Palma v. Georgia Farm Bureau Ins. Co.*, 270 Ga.App. 333, 336 (2004) (“Based on the undisputed facts of this case, Stanley Farms does not control the time, manner, and execution of Oscar Cruz’s work to an extent that he could be considered an employee, rather than an independent contractor. Oscar Cruz hires his own workers, provides all tools to his workers, and sets his own hours.”).

Agricultural Employees and Non-Agricultural Employees Attorneys representing farmers should also be aware of the classification between agricultural employees and non-agricultural employees (or, farm-work and non-farm-work). These distinctions play an important role in the areas of employment tax, worker compensation, and worker exemptions.²²

Farm-work does not include reselling activities that do not involve any substantial activity of raising agricultural or horticultural commodities (e.g., a retail store or a greenhouse used primarily for display or storage). Additionally, farm-work does not include processing services that change a commodity from its raw or natural state, or services performed after a commodity has been changed from its raw or natural state.²³

The distinction is important because of federal and state exemptions that apply only for farmworkers.²⁴ For example, some farm-work employees may be exempt from the federal Fair Labor Standards Act (FLSA) overtime requirement, whereas non-farm-work employees would not.²⁵ Similarly, farmworkers and non-farmworkers will each be treated differently for tax purposes.²⁶ Finally, federal and state authorities will vary for migrant, seasonal, and immigrant workers. These distinctions are addressed below in more detail.

In general, you're an employer of farmworkers if your employees do the following:

- Raise or harvest agricultural or horticultural products on your farm (including the raising and feeding of livestock);
- Work in connection with the operation, management, conservation, improvement, or maintenance of your farm and its tools and equipment, if the major part of such service is performed on a farm;
- Provide services relating to salvaging timber, or clearing land of brush and other debris, left by a hurricane (also known as hurricane labor), if the major part of such service is performed on a farm;
- Handle, process, or package any agricultural or horticultural commodity in its unmanufactured state, if you produced over half of the commodity (for a group of up to 20 unincorporated operators, all of the commodity); or
- Do work for you related to cotton ginning, turpentine, gum resin products, or the operation and maintenance of irrigation facilities.

²² See IRS PUBLICATION 51, *supra* note 20.

²³ *Id.*

²⁴ "Agricultural employers who utilize the services of a farm labor contractor are almost always in a situation of joint employment with the contractor in regard to the employees. Joint employment means that both the contractor and the farmer are responsible for complying with the minimum wage, overtime, recordkeeping, and youth employment provisions of the law. If either party fails to comply with the law both parties may be held liable." *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT. OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

²⁵ *Id.*

²⁶ "If you employ both farm and nonfarm workers, you must treat employment taxes for the farmworkers (Form 943 taxes) separately from employment taxes for the nonfarm workers (Form 941 and 944 taxes). Form 943 taxes and Form 941/944 taxes aren't combined for purposes of applying any of the deposit schedule rules." IRS PUBLICATION 51, *supra* note 20.

Volunteers, Interns, and “Apprentices” New England farms are experiencing two different, but related trends: (1) “agritourism” is on the rise, and (2) a new generation of agriculturalists are learning the trade. **Agritourism** has become a popular segment of the agricultural industry, raising awareness of farm preservation, organic farm sustainability, and the value of farms in providing a nutritional diet.²⁷ Agritourism has led to an increase in volunteering on farms, which can implicate labor provisions. Additionally, the desire of current farm operators to want to train the next generation of farmers, coupled with desire for the next generation to want to work with experienced farmers, has created some confusion around how to classify volunteers, interns, and apprentices.²⁸ Lawyers counseling farmers should be aware of the intricacies for each of these classifications and should advise farmers on practices they can use to keep compliant with these intricacies.

Volunteers A volunteer is someone who, without compensation or expectation of compensation, performs services at the direction of a nonprofit employer.²⁹ Volunteers usually work on a part-time basis and solely for their own pleasure.³⁰ Under FLSA, for-profit, private-sector employers may not have volunteers.³¹ However, for-profit farms are able to have unpaid internships.³² Farms in the public sector may have volunteers with one major exclusion. They may not allow their employees to volunteer additional time (without compensation) for the same work they are employed to do.³³

Private-sector employees are free to volunteer in the public sector without any restriction.³⁴ Volunteering on farms has grown into an international effort, as exhibited by the popular volunteer program, Worldwide Opportunities on Organic Farms (WWOOF).³⁵ Particularly for small nonprofit farms, recruiting volunteers to work on a farm is a way to lower costs for farmers and provide a learning experience to those interested in the farming process. Other similar work-exchange programs include HelpX, Workaway, Global Help Swap, and Grow Food.³⁶ Farmers should be aware of the types of duties that they are delegating to volunteers, keeping responsibilities to non-critical functions of the business.³⁷ Employers should also be aware that even

²⁷ *Agritourism – An Overview*, NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/overview/agritourism>. See also CONN. GEN. STAT. § 22-38a.

²⁸ AM. FARMLAND TRUST, CONSERVATION L. FOUND. & NE. SUSTAINABLE AGRIC. WORKING GRP., NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM 37 (Mar. 2014), http://www.cdf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULL.pdf; Suzy Konecky, *Understanding Labor Laws for Beginning and Mentor Farms*, NE. ORGANIC FARMING ASS’N (2013), <http://www.nofamass.org/articles/2013/03/understanding-labor-laws-beginning-and-mentor-farms>.

²⁹ LAWYERS ALLIANCE FOR NEW YORK, THE VOLUNTEER WORKFORCE: LEGAL ISSUES AND BEST PRACTICES FOR NONPROFITS 7 (2007) [hereinafter “VOLUNTEER WORKFORCE”].

