

Growers Legal Update

Select Labor Legal Issues

Andrew Branan, JD

Extension Assistant Professor

Department of Agriculture and Resource Economics

North Carolina State University

rabrana2@ncsu.edu



This Lawyer's Background

- Member of the Virginia State Bar (1992) and North Carolina State Bar (2003)
- Non-profit work in agriculture
 - American Farmland Trust
 - NC Farm Transition Network
- Private (Farm) Law Practice (2010 - 2018)
- NCSU Agricultural and Resource Economics (2018)
 - 70% Extension appointment
 - 30% Teaching (Environmental and Agriculture Law)

Agricultural and Natural Resource Law

Search



Meet Our Staff

Events

Agribusiness Law

Farm Transition and Succession

Land Use and Zoning

Environmental and Natural Resource Regulation

Energy

Public Lands and Wildlife Management

Department of Agricultural and Resource Economics

Publications & Factsheets

News and Updates

Farm Tenancy: Letter Template Available to Timely Terminate Verbal Farm Rental Arrangements

Though empirical data is lacking, it is believed that a majority of farmland acres in North Carolina are rented ...

FEATURED

Wills: NC Court of Appeals Interprets Per Stirpes Testamentary Intent

The North Carolina Court of Appeals demonstrated in September that use of the common law term per stirpes – ...

FEATURED

Endangered Species: New Landowner Extension Publication on Endangered Species Management

North Carolina Cooperative Extension has released a new landowner orientation guide regarding endangered or threatened species under Federal and ...

FEATURED

Hemp License Application and the "Bona Fide Farmer": Is There a Minimum Farm Income



Gate Disputes: North Carolina Court Affirms Law on Gates and Access



Key Issues

- Agriculture enjoys various exemptions in labor laws
 - Do these apply to **on-farm processing**?
 - Issues include
 - **Workers Compensation Requirement**
 - 3+ employees non-farm; 10+ non-seasonal
 - Separation of farming and processing re disability liability
 - **Fair Labor Standards Act**: overtime and minimum wage exemptions
- All employment requires pre-screening for work status
 - I-9 Documentation
 - Excess document requirement may lead to discrimination claim (federal)
 - E-verify requirement: 25+ employees
- Worker classification: employee v. contractor
 - Law presumes employee, withholding SE taxes
- Work Separations: follow clear path and policy and document

Federal EEOC Laws

- Equal Pay Act of 1963
 - Partial exemption: ag follows FLSA
- Civil Rights Act of 1964
- Age Discrimination and Employment Act of 1967
- Americans with Disabilities Act of 1990

But 4th Federal Circuit notoriously tough on discrimination claimants

NC Employment at Will

“Employment at will” means that either party in an employment relationship may alter or terminate the relationship at any time, for any reason, with or without notice, as long as the change does not violate an express contract or specific statute

Discrimination: What Can You Ask?

- Do ask:
 - About job-related qualifications and background
- Don't ask:
 - About non-job-related things such as family status, financial status, ownership of house or car, minority characteristics, personal or family health
- In case of a legal challenge, the burden is on the company to show a business necessity for a disputed question or qualification

The I-9 in discrimination context

- Main problem: “document abuse” (going beyond I-9 requirements) - possible national origin / citizenship discrimination charges
- Not for applicants - only for new hires
- Employer has three business days following hire to get the information
- Accept only unexpired documents
- Copies of documents are not required, but keeping them helps show they were reviewed
- Keep I-9 documentation for three years after hire or one year after employee leaves, whichever comes last

I-9 Documents

- [List of Documents – Class A, B, C](#)
 - Class A examples (one)
 - U.S. Passport (unexpired or expired)
 - Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
 - An unexpired foreign passport with a temporary I-551 stamp
 - Class B (identity) *and* C (eligibility)
 - E.g. Unexpired DL (B) + Social Security Card (C)
 - E.g. Voter Registration (B) + Original Birth Certificate ©
- [USCIS Employer Handbook](#)

Worker Classification (payment of taxes, etc.)

