



Specialty Crop Producers' Guide



to

Understanding Liability Protection, Regulatory Processes, and Other Legal Risks

2023

A guide for Pennsylvania specialty crop producers to assist in the prevention and planning necessary to avoid legal liabilities in conducting income-augmenting activities such as direct sales, pick-your-own, value-added commodity processing, or agritourism, agritainment, & public educational activities.

Visit the Center's website at aglaw.psu.edu for more resources.

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Specialty Crop Block Grant Program



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This guide is a companion to a six-webinar series produced by the Penn State Center for Agricultural and Shale Law in 2022 titled "[Legal Planning for Specialty Crop Producers: Understanding Liability Protections, Regulatory Processes, and Other Legal Risks.](#)"

The webinar series home page is located at <https://aglaw.psu.edu/legal-planning-for-specialty-crop-producers-webinar-series/>

Each section of this guide corresponds to a webinar produced as part of the series. The link to watch each webinar is set forth immediately below the description of the corresponding section of this guide set forth below.

The entire series of webinars can be viewed from a single [YouTube playlist](#) compilation page on our YouTube channel at <https://www.youtube.com/@AgShaleLaw>

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This topic will examine the ways in which legal liability can arise from the care, custody, and control of real estate upon which visitors are invited for the purpose of doing business with a specialty crop producer, as well as liability insurance coverage, waivers, etc.

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This topic will educate producers on the various theories of legal liability, highlighting “product liability,” that can arise from the production and sale of both raw agricultural products and value-added processed products, as well as how insurance may protect against such claims.

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- <https://www.youtube.com/watch?v=zrqpreDyYq4>

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1. Legal Liability Risks from Business Invitees on the Farm

A. Introduction – Legal Liability Generally & Negligence Claims

Negligence is a legal cause of action (i.e., a legal claim that can be asserted in a court of law) in which a person can seek monetary recovery for injury to their person or damage to their property. Business entities of various kinds that own property can also assert property damage claims based upon negligence. Negligence claims can be asserted against the persons or entities who own, possess, or control, real estate or personal property, a condition of which, or the use of which, is alleged to have caused the injury. Parties who have suffered injury to their person or property by alleged negligence have two years from the date of the injury to file a lawsuit or the right to do so is forever barred. This is called the statute of limitations.

- “Personal property” means any object which is not part of, or affixed to, land. Examples are farm equipment and tools.
- “Real Property” or “Real Estate” means land, including things affixed to land such as fences, buildings, or equipment installed in a fixed location.
- When the word “property” is used in this guide, it can mean “real property” or “personal property,” or both.
- When the word “injury” is used in this guide, it can mean injury to a person or damage to property, or both.
- When the word “control” is used in this guide, it can mean controlling the activities on real property by virtue of leasing it from the owner.

Negligence is a common form of legal liability claim and whether it results in a monetary recovery is based upon the strength of proof that one or more persons or entities who own, possess, or control the property did not exercise reasonable care to prevent the injury.

Who judges the strength of that proof? A court of law judges that by decision of a jury or judge after trial or by other legal decision-making process agreed to by the parties. Unless and until such an event occurs, however, whether legal liability exists is judged by estimating the prospects of legal liability being found if a trial were to occur.

For example, when an insurance company is handling a negligence claim for injury made by a visitor to a farm, the insurance company makes decisions based upon its opinion of how likely it is that a jury or judge would find that negligence occurred.

However, most legal claims of negligence never reach that stage and are either: (a) dismissed by a judge during litigation of a claim through the court system, with no monetary recovery, due to legal reasons recovery of money cannot occur; or (b) discontinued by agreement of the parties after a settlement agreement is reached for payment of an amount of money. The amount of a settlement payment represents an agreed compromise between the potential outcomes of the claim on its “best day in court” versus its “worst day in court.”

Thankfully, for individuals and businesses in today’s world, that decision is customarily made by insurance companies handling negligence claims—if a policy of liability insurance exists and the claim is covered by that policy. This highlights the importance of insurance, which will be discussed later in this guide. Without insurance, the result of negligence claims must be paid out of any assets owned by the person(s) or entities who are found to have committed the negligence (or are likely to be found negligent in the case of an agreed settlement before trial).



To succeed, a claim of negligence requires proof that the owner or possessor had:

- a) a duty to protect against the injury;
- b) that the duty was breached by a failure to exercise reasonable care to prevent the injury;
- c) that the injury was caused by the failure of reasonable care and not something else; and
- d) that the injury caused legally recognizable damages for which the law grants a monetary recovery.

In this guide, we won't discuss the last element because that issue is more commonly a legal matter for insurance companies, attorneys, judges, and juries to grapple with when a negligence claim is made. The third element also will not be discussed because it can become complex and is beyond a specialty crop producer's need in learning how to best protect its business and assets from liability exposure.

What a specialty crop producer needs to understand most are the first two elements. The same fundamental questions apply to most of the discussion of liability in this guide. Throughout this guide, we are concerned with:

- ***How and when can legal liability arise?***
- ***How can legal liability be best avoided and prevented?***

Every person has a legal duty to exercise reasonable care not to injure others or their property by his or her actions. For a property owner or possessor, their duty to protect against injury to persons or property applies over the entire land area, any activity conducted on that land, and to any person who enters that land for any reason—even trespassers to a small degree.

Because farms tend to have large land area, equipment, structures, domestic animals, and sometimes surface waters, specialty crop producers must be mindful of the many risks presented to visitors entering their land. It is easy to take those risks for granted and overlook them.

Activities on a specialty crop operation frequently result in products or substances leaving the site, either intentionally or otherwise, and producing injury elsewhere. A common example is a product produced on the property, sold to a consumer, and consumed, causing foodborne illness due to contamination with some form of pathogen. A legal duty to prevent that type of injury certainly exists but will be discussed in the next section of this guide.

In this section concerning negligence, we are primarily concerned with the conditions and activities on the specialty crop production site which could produce on-site injury. Conditions that can cause injury on the property are sometimes referred to as "hazardous conditions."

A duty arises to protect against injury from hazardous conditions or activities on the land which are foreseeable. This is critical to understand. If one can foresee an injury resulting from a hazardous condition on-site which is known, or which could be discovered by reasonable care in inspecting, a duty to protect against it exists.

If the land possessor is a farmer, their actions will be judged by what a reasonable farmer would have done to prevent injury to others. "Reasonable" means what an average person in that position would do, including accounting for their vocation and experience.

For farmers, consider what level of prudence the average farmer would exercise to prevent a condition or object on the property from harming someone? The merits of a liability claim are judged by what a jury impaneled to hear that claim would find was reasonable precautions under the circumstances.



A landowner or possessor does not have to foresee the way the person is injured or the extent of their injury to be held liable. For example, an exposed nail in a barn floor plank can be dangerous if someone steps on it. But if the puncture wound causes unexpected medical difficulties to this person due to unique circumstances, such as a blood-clotting disorder for example, the land possessor who knew or should have known of the exposed nail is liable for the whole extent of the injury, including unique medical results from injuries, because they were aware that leaving the condition unrepaired could cause an injury of some kind and to some extent.

The law of negligence charges those in ownership, possession, or control, of property with an obligation to continually assess the potential for accidents and injuries on their property. While as a rule, the burden of proving negligence by a preponderance of the evidence is upon the injured party, a prudent owner or possessor of land should strive to eliminate or mitigate all risks they can before third parties enter onto their property.

B. Strict Liability for Ultrahazardous Activities

Although “strict liability” is a rare and distinct legal claim from negligence, the two kinds of liability may arise from similar facts. Strict liability may apply when an activity, or the use or possession of some personal property, can be so inherently dangerous that its risk to others cannot be eliminated even with due care. These are called “ultrahazardous activities.”

Blasting subsurface rock deposits with explosives during construction is a commonly cited example of such an ultrahazardous activity. Proof that reasonable care was not taken is not necessary if the activity is found by a jury or judge to qualify as “ultrahazardous.”

The one example that may be suspected of applying in a farming operation is chemical (i.e., pesticide, herbicide, and rodenticide) possession and use. There is no legal precedent (i.e., prior legal decisions) under Pennsylvania law for a jury or judge finding that the mere possession or permitted use, according to law and label instructions, of pesticides, herbicides and rodenticides can lead to strict liability (i.e., be found an ultrahazardous activity) for injury caused to persons or property of third parties. However, negligence is highly likely to be found if injury is caused by failing to follow the laws, regulations and label use instructions regarding pesticide possession and use.

C. Negligence Claims & Business Visitors

Possessors of land, whether owned or leased, owe a duty to business visitors to protect them from risks of injury which are known or may be discovered with reasonable care. Therefore, the duty owed includes making as safe as reasonably possible all known risks, as well as any risks that can be discovered upon inspection of the property.

The duty owed to a business visitor is the highest degree of care owed to third parties entering land or buildings. For this reason, taking reasonable care to protect against injury to business invitees is always the best way of reducing all risks of liability to any party.

Business visitors, also referred to as “invitees,” are distinct from casual social visitors. However, even friends and family can be business visitors depending upon their reason for entering upon land or into buildings.

A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly arising from business dealings with the possessor of the land. The visitor does not need to purchase or sell something to become a business visitor, and the business reason can be for the visitor’s benefit, if it is due to the possessor’s use of, or activity on, the land. The primary



criteria are that the possessor gives the visitor “reason to believe” that the visitor’s presence is permitted on the land for business reasons and that the land is held open to the visitor.

D. Negligence Claims & Children

What may be considered a physical condition creating a risk of harm can change when children are present and potentially at risk. The law recognizes that children possess much less than an adults’ appreciation of the physical dangers which they may confront or in which they may place themselves. Therefore, a condition that may not be recognized as a risk of injury to an adult because they “know better,” may be a risk of injury to a child.

The knowledge, experience and recognition children may be legally expected to possess of conditions, objects, or conduct that are risks to themselves depends upon each individual child’s level of maturity. As a result, those in possession of property need to plan for safeguarding against injury to guests of the lowest level of developmental maturity to be encountered.

Although parents and guardians accompanying children can be found negligent for failing to exercise due care for the safety of accompanied children on a farm premise, a danger which is particularly attractive to children may give rise to a duty to disclose it so that parents or guardians can understand what precautions need to be reasonably taken while they and the child are present on the premises. Dangers known to be attractive to children may include domestic animals, bodies of water, unattended equipment, and tools, and surfaces accessible to climb upon which place them in danger of falling or other peril.

Even if the danger is disclosed clearly to a parent or guardian, it is not solely their duty to keep a child away from the risk. A landowner or possessor still owes a duty of care towards the child in addition to a parent or guardian. However, a jury or judge may find a different standard of care to be reasonable if a parent or guardian is also present.

Depending upon the availability of other methods of safeguarding, a land possessor may need to construct physical barriers around attractive dangers so that children cannot reach them. If practical and easily accomplished, exercising reasonable care when children are present may mean putting potentially dangerous objects or areas completely out of a child’s access.

A possessor of land may even be liable for an injury to a child who is a trespasser because the child may not be capable of appreciating a risk to themselves by entering and technically committing an act of trespassing. There is legal precedent in Pennsylvania law that states a landowner is only liable to a trespassing minor for “artificial conditions” on the land as opposed to natural conditions, such as a stream. But maximum protection against negligence claims is best provided by assuming that any dangerous condition that children may not fully appreciate should be protected against.

E. Negligence Claims & Trespassers

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the land possessor’s consent or otherwise. The duty to protect adult trespassers against injury is a reduced one. A landowner or possessor has the limited duty to trespassers to protect against injuries caused by “willful or wanton misconduct” in failing to prevent, or causing, injury.

The classic historical example is a “spring gun” or trap triggered by a trespasser and intended to cause them injury. Creating such conditions or failing to disable them when their presence is known is considered willful or wanton misconduct and monetary damages for negligence will likely be awarded to a trespasser so injured despite their unauthorized and illegal presence.



F. Negligence Applies to Foreseeable Risks

The key to understanding what poses a risk of liability in negligence is understanding what risks are foreseeable. A person will not be held liable in negligence for a risk that is truly unforeseeable. This may include so-called “acts of God,” such as extreme weather events. An act of God is said to be an act or force not due to or in any way contributed to by human agency. However, hazards which are known to occur, such as lightning strikes, may be foreseeable even if they are outside of human control. A land possessor cannot prevent the risk of injury from lightning, but as a universally known hazard in open fields during a significant storm, a land possessor may be found negligent if not offering some degree of shelter to visitors or for not closing the premises during risks of lightning.

G. Reasonable Care with Dangerous Instrumentalities

The law of negligence uses the phrase “dangerous instrumentalities” to describe objects such as farm equipment, chemicals, silos, and other grain or manure storage structures that are a common liability concern for agricultural operations. Pennsylvania law has a singular standard of care applicable in negligence actions, even those involving dangerous instrumentalities of any kind: *reasonable care under the circumstances*.

Every person must exercise reasonable care in proportion to the risk of injury involved in the activity, tool or machine involved. In determining reasonable precautions commensurate with the risks of injury, if one hazard is more potentially dangerous than another, it is reasonable to expend more effort to stop it from causing injury.

Twisting an ankle on uneven barn flooring is less hazardous than direct skin contact with caustic alkaline chemicals, so an expectation that more effort will be expended in preventing human contact with such chemicals is simply applying a standard of care that is commensurate with the potential injury.

H. Negligence Per Se by Violation of Law/Regulation

One area of negligence law where the measure of reasonable care can be provided by an objective source is in applying the concept of *negligence per se*.

This subset of negligence claims arises when it is alleged that an injury to person or property occurred because of a violation of a law or regulation—by either acting or failing to act in a certain way which fails to adhere to a requirement from federal, state, or local government.

Negligence is proven in such a case by proving that failure to comply with a law or regulation caused the injury or damage and is the kind the law or regulation was meant to protect against.

This is relevant to a specialty crop producer because there are many laws and regulations relating to the production, storage, processing, distribution, and sale of agricultural commodities, as well as to the actions that contribute to those activities.

The Food Safety Modernization Act and its various sets of regulations, or “rules” as they are referred to in the Code of Federal Regulations, are just one example of many. Examples of regulated actions that contribute to the production of agricultural commodities would be applying pesticides, herbicides, or fertilizers, managing stormwater or manure, the utilization of public roadways by farm trucks, tractors and implements of husbandry, and some portions of zoning ordinances and building codes.



