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Center for Agricultural
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MARKETING

Ag Workplace / Legal Compliance /

COVID-19 Vaccine

Brook Duer, Session Moderator



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- The session will end promptly at the specified end time



Ag Workforce Legal Compliance Check-up

Brook Duer, Penn State Ag Law Center





PennState Law

Center for Agricultural
and Shale Law

Ag Workforce Legal Compliance Check-Up



Monday, February 8, 2021
2:30 pm – 3:30 pm



Objective:

- 2020 was an eventful year for federal and state government changes to laws, regulations and guidance which impact the employer-employee relationship.
- Many have become routine, some have gone away, some are still with us.
- This session will attempt to arm agricultural employers with the chance to do a “check-up” on compliance with some current changes/requirements as well as provide lots of information on where to go for answers and guidance.



3:30 Session:

Keystone Agricultural Worker Program: Information on COVID-19 and Vaccination



Keystone Health Agricultural Worker Program

Information on COVID-19 and Vaccination



Materials adapted from CDC presentation
JANUARY 2021

FOR MORE INFORMATION: [cdc.gov/COVID19](https://www.cdc.gov/COVID19)

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Agricultural Law Weekly Review

The Agricultural Law Weekly Review provides an update of recent agricultural law developments from local, state, national, and international levels. Subscribe at pennstateaglaw.com.

Agricultural Law Weekly Review—week ending December 18, 2020

Pesticides/Herbicides: Punitive Damages Reduced to \$60 Million in Bader Farms Dicamba Case

On November 25, 2020, the U.S. District Court for the Eastern District of Missouri issued an opinion and order on post-trial motions reducing to \$60 million the February 2020 jury award of \$250 million in punitive damages against Monsanto/Bayer and BASF as a result of dicamba-caused property damage to a Missouri peach producer’s orchards in Bader Farms, Inc. v. Monsanto Company, No. 1:16-cv-00299. For more background, see ALWR—February 20, 2020, “Missouri Federal Jury Returns \$265 Million Verdict in Dicamba [...]

December 21st, 2020 | Tags: Agricultural Labor, Biotechnology, Invasive Species, Pesticides/Herbicides

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Agricultural Law Weekly Review—week ending December 11, 2020

Dean Foods Bankruptcy: Pennsylvania Milk Marketing Board Negotiates Nationwide Solution to Preference Payment Claims

On December 9, 2020, the Pennsylvania Milk Marketing Board (PMMB), partnering with the Pennsylvania Office of Attorney General, announced that it had negotiated with the St. Paul, Minnesota, law firm representing the Chapter 11 bankruptcy estate of Dean Foods, ASK LLP. As a result, the PMMB prepared, and posted on the PMMB website, forms which can be downloaded, completed by producers and milk haulers in any state in the country, and mailed to ASK LLP as soon as possible as a response to the [...]

December 15th, 2020 | Tags: Agribusiness, Animal Health, Conservation Programs, Dairy Policy, Food Labeling, Industrial Hemp, International Trade

