

Using Farm Labor Contractors for Domestic and H-2A Workers

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VARNUM

Farm Labor Contractor

- Farm Labor Contractor = person or entity that recruits, hires or provides agricultural labor
- Grower/farmer may proactively contact Farm Labor Contractor or may show up at farm offering labor force

Key Considerations

- Verify Farm Labor Contractor is registered under MSAWPA
- Ask Farm Labor Contractor for references from other growers and check them
- Execute written agreement with Farm Labor Contractor defining responsibilities and parameters of arrangement – See Template Agreement in Resources
- Ensure Farm Labor Contractor is complying with all laws pertaining to workers since DOL may assert joint employer liability
- If providing H-2A labor, Farm Labor Contractor must go through extensive filing process and farm must be listed on H-2A application
- If using Farm Labor Contractor who provides H-2A Labor, make sure you understand H-2A program because DOL may assert joint employer liability – See H-2A Section and Joint Employment Section

Resources

- MSAWPA FLC Registration
- Confidential Settlement Agreement and Release
- Highlights of Non H-2A Farm Labor Contractor Rules – Michigan
- Template Farm Labor Contractor Agreement
- Template Farm Lease
- Template Housing Lease (Grower to Grower)



FAQs

Q: Farm Labor Contractor said that a major benefit of using him for labor is that he is responsible for all employment matters relating to workers provided requirements instead of me. Is this true?

It is true that the Farm Labor Contractor is responsible for complying with all laws and regulations pertaining to the workers, but that does not automatically relieve you from liability. DOL will likely argue that there is a joint employment relationship between you and the Farm Labor Contractor meaning both of you are liable for violations.

Q: Farm Labor Contractor showed up at farm promising immediate H-2A labor force; is this possible and/or legal?

Farm Labor Contractors utilizing H-2A program are technically termed H-2A Labor Contractors. Since H-2A application and certification process spans several months, it is extremely unlikely that anyone providing immediate H-2A labor is in compliance with the H-2A regulations. This is a red flag that you should not engage this individual since you may be held liable for H-2A program violations if H-2A workers engage in work on your farm.

Joint Employer Liability

- Joint employment exists when person is employed by two or more employers which results in both employers having responsibility for compliance with employment laws
- Department of Labor (DOL) focuses on obligations under Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA)
- DOL issued 2016 guidance detailing vertical and horizontal analysis
- Joint employment may exist in following business relationships:
 - Sharing employees
 - Staffing agencies
 - Third party management companies
 - Labor providers (Farm Labor Contractors)
 - Independent contractors

DOL Analysis – Is there *Horizontal Joint Employment* or *Vertical Joint Employment* or both?

Horizontal Joint Employment

- Relationship of employers to each other
- Employee has employment relationship with two or more employers and Employers sufficiently related with respect to employee
- Examples:
 - Arrangement between employers to share or interchange employee's services
 - Employer acts directly/indirectly with employee in interest of other employer
 - Associated employers deemed to directly/ indirectly control employee – common ownership/management considered

Vertical Joint Employment

- Economic realities between worker and potential joint employer
- Employee in employment relationship with one employer (intermediary employer) and economic realities show dependence on another (joint) employer
- Joint employer contracts with intermediary employer to provide labor and performs some employer functions
- Usually established/admitted employment relationship with intermediary employer
- If intermediary employer determined employee of joint employer, then all employees of intermediary employer are also employees of joint employer

Economic Reality Factors

- Extent work controlled /supervised beyond reasonable degree of contract performance oversight – direct or indirect
- Indirect — control via intermediary
- Ability to hire, fire, modify conditions, change pay rate or method of payment
- Indefinite, permanent, full-time or long term relationship
- Repetitive low skilled work that requires little/no training
- Integral to business
- Performed on owned/controlled premises
- Administrative functions for employee
 - Payroll
 - Worker's compensation insurance
 - Facilities, safety equipment, housing, transportation or tools and materials

Farm Labor Contractor Joint Employment Analysis

- DOL will analyze whether farmer/grower who hired FLC is joint employer
- If DOL determines FLC is employee of farmer, then all workers supplied by FLC are employees of farmer and farmer is responsible for complying with all employment laws since joint employer
 - Farm labor contractor may define self as independent contractor, but DOL may consider an employee of grower because economically dependent on grower as matter of economic realities test
- Even if FLC not employee of farmer, farmer may be joint employer of all workers provided if some or all of following are true:
 - Farmer handles payroll or any other employer function
 - Farmer sets hours and schedule of workers
 - Farmer involved in hiring or supervising workers
 - Worker performs work duties on farmer's premises
 - Worker has ongoing personal relationship to farmer
 - Workers' job duties are integral to farm operation