Alleging that a violation of a law or regulations caused the injury makes it very easy for an injured party to prove a negligence claim. The government requirement provides the duty of care owed to prevent the injury and the violation proves that the duty of care was breached.

For example, assume a farm market licensed as a retail food facility fails to comply with Pennsylvania law's water testing requirements for use of well water in the market's operations. Several customers contract e-coli-related bacterial infections which are lab-tested to be of the same strain of e-coli as is found present in the well's water. The well is found to be contaminated by a manure storage facility that is not compliant with Pennsylvania manure management regulations. Under Pennsylvania law, the farm operator would very likely be found negligent for two reasons: (1) failing to conduct the legally required well water testing intended to protect against bacterial illness; and (2) storing manure in violation of regulations designed to prevent well contamination. The farm operator is said to be *negligent per se* in causing the customers' illnesses.

There are few negligence claims that are more "open and shut" than one involving negligence per se proven by a violation of law or regulation. One of the primary and necessary ways to reduce the risk of successful negligence claims is to comply with all applicable laws and regulations in every aspect of the conduct of a specialty crop farming operation. That is the bare minimum that the law of negligence requires.

I. Signage & Written Warnings

Signage which discloses known risks of injury on the property, and which is placed at all entrances or in a manner otherwise visible to all those entering the premises, is a very effective way to establish that third parties were adequately warned of the listed risks of injury should one befall them.

Ticketed entry to an agritourism or agritainment activity with the same content printed upon the ticket can be equally effective, as is any printed communication where this content can be reliably proven to have been delivered.

A land possessor should be attentive to the impression given about what areas visitors believe they can enter on the land. Without clear directions via signage or otherwise, if a land possessor is hosting an agritourism activity, a visitor may incorrectly believe they are allowed to access the entire farm or property.

For example, while opening a farm to the public for a pick-your-own operation, care should be taken to clearly communicate with signage or otherwise, exactly where, and potentially when, a visitor is free to enter portions of the property not necessary for picking the commodity at issue.

To eliminate ambiguity, signs at every entrance to the property, or proper directives given verbally or otherwise, can help reduce the liability risk from an inadvertent potential trespass into areas where third parties are not expected to be present. If a visitor is clearly advised what parts of the farm are "off limits" and nevertheless entered those areas and was injured, the possessor of land is in a much better position to argue that the visitor was trespassing and lesser safeguards against injury may be employed without being negligent.

Should a claim of negligence be asserted nevertheless, a legal defense to negligence called "assumption of the risk" can prevent liability being found if a jury or judge accepts that the injured party voluntarily and knowingly encountered an obvious and dangerous condition and nevertheless proceeded. Asserting this defense can be difficult because the injured visitor's subjective awareness of the risk and the voluntary nature of his or her subsequent actions with that knowledge must be proven. A sign remains simply evidence that the injured visitor had an



opportunity to be aware of the risk. The jury or judge still must find that the opportunity was taken, and awareness created.

The most important takeaway is that the mere presence of signs, or warnings in any prominent form of communication to visitors, is one of the most effective methods of reducing the success of negligence claims generally.

Notably, in 2021, Pennsylvania enacted a law known as the **Agritourism Activity Protection Act** which provides immunity from specifically defined types of negligence claims arising from agritourism activities on a farm if prescribed signs, printed acknowledgment forms, or printed text on a ticket, are utilized in a defined manner. Strict compliance with the details of this law is very important to gain its benefit. To learn about the requirements of Pennsylvania's Agritourism Activity Protection Act, see the Resources listed below.

J. Liability Waivers

The terms "exculpatory contracts," "releases of liability," and "waivers" refer to an agreement in writing in which a party agrees not to sue or hold the other liable for certain defined legal causes of action defined in the writing.

The use of liability waivers has become familiar to any parent whose child is involved in extracurricular activities or to persons who engage in activities like skiing, snow tubing, or just about any other organized recreational activity. A waiver is valid if: (1) it does not contradict public policy, (2) the contract is between people relating to their private affairs, and (3) each party is able to bargain over the terms of the contract and it is not a "contract of adhesion" where one party is powerless to negotiate any changes and faces a choice to either accept the terms or reject the contract altogether.

Just because a waiver is executed does not mean it is legally effective to prevent the claims, usually for negligence, identified in the waiver. Because it is a waiver of legal rights, courts will strictly construe it against the party seeking immunity from liability. If there is any ambiguity in the meaning of the text, a court must employ the least restrictive interpretation in favor of the party whose rights are being reduced.

The contract must be specific about what claims are being waived. A waiver cannot be established by inferences from ambiguous or vague language and the burden to establish immunity from liability rests on the party asserting it.

Whenever a waiver has been executed, a possessor of land is assisted in defending against a negligence claim even if the waiver's terms are not strictly enforced by a court. At a minimum, the document serves as good evidence that the visitor had an awareness of the defined risks, coupled with the opportunity to refuse the waiver yet chose to execute it and engage in the activity, nevertheless. This can be very convincing evidence of a person's awareness of the risks of injury outlined in the waiver even when the waiver does not result in dismissal of a claim.

Form waivers are available from many sources because of their long history of use in many sports and recreational activities. However, a waiver form must be carefully drafted in consultation with an attorney to have the desired effect, or in some cases, any effect at all.

Lastly, the use of liability waivers to attempt a waiver of negligence claims on behalf of minors (children under 18 years of age) does not have any legal effect under Pennsylvania law. Firstly, a minor's signature is not effective or binding on any form of legal document. Secondly, under Pennsylvania law, a waiver of liability signed by a parent or legal guardian on behalf of a minor is highly unlikely to be effective to accomplish a waiver of a minor's rights to assert any form of legal



claim. Court approval of any relinquishment of a minor's legal rights to make liability claims is required under Pennsylvania law. This point of law is addressed in more detail in the publication titled [Agricultural Law Fact Sheet: Pennsylvania's Agritourism Activity Protection Act](#) contained in the Resources below.

K. The Role of Liability Insurance

In general, liability insurance operates to reduce the risk that the landowner or possessor's assets will have to be used to pay a claim if found liable for negligence.

Liability insurance provides indemnification (payment on behalf of another) to the policyholder from the insurance company issuing the policy for the monetary award resulting from negligence claims, as well as creating a duty on the insurance company to attempt to prevent uninsured financial exposure from occurring by making good faith efforts to settle claims within the liability limits stated on the policy. In this way, the landowner or possessor's liability insurance premiums purchase peace of mind that business and personal assets are protected from being exposed to the results of legal liability claims insured against in the policy.

Insurance plays a key role in negligence claims because it is the primary, and usually only, source of assured recovery of damages by the injured party. Attorneys pursuing negligence claims on behalf of clients are, as a rule, not interested in pursuing business or personal assets; they are interested in attempting to reach a settlement with the applicable insurance company(s) that supply indemnity pursuant to a policy of liability insurance.

The claimant's attorney's objective is to try to settle the claim before the two-year statute of limitations expires so that filing a lawsuit is unnecessary. If an insurance company makes any payment of indemnity from a policy of liability insurance to the claimant, the insurance company has a duty to obtain a "general release" in exchange. A general release is the document signed by the claimant, which is a binding contract never to make any additional claim of any kind against any party whatsoever because of the incident which caused the injury.

It is routine for an insurance company handling a liability claim to disclose the applicable insurance policy(s) and indemnity limits so that any potential settlement negotiations can occur in good faith from both sides as early as possible. When a lawsuit is filed, disclosure of insurance policies becomes mandatory, so withholding that information until suit is filed may stifle settlement negotiations prior to suit filing.

Shopping for the proper insurance is one of the most important steps in protecting a specialty crop production business. Commercial general liability insurance coverage is included in a standard farm policy of insurance and all business policies. However, it is essential to consult with your insurance agent and be familiar with exactly what coverage is included. Liability insurance policies cover bodily injury and property damage claims asserted by third parties and caused by the alleged negligence of the insured party—according to the policy's terms. Part of any policy's terms are exclusions to coverage. Therefore, what isn't covered, as well as what is covered, must always be reviewed with the insurance agent responsible for issuing the policy.

One standard exclusion in many liability insurance policies is an exclusion of claims arising from intentional acts causing injury or damage. This is of negligible impact for a specialty crop producer. However, another standard exclusion is highly problematic for specialty crop producers, and many are completely ignorant of its existence. This is the exclusion from coverage of claims for injuries or damage caused by the actual products or services that a farm or specialty crop producer supplies or provides.



The result of this exclusion is that there is no coverage for claims arising from food products produced or supplied for human consumption. This is called the “your work” or “completed products” exclusion. This is an important exclusion to understand and will be addressed much more fully in the next section of this guide. It is essential that a specialty crop producer be comfortable that the “completed products” exclusion is not present or that supplemental “products liability” coverage is purchased.

To provide the best protection of business and personal assets, the limits of the liability coverage on a policy should be high enough to cover the total of all potential liability claims within the policy period—generally one year. The amount should be commensurate with the relative risks associated with the entire insured business operation. That is a hard number to determine as the aspiration is always that there will be no liability claims.

There are multiple other decisions about insurance coverage that need to be made together with an insurance agent, such as whether to purchase:

- an “occurrence” or “claims made” policy (which determines what claims are within the policy period—those that *occurred* within it, or those claims that are *made* within it);
- a policy with a high deductible (the amount of which is the policyholder’s responsibility to contribute to claim payments); and
- an “excess policy” that supplies an additional amount of liability insurance, at a much lower premium rate (should the primary policy’s limit be exhausted within the policy period).

These are just a few examples of the decisions to be made about liability insurance—an essential component in protecting a specialty crop production operation from legal liability risks.



Resources:

[Agricultural Law Fact Sheet: Pennsylvania's Agritourism Activity Protection Act](#), Penn State Center for Agricultural and Shale Law (2023).

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2. Legal Liabilities in Selling Raw and Processed Specialty Crop Products

A. Introduction to Product Liability

The previous section of this guide primarily addressed understanding legal liability claims for injuries based upon negligence in the ownership, possession, and control of real estate where specialty crops are produced.

This section will provide information on the legal principles and processes involved in legal liability claims arising from the sale of specialty crops themselves. The primary risk to be protected against from the sale of specialty products is their consumption by consumers causing foodborne illness. However, the most commonly pursued legal cause of action for foodborne illness is not negligence but a different legal liability claim called “product liability” or “products liability.” To understand product liability, some U.S. legal history must be reviewed first.

Predating the establishment of the United States, the court systems of the British colonies located in America enforced the borrowed principles of British common law, which included the concept of monetary compensation awarded by juries or judges for injuries caused by another’s negligence. At that time, the principles of negligence in British common law were based upon “legal precedent,” i.e., the historical written decisions of British courts. The term “common law” refers to principles of law that are not enacted by a legislature but arising from adherence to court precedent.

British common law of negligence was further developed and refined over the years through the operation of the American court system, both before and after the United States was founded. As the nation matured, the United States established its own common law, including the law of negligence and the various legal principles surrounding it, as well as establishing common law on other legal topics such as contract law pertaining to the sale of goods. Those goods include agricultural commodities.

In the latter part of the 19th and early part of the 20th centuries industrialization of commerce and manufacturing introduced increased processing, manufacturing, distribution, and sale of manufactured goods on a national scale, including food products. Significant advances in transportation and mechanical methods of cooling increased the sale and consumption of agricultural commodities and food products at a great distance from their production.

The increased urbanization of the country’s population and the growth of retailing goods and food as a major component of the nation’s economy, was accompanied by a decrease in the practices of self-sufficiency which characterized an agrarian life style, such as growing and producing one’s own foods from a basic set of staple ingredients either produced as part of a family homestead, or purchased from local mills, creameries, and farms.

The same decrease occurred in the making of one’s own clothing, tools, and household goods. Also declining was the prevalence of purchasing those goods from local and familiar makers, within a short distance from home, who in turn sourced the raw materials locally.

By the mid-20th century, the end user of many goods, including foods and staple food ingredients, became less and less familiar with who made them and their component parts and ingredients, as well as ignorance of where, when, and how they were made. This, coupled with a new and ever-increasing reliance upon the manufacturer’s and retailer’s potentially unreliable representations about product ingredients, attributes, proper use, and safety, i.e., unregulated marketing



representations, increased the risk of harm to end users of mass-produced goods.

As an illustration, at the turn of 20th century, a family's transportation needs were satisfied by a horse drawn carriage of simple wooden construction made by hand on the homestead or from a local craftsman. By the 1930s, those needs were being satisfied by an automobile weighing more than 1500 lbs., capable of traveling at more than 50 miles per hour, powered by an internal combustion engine burning explosive liquid fuel, and assembled from hundreds of mechanical parts from dozens of different sources and makers. The failure of virtually any one of those parts could cause catastrophic injury or death to the operator, occupants, other travelers, and bystanders. This assessment of the increased daily risk does not account for the additional increased risk from unskilled operation and misuse by novice drivers.

All of this economic and cultural change caused the common law principles of negligence, which had previously provided an adequate remedy for injuries caused by the actions of others, to be reconsidered as the exclusive available legal means to provide monetary compensation for injuries to one's person or property caused by others.

Proving negligence was deemed to be inappropriately burdensome in many situations of injury by mass-produced and mass-marketed goods, sometimes as large and complex as an elevator, truck or train. Goods made with rapidly evolving manufacturing processes, unknown to the population and frequently secret due to proprietary rights granted through patents, simply could not be analyzed in the same common-sense way by juries or judges to determine who may bear legal fault by negligence.

Regarding food products causing foodborne illness in particular, assigning fault through a determination of whose actions caused an injury, and whether those actions were negligent, was, and still is, considered an inadequate legal remedy. A mass-produced food product may involve combining multiple raw, cooked, or processed ingredients, from diverse and distant sources, in multiple processing operations, to produce a finished product suitable for mass distribution and sales—all delivered to the consumer in a sufficient time to prevent the growth of pathogens and bacteria to unsafe levels in what could be a highly perishable product containing meat, dairy, vegetables and fruit.

Modern expiration or "best-by" dating, and required ingredient labeling, addresses two informational needs of today's consumers about freshness and potential allergens, but does nothing to assist in determining who, how and why foodborne illness may have resulted from consumption. Consumers buying mass-produced food products gain little knowledge before consumption of the condition or age of the foods they are consuming and how they may have been processed and prepared. Many food products are not even visible before opening the packaging. These unavailable pieces of information are the material facts necessary for pursuing a negligence cause of action for foodborne illness.