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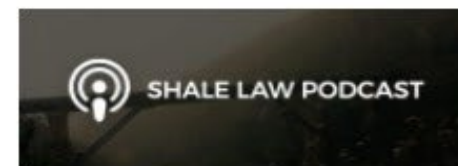
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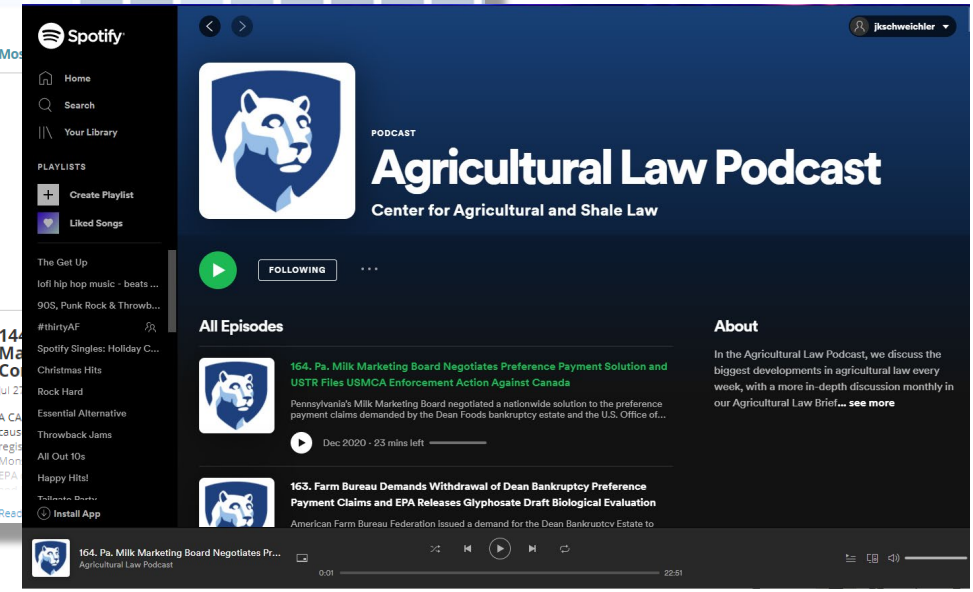
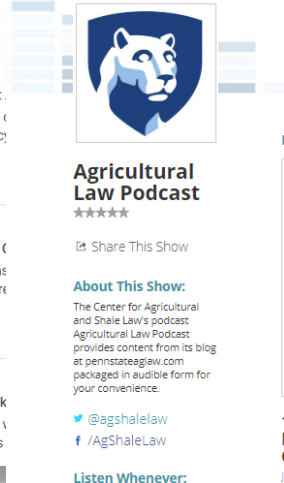
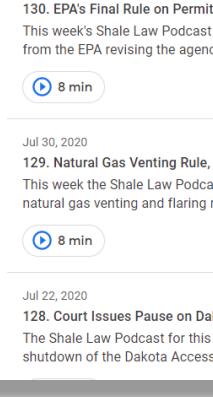
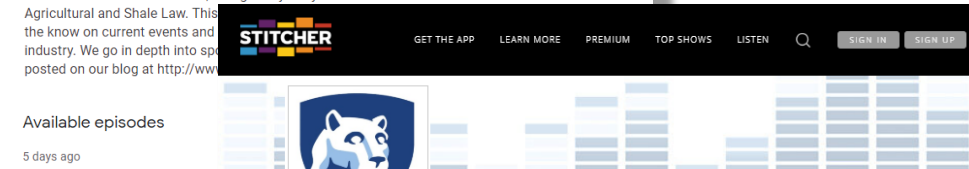
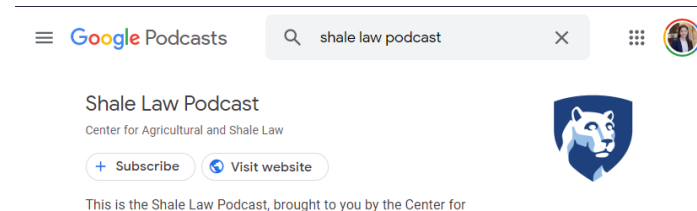
> [The CASL Ledger](#)





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- Stitcher





Pennsylvania Agricultural Mediation Program



- Who can request mediation?
 - USDA-related issues:
 - Agricultural Loans
 - Wetlands determinations
 - Compliance with farm programs, including conservation programs
 - National organic program established under the Organic Foods Production Act of 1990
 - Agricultural Credit
 - Rural water loan programs
 - Grazing on National Forest System land
 - Pesticides
 - Non-USDA issues:
 - Lease issues; including land leases and equipment leases.
 - Family farm transition.
 - Farmer-neighbor disputes



Pennsylvania Agricultural Mediation Program

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2020, we all remember it well.

- **Changes in federal and state employment-related laws, regulations and advisory “guidance” documents were coming out non-stop beginning in late March/early April when the pandemic hit the U.S.**
- **Hopefully, employers absorbed what was needed and got along alright. Now, it is 9 months later.**

So, what is new or has changed since then?



Expired Mandatory Requirement:

- Families First Coronavirus Response Act (FFCRA) requirements re: (1) *Paid Emergency Sick Leave* and (2) *Expanded FMLA Leave* expired 12/31/20!



Families First Coronavirus Response Act (FFCRA)

Eff. 4/1/20 - 12/31/20

- Employers with fewer than 500 employees.
- Refundable tax credits for amounts paid in leave and health coverage during leave.
- [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#)
- **Paid Emergency Sick Leave**
 - Any employee on payroll gets 10 days of paid sick leave benefits if :
 - subject to a government quarantine/isolation order or advised by a health care provider to self-quarantine
 - has symptoms of COVID-19 and is seeking a medical diagnosis
 - caring for a relative who is in quarantine/isolation or unable to work because their child's school/childcare is closed due to COVID-19
 - Leave for own illness/quarantine/isolation = Regular daily pay, up to cap of \$511
 - Leave to care for a family member/child due = 66% of regular daily pay, up to cap of \$200
 - Don't have to exhaust other sick leave first.