³⁰ *Id.*

³¹ *Fair Labor Standards Act Advisor*, U.S. DEP’T OF LABOR (2017), <http://webapps.dol.gov/claws/whd/flsa/docs/volunteers.asp>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *About Us*, FEDERATION OF WWOOF ORGS. (2016), <http://wwooof.net/#wwooof>. See also Will Coldwell, *Work on a Farm – and See the World for Free*, THE GUARDIAN (Nov. 26, 2013), <http://www.theguardian.com/travel/2013/nov/26/working-farm-holidays-around-the-world>.

³⁶ Christina Hegele, *Volunteer Abroad: WWOOFing and Other Options*, SANDAL ROAD (July 11, 2012), <http://sandalroad.com/travel-tips/wwooof/volunteer-abroad-wwooofing-and-other-options>.

³⁷ VOLUNTEER WORKFORCE, *SUPRA* NOTE 29, AT 29.

“partial compensation” of a volunteer may trigger other obligations under employment and wage laws.³⁸ Only public agencies are allowed to compensate volunteers by payment of reasonable fees or stipends; nonprofits may provide supplies related to the volunteer’s work or reimburse volunteers for their out-of-pocket expenses.³⁹ Connecticut courts have not recognized certain rights employees would have for individuals classified as volunteers.⁴⁰

Interns Legal counselors should be aware that interns would not fall under this volunteer category.⁴¹ Internships, like volunteer opportunities, are traditionally used to educate those looking to enter a particular industry through providing hands-on experience and oversight. Internships are for pay or not, and certain requirements apply.⁴² The Wage and Hour division of the U.S. Department of Labor (DOL) has specifically stated that internships must:

- be similar to training which would be given in an educational environment;
- be for the benefit of the intern;
- not displace regular employees, and provide for supervision by existing staff;
- not provide the employer with an immediate advantage from the activities of the intern;
- not necessarily entitle the intern to a job at the conclusion of the internship; and
- come to an understanding that the intern is not entitled to wages for the time spent in the internship (if unpaid).⁴³

Because farmers will traditionally obtain an immediate advantage from farm-work employees, these employees typically cannot be considered interns and would need to be paid. Non-agricultural employees however, may be classified as interns if they meet the above criteria. Unlike volunteers, Connecticut has expressly permitted rights for interns that allow them to bring complaints for workplace discrimination or harassment.⁴⁴

Student-workers Student-workers are those who are enrolled in school full-time and employed part-time. Student workers may be referred to as interns, but need to be paid.⁴⁵ These workers may be paid below

³⁸ *Are Volunteers a Legal Liability for Your Business?*, KAINEN, ESCALERA, & MCHALE, P.C. (Aug. 21, 2015), <http://www.kemlaw.com/are-volunteers-a-legal-liability-for-your-business>.

³⁹ VOLUNTEER WORKFORCE, SUPRA NOTE 29, AT 29 (citing 29 C.F.R. § 553.106).

⁴⁰ Paula N. Anthony, *Connecticut Supreme Court: Unpaid Volunteers Not Employees for Purposes of State’s Employment Anti-Discrimination Laws*, CONN. LABOR & EMPLOYMENT L.J. (Jul. 28, 2016), <http://www.connecticutlaboremploymentlawjournal.com/wage-hour/connecticut-supreme-court-unpaid-volunteers-not-employees-for-purposes-of-states-employment-anti-discrimination-laws>.

⁴¹ FARMERS’ LEGAL ACTION GROUP, INC., FARMERS’ GUIDE TO FARM INTERNSHIPS: FEDERAL AND MINNESOTA LABOR AND EMPLOYMENT LAW 2–2, (Feb. 2013), <http://www.flaginc.org/wp-content/uploads/2013/05/Farm-Intern-Guide-FINAL-w-covers.pdf>.

⁴² *FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT*, U.S. DEP’T OF LABOR WAGE & HOUR DIV. (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

⁴³ *Id.*

⁴⁴ An Act Protecting Interns from Workplace Harassment and Discrimination, Pub. Act No. 15-56, Conn. Gen. Assembly (2015), <http://www.cga.ct.gov/2015/act/pa/pdf/2015PA-00056-R00SB-00428-PA.pdf>.

⁴⁵ See 29 U.S.C. § 214; 29 C.F.R. §§ 520.200–508. sheet #12

minimum wage if the appropriate steps are taken by the employer to apply for and obtain a certificate from the DOL.⁴⁶ However, the DOL will not authorize the payment of less than minimum wage to student-workers unless the employer meets several requirements, including that the (1) employment of student workers “will not create a substantial probability of reducing the full-time employment opportunities” of other workers; and (2) “[t]he occupational needs of the community or industry warrant the training of student-learners.”⁴⁷

Apprentices An apprentice is a “worker, at least sixteen years of age unless a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade through a registered apprenticeship program. Training is provided through structured on-the-job training combined with supplemental related theoretical and technical instruction.”⁴⁸ In other words, an apprentice is recognized under the law as an employee. Apprentices are generally hired through registered apprentice programs with the federal government or Connecticut. Currently, Connecticut does not list agricultural opportunities as registered apprenticeships.⁴⁹ It is possible, however, for farm employees to be classified as apprentices under federal law. Should farmers choose to apply for the federal classification of its new hires as “apprentices,” or alternately as “learners,”⁵⁰ they would need to register with the DOL, and this may not substantively add value or affect employee expenses.⁵¹ Importantly, as discussed below, because of a 500-hour man-day exception, many small farms will already be exempt from the federal minimum wage requirement and thus may not find a large benefit in apprentice registration.