Based upon changed cultural circumstances, it has been universally accepted that it is no longer equitable, effective, efficient, or reliable to ask a jury or judge to apply the principles of negligence to determine who, where, when and how one of the multitude of persons or entities contributing to a mass-produced food product failed to exercise reasonable care and caused injury. This is also true when dealing with other products, such as a failed steel cable carrying an elevator car in the 1920s, canned meat products containing botulism in the 1950s, a defective and exploding automobile gas tank in the 1990s, or over-the-counter pain medication capsules found to contain metal shavings in 2020.

By consensus of legal scholars and judges, and through adoption by U.S. state and federal courts, the mid-20th century in the United States saw the development of more than one new alternative legal cause of action as a supplement to the relative simplicity of pre-industrial concepts of



negligence.

The first such legal theory developed in the 20th century was the concept of an “implied warranty” given with the sale of goods which warrants a product to perform in accordance with, among other things, the reasonable consumer expectation that it will not cause the user injury when put to its intended use. Implied warranty legal causes of action were created to supplement any express warranty about a product’s attributes or quality. While implied warranty theories of liability are still alleged in court filings to this day, they are seldom pursued in earnest to trial and have been eclipsed by product liability. Implied warranties will not be discussed in this guide further in favor of a necessary understating of product liability.

B. What is a “Defective Product?”

The legal cause of action known as product liability, as adopted and now in effect in every U.S. state, authorizes a jury or judge to find the manufacturer, distributor, and retailer equally legally liable for an award of monetary compensation to any persons who are caused injury by a “defective product.” That injured person is not required to have purchased the product, but only to have been injured by it, in order to make a claim for product liability.

A “defective product” is a product that, as manufactured, designed, supplied, or marketed, is found by a jury or judge to possess a deficiency or “defect” which caused it to injure a person or property when used for its intended use or a foreseeable misuse.

Simply put, a product is required to be capable of being safely possessed and used without causing injury. However, if the cause of the injury is a deficiency or defect in the product which a jury or judge finds resulted from the product being put to a use which is neither its intended use nor a foreseeable misuse, that is a complete defense to the claim.

Each party in the chain of production and distribution (“defendants”) of a defective product which causes injury, including manufacturers and suppliers of component parts or ingredients, are held legally liable jointly for the entire monetary compensation awarded. The injured party (“plaintiff”) receives a single award of monetary compensation from a jury or judge and may only recover that amount, and no more, from all liable parties jointly. This is referred to as “joint and several” liability.

Injured parties can pursue multiple legal causes of action simultaneously in the same lawsuit for the same injury, for example both negligence and product liability as alternative legal approaches. However, all claims arising from that injury must be asserted together at one time against all possible defendants and the plaintiff is only ever entitled to receive one award and payment of compensation.

It is the plaintiff’s option to collect that amount from whomever has the so-called “deepest pockets.” This expression may be better stated as “the pockets easiest to reach.” Any business of any kind engaged in the sale or distribution of products in modern commerce needs product liability insurance coverage to be available to easily supply that “pocket” so that product liability obligations do not consume vital business assets. More will be explained in the insurance portion of this topic below.

Product defects can include the design, labeling, use instructions, or other representations made in the marketing and packaging of the product about how it is to be used, and its safe and intended uses. A product can also be found defective if it fails to include warnings about its use which a jury or judge finds would have prevented the injury if they had been given. This is called a “failure to warn” legal theory of product liability.



The law of product liability authorizes a jointly liable defendant to pursue a legal claim for “indemnification,” i.e., a form of reimbursement or recoupment for payments to the plaintiff, if such payments are made merely because of that defendant’s presence in the chain of distribution and not due to any contribution to the defect or causation of the injury. While still legally liable to the injured party, those who simply sold the product in the chain of distribution without any material alteration in its condition while in their possession and control are provided a corrective remedy commensurate with their actual role.

This is a very simplified description of a body of legal liability law that has taken decades to be developed and refined. As described above, the law of “implied warranty” can be seen as bridging a gap in the common law between contract law, that deals with the terms of a transaction for the sale of goods, and product liability law. Product liability law is one of a group of legal remedies and claims recognized in common law as so-called “tort” liabilities—of which negligence is also one.

Product liability was adopted by U.S. courts as an advancement of common law. In a few states, product liability law has also been enacted as legislation. California is one example. Pennsylvania’s legislature has not enacted product liability law, but the legal principles have become part of Pennsylvania law by legal precedent of Pennsylvania courts adopting product liability legal principles similar in all respects to those now in effect in all other states.

C. Product Liability & the Specialty Crop Producer

Pennsylvania specialty crop producers who pursue augmentation of wholesale sales revenue with income from direct sales like farm markets, farmers’ markets, pick-your-own and value-added commodity processing, need to be aware that these types of retail sales, while frequently very lucrative under the right circumstances, also bring added potential legal exposure from product liability claims.

The traditional specialty crop production model is to produce an agricultural commodity, sell it at a wholesale price, after which it passes through the possession of one or more wholesale entity(s), potentially being cleaned, stored, aggregated and co-mingled with other quantities of the same commodity. The product makes its way to either: (a) a retail store for sale as a raw agricultural commodity, i.e., fresh fruits and vegetables, or (b) a food manufacturer as wholesale processing grade raw commodities for use in manufactured food products, for example processing of canned products, frozen foods, juices, and baked goods.

In the retail store distribution path, traditionally many raw agricultural commodities, such as a head of lettuce or a tomato, are sold at retail without the ability to determine who produced them, nor to perform direct tracebacks to individual producers should there be contamination by some illness-inducing bacteria, pathogen, or even a foreign substance. Food safety and marketing concerns have begun to make producer identification of fresh fruits and vegetables at retail more prevalent but only for large scale producers.

In the food manufacturer distribution path, once co-mingled with other producers’ identical commodities either in storage or after utilized as an ingredient, such commodities: (a) are rendered incapable of being distinguished from other producers’ product; and (b) are not susceptible to a determination of if and how contamination may have occurred in one particular producer’s product.

As these examples illustrate, the more traditional production and distribution model for specialty crops inherently provides a layer of protection against any form of liability claim being successfully asserted against the producer by a person(s) injured by a foodborne illness.

As the more traditional production and distribution model gives way to increasing utilization of a



direct-to-consumer sales model of one form or another, specialty crop producers now must be more aware and informed about the additional risk of product liability claims which arise. The ability to identify exactly who produced the product, when, and potentially even more information about the condition of the product, can be readily known by the consumer in “direct-to-consumer” cases of foodborne illness. This is a significant, yet subtle, impact from a specialty crop producers’ choice of marketing options. The trade-off is between a higher profit margin and a loss of the reduced liability risks enjoyed with other marketing models for specialty crops.

When a specialty crop producer engages in the various forms of direct sales, the producer has now become the readily identifiable retailer and manufacturer in the distribution chain for product liability purposes—with all of the accompanying product liability exposure those roles potentially bring.

Additionally, should a farm or farmers’ market operator choose to sell some products made by others, for example meats, cheeses, canned and bottled products, and baked goods, the risk of an entirely new legal liability has been introduced—the product liability exposure as simply a seller of the product of another.

Even an act as seemingly innocuous as seasonally expanding offerings by allowing a neighboring farmers’ melons to be sold on commission, or other revenue splitting arrangement, makes the market operator now liable for any and all products liability claims should those melons transfer E. coli bacteria to one or more consumers. This despite no involvement whatsoever in their production. Not being involved in their production is not a defense available to a retailer in a product liability claim.

Under product liability, a seller is equally and jointly liable with the “manufacturer,” i.e., the grower, and the recourse for the seller is to pursue a legal claim for indemnification from the grower. What if the grower should be a beginning farmer with little to no assets to satisfy such a claim? What if the neighboring farmer has not purchased an insurance policy with coverage for injuries caused by farm products—the melons. This is surprisingly common, as the discussion of insurance which follows will explain.

D. Insurance & Product Liability Coverage

For a specialty crop producer engaging into any form of direct sales, an understanding of the type of liability insurance necessary to protect against product liability obligations and risks, and the necessary business practices to employ to gain the maximum benefit of one’s own and one’s suppliers’ liability insurance, is one of the most vital protections of the viability of that business.

Firstly, liability insurance coverage in its most basic form is supplied as part of any commercial business or “farm policy” of insurance. The person or entity who purchases the insurance policy is called the “policyholder.”

All such policies have coverages that apply to losses and supply reimbursement (called “indemnity”) for casualty losses (for example, fire, weather events, or theft) to the policyholder’s own assets, i.e., one’s own tangible physical assets (for example, equipment, vehicles, and buildings). This is called casualty coverage. The absolutely essential other category of coverage is indemnity for legal liability claims made against the policyholder of the type discussed thus far in this guide. This is called liability coverage.

All commercial and farm policies contain liability coverage. However, it cannot be assumed that all commercial and farm policies contain liability coverage that provides indemnity for product liability claims obligations resulting from claims made against the policyholder.



Surprising to some, standard farm insurance policies may not provide indemnity for product liability. In fact, coverage for indemnity from claims and legal liabilities arising from “completed products” is specifically excluded from some, if not all, liability insurance coverage supplied as part of a standard commercial or farm policy.

Why is that? At least in regard to farm policy coverages, most standardized policy language forms were developed in an era when direct sales and value-added producer processing was not common. They were written in an era of the traditional model of production that assumed the farm was engaged in strictly production and wholesale sale of a raw agricultural commodity to others for any processing, further wholesale sale and distribution to end-users and a retail market.

There are three unwavering and mandatory rules to be followed by specialty crop producers who engage in any form of direct sales, including farm markets, farmers’ markets, CSAs, and value-added processing.

RULE NO. 1: Completed Products Coverage

What is absolutely imperative for specialty crop producers is to purchase liability insurance that is confirmed in writing from the insurance agent to contain “completed products” coverage, sometimes simply called product liability coverage. This will generally take the form of a separate liability insurance supplement to a commercial or farm policy, or it may be included in the policy already as written.

For a specialty crop producer to purchase insurance that is not confirmed in writing to contain product liability or completed products coverage will leave the producer catastrophically exposed to, and completely uninsured for, products liability claims and obligations.

For a specialty crop producer’s liability insurance coverage and business practices to provide protection from the risk of product liability claims, following a second rule is also absolutely imperative.

RULE NO. 2: Additional Insured Coverage

This rule has multiple intertwined aspects that require some explanation.

First, if a specialty crop producer is supplying, whether by sale, consignment or any other arrangement, any product to a third party for delivery or sale through that third party’s retail store, restaurant, food service, website, or wholesale distribution operation of any kind, the specialty crop producer must purchase liability insurance that contains what is termed “additional insured coverage.” Best business practices of the well-run operations in those fields require that those entities be named as an additional insured on their suppliers’ liability policies.

Second, it is also equally mandatory that additional insured coverage be purchased as part of liability insurance if selling direct-to-consumer at a farmers’ market or similar physical location, for example an event, fair or exhibition, operated by a third party. Again, best business practices of those types of collective retail spaces require that the venue operator be named as an additional insured on vendors’ liability insurance.

What exactly does “named as an additional insured” really mean?

- Additional insured coverage means liability insurance that is extended to parties other than the policyholder to provide liability insurance coverage to a third party who requests it for participation in a distribution channel or location through which the primary policyholder’s goods are sold either directly or indirectly. In other words, anywhere the policyholder acts



as a supplier or vendor.

- The additional insured coverage provisions contained in or purchased as a supplement to a liability insurance policy generally become effective simply upon agreement, required to be memorialized in writing, that access to that distribution channel or location requires naming the operator “as an additional insured.”
- There is traditionally a time frame and/or specific activity or location defined as how long or why the coverage needs to be in effect, such as “for purposes of the XYZ Farmers’ Market for the 2023 season” or “for the purposes of supplying produce to Smalltown Grocery Market.”
- Additional insured status means the third party responsible for the distribution channel or location will be considered by the insurance company as insured under the policyholder’s policy for liability claims in accordance with the terms of insurance policy.

Third, the insurance company issuing the liability insurance policy must agree to confirm that additional insured coverage is contained in the policy’s provisions, referred to as a “Vendor Endorsement” (sometimes also spelled as “Vendors,” “Vendor’s,” or “Venders” Endorsement). This is done through the issuance of “Additional Insured Certificates” listing the third party as an additional insured.

Based upon the insurance company, the size, sophistication and scope of the policyholder, and the agent relationship that may be involved, these certificates may be issued by the policyholder, the agent, or the insurance company itself. To be accepted, best business practices are that the insurance certificate must contain a statement naming the additional insured party by name, show that products liability coverage is included in the policy and state the dates or event for which the coverage is in effect.

- The typical example of such an arrangement is as follows: Retail Store X agrees to stock on its shelves a line of value-added apple, strawberry and rhubarb pie fillings made by a specialty crop producer from their raw agricultural commodities, but in order to do so states that it requires “an insurance certificate naming Retail Store X as an additional insured.”
- Other examples are a farmers’ market requesting the same as part of the vendor agreement to be executed in order to occupy a space at its market, or a “farm to table” restaurant that requires the same in order to purchase produce from a local specialty crop producer.

Fourth, the additional insured coverage should always be obtained on an “occurrence” basis. That means the coverage applies to all those claims that may “occur” (measured by the date of the foodborne illness) within the dates the insurance policy is in effect, or “policy period.”

Lastly, if a specialty crop producer operates a farm market and includes in inventory for sale any products produced by others, in order to be protected from foodborne illness claims, or any other claims that might be asserted for non-food products produced by others, a specialty crop producer should adopt the same business practices with regard to the suppliers of those products.

- In other words, for full protection against products liability claims for all products of others sold in a specialty crop producers’ farm market it is essential that additional insured certificates, or vendor’s endorsements, naming the farm market operating entity as an additional insured on an occurrence basis be obtained from the suppliers of all such products.



- In the previous example of a neighboring farmer seasonally selling E-coli contaminated melons through a specialty crop producer's farm market, sound business practice to secure the best protection from product liability claims would have been to require an additional insured certificate in the same fashion as described above.
- Put another way, replication of the same business practices required of a producer in order to supply or sell through a third party's distribution channel should be employed in that producer's own farm market.