Families First Coronavirus Response Act (FFCRA) (cont.)

- Expanded FMLA leave

- 12 weeks of leave if cannot work because their minor child's school or childcare service is closed due to COVID-19.
- Applies to any employee who has been on the payroll for at least 30 days.
- May be used intermittently if approved by your employer.
- Employee may use Emergency Paid Sick Leave for the first 2 weeks (otherwise unpaid) or may also substitute other available paid leave.
- For the remaining 10 weeks, leave benefit paid at 66% or regular earnings up to a cap of \$200/day (or \$10,000 total)
 - Varying hour calculation for part-time employees



What is FFCRA leave's relevance now?

- The mandatory [employee rights poster](#) is no longer required as of 12/31/20.
- Leave can be offered voluntarily, and the accompanying tax credit still applies until 3/31/21.

FFCRA Leave Requirements Expired Dec. 31, 2020

The requirement that employers provide paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA) expired on Dec. 31, 2020. Please visit the Wage and Hour Division's [FFCRA Questions and Answers](#) page to learn more about workers' and employers' rights and responsibilities after this date. An employer may voluntarily decide to provide such leave. The Consolidated Appropriations Act, 2021, **extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to employees until March 31, 2021.**

Employers with questions about claiming the refundable tax credits for qualified leave wages should consult with the IRS. Information can be found on the IRS website (<http://www.irs.gov/coronavirus/new-employer-tax-credits>).



What else is new?

- **IRS: Guidance on Reporting Qualified Sick Leave Wages and Qualified Family Leave Wages Paid Pursuant to the Families First Coronavirus Response Act**
- **IRS: COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs**
- **IRS: Employee Retention Credit** - tax credit that may be available to employer for wages paid between 3/12/20 – 1/1/21, but not for FFCRA leave.
- **DOL: Federal Supplemental Unemployment Change**: Federal Pandemic Unemployment Compensation (FPUC) restarted at \$300/wk starting 12/26/20 (previously expired 7/31/20) and ending March 14, 2021.



CDC Guidance Documents (non-binding)

The CDC is not a regulatory body but has issued guidance documents on various subjects. They don't contain mandatory regulatory requirements but provide best practices.

- [COVID-19 Critical Infrastructure Sector Response Planning](#) (last updated 12/3/20)
- [Meat and Poultry Processing Workers and Employers](#) (April 26, 2020) - last updated 2/6/21
- [Agriculture Workers and Employers](#) (June 2, 2020) – last updated 2/2/21



Other Guidance from CDC

- [Considerations for Outdoor Farmers Markets](#) (last updated 9/17/20)
- [What Grocery and Food Retail Workers Need to Know about COVID-19](#) (11/12/20)

PDA Guidance

- [Farmers Markets](#)
[Farms & On-Farm Deliveries](#)
[Retail Food/ Manufacturing Processes for Sanitation and Diagnosed Employees](#)
[Public Health Safety Measures for Life Sustaining Food Businesses Permitted to Maintain Operations](#)
[Grocery & Convenience Store Employees](#)
[Agricultural Auctions & Markets](#)
[Modifications to Seasonal Farm Labor Camp Requirements](#)



OSHA – few applicable regulations

Apart from PPE specifications (if employed), the sole mandatory workplace regulatory requirement OSHA presently has at its disposal is the so-called “General Duty Clause”

General Duty Clause	
OSH Act 5(a)(1)	The employer did not furnish a place of employment that was free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. Under the general duty clause, employers must protect employees from COVID-19 hazards at the workplace by, for example, installing plastic barriers or ensuring social distancing.



OSHA - *New* Guidance Document (non-binding)

While OSHA had joined with CDC on their non-binding guidance documents, OSHA had not addressed much substance beyond mask issues until the President issued a 1/21/21 Executive Order directing OSHA to issue revised guidance.

- **Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace** (1/29/21)

Previous 1–2-page, non-detailed substantive releases :

- Preventing Farmworker Exposure to COVID-19 in Employer-Provided Vehicles (December 2020)
- COVID-19 Guidance on the Use of Cloth Face Coverings while Working **Outdoors** in Hot and Humid Conditions (September 2020)
- COVID-19 Guidance on the Use of Cloth Face Coverings while Working **Indoors** in Hot and Humid Conditions (September 2020)



OSHA (cont.)

- [Understanding Compliance with OSHA's Respiratory Protection Standard During the Coronavirus Disease 2019 \(COVID-19\) Pandemic](#) (August 2020)
- [Frequently Asked Questions](#). (July 2, 2020).