FEDERAL EMPLOYMENT PROVISIONS

Several other federal provisions impact farm labor and employment. Agencies such as the DOL, IRS, Equal Employment Opportunity Commission, and Occupational Safety and Health Administration administer many of these federal provisions to ensure worker safety and fair labor practices. These provisions typically cover

⁴⁶ *Subminimum Wage*, U.S. DEP’T OF LABOR, <http://www.dol.gov/general/topic/wages/subminimumwage>; *Fact Sheet #32: Youth Minimum Wage – Fair Labor Standards Act*, U.S. DEP’T OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs32.pdf>; Instructions for Form WH-205: Application to Employ Student-Learners at Subminimum Wages, U.S. DEP’T OF LABOR WAGE & HOUR DIV., http://www.dol.gov/whd/forms/fts_wh205.htm; *Special Employment*, U.S. DEP’T OF LABOR WAGE & HOUR DIV., <http://www.dol.gov/whd/specialemloyment>.

⁴⁷ See 29 U.S.C. § 214(b); 29 C.F.R. § 520.503.

⁴⁸ 29 C.F.R. § 520.300.

⁴⁹ See *Work Schedules – Apprenticeable Trades*, CONN. DEP’T OF LABOR (2018), <http://www.ctdol.state.ct.us/progsupt/appren/WorkSchedules/apptoc1.htm>.

⁵⁰ 29 C.F.R. § 520.300 provides: “*Learner* means a worker who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgment must be learned and who, when initially employed produces little or nothing of value. Except in extraordinary circumstances, an employee cannot be considered a “learner” once he/she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility(ies) during the past three years. An individual qualifying as a “learner” may only be trained in two qualifying occupations.”

⁵¹ See *What Is Registered Apprenticeship?*, U.S. DEP’T OF LABOR (last updated Nov. 21, 2014), <http://www.doleta.gov/OA/apprenticeship.cfm>. Importantly, Connecticut does not allow apprentices to be paid subminimum wage, there are however, instances when a learner may be paid a subminimum rate if registered with the Connecticut Labor Commissioner. See CONN. AGENCIES REGS. §§ 31-60-8 (apprentices), 31-60-7 (learners).

farm operators and their employees because they produce goods for interstate commerce.⁵² Farmers, in their employer capacity, are offered some exceptions from these provisions for farmworkers, such as minimum wage, overtime pay, recordkeeping, and child labor.⁵³

Federal Standards These federal provisions address the employment of migrant and immigrant workers as well as employee health and safety. Below is an overview of how these laws may affect farmers and their workers. It is important to keep in mind that, while these provisions set certain federal standards, these federal standards set a minimum bar, meaning higher standards may be set by the state and employers must comply with these higher standards. Two requirements that are *absolute* standards revolve around equal employment and federal tax.

- **Equal Employment Opportunity** laws prohibit employers from discriminating against employees, potential employees, or previous employees based on the employee's protected class (e.g., age, race, sex, religion, etc.).⁵⁴ Discriminatory practices include hiring and firing, classification, testing, and employee compensation, among others.⁵⁵ Equal Employment Opportunity requirements for farmers do not differ from employment requirements in other industries.
- **Federal Unemployment Tax Act (FUTA)** provides for payments of unemployment compensation to workers who have lost their jobs.⁵⁶ A farm employer pays FUTA tax if the farmer "paid cash wages of \$20,000 or more to farmworkers in any calendar quarter [during the previous year or current year], or employed ten or more farmworkers during at least some part of a day (whether or not at the same time) during any twenty or more different weeks [during the previous year or current year]."⁵⁷ Crew leaders are considered employees of the farm operator for purposes of FUTA, unless (a) the crew leader is registered under the Migrant and Seasonal Agricultural Worker Protection Act (discussed below), or (b) substantially all of the workers supplied by the crew leader operate or maintain farm machinery provided by the crew leader.⁵⁸
- **Prohibiting Retaliation:** As addressed in both section 15(a)(3) of the Fair Labor Standards Act and section 505(a) of the Migrant and Seasonal Agricultural Worker Protection Act, employers are prohibited

⁵² SEE Fact Sheet #12: *Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT. OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

⁵³ *Id.*

⁵⁴ *Federal Laws Prohibiting Job Discrimination Question and Answers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/qanda.html>.

⁵⁵ *Id.*

⁵⁶ IRS PUBLICATION 51, *supra* note 20.

⁵⁷ *Id.* "To determine whether you meet either test above, you must count wages paid to aliens admitted on a temporary basis to the United States to perform farmwork, also known as "H-2A" visa workers. However, wages paid to "H-2A" visa workers aren't subject to the FUTA tax."

⁵⁸ *Id.* Connecticut offers unemployment tax guidance on agricultural labor, as well. See *Conditions of Liability*, CONN. DEP'T OF LABOR (2017), <http://www.ctdol.state.ct.us/uitax/CondLiab.htm>.

from retaliating against an employee who has filed a complaint or cooperated in an investigation against the employer.⁵⁹

Fair Labor Standards Act (FLSA) FLSA is the federal statute that sets minimum wage, overtime, recordkeeping, and child labor standards, and it is enforced by the Wage and Hour Division of the DOL.⁶⁰ FLSA applies to any agricultural employee, as the term is defined under the Act.⁶¹ The Act offers exceptions to these employees in the above-mentioned areas of minimum wage, overtime, and child labor. FLSA allows employers to pay their employees either in the form of cash wages or in the form of non-cash benefits, also known as in-kind benefits.⁶² In-kind benefits are goods or services that an employer provides to an employee, such as food, housing, or other services.⁶³

Minimum Wage and Overtime FLSA institutes a “500 man-day” rule, which exempts employers from paying a minimum wage “if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor.” A man-day is “any day during which an employee performs agricultural labor for not less than 1 hour.”⁶⁴ Also, according to the statute, employees who are employed in agriculture are exempt from the overtime pay provisions, meaning employees do not have to be paid time-and-one-half their regular rates of pay for hours worked more than forty per week.