In conclusion, in order to take advantage of revenue-expanding opportunities available to specialty crop producers, unique and sometimes unfamiliar new business practices need to be understood and employed to ensure adequate protection from liabilities not previously encountered. Of all the takeaways from this guide, the concepts covered here are perhaps the most important.

E. Contract Law Basics

It is also worthwhile to review some basic principles of contract law which impact specialty crop producers engaged in direct sales. Breach of contract can cause a legal claim for monetary damages. It is another form of legal liability from which protection is essential to ensuring the continued viability of a specialty crop production business.

Every sale of a good or service is primarily a contract. In the broadest terms, a contract is an agreement between two or more parties, with each party exchanging something of value. In legal terms this "something of value" is called consideration. Forming a legally enforceable contract requires three separate elements: offer, acceptance, and consideration.

An offer occurs when one party holds themselves out as willing to enter into an exchange of consideration with another party. A written document is not required in all contracts, but it is helpful in terms of limiting misunderstandings between the parties by memorializing the terms in writing. In this way, "get it in writing" is the most basic form of liability protection.

Once an offer has been made, it is up to the person or entity to whom the offer was made to accept the terms of the offer and at that point enter into a legally binding contract. Acceptance in contract law takes on different forms. Oftentimes a party will accept via written or verbal communication. Other times acceptance can be via commencing performance. The required manner of acceptance can frequently appear in the offer itself, for example a purchase order document that says, "Please confirm today by phone for delivery on Friday."

In many cases, the initial terms of the offer will not be acceptable to the offeree. In this scenario, the offeree may change the terms to align with their needs and then make a counteroffer to the initial offeror. Under traditional legal principles, the so-called "mirror-image rule" requires that an acceptance matches the offer exactly; if it does not, then the acceptance is automatically a counteroffer, extinguishing the original offer and conditioned now on acceptance by the original offeror.

The third element of a legally binding contract is consideration. Consideration is most easily understood as the benefit bargained for from each side and takes one of three forms: (a) a promise to act in the future; (b) the taking of a contemporaneous action in the present; (b) money or its equivalent. While it is not necessary that the exchange of consideration between offeror and offeree be of equal value, it is necessary that the consideration be, in form and content, as agreed in the contract.

One common contract into which specialty crop producers enter is a vendor agreement for



participation in a farmers' market. In a farmers' market vendor agreement, the market operator receives money from the producer as either a flat rental rate or a percentage of sales, while the farmer receives the ability and space to sell at the market location. Both of these have value and are valid to satisfy the requirement of consideration for an enforceable contract.

The intricacies of contract law are well beyond the scope of this guide, but it is important to grasp that oral contracts are formed every day to transact business, sometimes for transactions worth millions of dollars. As long as the three requisites reviewed above are present, an oral contract can be formed, can be breached, and can be enforced.

While a contract need not be in writing to be valid and enforceable, proving the terms of an oral contract can be difficult and is generally only successful in proving a very few, extremely simple, terms. This has limited usefulness when one party feels the performance by the other was not as agreed. The strength of any contract is in how well it provides a predictable and known outcome for any contingency in performance that arises. Therefore, a written contract that is capable of addressing a larger number of contingencies is exponentially better in all circumstances.

Contracts and their terms can be proven without formal signature of both parties on a single document. A document that supplies proof and confirmation of agreed contract terms may appear to be more akin to a "term sheet" without signatures, yet it nevertheless memorializes the agreement of the parties. Contract documentation may be a series of written documents, such as emails, which, taken together with the conduct and actions of the parties taken in response, constitutes the proof that the parties agreed on the terms stated in the writings.

Written contracts or writings which memorialize the terms of an agreement allow parties to be certain what is a contractual term which, if not fulfilled, constitutes a breach of the contract. Frequently, things said in negotiations leading up to the preparation of a written contract are important inducements to proceed and remembered vividly by the other party. Problems arise when things said and relied upon are not included "within the four corners" of the written agreement.

Reviewing carefully and knowing what is included in a written contract or the writings which memorialize an agreement, as well as identifying what may be missing and needs to be added, is another vital protection from contract claims. Including in writing all contract terms that are considered "material," meaning that without those particular terms the party would not have signed or proceeded with performance, ensures that any breach of those terms can potentially provide a basis for the non-breaching party to stop performing and possibly even terminate the contract entirely—after seeking the advice of legal counsel.

Contracts may have their own unique and specific terms on breach, damages, and termination, so no written contract on an important business matter should be signed without a careful and complete reading and an attorney's review to explain anything that is not understood. The rules of evidence concerning written contracts generally exclude verbal statements which are not contained in the written contract from being considered as terms of the agreement. There are certain exceptions to those rules that an attorney might be able to utilize in litigation, but a layperson simply needs to understand and apply this basic premise.

In order to best manage the risk of contract disputes in the day-to-day business of specialty crop production and sales, the best protection is to adopt and consistently implement a practice of confirming all verbal communications in writing, which includes by email, in order to leave a paper trail of each side's statements and actions. Business conducted in this way leaves the evidence necessary for proving the actions, and evidencing the intent, of the parties should a dispute arise. This is the common and adopted practice of attorneys in their own businesses and it serves all who employ it well, even farmers.



Resources:

[Understanding Product Liability: Protecting Your Farm-Based Food Business](#), webinar by the University of Scranton Small Business Development Center and the Penn State Center for Agricultural and Shale Law (2023). (Enter Password: SeCetX2F to view video)

- <https://agfirstfcb.webex.com/recordingservice/sites/agfirstfcb/recording/b2a4af97a567103b97bf6e83da7155e4/playback>

[Product Liability Insurance](#), Lynn Kime & Winifred W. McGee, Penn State Extension (2023).

- <https://extension.psu.edu/product-liability-insurance>

[Small Farm Product Liability](#), Lindsay Borman, Cornell University, Small Farms Program (2017).

- <https://smallfarms.cornell.edu/2017/07/small-farm-product-liability/>

[Product Liability Insurance Importance & FAQ](#), Savannah L. Columbia, University of Kentucky Extension (2021).

- <https://www.uky.edu/ccd/sites/www.uky.edu.ccd/files/ProductLiabilityInsurance.pdf>

[Insurance Coverage Options for Fresh Produce Growers](#), Roderick Rejesus, et al., North Carolina State Extension (2009)

- <https://peaches.ces.ncsu.edu/wp-content/uploads/2015/03/ag-710-final-printed.pdf?fwd=no>

[Food Safety and Liability Insurance for Small-Scale and Limited Resource Farmers](#), USDA Risk Management Agency (2010).

[Managing Liability, Legal Liability in Agritourism and Direct Marketing Operations](#), Jesse J. Richardson, Jr., Virginia Cooperative Extension (2012).

- https://www.pubs.ext.vt.edu/content/dam/pubs_ext_vt_edu/CV/CV-25/CV-25-PDF.pdf



3. Business Structures for Operational Resilience and Liability Avoidance

A. Introduction to Business Entity Structures

This guide has thus far examined legal liability claims of negligence arising from the ownership, possession, and control of real estate and from selling specialty crop products that cause liability claims, primarily due to foodborne illness. Both sections provided this information in order to help a specialty crop production business protect itself from such risks.

This section will address the attributes of the various business entity structures available through which to do business. Once again, reducing and avoiding liability risks is the objective behind examining business entity structures in this section.

Note: Non-profit business entities will not be discussed in this guide as they do not involve ownership interests and therefore do not carry the risk of individual or personal liability in the absence of equity owners.

The choice of business entity structures that may be employed by a specialty crop producer all have pros and cons in terms of formalities that must be followed, how easy or complex it is to do business through them, how flexible they are to add or remove persons who share in the entity's ownership and net profits, and how the net profits taken out of the business as compensation are taxed.

Lastly, and most important for this guide, is that each structure has attributes that should be understood with regard to whether the individuals holding an ownership interest, i.e., "equity," can be individually and personally liable for the business' financial liabilities.

Financial liability for business debts many times takes the form of contractual liability, such as a delinquent loan or a breached lease or contract to sell goods. However, it can also arise from legal liability claims like negligence or products liability if there is an absence or insufficient insurance coverage to provide full indemnity, as discussed in the preceding sections of this guide.

Below are seven factors for a specialty crop producer to consider in the choice of business entity structure.

1. Individual/personal liability avoidance.
2. Tax treatment of compensation paid to equity owners.
3. Decision-making authority and business management.
4. Formalities required to maintain the business entity in accordance with state law.
5. Handling of capital contributions.
6. Transferring equity interests, upon death or otherwise.
7. Eligibility criteria and other aspects of government agricultural program payments.

Discussing and examining all of these factors is far beyond the scope of this guide. This guide is primarily concerned with the first factor mentioned—how individual/personal liability of equity owners is avoided.

Having said that, all these factors should play a part in the choice of entity made. These choices could include a decision to change the entity structure of a business already in operation, as well as the continuing choice not to make such changes. Any choices made about business entity structures should be made with the involvement of legal counsel in every aspect. It is during this



process that all of these factors can be considered.

The formation and maintenance of business entities is generally governed by state law, not federal law, and there can be material differences between states. Pennsylvania law will be the scope of this guide.

B. Most Common Business Entities

In Pennsylvania, the Commonwealth of Pennsylvania Department of State is the agency of the state government which business entity formation filings and registration. The six most common business entity structures used in Pennsylvania, and throughout the country with potential variations in finer details, are outlined below.

1. **Sole Proprietorship** – a single person owning 100% of the business.
 - a. When no other business entity is duly formed under state law, business done by one person is done as a sole proprietor. There are no state laws enacted by the Pennsylvania legislature governing formation and operating as a sole proprietor; common law principles of law apply.
 - b. The owner is individually and personally liable for all legal and financial liabilities and business debts.
 - c. The sole proprietor files an individual tax return and pays the income tax owed on any income from operating the business.
 - d. For any business entity type, the owner(s) may, or may not, be involved in the day-to-day operations, and can have an indefinite number of employees, or independent contractors, who operate the business for the owner(s). The same applies to sole proprietors.

2. **General Partnership** – any combination of two or more persons or legal entities (called “general partners”), owning a business together and who have not formed one of the other business entity types available and authorized under Pennsylvania state law.
 - a. For partnerships formed in Pennsylvania after April 1, 2017, the law governing formation and maintaining a general partnership is the Pennsylvania Uniform Partnership Act of 2016.
 - b. For partnerships formed prior to that date, unless they elect to be so governed, they are not governed by that law and their formation and operation are governed by common law.
 - c. A written partnership agreement is ideal but not necessary, regardless of when formed or what law applies. Oral partnership agreements generally leave many unanswered questions, but partnerships based upon them exist and some operate very successfully, even at the highest levels of the U.S. economy. Pennsylvania’s Uniform Partnership Act, if it applies, supplies terms by default on many topics in the absence of a written agreement.
 - d. General partners are individually, personally, and jointly liable for all legal and financial liabilities and business debts of the partnership. Being “jointly liable,” also termed “joint and several liability,” means being liable equally and to the same extent as the other general partners.
 - i. For example, if a partnership of five persons owes a financial liability of \$100,000, in the absence of partnership assets to “satisfy,” or pay, that debt, each partner could theoretically be pursued by the creditor to pay the entire amount alone from their personal assets. Of course, a creditor is only entitled to one collective recovery of \$100,000, so if \$10,000 was already recovered from another general partner, only \$90,000 could be collected from any other single



- or combination of general partners. However, until that debt is “satisfied” and paid in full, each partner owes the balance due as a joint obligation with the other partners.
- e. While a general partnership files an annual “informational” tax return, it does not pay income tax on partnership income. The income derived from doing partnership business which is distributed to each partner is treated as a “pass through” by the partnership entity to the partners themselves, and it is the partners who are solely liable to the federal government pay the income tax owed on their individual income.
3. **C Corporation** – a business entity made up of one or more owners, which can be another business entity, whose ownership interest is created and measured by holding shares of stock in the corporation.
- a. The ability to form corporations, create and issue stock, appoint corporate officers, operate the business through a managing board of directors elected by shareholders, and the rights granted to, and obligations imposed upon, shareholders are all strictly governed by Pennsylvania’s Business Corporation Law.
 - b. Corporate income tax is paid by the corporation on net corporate profits. If any portion of net corporate profits are distributed to shareholders as dividends, income tax is paid yet again by the individual shareholders on those distributions. This is called “double taxation” and is perceived as the major negative feature of C corporations.
 - c. Owners (shareholders) have no responsibility for legal and financial liabilities and business debts of the corporation. Their only risk is potential loss of stock share value if the business becomes insolvent from possessing more liabilities than assets. The shareholders only lose whatever may have been paid for or contributed to the corporation in exchange for that stock.
 - d. The advent of C corporations in the U.S. during the 19th century enabled the comparatively risk-free concentration of capital from hundreds or thousands of individual investors into businesses of unprecedented size which were capable of engaging in capital intensive high-risk businesses like railroads, domestic and international shipping, manufacturing, mining, and oil production. The use of the C corporation to do business enabled the settlement of the North American continent, the industrial revolution, and massive U.S. economic growth in the 20th century.
4. **S Corporation** – a business entity structured on paper very similar to a C corporation but removing the corporate entity’s income tax obligation in exchange for restrictions on stock ownership terms which are not consistent with publicly traded corporations whose shares are able to be acquired by any shareholder willing to pay the market price.
- a. S corporations were created by a set of late 1950s federal tax code changes, rather than state laws, which eliminated the double taxation burden of a C corporation in order to promote small business viability after World War II.
 - b. Like a C corporation, the owners (shareholders) enjoy personal immunity from legal and financial liabilities and business debts of the corporation. Their only risk is potential loss of stock share value. In an S corporation, share value is typically comparatively low due to stock restrictions that prevent the stock from being freely tradable, combined with the small business accounting practice of annually distributing virtually all net profits on an annual basis to shareholders.
5. **Limited Partnership (LP)** – a partnership between one or more general partner(s) and at least one or more “limited partners.”