Joint Employment Example

- Workers hired by farm labor contractor (FLC) to pick produce on Grower's farm
- FLC hires and pays workers
- Grower dictates timing of harvest, which fields workers should harvest, and daily schedule
- Work is unskilled and any training is provided by Grower
- Grower keeps track of amount of produce worker picks/hour
- Grower provides buckets, transports produce from field, stores produce
- Grower pays FLC per bucket of produce picked and withholds money to cover workers' compensation
- Worker working repeatedly work on Grower's farm during harvest seasons whether through FLC or direct

DOL considers joint employment and both employers responsible for complying with employment laws and liable for any violations

Resources

- U.S. Department of Labor – Final Rule on Joint Employer Status under the FLSA
- Template Farm Lease
- Template Housing Lease (Grower to Grower)



FAQs

Q: If workers complete work for me and also for my neighbor, are we joint employers?

Maybe. It depends on whether you and your neighbor share responsibility for scheduling employees, share payroll functions or co-manage employees. If you share in these activities, DOL will likely find joint employment.

Q: If I am a Grower that hires a Farm Labor Contractor to provide labor services for the same activities that my direct employees complete, must I follow H-2A requirements for my workers?

While many Farm Labor Contractors (FLC) will assert that Grower is not subject to H-2A requirements if the Grower keeps operations and workers separated with no Grower supervision of FLC workers, Department of Labor (DOL) may review the totality of circumstances to determine if joint employment exists and the Grower is therefore subject to H-2A requirements for its direct workers. DOL may interview Grower and FLC workers to assess whether completing the same activities on the same farm and will assess joint employer factors. The primary factor that leads to DOL finding joint employment is the economic reality test which means that both the FLC and Grower employees are completing work ultimately for Grower benefit. While DOL maintains that they will not always find joint employment between FLC and Grower, all hypothetical situations presented to DOL, such as workers separated or working different times, resulted in DOL finding joint employment when the workers were completing the same activities for the benefit of the same Grower. Sometimes DOL is focused on only the FLC or only the Grower in its investigation so that the joint employer issue may not arise, however, if DOL assesses in circumstances outlined above, joint employment finding is likely and employer will be subject to H-2A requirements. While the primary concern will be that the Grower workers are paid AEWR, Grower will be subject to all H-2A requirements including housing and transportation for worker not residing within commutable distance.

Agricultural Employer Checklist - Pre-Hire Actions

- Determine whether position is employee or independent contractor
 - Farmworkers will rarely be classified as independent contractor
 - If independent contractor:
 - Obtain independent contractor Employer Identification Number or Social Security Number using Form W-9, Request for Taxpayer Identification Number and Certification
 - Issue Form 1099 at year end for payments paid to independent contractor
 - Form I-9 technically not required
 - I-9 rules are strictest against independent contractor classification
 - May obtain I-9 for all independent contractors
 - However, I-9 completion may be used as evidence of incorrect classification
 - Need to weigh risks of I-9 violation against misclassification liability
 - If employee, follow remaining items on this checklist

Agricultural Employer Checklist - Pre-Hire Actions – Cont.

- Determine if Migrant and Seasonal Agricultural Worker Protection Act applies
 - If applicable, provide worker disclosures at time of recruitment
- Provide applications to recruits, interview, perform background check and make hiring decision
 - If outside agency to conduct background investigations, must provide a written disclosure to each applicant and obtain written authorization prior to conducting the background check.
 - Must also provide the FCRA Summary of Rights Form at the same time. Must certify to the company that is conducting the background check that they have notified the applicant/employee and obtained their permission to obtain the consumer report, complied with all FCRA requirements, and will not discriminate against the applicant (or otherwise misuse the information) based on what they discover in the background check.
 - If the background check yields unfavorable results, before employer takes any kind of adverse employment action against the individual, they must provide the applicant with written notice and include a copy of their consumer background report and Summary of Rights form.
 - Must also give the applicant/employee a chance to provide a response or otherwise dispute the information in their report. If after this, employer still wants to take adverse action they have to provide the applicant/employee with an Adverse Action notice.
 - Hiring decisions made based on business reasons, NOT: race, religion, color, national origin, sex, disability, age, marital status, height, weight, arrest record, genetic information, familial status

Agricultural Employer Checklist - Pre-Hire Actions – Cont.