Child Labor Standards Numerous restrictions impact the employment of minors less than sixteen years of age, particularly in occupations declared hazardous. However, under FLSA, a farmer could allow an individual fourteen years of age or older to work on the farm if certain conditions are met.⁶⁵ There are also exceptions for children younger than fourteen and children related to the farmer.⁶⁶

Recordkeeping FLSA also sets strict standards for recordkeeping of all workers. One of these provisions requires employers to display an official poster outlining the provisions of the FLSA.⁶⁷ The FLSA also specifies

⁵⁹ *FACT SHEET # 77A: PROHIBITING RETALIATION UNDER THE FAIR LABOR STANDARDS ACT (FLSA)*, U.S. DEP’T OF LABOR WAGE & HOUR DIV. (Dec. 2011), <http://www.dol.gov/whd/regs/compliance/whdfs77a.pdf>; *FACT SHEET # 77C: PROHIBITING RETALIATION UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA)*, U.S. DEP’T OF LABOR WAGE & HOUR DIV. (Dec. 2011), <http://www.dol.gov/whd/regs/compliance/whdfs77c.pdf>.

⁶⁰ *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT. OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

⁶¹ *Id.* FLSA’s definition of agriculture appears to be broader than that of the IRS. See 29 U.S.C. § 203(f).

⁶² 29 C.F.R. § 531.2(a). See also 29 U.S.C. 203(m); Walter M. Luers, *Workfare Wages Under the Fair Labor Standards Act*, 67 FORDHAM L. REV. 203 (1998), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3502&context=flr>.

⁶³ *Id.*

⁶⁴ 29 C.F.R. § 780.305.

⁶⁵ 29 U.S.C. § 213(c).

⁶⁶ *Fact Sheet #40: Overview of Youth Employment (Child Labor) Provisions of the Fair Labor Standards Act (FLSA) for Agricultural Occupations*, U.S. DEP’T OF LABOR WAGE & HOUR DIV. (Dec. 2016), <http://www.dol.gov/whd/regs/compliance/whdfs40.pdf>; *Fact Sheet #32: Youth Minimum Wage – Fair Labor Standards Act*, U.S. DEP’T OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs32.pdf>.

⁶⁷ This poster is available electronically for downloading and printing at <http://www.dol.gov/osbp/sbrefa/poster/main.htm>.

what data are required to be kept and for how long.⁶⁸ FLSA also sets out the record keeping requirements for agricultural employers.⁶⁹ Like all other employers, farm employers are required to display an official poster outlining the requirements of the FLSA.⁷⁰ As a cautionary measure, employers may want to consider keeping more than one set of records; paper and electronic, for example. Some of the major retention requirements for employers include the following:

- **Three-Year Records:** Employers are required to preserve records of payroll, collective bargaining agreements, employment contracts, and sales and purchase records for three years.⁷¹
- **Two-Year Records:** Employers are required to preserve records of supplementary basic records for two years.⁷² This includes the following: basic employment and earnings records; wage-rate tables; order, shipping, and billing records; additions to or deductions from wages paid; and any records used by the employer to determine the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs are involved in the additions or deductions from wages paid.⁷³

These recordkeeping requirements are important in proving compliance with the standards and exceptions set by FLSA. They are also important in establishing compliance with other Department of Labor administered statutes such as the Migrant and Seasonal Agricultural Worker Protection Act.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)⁷⁴ Lawyers representing farmers should understand that certain seasons require an influx of workers. These workers are often referred to as migrant⁷⁵ or seasonal⁷⁶ workers. Like FLSA, MSPA also establishes employment standards related to wages and recordkeeping.⁷⁷ Because many migrant or seasonal employees are transient and often from immigrant communities, MSPA also establishes provisions pertaining to housing, transportation, and labor disclosures.⁷⁸

⁶⁸ *Fact Sheet #21: Recordkeeping Requirements Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs21.pdf>.

⁶⁹ 29 C.F.R. §§ 516.1–34.

⁷⁰ *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR WAGE & HOUR DIV. (2017), <https://www.dol.gov/whd/flsa>.

⁷¹ 29 C.F.R. § 516.5.

⁷² *Id.* § 516.6.

⁷³ *Id.*

⁷⁴ Migrant and Seasonal Agricultural Worker Act, Pub. L. 97-470, 96 Stat. 2583 (1983), <http://www.gpo.gov/fdsys/pkg/STATUTE-96/pdf/STATUTE-96-Pg2583.pdf>.

⁷⁵ The term "migrant agricultural worker" is "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8).

⁷⁶ The term "seasonal agricultural worker" is "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence (i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation. *Id.* § 1802(10).

⁷⁷ *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEP'T OF LABOR WAGE & HOUR DIV. (2017), <http://www.dol.gov/whd/mspa/index.htm>.

⁷⁸ *Id.*

Transportation, Housing, and in the Fields Farm employers must meet specific health and safety requirements. For example, if an employer provides **transportation** to workers, the method of transportation must be safe and meet certain requirements, such as a separate seat for each passenger, properly attached doors, adequate ventilation, and several others.⁷⁹ Similarly, if employers offer **housing**, it must be safe and sanitary, meeting such requirements as having a bed for each person, providing access to hot and cold running water, making available first aid kits, and complying with other like standards.⁸⁰ MSPA also addresses standards in the **field**, including drinking water, toilets, and hand-washing facilities.⁸¹ Employers who contract for these services must use only Farm Labor Contractors who are authorized to operate by the DOL.⁸²

Farm Labor Contractor Registration Farm Labor Contractors are individuals who, for compensation, perform any farm labor contracting activity (this is different than crew leaders, mentioned above).⁸³ To legally operate as farm labor contractors, individuals and companies must register with the DOL.⁸⁴ The DOL maintains a list of registered Farm Labor Contractors and a list of farm labor contractors whose authorization to operate has been revoked. If an employer wishes to use a Farm Labor Contractor, that employer must first verify the contractor's registration status.