- a. The structure, participation, and liability of the general partners mirrors a general partnership.
 - b. Investors can become limited partners by supplying capital only (without decision making authority) in exchange for an ownership interest that carries a right to whatever net profit distributions are authorized in the limited partnership agreement.
 - c. Limited partners enjoy the same immunity from legal and financial liabilities and business debts enjoyed by shareholders of a corporation, unlike the general partner(s).
 - d. Limited partnerships are included here to provide familiarity with their existence. However, due to the advent of other more attractive entity choices in recent years, such as limited liability companies, limited partnerships are fairly consistently being less frequently used in agricultural production. Limited partnerships will not be discussed further in this guide.
6. **Limited Liability Company (LLC)** – a business entity composed of one or more LLC “members” who do business in much the same way that partners do business—in accordance with an “Operating Agreement,” the terms of which are extremely flexible and almost entirely up to the members.
- a. LLC members enjoy the income tax treatment as partners; double taxation is eliminated.
 - b. LLC members enjoy the same liability protections as corporate shareholders.
 - c. LLCs are thought of as the best of both worlds of a partnership and a corporation combined. They were not an authorized business entity type in Pennsylvania until 1994. The state law has been amended several times since then and the present governing LLC law is called the Uniform Limited Liability Company Act of 2016.

Other business entities authorized under Pennsylvania law, including professional corporations, and agricultural cooperative associations—both forms of a corporation with small twists—have highly specialized attributes and uses. Examining them is also beyond the scope of this guide. Further resources on agricultural cooperatives are included in the Resources list below.

An increase in personal financial exposure is always risked when business is conducted without attention to business entity formation and its implications. Some simple examples follow.

- o An individual engaged in farming under their own direction is by default a sole proprietor, bearing 100% of the business liabilities personally. It is true that some substantial and successful businesses continue to be operated in this manner and farming is one area where sole proprietorships are still quite common. Unfortunately, this is primarily by default and lack of planning, rather than the result of conscious decision making arrived upon after legal consultation. An individual in this circumstance could easily and immediately reduce their financial risk and personal exposure by the simple act of forming a one-member limited liability company.
- o It is very common for farms to be operated as a general partnership of two spouses by default, and with significant negative impacts that can easily be avoided. This occurs when: (a) no business entity has been formed to operate the farm; (b) the land being farmed is deeded in the name of both spouses (as required by any mortgage holder); and (c) the farming duties are shared to some degree by both spouses. Even if one spouse does not share even 1% of the farming duties, any net farming profits are considered shared marital property and therefore also partnership assets, and the non-farming spouse is contributing the use of his or her one-half interest in the land without compensation. Legally, a spousal partnership exists and each spouse’s personal one-half interest in the real estate becomes



a partnership asset. Ironically, while the mortgage holder requires the deed be in both spouses' names to theoretically gain the customary legal protection of marital assets from debts that may be incurred by only one spouse, the actions of the spouses have in fact erased any protection that could have existed and guarantees that the personal marital asset is exposed to 100% of any farming debt. In this circumstance, protecting each spouses' personal financial interest in one-half of the real estate, and protecting it from farming debts, can be accomplished simply by: (a) forming a limited liability company (LLC), consisting of both spouses as its sole members, to operate the farm; and (b) executing a lease of the land from the two individual spouses to the LLC.

In today's volatile agricultural markets, the risks of outstanding business debt and liability claims, and the potential magnitude of such claims should they occur, continue to increase while revenues continue to fluctuate. For all of the reasons discussed in Sections 1 and 2 of this guide, specialty crop producers should reevaluate operating as a sole proprietor or a general partnership, in consultation with legal counsel and an accountant, and seek the most protective business entity structure possible for their particular business.

C. Piercing the Corporate Veil

"Piercing the corporate veil" is a legal term that began as a reference to a process, authorized by state law in every U.S. state, that alleges that the formalities and requirements of a C corporation or an S corporation under applicable state law are not being honored, at the outset or at any point in the corporation's operations. If the standard in the applicable state involved is satisfied, the protection of the corporate shareholders from legal and financial liabilities and business debts of the corporation can be lost and the shareholder(s) can become personally liable.

This result is exceedingly rare and is sought by the filing of a lawsuit requesting a court to permit judgments be entered against shareholders for business debts and subject shareholders' personal assets to satisfy those debt, i.e., "pierce the corporate veil." The extent of the non-compliance, and the corporate requirements being disregarded, which can lead to this result, are matters to be decided in the lawsuit. They include such things as failure to maintain a validly constituted board of directors, failure to conduct director's meetings and/or shareholders meetings, conduct which violates that applicable state's Business Corporation Law, failing to keep the corporation adequately capitalized to meet obligations and corporate accounting practices that fall below reasonable standards and/or defrauding creditors. For more information, see the Resources below.

Today, the phrase is now employed for the same concept and process as applied to any business entity structure that includes corporate shareholder-like liability protection, e.g., a limited liability company. As a result, it is of the utmost importance that in forming and conducting the business of any form of corporation or limited liability company, that the advice of legal counsel be sought on the specific concept of "piercing the corporate veil" applicable to the entity being formed and that any advice be strictly adhered to at all times.

D. Professional Legal and Accounting Advice

As stated at the outset, the above discussion of business entity types is primarily to familiarize specialty crop producers with the liability protections, or lack thereof, that come with certain entity structures, as well as some basic pros and cons in other areas.

Producers should be aware that the topic of how net profits are taken out of the business as compensation to equity owners is an area upon which many rules exist, and much creative thinking has been devoted. It is also a subject upon which legal and accounting help is absolutely necessary before setting up an entity or making any changes to an existing entity. There are many legal, tax, accounting, and management issues to decide upon, the overwhelming majority of



which are not mentioned here.

All of the above simply provides a very simplified and broad-brush approach to how ownership is held, how distributions of net profits to the holders of ownership equity are taxed, and most importantly, how these business entity structures can be instrumental in protecting business owners from liabilities that may arise in the course of doing business.

Any steps taken to choose, form, revise, or discontinue a business entity should be done only after consultation with legal counsel and an accounting professional about all aspects of the decisions being made. Some business entities are easier than others to revise and decisions can have financial consequences for years to come.



Resources

[A Guide to Farming in Pennsylvania: Planning](#), Penn State Extension (2022).

[Entrepreneur’s Guide: Starting and Growing a Business in Pennsylvania](#), Pennsylvania Department of Community & Economic Development (2019).

- <https://dced.pa.gov/download/entrepreneurs-guide/?wpdmdl=56163>

- *Summary Table – Registering Business Structure and Name:*

	STATE FORMS	NON-STATE FORMS <i>(these are not required to be filed or drafted)</i>	NAME REGISTRATION <i>See "Business Name"</i>
Sole Proprietorship	No state form required	None	If fictitious name: File Form 54-311 – Application for Registration of Fictitious Name
Partnership	No state form required	Internal rules are called the Partnership Agreement	If fictitious name: File Form 54-311 – Application for Registration of Fictitious Name
Limited Partnership (LP)	<ul style="list-style-type: none"> • Form 15-8511 – Certificate of Limited Partnership 	Internal rules are called the Partnership Agreement	Business name is registered in the same documents for establishing the LP, LLP, LLC, corporation or S-corp. However, if planning on doing business under a different name, than the legal name of the business (exact name listed on the respective form to create the LP, LLP, LLC, or corporation), then must file Form 54-311 – Application for Registration of Fictitious Name.
Limited Liability Partnership (LLP)	<ul style="list-style-type: none"> • Form 8201a – Registration Limited Liability Partnership 	Internal rules are called the Partnership Agreement	
Limited Liability Company (LLC)	<ul style="list-style-type: none"> • Form 15-8821 – Certificate of Organization Domestic Limited Liability Company • Docketing statement 	Internal rules are called the Operating Agreement	
Corporation	<ul style="list-style-type: none"> • Form 15-306-7102 – Articles of Incorporation • Docketing statement 	Internal rules are called Bylaws	
S Corporation	Same documents as corporation, plus also file the following: <ul style="list-style-type: none"> • IRS Form 2533 • PA Form REV-1640 	Same documents as corporation	See "Business Name" for more information. Contact the Pennsylvania Department of State with specific questions regarding when an LP, LLP, LLC or corporation would need to file a fictitious name.

[Pennsylvania Department of State, Business Entity Filing Forms](#)

- <https://file.dos.pa.gov/forms/business>

[Farmer’s Guide to Business Structures: LLCs, Corporations, Partnerships and More](#), Rachel Armstrong, et al., Sustainable Agriculture Research and Education ([SARE](#)) (2018).

- <https://www.sare.org/wp-content/uploads/Farmers-Guide-to-Business-Structures.pdf>

[Protecting Diversified, Direct-Market, and Value-Added Operations with Smart Business Structures, Written Agreements, and Regulatory Compliance](#), Rachel Armstrong, et al., Sustainable Agriculture Research and Education ([SARE](#)) (2015).

- <https://projects.sare.org/project-reports/Inc13-348/>

[Ownership Structures for Your Farm or Ranch: Some Basic Considerations](#), Joe M. Hawbaker, University of Nebraska-Lincoln Center for Rural Affairs



[Using a Business Organization Structure to Limit Your Farm's Liability](#), Ashley Newhall & Paul Goeringer, University of Maryland Extension (2015)

- <https://extension.umd.edu/resource/using-business-organization-structure-limit-your-farms-liability-eb-422>

[National Agricultural Law Center Publications:](#)

- <https://nationalaglawcenter.org/research-by-topic/business-organizations/>
 - [An Overview of Organizational and Ownership Options Available to Agricultural Enterprises, Part 1](#) (Goforth)
 - [An Overview of Organizational and Ownership Options Available to Agricultural Enterprises, Part 2](#) (Goforth)
 - [Forms and Filing Information: Business Organizations](#) (NALC Staff, 2019)
 - [State-Specific Direct Marketing Business Guides](#) (National Ag Law Center & U. IL @Urbana)
 - [Using Alternative Enterprises and Recreational Development to Bolster Farm Income — Workbook](#) (R. Rumley & Tullos, 2012)
 - [Legal and Business Guide for Specialty Crop Producers](#) (National Ag Law Center & U. AR Division of Agriculture, 2011)
 - [Legal Risk Management: Protecting Your Farm and Family – PowerPoint Presentation](#) (Mirus, 2009)
 - [Considerations for Operating Agreements](#) (Ferrell, 2011)
 - [A Snapshot of LLCs and Farming: How Farm Businesses have implemented the Limited Liability Company Structure in the Midwestern United States](#) (Bachelor & Hall, 2019)
 - [An Introduction to the Federal Securities Laws As They Might Apply to Agricultural Operations](#) (Goforth, 2004)
 - [The Farmer’s Legal Guide to Producer Marketing Associations](#) (O’Brien, Hamilton, & Luedeman, 2005)
 - [Legal and Policy Considerations of Investor-Friendly Cooperatives](#) (O’Brien, 2005)
 - [States’ Agricultural Cooperative Formation](#) (NALC Staff, 2022)
 - [Navigating Your Legal Duties: A Guide for Agricultural Cooperative Directors](#) (Scott & Traxinger, 2021)

[How to Start a Cooperative](#), USDA Rural Development (2015).

- https://www.rd.usda.gov/files/publications/CIR_7_HowtoStartaCooperative.pdf

[Agricultural Business Organizations: Basic Characteristics and Choices](#), Forrest A. Buhler, Kansas Agricultural Mediation Service

- https://www.ksre.k-state.edu/kams/succession/financial/Agricultural_Business_Structures.pdf



[Limited Liability Companies: Operating Agreement Components and Sample Language](#), Robert A. Branam, North Carolina State Extension (2022).

- <https://content.ces.ncsu.edu/limited-liability-companies-operating-agreement-components-and-sample-language>.

Chart Comparing Pennsylvania Business Entity Types

	Sole Proprietorship	Corporation (S-Corporation)	Limited Liability Company (LLC)
Formalities and Initial Filing Requirements	No formalities with Department of State. May require filing of Pennsylvania Enterprise Registration Form	Must file articles of incorporation with Dept. of State. Once incorporated, may elect to be an S-Corporation. Additional filing and bylaw requirements apply.	Must file a Certificate of Organization and a docketing statement with Dept. of State.
Management	Self-managed and operated.	Management is centralized in the board of directors.	If "member-managed" all members have authority to act as an agent. If "manager-managed" only designated managers have agency authority.
Liability	The owner is personally liable for the debts and liabilities of the sole proprietorship.	Shareholders are not personally liable for the debts of the corporation, with some exceptions.	Members are not personally liable for the debts or similar liabilities of the LLC.
Taxes	No separate tax return. The owner's income or loss is reported on his or her personal tax return.	<u>C-Corporations</u> have double taxation at both; corporate and individual level. <u>S-Corporations</u> have only one level of tax at the individual level.	Taxes of the LLC flow through to the individuals. Each member recognizes income or loss on their personal tax returns.
Transferability	Transferring interest must be done by transferring each individual asset of the sole proprietorship.	Transferring interest can be done by transferring shares.	Interest can be transferred by transferring the entire entity, as well as transferring a portion of the entity.



Notes on Chart Comparing Pennsylvania Business Entity Types

A. Sole Proprietorship

A sole proprietorship is an **unincorporated** business, owned by **one** person. The business and the owner are one and the same.

Filing: A sole proprietorship is an informal business entity. There are no documents filed with the Department of State to create a sole proprietorship. You may file and operate under a Fictitious Name. The filing of a Fictitious Name does not create a separate legal entity under Pennsylvania State law, therefore, none of the protections of a business entity are afforded to a sole proprietor operating under a Fictitious Name.

A sole proprietor may be required to register as a Pennsylvania Enterprise Registration Form (PA-100) for certain taxes and services administered by the PA Department of Revenue and the PA Department of Labor & Industry. An Enterprise is any individual or organization which is subject to the laws of the Commonwealth of Pennsylvania and performs at least one of the following:

- Pays wages to employees
- Offers products for sale to others
- Offers services for sale to others
- Collects Donations
- Collects taxes
- Is allocated use of tax dollars
- Has a name which is intended for use and, by that name, is to be recognized as an organization engaged in economic activity

An Establishment is an economic unit, generally at a single physical location if any of the following apply: business is conducted inside PA, business is conducted outside PA with reporting requirements to PA, or PA residents are employed, inside or outside PA.

Formalities: If a Fictitious Name is filed, the sole proprietor is required to advertise in the county in which the main office or place of business is its intention to file for registration of a Fictitious Name. This advertisement can appear before or after the day the application is filed with the state.

Management: Self-managed and operated.

Liability: The owner is personally liable for all debts of the sole proprietorship. This form of business does not provide a shield against personal liability to the owner.