- Display required posters
- Sign confidentiality/non-compete agreement if applicable

Agricultural Employer Checklist– Post-Hire Checklist

- If Migrant and Seasonal Agricultural Worker Protection Act applies
 - Provide worker disclosures at time of employment
 - Provide housing agreement/rules if applicable
- Complete Form I-9 (Employer Eligibility and Identity Verification)
 - Obtain current I-9 Form and instructions
 - Employee must complete Section 1 on first day of employment
 - Employer must complete Section 2 by third day of employment
 - See USCIS Handbook for Employers – Guidance for Completing Form I-9
- Federal registration and withholding forms
 - If new employer, obtain FEIN (Federal Employer ID Number); apply online: or can use SS-4 Form. See IRS instruction page for more detail: IRS Phone: 1-800-829-4933
 - Obtain Form W-4, Employee's Withholding Allowance Certificate, from every employee

Agricultural Employer Checklist– Post-Hire Checklist – Cont.

- Michigan registration and withholding forms
 - If new employer, register for Michigan business taxes
 - Obtain Form MI-W4, Employee’s Withholding Exemption Certificate from each employee (Federal W-4 cannot be used in place of the MI-W4)
- New hire reporting: Report new employees and rehired employees to the Michigan New Hires Operations Center within 20 days after employee is hired or re-hired or returns to work
- Unemployment insurance – determine whether you are a “liable employer”
 - Agricultural “liable employer”
 - Paid wages of \$20,000 or more to agricultural workers in any quarter of current or previous calendar year, OR employed 10 or more workers in some portion of a day in 20 separate weeks in current calendar year or preceding calendar
 - Special rules for seasonal employment
 - Michigan Unemployment Agency Employer Handbook
 - Annually file federal Form 940, Employer’s Annual Federal Unemployment Tax Return
 - Quarterly file state forms UIC 1017, Wage Detail Report and UIC 1028 Employer’s Quarterly Wage/Tax Report

Agricultural Employer Checklist– Post-Hire Checklist – Cont.

- Worker's Compensation Insurance – determine if required to provide
 - General rule: Agricultural employers if they employ 3 or more employees 35 hours or more per week for 13 or more consecutive weeks
 - Best practice: Provide workers' compensation insurance for all employee
 - If employee is under age 18, comply with federal and state child labor laws
- Affordable Care Act Notice
 - Within 14 days of hire, all new employees must receive notice that either
 - Employer does not provide coverage, or employee is not eligible for coverage under employer plan
 - Employee is eligible for coverage under employer plan
- Comply with minimum wage laws
 - Michigan minimum wage = \$10.33/hour H-2A AEW = \$18.50
 - Pennsylvania minimum wage = \$7.25/hour H-2A AEW = \$17.20
 - If piece rate, ensure employee received hourly rate not less than minimum wage
 - Always best to pay at least minimum wage even though limited exemptions

Agricultural Employer Checklist– Post-Hire Checklist – Cont.

- Comply with overtime laws
 - 1-1/2 times regular rate for all hours worked over 40 hours in a workweek
 - Agricultural exemption may apply
 - Be careful: Agricultural exemption does not apply to activities that are not an incident or in conjunction with farming operations, such as packing produce of another farmer
- Pay employees on regular pay schedule:
 - Typically weekly or biweekly
 - Hand harvesters must be paid at least once a week unless otherwise specified in written contract
 - If employment is terminated, pay wages:
 - Next regular scheduled payday (whether terminated or quit)
 - Hand harvesters must be paid within one day of termination or within three days of quitting

Agricultural Employer Checklist– Post-Hire Checklist – Cont.

- Provide employees with wage statement along with paycheck that includes:
 - Employer name, address, and Federal Employer Identification Number
 - Employee name and address (and social security number if subject to MSAWPA)
 - Note: MSAWPA requires full social security number. Michigan Social Security Privacy Act instructs to limit to last four digits. DOL has accepted last four digits as compliant given the Michigan law and privacy concerns.
 - Dates wages are earned
 - Hours worked
 - Gross wages paid
 - Itemization of deductions
 - Must have written authorization from employee for deductions other than those authorized by law, such as State or Federal taxes
 - Ensure deductions (other than authorized by law) do not reduce employee's gross wages below minimum wage

Agricultural Employer Checklist– Post-Hire Checklist – Cont.

- Deposit federal and state withholding
 - Determine required schedule for deposits – will depend on size of payroll and withholding
 - Federal requirements, see Agricultural Employers Tax Guide (Circular A)
 - Michigan requirements, see Sales, Use and Withholding Tax Forms and Instructions
- Annually, file
 - IRS Form W-2, Wage and Tax Statement for all employees by January 31 of following year
 - IRS Form W-3 – Transmittal of Wage and Tax Statements by February 28. If subject to unemployment, IRS Form 940 – Employer’s Annual Federal Unemployment Tax Return, due by January 31
 - IRS Form 943, Employer’s Annual Federal Tax Return for Agricultural Employees by January 31
 - Michigan Form 165, Sales, Use and Withholding Taxes Annual Return
- Recordkeeping

Any Questions?



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