Documents explaining OSHA's flexible approach to enforcement:

- [Lessons Learned: Frequently Cited Standards Related to COVID-19 Inspections](#) (November 6, 2020)
- [Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#) (May 19, 2020).
- [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\)](#). (May 19, 2020).
- [Discretion in Enforcement when Considering an Employer's Good Faith Efforts During the Coronavirus Disease 2019 \(COVID-19\) Pandemic](#). (April 16, 2020).
- [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#). (April 13, 2020).
- [Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\)](#). (April 10, 2020).



Executive Order on Protecting Worker Health and Safety – 1/21/21

- In addition to the immediate OSHA guidance on COVID-19 issued on 1//29/21, OSHA shall:
 - consider whether any emergency temporary standards (including masks in the workplace) are necessary & **issue any by March 15, 2021.**
 - review enforcement efforts and identify any short-, medium-, and long-term changes
 - launch a national program to focus OSHA enforcement efforts on violations that put the largest number of workers at serious risk (or “contrary to anti-retaliation principles”)
 - explore mechanisms to protect workers not protected under the Act
- **By March 15, 2021, we will likely see Emergency Temporary Standards**
- **Q: Will the so-called “OSHA Exemption” for small farms be debated?**
 - <10 employees/no employer-supplied housing



FDA Employee Health & Food Safety Checklist

“ . . .checklist for FDA-regulated human and animal food operations to use when assessing operations during the COVID-19 pandemic, . . . Some or all of this checklist may be useful to persons growing, harvesting, packing, manufacturing, processing, or holding human and animal food regulated by FDA.”

- [Employee Health and Food Safety Checklist for Human and Animal Food Operations During the COVID-19 Pandemic](#). (August 19, 2020).
- The actual [checklist](#).

Other resources:

- [Western Center for Agricultural Health and Safety](#) (UC Davis)
- [Testing Strategy for Coronavirus \(COVID-19\) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case Is Identified](#) (CDC)
- [CDC- Agricultural Employer Checklist for Creating a COVID-19 Assessment and Control Plan](#) (CDC)
- [Model COVID-19 Prevention Program](#) (CAL OSHA)
- [Guidance on Preparing Workplaces for COVID-19](#) (OSHA)
- [SARS-CoV-2 Testing Strategy: Considerations for Non-Healthcare Workplaces](#) (CDC)



COVID-19 & EEOC

- **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act** (older document adapted and revised for COVID-19)

- **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws** - *Technical Assistance Questions and Answers - Updated on Dec. 16, 2020*



- A quick review of this document reveals the many sticky questions that may arise in handling COVID-19 in the workplace. This is one area where an employee's medical information can be relevant and an employer may inquire/possess information that is not customary.



Examples of issues addressed:

- ADEA prohibits an employer from involuntarily excluding from the workplace an employee because that employee is 65 or older and more at risk. Older employees may have medical conditions affording them disability protection under the ADA, entitling them to accommodation for that disability.
- Employers may not require employees to submit a positive COVID-19 antibody test to determine whether the employee may return to work.
- An employer may test an employee for COVID-19 before permitting the employee to enter the workplace without violating the Americans With Disabilities Act (ADA).



EEOC on the COVID-19 Vaccine & Workplace

- In the EEOC's "[What You Should Know . . .](#)" document an entire section is included on COVID-19 vaccines.
- **Example of issues addressed:**
 - Q: If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of . . . a **disability**?
. . . a **sincerely held religious practice or belief**?
 - Q: What happens if an **employer cannot exempt or provide a reasonable accommodation** to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?
 - A: The employer must show that an unvaccinated employee would pose a direct threat due to a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. If so, It would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.



Pending Request re: Vaccination Incentives – letter to EEOC dated 2/1/21 from U.S. Chamber of Commerce and 40+ other business organizations.

Employer-provided incentives can assist governments in quickly and efficiently distributing vaccines. Legal uncertainty about providing such incentives, however, has many employers concerned over liability and has made them hesitant to act. We, therefore, urge the EEOC to issue guidance providing clarification on the extent to which employers may offer their employees incentives to vaccinate. To ensure the guidance is as effective and efficient as possible, we also encourage the EEOC to define what qualifies as a permissible incentive as broadly as possible.

- [Aldi](#) is offering to cover vaccine-associated costs and up to four hours of pay per employee
- [JBS USA](#) is offering a \$100 incentive bonus to any worker who receives a vaccine.