Taxes: A sole proprietorship that does not have any employees does not need an Employer Identification Number from the Internal Revenue Service (IRS). The sole proprietorship also does not need to file a separate tax return. Instead, the owner's income is reported on his or her personal federal and Pennsylvania individual income tax returns. As the owner of a sole proprietorship, you are not considered an employee of your own business. Sole proprietors should make special note of their tax withholdings since they will not be covered by any provisions of the payroll tax. Since no taxes are withheld from your self-employment income, you will need to make quarterly estimated tax payments (Form 1040-ES) to cover both federal income taxes and self-employment taxes.

Transferability: Transferring interest must be done by transferring each individual asset of the sole proprietorship.

B. Limited Liability Company (LLC)

An LLC is a **separate business entity**, separate and apart from its owners.

Filing: To form an LLC, the applicant must file a Certificate of Organization and a docketing statement. A Certificate of Organization is required to be filed with the Corporation Bureau, Department of State, on Form DSCB: 15-8913 accompanied by a docketing statement, Form DSCB: 15-134A. Pa. C.S.A. § 8914. An Operating Agreement, similar to the bylaws of a corporation, sets forth the members' rights and duties. The Operating Agreement does not need to be in writing, except where required by statute. Without an Operating Agreement, the default provisions of the statute apply. (Pa. C.S.A. § 8916). A Federal Employer Identification Number



(EIN) may be obtained by filing an IRS Form SS-4, which also allows you to select the tax treatment for the LLC. Formalities of an LLC must be met and maintained to ensure personal liability protection.

Formalities: In addition to the filing requirements for an LLC, each year a Certificate of Annual Registration, or Form DSCB: 15-8998, must be filed with the Corporation Bureau, Department of State. In order to preserve the liability protection of an LLC members must not co-mingle personal and business assets. Other formalities can be outlined in an Operating Agreement.

Management: An LLC provides management flexibility. LLC can be elected to be either “member-managed” or “manager-managed,” which allows the allocation of agency authority.

- If “member-managed,” all members have authority to act as an agent on behalf of the LLC.
- If “manager-managed,” only the members that are designated as managers have authority to act as agents of the LLC.

The management structure is specified in the operating agreement and can be either decentralized or centralized. Profits of the LLC are distributed by the members as they see fit. Many states allow free transferability of member rights. An LLC exists in perpetuity unless otherwise provided and the applicant may be able to set up automatic renewal.

Liability: Once properly formed, an LLC provides a shield for personal liability where personal assets, generally, cannot be sought for debts of the LLC. Owners **are not personally liable for the debts of the business**. Members’ liability is limited to the amount contributed into the LLC. There are several exceptions where the LLC will not provide a shield to liability for personal assets, in which case the owners can be held individually liable for the debts of the LLC. The following are some of the instances where the LLC would not provide liability protection: If the LLC was not properly formed, in which case it would be deemed as if the LLC did not exist and the members will be personally liable; if the formalities to maintain the LLC are not met (any filing and reporting requirements); or if LLC fails to make capital contributions that shareholders have agreed to make.

Taxes: Each member must recognize the income or loss of the LLC on his or her personal tax return. There is no corporate tax on an LLC and the taxes of an LLC flow through to the individuals. This is the same way a partnership would be taxed. There is no tax at the corporate level, **only one level of tax at the individual level**.

C. Corporation (S-Corporation and C-Corporation)

A Corporation is a **separate business entity** that is distinct and separate from its owners.

Filing: A corporation is formed by filing articles of incorporation with the PA Corporations Bureau at the Department of State. The articles of incorporation provide basic information and are made open to the public. Once incorporated, the corporation can create its own bylaws, which are internal operating rules for the corporation and are not required to be available to the public.

Forming an S-Corporation: The filing of articles of incorporation produces a C-Corporation. Once formed, the C-Corporation may elect to be treated as an S-Corporation (an S-Corporation creates a pass-through tax filing that is further discussed below) with the Internal Revenue Service and Pennsylvania Department of Revenue. This is often done at the same time.

Corporations have the strictest operational requirements of the four entity options listed in this document. The requirements include shareholder meetings, keeping minutes, maintaining certain records, and updating the bylaws.

Formalities: In addition to the filing requirements for an S-corporation, corporate directors are required to observe a number of formalities in order to preserve the business entity. The most important are to (1) maintain separate bank accounts for personal and corporate funds, (2) hold meetings of the corporation’s board of directors at least once a year, (3) keep detailed minutes of meetings of the board of directors and/or shareholders, and (4) keep written agreements of all corporate transactions.

Management: The corporation’s management is centralized in the board of directors. The shareholders elect a board of directors. The board of directors appoints the managers, and the managers generally hire the regular workers. In a small corporation, a single person can hold



multiple positions at once. For example, a person could be the sole shareholder, the sole director, and the CEO while doing regular work of the corporation. The directors and officers of the corporation have a fiduciary duty to act in the best interest of the shareholders.

Liability: Both a C- and S-Corporation provide a shield against personal liability. Shareholders are **not personally liable for the debts of the corporation**. Shareholder liability for suits against the corporation is limited to the amounts the shareholders contributed. There are four exceptions to the general rule that shareholders are not liable for corporate wrongdoing:

1. If the corporation was not properly incorporated.
2. If the corporation has decided to make distributions to shareholders and fails to do so.
3. In limited circumstances the corporate veil can be pierced, and the shareholders could be personally liable. Some of these circumstances include undercapitalization or failure to follow corporate formalities.
4. Individuals can always be liable for the wrongs they commit themselves.

Taxes: C-Corporations are taxed at both the corporate level and the individual level. The C-Corporation is taxed on the income the corporation makes; and the shareholders are taxed on any distributions, usually through a dividend, made to them by the C-Corporation.

In an S-Corporation there is **only one level of tax at the individual level**. Each shareholder personally recognizes income or loss on his or her tax return. Only the wages of a shareholder who is also an employee are subject to employment tax.

Transferability. Transferring interest in an S or C-corporation is done through the transfer of corporate shares to the receiving party.



4. Licensing and Regulatory Obligations in Selling Raw and Processed Specialty Crop Products

A. Introduction To Regulatory Obligations

A specialty crop producer of raw agricultural commodities for human consumption who conducts direct sales and value-added processing is subject to a framework of federal and state statutes and regulations, and even local ordinances, which can contain production, handling, processing, and other regulatory food standards and licensing requirements. Compliance is necessary or another type of risk to business arises—the risk of regulatory liability.

In addition to the legal liability claims and financial liabilities already discussed in this guide, a business can incur regulatory liabilities to state, federal, or local government agencies which can result in monetary fines and orders to cease certain practices or even stop operations entirely.

This section is designed to educate and help protect specialty crop producers from incurring these liabilities. Moreover, as outlined in the explanations of negligence and product liability claims, a producer can be found negligent or its product found defective, if the failure to comply with a government requirement caused an injury to a person or property.

A few clarifications about this section are in order at the outset.

- This section primarily focuses upon the principal regulatory obligations arising from a handful of Pennsylvania laws most likely to impact specialty crop producers augmenting income. More specifically, it will concentrate upon the obligations applicable to operating a “retail food facility” or a “food establishment” under Pennsylvania law, or both. Those are the key terms for purposes of this section and will be explained and defined below.
- The so-called “Model Food Code,” a federal regulation that becomes applicable to retail food facilities and food establishments in Pennsylvania by its adoption via regulations of the Pennsylvania Department of Agriculture, regulates food handling, processing, and storage activities conducted while engaging in direct sales and value-added specialty crop processing. The finer details of the Model Food Code are well beyond the scope of this guide. Its existence and role in Pennsylvania’s regulatory framework are the necessary takeaways for readers of this guide.
- This section will not address food safety regulation with regard to commodities other than specialty crops, such as meat, poultry, dairy, and eggs.
- The federal Food Safety Modernization Act (FSMA) will be explained generally but is an extremely broad subject which commands its own educational curricula well beyond the scope of this guide. FSMA regulations and compliance are in the process of being phased in over time, a process that has consumed several years to date and will continue to progress in the coming years. For more information on FSMA, see the Resources below.

At the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) work cooperatively to address food safety in the United States. These two federal agencies promulgate regulations pursuant to laws enacted by the U.S. Congress to regulate food safety and other matters related to the security of the nation’s food supply nationally. Specifically, the USDA has regulatory authority, among other things, over meat, poultry, and egg products, while the FDA regulates all other food products in the U.S., along with dietary supplements, veterinary and human drugs, and many other biological products.



At the Pennsylvania state level, food safety laws are administered by, and regulations to enforce those laws are promulgated by, the Pennsylvania Department of Agriculture (PDA) pursuant to several laws enacted by the Pennsylvania General Assembly dealing with food safety. Until changes were made approximately forty years ago, the Pennsylvania Department of Health was the agency once responsible for all those duties.

Additionally, under Pennsylvania law, county and municipal governments have the option to choose to become involved in food safety regulation by forming and operating a local health department. If so, the local health department supplants the Pennsylvania Department of Agriculture as the licensor and inspector of retail food facilities, but not food establishments.

The determination of the licensor depends upon the exact location of a retail food facility. For a particular location, it must first be determined who is the licensor and what regulations are adopted and in effect for that jurisdiction. Pennsylvania has a contingent of county and municipal health departments which could have jurisdiction. More information about local health departments existing in Pennsylvania is in the Resources below.

This section will first outline federal statutes and regulations generally, before proceeding to address Pennsylvania state statutes, regulations, and licensing.

B. Federal Law and Regulations

i. FSMA's Produce Safety Rule

The Food Safety Modernization Act (FSMA) was enacted as federal law in 2011 with the aim of minimizing the significant annual public health burden imposed by foodborne illness or disease in the United States. FSMA marks a shift away from the federal government's historic focus on detecting, compiling data on, and responding to foodborne illness outbreaks, toward a more preventative objective that reaches all the way to the farm.

As of the conclusion of 2022, approximately nine major sets of federal regulations, and seven more subsets of those nine, all referred to as "rules," have been finalized by the FDA in its implementation of FSMA. However, not all, or the entirety of all, have become effective as of mid-2023. For the purposes of this document, just one of these rules will be discussed, the Produce Safety Rule. To gain a larger understanding of FSMA, see the Resources at the conclusion of this section.

The "Produce Safety Rule" in particular is important for specialty crop producers engaged in direct sales. Many other FSMA regulations, or parts of regulations, issued under FSMA can apply to a specialty crop producer's activities and producers are best served by seeking out FSMA education and training specifically for their operation's scope.

The Produce Safety Rule establishes minimum standards for the safe growing, harvesting, packing, and holding of produce for human consumption, and marks the very first time that minimum standards have been established for these processes and functions at the farm level.

The focus of the rule is "raw agricultural commodity" production. A raw agricultural commodity is defined in the rule as "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." Covered produce includes fruits and vegetables that are regularly consumed in their raw form. The rule provides a list of such produce. Generally, farms subject to the rule's requirements include farms whose average annual monetary value of produce sold, averaged over the past three years, exceeds \$25,000.



The Produce Safety Rule requires that covered producers comply with its requirements to minimize the risk of illness or disease caused by a consumer's use of, or exposure to, produce covered under the Act.

Covered producers must follow requirements relating to personnel qualifications and training, health, and hygiene; agricultural water; animal access and contact; activities relating to growing, harvesting, packing, and holding covered produce; equipment, tools, buildings, and sanitation; specific analytical methods; and recordkeeping. The rule also provides provisions for variances from the rule's requirements, compliance and enforcement provisions, and the withdrawals of qualified exemptions.

For specialty crop producers, the threshold question is whether their farm or produce items offered for sale are subject to the Produce Safety Rule, or whether they fall into one of the rule's exemption categories. The following provides a list of exemptions under the Rule:

- Produce that is rarely consumed raw. Examples include beans, corn, peanuts, and sweet potatoes. The rule provides an exhaustive list of such produce.
- Produce produced for personal consumption or for consumption on the farm or a farm under the same management.
- Produce that is not a raw agricultural commodity (RAC).
- Produce going to processing that has a kill step, meaning that the produce is commercially processed in a way that "adequately reduces the presence of microorganisms of public health significance." This exemption requires annual written assurance of the processes used.
- Producers with less than \$500,000 annual food sales and whose majority of food sales (by value) is directly to a qualified end user (not to consumers).
- Farms with less than \$25,000 annually in produce sales, averaged over the past 3 years.

ii. Model Food Code

The FDA publishes and adopts an updated Model Food Code every four years. This model code is designed to assist state and local governments by providing a model to help in developing their own food codes and to strive for a jurisdiction-to-jurisdiction uniformity that also aligns with federal government policy. Pennsylvania has formally adopted the current version of FDA's Model Food Code through incorporation by reference into PDA's food safety regulations. The Model Food Code was most recently updated via a 2022 edition published in January 2023. Details about Pennsylvania's incorporation of the Model Food Code will be discussed below.

iii. USDA APHIS regulated plant permits

A final note about federal regulations that may impact specialty crop producers. USDA's Animal and Plant Health Inspection Service (APHIS) establishes a category of regulated plants or plant products for which import into, and movement within, the U.S. requires a USDA APHIS permit. There are also lists of designated wood and wood products, pest organisms (including fungi), soil and soil amendments, and some phytosanitary treatments that require USDA APHIS permits for import and movement within the U.S. More information can be obtained in the Resources below.



C. Pennsylvania Law and Regulations

i. Act 106 of 2010 – Recodification of Pennsylvania’s Food Safety Laws

In 2010, Pennsylvania repealed and reenacted, in a substantially revised version, its set of laws addressing food safety in the processing, manufacturing, storage, handling, transport, and retail sale of food and food ingredients, and prepared or made-to-eat foods sold, served, or delivered in any manner. This includes all food stores, restaurants or facilities of any kind providing food for human consumption, on or off premises.

The legal term for what was done in 2010 is a “recodification.” This was done to: (a) address outdated and inadequate provisions that had not kept up with changing circumstances; (b) provide more uniform administration by government; and (c) provide clarity and an “easier to read and understand” compilation of food safety requirements for the regulated community and the general public.

The act of the Pennsylvania General Assembly accomplishing this recodification is called Act 106 of 2010. The act is divided into two separate laws with similar names, which work together to include within their scope every conceivable situation that is deemed to need food safety regulation and how the requirements are enforced. Both laws will be summarized below and are titled:

(a) **Retail Food Facility Safety Act**; and

(b) **Food Safety Act**.