Disclosures and Recordkeeping Employers must disclose the terms and conditions under which they are hiring, including the kind of work to be conducted, how much migrant workers will be paid, the number of hours the workers will work, and what type of housing the employer will provide (if any).⁸⁵ The employer must also keep records of information, such as identifying information of an employee and keep track of payroll data such as whether an employee is paid hourly, fixed, or piece-rate (i.e., paid-by the number of units the employee harvests).⁸⁶ Lawyers representing farmers should be aware of the nuances of these provisions. For example, farmers must include the time waiting for a truck to arrive to pick up workers or must include the time workers spend waiting for a field to dry.⁸⁷ Other detailed provisions also stipulate what notices or posters need to be presented and the language requirements of these disclosures.⁸⁸

⁷⁹ See 29 U.S.C. § 1841; 29 C.F.R. § 500.104; U.S. DEPT. OF LABOR, CULTIVATING COMPLIANCE: AN AGRICULTURAL GUIDE TO FEDERAL LABOR LAW 14–19, <http://www.dol.gov/whd/FLSAEmployeeCard/AgGuideEnglish.pdf> [hereinafter “CULTIVATING COMPLIANCE”].

⁸⁰ See 29 U.S.C. 1823; 29 C.F.R. §§ 500.130–135; CULTIVATING COMPLIANCE, *supra* note 79, at 20–25.

⁸¹ *Id.* at 28–29.

⁸² Employers are encouraged to verify the “Farm Labor Contractor Certificate of Registration” card. See *id.* at 18.

⁸³ The term “farm labor contracting activity” means “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” 29 U.S.C. § 1802(6).

⁸⁴ There are special registration requirements for farm labor contractors who intend to house, transport, or drive a migrant or seasonal agricultural worker. U.S. DEPT. OF LABOR, *Instructions for Form WH-530: Application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration*, U.S. DEP’T OF LABOR WAGE & HOUR DIV., http://www.dol.gov/whd/forms/fts_wh530.htm.

⁸⁵ 29 U.S.C. § 1821(a).

⁸⁶ *Recordkeeping*, U.S. INTERNAL REV. SERV. (LAST UPDATED NOV. 29, 2017), <http://www.irs.gov/businesses/small-businesses-self-employed/recordkeeping>.

⁸⁷ *Cultivating Compliance – An Agricultural Guide to Federal Labor Law*, U.S. Dep’t of Labor, <http://www.youtube.com/watch?v=tjYEFvsUeq0&feature=youtu.be>.

⁸⁸ 29 U.S.C. §§ 1821(b), (g).

Joint Employer Liability Under both FLSA and MSPA, the DOL may determine that an agricultural employer who uses the services of a Farm Labor Contractor or a crew leader is a “joint employer” of the workers furnished by the contractor.⁸⁹ In joint employment situations, the agricultural employer or association is equally responsible with the party furnishing the workers for compliance with employment-related FLSA and MSPA obligations (e.g., proper payment of wages, disclosures, and recordkeeping).⁹⁰ Courts will often consider the “joint employment” status of labor contractors and growers based on the “economic reality” of the relationship.⁹¹ An example of factors a court might consider are whether (1) the growers control the number of workers needed and the specific hours of work; (2) have a significant degree of supervision and intervention in the work process; (3) are involved in payroll practices; and (4) have responsibility for investment and/or ownership of equipment used by the workers.⁹²

The joint employment test varies by jurisdiction and attorneys should be aware that, for matters such as Connecticut Workers’ Compensation liability, the state statute favors the worker or employee.⁹³ Attorneys should also be aware of two forms of joint employment: horizontal and vertical. In 2016, the DOL issued two Administrative Interpretations discussing these forms of joint employment. Though they have since been withdrawn, attorneys may wish to provide farm operators with background for both.⁹⁴ Per the previous DOL guidance, a **horizontal joint employment relationship** exists when an “employee has employment relationships with two or more employers, and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee.”⁹⁵ A **vertical joint employment relationship** may exist where the employee has a relationship with one employer, but the circumstances show the employee is, in fact, employed by another entity.⁹⁶ Vertical joint employment is most commonly found in relationships involving staffing agencies, labor providers and subcontractors.⁹⁷

⁸⁹ *Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEPT. OF LABOR WAGE & HOUR DIV. (Jan. 2016), <http://www.dol.gov/whd/regs/compliance/whdfs35.pdf>.

⁹⁰ *Wages and Hours Worked: Worker Protections in Agriculture*, U.S. DEP’T OF LABOR (Dec. 2016), <http://www.dol.gov/compliance/guide/mspa.htm>.

⁹¹ See 29 C.F.R. § 791.2(a) (“A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of [FLSA] depends upon all the facts in the particular case.”). See also *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

⁹² *Id.* at 933–38. See also, *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir. 2016).

⁹³ CONN. GEN. STAT. § 31-291.

⁹⁴ Jennifer Hazelton, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance*, U.S. DEP’T OF LABOR (June 7, 2017), <http://www.dol.gov/newsroom/releases/opa/opa20170607>.

⁹⁵ ADMINISTRATOR’S INTERPRETATION NO. 2016-1, JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT AND MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT, U.S. DEP’T OF LABOR (Jan. 20, 2016), http://www.smithmoorelaw.com/webfiles/DOL_Joint_Employment2016.pdf.