[COVID-19 Vaccine Communication Toolkit for Essential Workers: Getting Started](#) - for educating employees about the vaccine



“Not-Necessarily COVID-19” Legal Issues

- **Form I-9 Flexibility** – all flexibilities to deviate from the requirements of the form’s instructions expired 2/1/21, unless an employer is operating remotely in which case all flexibilities expire March 31, 2021.
- **Employer Correction Request (ECR)** or “no-match” letters. If you have recently received letters from the Social Security Administration that seem to deviate from past procedure, consult the 1/8/20 [**Social Security Number/Name No-Match Update**](#) from Farm Employers Labor Service.



US DOL's Wage and Hour Division's

Agriculture Compliance Assistance Toolkit

- [Cultivating Compliance](#) – A comprehensive guide to labor law compliance specifically for employers of agricultural workers.
- [Cultivating Compliance: – Your Next Steps as a Registered Farm Labor Contractor \(FLC\)](#) – A guide to MSPA's requirements for certified farm labor contractors.
- [Migrant and Seasonal Agriculture Worker Protection Act \(MSPA\) poster](#) – Required for employers of farm labor workers.
- [H-2A Program poster](#) – Required for employers of workers on H-2A visas.
- [Poster: Agriculture under the Fair Labor Standards Act](#)
- **Agricultural Fact Sheets**
 - [Wage and Hour Fact Sheet 49: The Migrant and Seasonal Agricultural Worker Protection Act](#)
 - [Wage and Hour Fact Sheet 50: Transportation under the Migrant and Seasonal Agricultural Worker Protection Act](#)
 - [Wage and Hour Fact Sheet 51: Field Sanitation Standards under the Occupational Safety and Health Act](#)
- [Agricultural Employer's Pocket Guide to Youth Employment](#)



Final Rule: Independent Contractor Status under the Fair Labor Standards Act

- On January 7, 2021, the Department of Labor (Department) published a final rule clarifying the standard for employee versus independent contractor under the Fair Labor Standards Act (FLSA). The effective date of the final rule was to be March 8, 2021. [86 FR 1168](#)
- However, in accordance with the White House memorandum of January 20, 2021, titled "[Regulatory Freeze Pending Review](#)," DOL has now published a proposal to delay the rule's effective date to May 7, 2021. [86 FR 8326](#). The public comment period is open until February 24, 2021.
- Presumably, if the new administration decides to do so, the final rule may be withdrawn and/or revised.



H-2A Final Rule: *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*

- Published as a [proposed rule](#) on 7/26/19. After the close of public comment 9/24/19, did not move due to possibility of reform legislation. Reform passed House in 2019 and died in the Senate.
- One portion re: Adverse Effect Wage Rate (H-2A “minimum wage”) was broken out and published as a final rule separately on 11/5/20 with an effective date of 12/21/20. [85 FR 70445](#). A legal challenge was immediately filed and the effective date was stayed. Presently this portion is in litigation and there is no AEWR for 2021. (That is a problem.)



H-2A Final Rule (cont.)

- In the meantime, certain “flexibilities” to the H-2A regulations on the books had been granted via a temporary final rule, first in August 2020, and then made longer-term on 12/18/20, [85 FR 82291](#), which essentially permits H-2A workers a streamlined process to extend their stay in the U.S. and immediately go to work for another employer without any “touchback” to their home country, for up to three years, provided they apply for this between 12/18/20 and 6/16/21.
- Finally, on 1/15/21, [DOL announced](#) that the final rule would be published and provided a [preview copy](#). However, that final rule has never been published in the Federal Register. While not announced publicly, presumably this regulation is now being held and possibly tabled pursuant to the White House memorandum of January 20, 2021, titled “[Regulatory Freeze Pending Review.](#)”
- **So, it is apparent that H-2A will need the new administration’s attention in the first 100 days, particularly since there is no AEWR established as the 2021 federally-established minimum H-2A wage.**



H-2A – Miscellaneous

- DHS published the annual [Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs](#) on 1/13/21. Removed Mongolia, Samoa, Tonga from both programs. Philippines added to H-2B.
- **South African Problem Solved**
 - [Presidential Proclamation of 1/25/21](#) - Due to widespread COVID-19 and a variant strain detected, the U.S. suspended the entry into the United States, as immigrants or nonimmigrants, of noncitizens of the United States who were physically present within the Republic of South Africa during the 14-day period preceding their entry or attempted entry into the United States.
 - [National Interest Exception for Certain H-2 travelers from South Africa](#) - H-2A and certain H-2B travelers covered by the Presidential Proclamation of January 25, 2021 are eligible for national interest exceptions.



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Thank you!

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