For specialty crop producers, this means that as of the Act’s effective date in 2011, the operation of a farm market, a stand or space at a farmers’ market, and potentially any areas on a farm or other premise where food is stored, handled, processed, or packaged is regulated by PDA—if meeting the definition of a “retail food facility” or a “food establishment.”

More detail will be provided below, but the term retail food facility generally means a sales location and the term food establishment means a processing or storage location. With regard to the former term, if a local health department is in existence for the county or municipality involved, and a facility meets the definition of a retail food facility, then PDA’s jurisdiction is supplanted, and the local health department is the licensor.

ii. Retail Food Facility Safety Act

The Retail Food Facility Safety Act (Act) sets out the licensing and food safety requirements with which retail food facilities in the Commonwealth of Pennsylvania must legally comply. Generally stated, the Act requires retail food facilities to obtain a license and submit to inspections on a regular basis and authorizes the Pennsylvania Department of Agriculture to promulgate regulations carrying the force of law which establish food handling and storage requirements, and cleanliness requirements for equipment and personnel within a retail food facility.

The Model Food Code serves as the majority of those regulations and is adopted in Pennsylvania in substantially the same form as it appears in federal FDA regulations. The most critical portions of the law for specialty crop producers in the business of direct sales and value-added processing are outlined below. More information can be found under Resources below.

a. License Requirement

Section 5703 of the Act requires that all retail food facilities obtain a license, except for those



facilities that are explicitly exempted. Section 5703(a) states that it is “unlawful for any proprietor to conduct or operate a retail food facility without first obtaining a license,” and Section 5703(b) outlines retail food facilities exempt from licensing. Among other things, licensure makes known to governmental authorities the substantial majority of potential sources in the event of a food borne illness or disease and allows the state or local government to “traceback” (find the source), track (determine who may have been exposed), and hopefully control sources of foodborne illness.

There are two critical questions to answer to determine if a specialty crop producer may be operating in such a way as to require a retail food facility license:

- (1) Whether any portion of the farm meets the definition of a “retail food facility?”
- (2) If yes, whether that portion qualifies for a license exemption?

To answer the first inquiry, a “retail food facility” is defined as “A public eating or drinking place or a retail food establishment.” The operative terminology is “**retail food establishment**,” defined in the Act as follows:

An establishment which stores, prepares, packages, vends, offers for sale, or otherwise provides food for human consumption and which relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or delivery service provided by common carriers. The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast homestead or inn.

Note: The term “public eating or drinking place” is an obsolete term appearing in Pennsylvania’s previous law repealed by Act 106 of 2010. It continued to appear in PDA’s regulations for several years thereafter but has now been completely stricken and can be disregarded.

As a result of the Act’s definitions, any specialty crop producer selling their products directly to a consumer, with or without any value-added processing, is operating a retail food facility. This includes every on-farm market, farmers’ market stand, or community-supported agriculture (CSA) arrangement. If more than one of these activities is being conducted on the same premise, only one retail food facility license is needed for that premise. If such activities are conducted at more than one location, separate licenses are needed for each location where those activities are being conducted.

b. Exemptions from Licensing

The Act outlines two categories of exemptions from the retail food facility license requirement. One category is mandatory and applies state-wide, while the other category may be formally adopted at the discretion of the “licensor,” i.e., either PDA or a county or local health department, as applicable.

- *Mandatory State-Wide Exemptions:*
 - sells only raw agricultural commodities.
 - sells only prepackaged, non-potentially hazardous food or beverages.
 - sells only honey produced on site and compliant with Honey Sale and Labeling Act.
- *Discretionary Exemptions:*
 - operates three days or less per calendar year.
 - all foods and beverages sold only through a vending machine.
 - owned by a charitable nonprofit entity and is a:
 - a food bank operated for charitable or religious purposes.
 - a soup kitchen operated for charitable or religious purposes.



- promotes extracurricular recreation for K-12 public/private/parochial schools and offers only non-potentially hazardous foods or beverages.
- school cafeterias.
- owned by a church/religious order or institution (plus some additional criteria, see the Act's text).

For all portions of the state where PDA is the licensor because no county or local health department exists, PDA has adopted all of the discretionary exemptions except: (a) school cafeterias; and (b) facilities owned by a church/religious order or institution.

Within the jurisdiction of a county or local health department, consultation with the licensor is necessary to determine what discretionary exemptions, if any, have been adopted there.

To fully understand the exemptions, it is necessary to understand the terminology "potentially hazardous food or beverage." Potentially hazardous food is defined by the FDA as any food that requires time or temperature controls for safety (TCS) to limit pathogenic microorganism growth or toxin formation. Common examples include foods containing any meat, eggs, or dairy products.

Oddly enough, gas stations provide an illustration of a simple dividing line between exempt and non-exempt retail food facilities. If a gas station sells only packaged snack foods and bottled soft drinks, it can operate with no retail food facility license. As soon as hot dogs on a roller, fountain drinks, or milk are offered, it is required to possess a retail food facility license. Based upon that simple illustration, the sheer number of facilities that have to be licensed and inspected by either PDA or a local health department pursuant to the Retail Food Facility Safety Act is quite staggering.

Lastly, and very significantly, the Act states that an exempt facility "shall remain subject to inspection and all other provisions of this subchapter." This means that, although the existence, location and operational details of an exempt retail food facility are not required to be on file with or made known to a licensor, if a foodborne illness should occur or other matter arises that brings the facility's existence and operation to the attention of the applicable licensor, the facility can be inspected. In addition, as a result of any such inspection, the license-exempt facility may be found in violation of the food handling or operational requirements (excepting the license requirement) of the Retail Food Facility Safety Act and its authorized regulations, i.e., the Model Food Code as adopted in Pennsylvania.

The Retail Food Facility Safety Act also establishes the penalties for violations of any provision of the Act. First and second violations are summary offenses, the equivalent of a traffic ticket, and the operator is fined between \$100 and \$300. After the second offense, a violation may be considered a misdemeanor of the third degree. In addition, the violator may also be assessed a civil penalty not to exceed \$10,000 for each offense committed. The civil penalty amount is to be determined based upon the "gravity of the violation," and a warning may be issued in lieu of a monetary civil penalty if the violation "did not cause harm to human health."

iii. The Food Safety Act

The Food Safety Act serves two purposes.

- Firstly, a portion of it is Pennsylvania's framework for registering and regulating "food establishments" which manufacture, process, transport, or store food but do not engage in retail sales or any other form of delivery to the consumer at that location. Otherwise, it would be required to be licensed as a retail food facility.
 - Unlike retail food facilities, the regulation of food establishments does not involve



county or local health departments in any way. The Pennsylvania Department of Agriculture (PDA) is the sole regulatory entity in the state for food establishments. In jurisdictions where a local health department exists, PDA has agreements with the substantial majority of those jurisdictions to avoid duplicative inspections by having PDA assume all regulatory duties if a location houses both a retail food facility and a food establishment.

- Secondly, the Food Safety Act provides general purpose provisions which apply to both retail food facilities and food establishments on several topics, including defining when food is “misbranded” or “adulterated” and authorizing enforcement action by the Pennsylvania Department of Agriculture to remove and exclude it from commerce.

a. Registration of Food Establishments

Food Establishment is defined as:

“A room, building or place or portion thereof or vehicle maintained, used or operated for the purpose of commercially storing, packaging, making, cooking, mixing, processing, bottling, baking, canning, freezing, packing or otherwise preparing, transporting or handling food. The term excludes retail food facilities, retail food establishments and public eating or drinking places and those portions of establishments operating exclusively under milk or milk products permits.”

This definition is extremely broad and specialty crop producers should recognize that portions of a farm homestead, barns, and outbuildings on a farm, in whole or in part, can certainly be considered “food establishments” under Pennsylvania state law.

If a licensed retail food facility, i.e., farm market, is being operated on the premises, then all portions of the property devoted to the listed activities will generally be considered simply work areas already encompassed by the retail food facility license.

However, for any otherwise unlicensed premises devoted to the listed activities where the food is transported off site for a retail delivery or sale at another location, a food establishment registration will be necessary.

The requirement for a food establishment is a registration, not a license. The terminology has a technical difference in legal enforcement matters but suffice it to say that most food establishment registrants do not experience any functional difference between a license and a registration. The establishment remains subject to inspection by PDA and essentially the same penalties for non-compliance.

b. Regulations Applicable to Food Establishments

The Act also includes a provision which adopts wholesale by incorporation all federal food manufacturing, processing, and related regulations. Pennsylvania’s Food Safety Act states,

“All regulations and supplements thereto or revisions thereof adopted under the Federal acts which relate to food on, before or after the effective date of this subchapter are adopted as regulations in this Commonwealth and shall remain in effect unless subsequently modified or superseded by regulations promulgated by the secretary.”

These federal food-related regulations can be those authored and issued by the United States Department of Agriculture (USDA) or the Food & Drug Administration (FDA). They are found in the Code of Federal Regulations, called the “CFR.” This encompasses more than just the Model Food



Code.

These FDA regulations prescribe the manufacturing, processing, and packaging methods that apply to hundreds of foods. The objective is to reduce risk in foods which have a potential to harbor or produce pathogenic microorganisms or toxins if the regulations are not followed. This is particularly important in foods manufactured to be eaten without cooking or other “kill step” which destroys bacteria and pathogens.

The breadth of these regulations incorporated into Pennsylvania law is well beyond the scope of this guide. The important takeaway is that a party wishing to manufacture a particular food in Pennsylvania must register as a food establishment (or be otherwise licensed as a retail food facility) and comply with all the applicable federal regulations that concern that food, and, when applicable, its ingredients also. The Pennsylvania Department of Agriculture is the best resource for learning what applies to a particular food, preparation method or packaging method. Many private food safety consultants are also available to address those issues.

Other federal regulations on food manufacturing incorporated into Pennsylvania state law define exactly what attributes a food must possess to be labeled with a particular common name. These are called “standards of identity.” A simple example is the standard of identity for “butter.” It defines what and how butter must be made in order to be called butter, rather than something else like margarine or oleo. Standards of identity serve an important function in giving consumers assurance that a food “is what it says it is” and is not misleading consumers or misrepresenting the product in its labeling.

c. Provisions Applicable to Retail Food Facilities and Food Establishments

The Food Safety Act contains a laundry list of fourteen prohibited acts which apply to all Retail Food Facilities and Food Establishments. Some are simple prohibitions, such as not keeping foods at the safe temperatures (hot or cold) set by regulation. Some are potentially complex and lengthy prohibitions with explanatory and definitional terms that must be understood.

The two most important deal with prohibited: (1) “misbranded” foods; and (2) “adulterated” foods.

Under the Pennsylvania Food Safety Act’s regulation of Retail Food Facilities and Food Establishments, **the following acts, among others, are prohibited:**

- Adulterating or misbranding any food; the “manufacture, sale, delivery, consignment, bailment, holding or offering for sale” of any adulterated or misbranded food.
- “Knowingly receiving in commerce” and “the delivery or proffered delivery thereof for pay or otherwise” of misbranded or adulterated food.
- Adding a “poisonous or deleterious substance” to food, which can include pesticides and food additives used in violation of federal law.

Misbranded food is defined, in part, to include the following:

- Its labeling is false or misleading in any way; it is offered for sale under the name of another food; it is an imitation of another food without the word “imitation” immediately followed by the name of the food simulated; its container is so made, formed, or filled as to be misleading;
- It is represented as a food for which a standard of identity exists, and it fails to conform to the standard of identity.
- Its package does not bear a label containing the name and place of business of the manufacturer, packer or distributor and an accurate statement of the quantity, weight, measure, or number;



- Its label does not bear the common or usual name of the food, if any.
- If made from two or more ingredients, the common or usual name of each ingredient is not listed in descending order of predominance by weight (except spices, flavoring, and colorings, which may be designated as “spices, flavorings and colorings” without naming each).
- If it contains any artificial flavoring, artificial coloring, or chemical preservative, unless the label states that fact (“[C]hemical preservatives shall not apply to a pesticide chemical when used in or on a raw agricultural commodity which is the produce of the soil.”).
- If it is a raw agricultural commodity containing a pesticide chemical applied after harvest (unless the container’s label so states “the chemical used and the common name and function of the chemical.”)
- If any sign, placard or other graphic at a retail display of the food is false or misleading.

Note: An exception to many of the acts of misbranding are granted for the following: “Bakery goods sold at retail by the bakery directly to the consumer in a store or market stand operated by the bakery” and “Bakery goods sold to the operators of retail food facilities when the required information is available to the public on the premises of the retail food facility.” Another very significant exception exists for food which is not offered for sale in packaged form. It requires that the food “shall be accompanied by a sign, placard or notice listing the ingredients in descending order of predominance by weight.”

Specialty crop producers should also be aware that the Model Food Code and the other federal food regulations incorporated into Pennsylvania law, contain more and different requirements to avoid misbranding claims. The above is simply provided as an example of how foods can be considered misbranded in direct retail sale of value-added processed products.

Reviewing the types of things considered by Pennsylvania law to be misbranding and applying that information to foods potentially made and sold as value-added products, producers can begin to understand what issues need to be fully investigated and planned for in venturing into direct or wholesale sale of value-added products. Consultation with PDA, other licensor personnel if applicable, Penn State Extension or private food safety consultants, about particular foods and particular wholesale or retail plans and packaging is very highly recommended and virtually essential to avoid missteps.

Adulterated food is defined, in part, to include the following:

- It contains “any poisonous or deleterious substance” which may render it injurious to health.
 - However, this does not include “a pesticide chemical in or on a raw agricultural commodity, a food additive or a color additive.”
- It contains a color additive which is used in a manner out of compliance with federal law.
- It is a raw agricultural commodity and contains a pesticide chemical used in a manner out of compliance with federal law.
 - However, if the pesticide is still existing in an amount not greater than the tolerance prescribed for the raw agricultural commodity after processing “through canning, cooking, freezing, dehydrating or milling,” and the residue “has been removed to the extent possible in good manufacturing practice,” it will not be considered adulterated.
- It consists, in whole or in part, of any “diseased, contaminated, filthy, putrid or decomposed substance or is otherwise unfit for food.”
- It has been produced, prepared, packed, or held under unsanitary conditions such that “it is contaminated with filth,” rendered diseased, unwholesome, or injurious to health.
- Its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health, unless the container is fabricated or manufactured with good manufacturing practices according to federal law.
- Food concerning which:
 - any valuable constituent has been, in whole or in part, omitted or abstracted therefrom;



- any substance has been substituted wholly or in part;
- damage or inferiority has been concealed in any manner; or
- any substance has been added thereto or mixed or packed so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.