⁹⁶ *Id.*

⁹⁷ *Id.*

H-2A Visa Program Through the Immigration and Nationality Act, the DOL also oversees employer compliance requirements for immigrant workers. The H-2A Visa program is a special visa to “guest workers,” workers who come into the United States specifically to perform temporary agricultural labor.⁹⁸ The program is designed to ensure farmers have enough labor to cultivate the farm while also protecting job opportunities for U.S. workers.⁹⁹ These workers may be hired through an application process with the DOL’s Employment and Training Administration.¹⁰⁰ In the application, the employer must state that (1) there are not a sufficient number of U.S. workers able, willing, and qualified to perform the requested services, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S.

workers. Lawyers should be aware of the nuances in recordkeeping, reporting, and disclosures that are required if farmers employ H-2A workers.¹⁰¹

H-2A Visa Program Topline Requirements:

- H-2A workers and domestic workers in like employment must be paid special rates of pay that vary by locality;
- Must be provided housing and transportation from that housing to the job site if their employment requires them to be away from their residence overnight; and
- Must be guaranteed an offer of employment for a total number of hours equal to at least 75 percent of the work period specified in the contract.

Occupational Safety and Health Act (OSHA) OSHA provisions will also impact farm operators. OSHA regulates the health and safety of farmers.¹⁰² OSHA implements a general duty on employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” and requires compliance with occupational safety and health standards promulgated under the Act.¹⁰³

⁹⁸ *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)*, U.S. DEPT. OF LABOR WAGE & HOUR DIV. (Feb. 2010) <http://www.dol.gov/whd/regs/compliance/whdfs26.pdf>.

⁹⁹ JASPER WOMACH, CONG. RESEARCH SERV. LIBRARY OF CONG., AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS, AND LAWS, 2005 EDITION 133 (2005), http://digital.library.unt.edu/ark:/67531/metacrs7246/m1/1/high_res_d/97-905_2005Jun16.pdf.

¹⁰⁰ The H-2A Visa application can be viewed at <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>.

¹⁰¹ See, e.g., CULTIVATING COMPLIANCE, *supra* note 79, at 32–37.

¹⁰² The Occupational Safety and Health Administration, the department that oversees OSHA, describes farming as “the nation’s most hazardous occupation.” WOMACH, *supra* note 99, at 189. OSHA defines a “farming operation” as “any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.” Dorothy Dougherty, *Policy Clarification on OSHA’s Enforcement Authority at Small Farms*, U.S. DEP’T OF LABOR (July 29, 2014), https://www.osha.gov/dep/enforcement/policy_clarification_small_farms.html.

¹⁰³ 29 U.S.C. § 654(a).

OSHA specifically addresses hazards and controls that agricultural employers should be aware of, including but not limited to, vehicle hazards, heat, ladders and falls, and musculoskeletal injuries.¹⁰⁴ These provisions also provide guidelines for other matters, like accident prevention signage, machinery guarding, and Workers' Compensation insurance.¹⁰⁵ Lawyers should also note that small businesses have some exemptions under OSHA, including for farmers who employ ten or fewer employees.¹⁰⁶

CONNECTICUT EMPLOYMENT PROVISIONS

As mentioned above, it is important for attorneys to note that some states will have analogous laws to those above, who may set higher standards for farm employers.¹⁰⁷ In Connecticut, however, the state's own counterpart to OSHA (CONN-OSHA) covers only state and municipal public employees and generally mirrors OSHA.¹⁰⁸ Aside from CONN-OSHA, Connecticut also has standards to enforce the misclassification of workers¹⁰⁹ and provisions that set standards for minors in agricultural employment, which deal with minimum wage exceptions and exceptions to overtime pay.¹¹⁰ For example, the Connecticut minimum wage is currently \$10.10 (as of January 1, 2017), whereas the federal minimum is \$7.25 (as of July 24, 2009).¹¹¹ It is important for attorneys to be aware of other standards, as they may (like minimum wage) set a higher bar than those set by the federal provisions mentioned above.

¹⁰⁴ *Agricultural Operations: Hazards & Controls*, U.S. DEPT. OF LABOR OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/dsg/topics/agriculturaloperations/hazards_controls.html; *FACT SHEET #51: FIELD SANITATION STANDARDS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT*, U.S. DEP'T OF LABOR WAGE AND HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs51.pdf>.

¹⁰⁵ *SEE, E.G., HAZARD PREVENTION AND CONTROL*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY & HEALTH ADMIN., [HTTPS://WWW.OSHA.GOV/SHPGUIDELINES/HAZARD-PREVENTION.HTML](https://www.osha.gov/shpguidelines/hazard-prevention.html).

¹⁰⁶ *Small Business*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY & HEALTH ADMIN., <http://www.osha.gov/dcsp/smallbusiness/index.html>; Jeff Caldwell, *OSHA Clarifies Small Farm Regulation; Does it Apply to Your Farm?*, SUCCESSFUL FARMING (Aug. 6, 2014), http://www.agriculture.com/news/business/osha-clarifies-small-farm-regulation_5-ar44607.

¹⁰⁷ John Moran, *Employment of 14- and 15-year-olds in Connecticut Compared to Federal Law*, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (May 30, 2008), <http://www.cga.ct.gov/2008/rpt/2008-R-0330.htm>.

¹⁰⁸ *Connecticut*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY & HEALTH ADMIN., <http://www.osha.gov/dcsp/osp/stateprogs/connecticut.html>; *Worker Safety (Occupational Safety and Health – CONN-OSHA)*, CONN. DEP'T OF LABOR (last updated Oct. 6, 2017), <http://www.ctdol.state.ct.us/osha/osha.htm>.

¹⁰⁹ See Guy Brenner & Carolyn M. Dellatore, *Connecticut Supreme Court Issues Important Clarification for Independent Contractor Test*, Proskauer Rose LLP (Mar. 23, 2017), <http://www.lawandtheworkplace.com/2017/03/connecticut-supreme-court-issues-important-clarification-for-independent-contractor-test>.

¹¹⁰ "Minors under 18 years of age employed in agriculture may be paid 85% of the applicable minimum wage. Minors employed by agricultural employers who did not, during the preceding calendar year, employ eight or more workers at the same time shall be paid a minimum wage of not less than 70% of the minimum wage as defined in section 31-58." *Wage and Workplace Standards*, CONN. DEP'T OF LABOR WAGE & WORKPLACE STANDARDS DIV. (May 2015), <http://www.ctdol.state.ct.us/wgwkstnd/DOL-75.pdf>; CONN. DEP'T OF LABOR WAGE & WORKPLACE STANDARDS DIV., *A GUIDE TO WAGE AND WORKPLACE STANDARDS DIVISION AND ITS LAWS*, <http://www.ctdol.state.ct.us/wgwkstnd/MinWageGuide2014.pdf>.

¹¹¹ *Minimum Wage Laws in the States – September 30, 2017*, U.S. DEP'T OF LABOR (last updated Sept. 30, 2017), <http://www.dol.gov/whd/minwage/america.htm>; Karl Russell, *A Higher Minimum Wage in 2017*, N.Y. TIMES (Jan. 5, 2017), <http://www.nytimes.com/interactive/2017/01/05/business/economy/state-minimum-wages.html>.

Connecticut Department of Labor (CT DOL) The CT DOL’s rules align with and differ from the federal DOL’s rules in particular ways.¹¹² Lawyers counseling farmers should be prepared to address these differences with their clients and should be well versed in sections providing for exceptions. These standards can often be left open for interpretation and can vary based on individual circumstance. For example, the CT DOL allows farmers to make deductions or allowances for the “reasonable value of board and lodging” for their workers;¹¹³ however, the provision also stipulates a varying maximum allowable deduction for private rooms versus shared rooms.¹¹⁴ An additional example, further showcasing how the standard may be left to interpretation, provides that deductions may be made for a “full meal” but also stipulates which “wholesome nutritious food” and what portions of such nutritious food constitutes a “full meal.”¹¹⁵

Connecticut Department of Agriculture The Connecticut Department of Agriculture administers, licenses, and permits specific agricultural operations, such as dairy, livestock, poultry, domestic pet-related, agricultural commodities, and seafood.¹¹⁶ The Department also conducts inspections and enforces the laws regulating these operations.¹¹⁷

Connecticut Workers’ Compensation Act The main purpose of the Connecticut Workers’ Compensation Act is to provide wage replacement and other benefits (e.g., medical treatment) for those employees who have been injured, disabled, or killed while performing their jobs.¹¹⁸

Recordkeeping Connecticut specifically states that employers must furnish certain information in writing at the time of hiring a new worker. This requirement includes the rate of pay, the hours of employment, and the wage payment schedule. Employers must also make available to employees in writing any employment practices and policies or changes to such policies (e.g., policies including vacation, sick pay, wages, health and welfare matters, etc.).¹¹⁹

LABOR AND EMPLOYMENT BEST PRACTICES

Lawyers should not only be adept at counseling on legal matters specific to farms, but they should also be able to advise farm operators in a quasi-legal capacity, helping farmers address issues that may not be strictly legal, but issues that will help farmers oversee a smooth and successful workforce. The below explores a few farm

¹¹² Moran, *supra* note 107 (stating that agricultural employers may employ fourteen- and fifteen-year-olds, as well as minors as young as twelve years old outside of school hours with written permission from their parents).

¹¹³ CONN. AGENCIES REGS. § 31-60-3.

¹¹⁴ *Id.* § 31-60-3(f).

¹¹⁵ *Id.* §§ 31-60-3(c)(1)–(6), (d)(1)–(5).

¹¹⁶ *Licenses and Permits*, CONN. DEP’T OF LABOR (2017), <http://www.ct.gov/doag/cwp/view.asp?a=1365&Q=477664&PM=1>.

¹¹⁷ *Bureau of Regulatory Services*, CONN. DEP’T OF LABOR, <http://www.ct.gov/doag/cwp/view.asp?a=1367&q=259106&doagNav=|>.

¹¹⁸ *An Introduction to Workers’ Compensation in Connecticut*, Conn. Workers’ Compensation Comm’n (last updated May 22, 2001), <http://wcc.state.ct.us/gen-info/wc-intro.htm>. Employers of agricultural employees may have certain exemptions pertaining to smaller business. See CONN. DEP’T OF LABOR, AN EMPLOYER’S GUIDE TO UNEMPLOYMENT COMPENSATION 3 (AUG. 2010), <http://www.ctdol.state.ct.us/uitax/empl-guide.pdf>.

¹¹⁹ CONN. GEN. STAT. § 31-71f.

and food industry best practices geared toward improving the management of labor and employment matters as well as increasing access to industry specific agency benefits.

Disclosures Farm operators can utilize disclosures to foster a positive and safe place of employment. There are some disclosures regarding employment that farmers are required to produce, such as clearly displaying posters regarding responsibilities and wages. Farmers may also wish to display posters that are not required but will assist employees in their day-to-day efforts. Such posters may include best safety practices, way-fairing signs to help farmers navigate the land, or workers' rights posters. Farmers should also be sure to confirm employees are aware of these disclosures through routine communication with their workers.

Handbook Employers should also consider the need to create and maintain a positive farm culture through handbooks, which farmers should require employees to read at the beginning of their work relationship. These handbooks should address farm employment practices, and farmers should consider a separate section or an entirely separate handbook dedicated to farm safety. These handbooks should be in English, Spanish, and any other languages pertinent to the farmworkers.