This is a complex but only partial list of potential conditions of food that can be considered adulteration. Many producers may justifiably feel that the scenarios described as adulterated food are unlikely to occur and may even be far-fetched under normal circumstances. Nevertheless, it is important to understand that cases of foodborne illness from salmonella, e-coli, listeria, and other sources, do arise quite frequently from contamination scenarios that are not particularly far-fetched or relegated to only poorly maintained farms. These pathogens can arise in a manner which can be perceived as “out of the blue” and seemingly without obvious fault. Once again, this fact reinforces the necessity of product liability insurance coverage.

Be aware that the FSMA rule known as “Preventative Controls for Human Food” is the FDA federal FSMA regulation significantly involved in regulating and setting standards for all food establishments. Information on it, and all other aspects of FSMA, should always be sought separate from this guide in order to assure compliance.

iv. Pennsylvania’s Limited Food Establishments

Lastly, although it is not something specifically provided for in the Model Food Code and federal food manufacturing regulatory scheme, Pennsylvania and many other states provide an additional compliance method for specialty crop producers and others to manufacture food products for retail sale pursuant to a set of less expensive production facility requirements and processes that still serve food safety concerns but also allow smaller operations with less resources to participate in direct sales. Some jurisdictions use the terms “cottage food business,” or “home-based kitchen.” This can also include the relatively newer concept of more than one producer sharing a common kitchen/processing facility location.

PDA describes the limited food establishment allowance as follows:

- “The Department will allow some 'limited' types of food processing to occur in a 'residential style kitchen ' that may not meet the full regulatory code requirements, with the intent of the producer to offer these products for sale to the public. . . Generally, the types of production that can occur in 'limited food establishments' (whether an actual home-use kitchen or a kitchen designed in a residential fashion) are limited to foods that are not 'time and temperature controlled for safety' (TCS) foods (i.e., potentially hazardous foods, 'PHF'). TCS foods are foods that will support the growth of pathogenic microorganisms and require temperature controls (kept hot or cold). TCS foods can only be produced in a licensed / registered 'commercial' food establishment kitchen that meets the full regulatory code requirements, including separation from residential-use areas, and adequate plumbing fixtures.”

The best way to familiarize oneself with the regulatory process for obtaining and operating under a limited food establishment in Pennsylvania is to read the PDA Bureau of Food Safety’s Limited Food Establishment Registration Packet. See Resources below for more information. It is very detailed and contains extensive explanations of the requirements and process for approval.

Limited food establishments under Pennsylvania law remain solely under the PDA’s jurisdiction, with no involvement of county or local health departments. All retail sales still must occur through a duly licensed retail food facility, which are subject to county and local health department



regulation where such entities exist. Various FSMA rules also may apply equally to limited food establishments.

Lastly, limited food establishments should not be confused mobile and temporary retail selling operations, such as food trucks, trailers, and event vendors. Mobile and temporary retailing of prepared foods is simply another form of retail food facility license and is regulated as such by county or local health departments or PDA, as applicable. PDA maintains a dedicated webpage with multiple guides and resources specifically addressing mobile and temporary retail food facilities. See Resources below for more information.



Resources

FDA

[FDA's Food Homepage](#) – FDA's food regulation homepage. In order to see how FDA's food regulation resources are organized, see "*Navigate the Food Section*" and "*Industry Guidance & Regulation*" menus at the bottom of this page.

- <https://www.fda.gov/food>

[Food Safety Modernization Act \(FSMA\)](#)

- <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma>
 - [Full Text of the Food Safety Modernization Act \(FSMA\)](#)
 - [Frequently Asked Questions on FSMA](#)
 - [FSMA Rules & Guidance for Industry](#)
 - [What's New in FSMA](#)
 - [FSMA Training](#)
 - [FSMA Technical Assistance Network \(TAN\)](#)

[FSMA Compliance Dates](#)

- <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-compliance-dates>

PDA

[Retail Food Facility Safety Act & Food Safety Act](#)

- <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=03&div=0&chpt=57>

[Food Manufacturing, Packing, Holding and Distribution](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/manufacturing-packing-holding-distribution/Pages/default.aspx

[PDA Regional Food Safety Offices](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Pages/default.aspx

[County and Local Health Departments](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Documents/Local%20Health%20CURRENT%2010-06-22.pdf

[Application Packet – Retail Food Facilities and Restaurants](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Retail%20Food/Retail%20Foods%20Facilities%20and%20Restaurants/Documents/RETAIL%20FOOD%20FACILITIES%20AND%20RESTAURANTS%20Application.pdf

[Farmers Market Application Packet](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Retail%20Food/Documents/FARMERS%20MARKET%20Application.pdf

[Farmers Market General Guidelines](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Retail%20Food/Pages/Farmers-Markets.aspx

[Farmers Market Guide to Licensing and Sales Tax](#)

https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Retail%20Food/Documents/Farmers%20Market%20Guide%20to%20Licensing%20and%20Sales%20Tax.pdf

[Mobile Food Facilities, Fairs and Temporary Homepage](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/Retail%20Food/Pages/Fair-and-Other-Temporary-License-Facilities-.aspx

[Foods with Standards of Identity](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/manufacturing-packing-holding-distribution/commercial-food-establishments/Documents/Food%20with%20Standards%20of%20Identity.pdf



[Application Packet Food Establishment Registration: Food Establishment](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/manufacturing-packing-holding-distribution/commercial-food-establishments/Documents/Food%20Establishment%20Registration%20Application%20Packet.pdf

[Application Packet Food Establishment Registration: Limited Food Establishment](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/manufacturing-packing-holding-distribution/Documents/Limited%20Food%20Establishment%20Application%20Packet.pdf

[Shared Facility Agreement](#)

- https://www.agriculture.pa.gov/consumer_protection/FoodSafety/manufacturing-packing-holding-distribution/commercial-food-establishments/Documents/Shared%20Facility%20Agreement.pdf

OTHER

[State and Federal Regulations for Food Processors](#), Luke LaBorde, Penn State Extension (2023)

- <https://extension.psu.edu/state-and-federal-regulations-for-food-processors>

["Cottage Food" Laws](#), National Agricultural Law Center

- <https://nationalaglawcenter.org/state-compilations/cottagefood/>

[Cottage Foods and Home Cooking](#), Harvard Law School, Food Law and Policy Clinic (2021)

- <https://chlpi.org/wp-content/uploads/2022/04/Cottage-Foods-Final-4.4.pdf>



5. Municipal Law & Zoning for Agritourism / Agritainment, Specialty Crop Processing & Sales

This section provides producers resources on some select local municipal government requirements and procedures involved in gaining approval and/or zoning permits for the “use” of land for agritourism, agritainment, value-added processing, and direct sales activities conducted in conjunction with the production of specialty crops on a farm.

This section is simply a list of resources, unlike the preceding sections. For a more complete presentation of the subject matter, view the webinar on this subject produced in conjunction with this guide, titled “[Municipal Law & Zoning for Agritourism, Agritainment, Specialty Crop Processing & Sales](https://www.youtube.com/watch?v=gAiep36f-wg).” It can be viewed at: <https://www.youtube.com/watch?v=gAiep36f-wg>

Approval of land uses is a function of zoning ordinances and their administration. Zoning and land use approval is the municipal law issue most commonly encountered by specialty crop producers. That is not to imply that specialty crop producers engaged in these activities should not be equally concerned with other generally applicable municipal ordinances that deal with such topics as stormwater, subdivision, land development, and building codes. Those are equally important and necessary.

Entire legal volumes are written on these topics because generally applicable municipal ordinances and zoning ordinances and concepts, principles and issues apply to all land uses on all real estate located within a municipality’s jurisdiction.

Under Pennsylvania law, the Commonwealth of Pennsylvania is organized into 67 counties, each comprised of municipalities. The enactment and administration of zoning ordinances is a function of the three types of municipalities authorized by state law: (1) cities; (2) townships; and (3) boroughs.

As a general rule, agricultural activity and operations occurs mostly within townships, not cities or boroughs, so specialty crops producers generally will be dealing with their township government on zoning and other land use issues and approvals. However, there are some rare instances in Pennsylvania where the controlling zoning ordinance may be an enactment of county government made applicable in a particular township by election of that township’s government.

Also rare, but existent, in Pennsylvania are townships which simply have no zoning at all. This is generally in very rural counties. Nevertheless, for the purpose of this guide, it is relatively safe assumption that wherever a specialty crop production operation is located, it is subject to the local township’s zoning ordinance. The state law that authorizes townships to enact zoning ordinances and governs how zoning regulations are to be administered in a township is called the Municipalities Planning Code (MPC).

The following is a compilation of resources on zoning law in Pennsylvania and some that address issues specific to zoning issues that may be encountered by specialty crop producers.



Resources

PENNSYLVANIA DEPARTMENT OF COMMUNITY & ECONOMIC DEVELOPMENT

Center for Local Government Services – This agency of state government hosts a large on-line library of state laws and publications on local government operations and functions, including many dealing with municipal ordinances and zoning in particular. The publications are written with a public audience in mind so that citizens can understand the operation(s) of local government.

[Local Government Laws](#)

- <https://dced.pa.gov/local-government/local-government-laws/>

[Pennsylvania Municipalities Planning Code](#)

- <https://dced.pa.gov/download/pennsylvania-municipalities-planning-code-act-247-of-1968/>

[DCED publications specific to zoning or related land use issues:](#)

- https://dced.pa.gov/library/?wpdmc=publications_and_documents
 - [Planning Specifically for Agriculture](#)
 - [Planning Series 01: Local Land Use Controls in Pennsylvania](#)
 - [Planning Series 04: Zoning](#)
 - [Planning Series 06: The Zoning Hearing Board](#)
 - [Planning Series 07: Special Exceptions, Conditional Uses and Variances](#)
 - [Planning Series 09: The Zoning Officer](#)
 - [Planning Series 08: Subdivision and Land Development in Pennsylvania](#)
 - [Tip Sheet – Agricultural Zoning](#)
 - [Tip Sheet – Official Map – 2019](#)
 - [Tip Sheet – Subdivision & Land Development](#)
 - [Tip Sheet – Zoning Hearing Board Procedures](#)
 - [Tip Sheet – Zoning Ordinance Amendment Procedures](#)

PA.GOV

[Municipal Permitting & Zoning Jurisdiction](#) (search by address)

- <https://business.pa.gov/register/local-registrations-permits-zoning/>

CENTER FOR RURAL PENNSYLVANIA

[Your Agritourism Business in Pennsylvania, A Resource Handbook](#)

- <https://www.rural.pa.gov/download.cfm?file=Resources/reports/assets/2/AgritourismHandbook2021Dec.pdf>

LANCASTER COUNTY PLANNING COMMISSION

[Agricultural Zoning District Guidelines for Lancaster County, Pennsylvania](#)

- <https://lancastercountypanning.org/DocumentCenter/View/138/Agricultural-Zoning-District-Guidelines>

[Agritourism Guidelines for the Promotion and Regulation of Farm-based Tourism Enterprises](#)

- <https://lancastercountypanning.org/DocumentCenter/View/139/Agritourism-Guidelines>



6. Statutory Protections/Restrictions: Understanding PA's Ag Area Security, Right- To-Farm, ACRE, and Clean & Green Laws for Specialty Crop Producers

This section will provide a compilation of resources to better understand the scope of various statutory protections in Pennsylvania law for certain very defined situations that involve agricultural operations. Some of these statutory programs also involve defined limitations either from voluntary enrollment or which are applicable in order to claim the benefit of the statutory protection or benefit provided. The limitations of these statutory protections are as important to understand as the benefits. All of these statutory protections ultimately seek to preserve agricultural uses of land.

Like the preceding section, this section is simply a list of resources. For a more complete presentation of the subject matter, view the webinar on this subject produced in conjunction with this guide, titled "[Understanding PA's Ag Area Security Law, Right-To-Farm Act, ACRE and Clean & Green Law for Specialty Crop Producers.](https://www.youtube.com/watch?v=zrqpreDyYq4)" It can be viewed on our YouTube channel at: <https://www.youtube.com/watch?v=zrqpreDyYq4>

Resources

THE CENTER'S [VIRTUAL RESOURCE ROOMS](#) – The Penn State Center for Agricultural and Shale Law has web-based resources pages where a full set of resources explaining the four laws which are the subject of this section and what benefits they can provide and any potential limitations in exchange.

[Pennsylvania Agricultural Area Security Law](#)

- <https://aglaw.psu.edu/research-by-topic/library-guide/pennsylvania-agriculture-area-security-law/>

[Pennsylvania Right To Farm Act](#)

- <https://aglaw.psu.edu/research-by-topic/library-guide/3228/>

[ACRE/Pennsylvania Act 38](#)

- <https://aglaw.psu.edu/research-by-topic/library-guide/pennsylvania-acre-act/>

[Pennsylvania Clean and Green Act](#)

- <https://aglaw.psu.edu/research-by-topic/library-guide/pennsylvania-clean-and-green-act/>

OTHER CENTER RESOURCES

[Understanding the Basics of Agricultural Conservation Easement Programs](#)

- <https://www.youtube.com/watch?v=hAyNp0bAhGg>

[Understanding the Basics of Pennsylvania's "Clean & Green" Preferential Tax Assessment Program](#)

- <https://www.youtube.com/watch?v=WRyOOyLZ4rM>

[Understanding the Basics of Statutory Protections for Agricultural Operations](#)

- https://www.youtube.com/watch?v=Oq_h_SF-veg&list=PLmP04mPbQ-LKK38kQu4O6HJ1xuLcIOp2n&index=5&t=88s

PDA

[Bureau of Farmland Preservation](#)

- https://www.agriculture.pa.gov/Plants_Land_Water/farmland/Pages/default.aspx

PENNSYLVANIA OFFICE OF ATTORNEY GENERAL

[ACRE – Agriculture, Communities and Rural Environment](#)

- <https://www.attorneygeneral.gov/resources/acre/>



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CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information.

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