Recordkeeping Recordkeeping is vital to the success of any agricultural employer. As a best practice, employers should maintain a personnel file for each employee. Personnel files should contain data related to employment. Personnel files should not contain medical information and certain other types of sensitive information. Medical information should be stored in separate and confidential medical files.¹²⁰ Employers should also keep applicant records for non-hires, such as resumes, application forms, interview notes, and skill inventories.¹²¹ Although laws do not require electronic retention, electronic retention should be considered because employers are required to promptly retrieve and produce legible copies of records.¹²²

Non-Traditional Benefits Employers can help retain employees by offering a number of non-traditional benefits, such as allowing social service agencies to conduct outreach on the farm, letting employees take home food from the farm, providing no-interest loans to employees that can be paid back through payroll deductions, among many other benefits.¹²³

Employment of Family Members There are a number of exemptions when family member are workers at a farm. Attorneys should be aware that minimum wage, overtime, and other various accompanying disclosures and recordkeeping requirements likely do not apply to family members working on the farm,

¹²⁰ HR Solutions Blog Team, *RECORDKEEPING FAQS: RETENTION, ACCESS & MORE*, ADP (Aug. 10, 2015), [HTTP://SBSHRS.ADPINFO.COM/BLOG/RECORDKEEPING-FAQS-RETENTION-ACCESS-AND-MORE](http://sbshrs.adpinfo.com/blog/recordkeeping-faqs-retention-access-and-more).

¹²¹ HR Solutions Blog Team, *New Hire Paperwork and Other Recordkeeping Requirements* ((Aug. 24, 2015), <http://sbshrs.adpinfo.com/blog/new-hire-paperwork-and-other-recordkeeping-requirements>.

¹²² *Id.* Electronic records may make searching records easier as well..

¹²³ CALIFORNIA INSTITUTE FOR RURAL STUDIES ET AL., *POSITIVE PRACTICES IN FARM LABOR MANAGEMENT – KEEPING YOUR EMPLOYEES HAPPY AND YOUR PRODUCTION PROFITABLE* (2008), <http://attra.ncat.org/attra-pub/download.php?id=278>.

though this type of relationship may bring other challenges, particularly upon a blurring of the relationship between business and family.¹²⁴

Paid Sick Leave The state of Connecticut requires employers to pay paid sick leave if they employ fifty or more people.¹²⁵ For farm employers who do not meet this threshold, it may still be advantageous to offer paid sick leave, as farm employees have noted that this is the second-most important fringe benefit (health insurance being the most important).¹²⁶

Wagner-Peyser Agricultural Outreach CONN-DOL, through the Wagner-Peyser Agricultural Outreach Plan (the “Plan”), aims to provide services to the agricultural community for employers and workers.¹²⁷ This Plan tracks metrics of agricultural activity in Connecticut and assists farmers in navigating the migrant-worker screening and hiring process. Through the Plan, the state also assists by providing informational packets to migrant or seasonal workers and also helps match employers and employees.

CONCLUSION

Becoming an employer and remaining a compliant employer are detail-oriented processes that require clear communication and structure as well as rigorous attention to detail, safety, and healthy working conditions. Formal structures will help employers define employer-and-worker structures and keep a system in place for managing the complexities of payroll, benefits, seasonal hiring, and labor reporting. Safety will be progressed both through communication and formal structures, but farmers should also be ever cognizant of their surroundings and working conditions. Through these steps, attorneys can effectively work with farmers to create clear relationships that are compliant with federal and state regulations. In this way, attorneys can help farmers continue to steward the land and grow the local economy.

RESOURCES

Connecticut Agricultural Business Management Guide

http://www.ct.gov/doag/lib/doag/marketing_files/agbusinessguide_9_28_10%5B1%5D.pdf.

United States Department of Labor, *Cultivating Compliance: An Agricultural Guide to Federal Labor Law Handbook*

<http://www.dol.gov/whd/FLSAEmployeeCard/AgGuideEnglish.pdf>.

¹²⁴ See, e.g., 29 C.F.R. § 570.70 (EXCEPTING FROM FLSA YOUTH BELOW THE AGE OF SIXTEEN WHO ARE EMPLOYED BY THEIR PARENTS). SEE ALSO *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT. OF LABOR WAGE & HOUR DIV. (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>

¹²⁵ *Connecticut General Statute 31-57r – Paid Sick Leave*, CONN. DEP’T OF LABOR (2017), <http://www.ctdol.state.ct.us/wgwkstnd/SickLeave.htm>.

¹²⁶ GREGORIO BILLIKOPF, LABOR MANAGEMENT IN AGRICULTURE: CULTIVATING PERSONNEL PRODUCTIVITY 223–24 (2014), <http://nature.berkeley.edu/ucce50/ag-labor/7labor/17.pdf>.

¹²⁷ WAGNER-PEYSER AGRICULTURAL OUTREACH, CONN. DEP’T OF LABOR (2013), http://www.ctdol.state.ct.us/wia/MSFW-AOP2013_6-17-13.pdf.

Occupational Safety and Health Administration, *Agricultural Safety Fact Sheet – Emergency Preparedness for Farmworkers*

<http://www.osha.gov/Publications/OSHA3870.pdf>.

Organic Growers School

<http://organicgrowersschool.org/structuring-labor-on-the-small-farm>.

Connecticut Department of Agriculture, *Agricultural Laws and Regulations*

<http://www.ct.gov/doag/cwp/view.asp?a=1366&q=446556>.

Community Involved in Sustaining Agriculture, *Labor Law and Management Tipsheets – Farm Apprenticeships*

<http://www.buylocalfood.org/upload/resource/Labor.farmapprenticeshipsfinal.pdf>.