- Law presumes that a worker is an employee
- Burden is on the employer to prove otherwise
- Back taxes, interest, and penalties can result from misclassification of workers
- “Contract labor” usually means temporary staff obtained from a temporary staffing firm, or workers supplied by a labor agent
- Reality: Independent contractors exist, but all the legal presumptions are against employers who want to classify workers as such

Classification Factors

- subject to the will and control of the employer not only as to **what** will be done but **how** it will be done
 - The *right* to do so
- Employer supplies tools
- Employer supplies place to work

<http://www.ncosc.net>

Workers Comp and Disability

- The Workers' Compensation Act creates an exclusive remedy for employees injured in work-related incidents. N.C. Gen. Stat. Ann. § 97-10.1 (2013)
- Requirement to have N.C.G.S. § **97-1**
 - All employers, 3+ employees
 - Agricultural Employers exempt up to 10 non-seasonal employees as “farm laborers” in **regular employment**
- An injury is compensable under the Workers Compensation Act only if that injury “aris[es] out of and in the course of the employment[.]” N.C. Gen. Stat. § 97-2(6) (2017)
- Maximum weekly pay (2019): \$1,028.00

“Farm Laborer”

- "Whether an employee is a **farm laborer** depends, in a large degree, upon the nearness of his occupation to the planting, cultivation, and harvesting of crops... In determining whether an employee is a farm laborer, emphasis is placed on the nature of the employee's work rather than the nature of the employer's business. (Quoting Hinson v. Creech, 286 N.C. 156, 158, 209 S.E.2d 471, 473 (1974). (Bailey v. Roberts Prot. & Investigations (N.C. App., 2011))

Disability

- Proof of disability (3 factors)
 - (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment;
 - (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment; and
 - (3) that this individual's incapacity to earn was caused by plaintiff's injury...*
- Once proven, burden shifts to employer to prove suitable jobs are available
- *Shipman v. Murphy-Brown* (COA18-1243)(unpublished)
 - Upholds factors above

*Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)

A Few Rules of Coverage

- **“Scope of Employment”**
- **Coming and Going Rule:** “an injury is not deemed to occur ‘in the course of employment’ when sustained in an accident during the employee’s travel to or from work. *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996)
- **Liability of Contractor:** 1) the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. 2) the subcontractor does not have workers' compensation insurance coverage covering the injured employee.” (*Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156 (1995))
- **Farm processor entity vs. farm production entity**
 - *Kenion v. Maple View Farm, Inc.*, No. COA07-1478 (N.C. App. 8/19/2008) (N.C. App., 2008)
 - Upheld the separation of farming entity and processing entity (farm laborer was injured)
- **Injury result of special condition**
 - [*Kevin Terry v. Harris Teeter Supermarkets Inc.*](#), Court of Appeals of NC, No. COA17-491, 1/2/18
 - **Frozen fingers result of Gillian-Barre disease – No Compensation**

Meat Packing and Processing

- Is “on-farm processing” agriculture?
 - Depends on activity (rule followed by other states)
 - Exemption is for “farm labor”
 - No reported NC appellate cases
- Various classifications in rate manual (2016)
 - Meat Products Mfg. NOC
 - Store - Meat, Fish or Poultry Dealer - Retail
 - Store - Meat, Fish or Poultry Dealer - Wholesale
 - Store - Meat, Grocery and Provision - Combined - Retail NOC

Farm Labor Defined

- 26 USCS § 3121 [Title 26. Internal Revenue Code; Subtitle C
 - (4) (A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed

Farm Labor

- Applicable Statutes
 - Fair Labor Standards Act (Federal)
 - Immigration Reform and Control Act of 1986 (IRCA) (Federal)
- **FLSA Agriculture Exemption (minimum wage and overtime):** Any employer in agriculture who did not utilize more than 500 "man days" of agricultural labor in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA for the current calendar year. A "man day" is defined as any day during which an employee performs agricultural work for at least **one hour**.

Fair Labor Standards Ag Exemptions

- Agricultural employees who are immediate family members of their employer
- Those principally engaged “on the range” in the production of livestock (no cowboys in NC!)
- Local hand harvest laborers who commute daily from their permanent residence, are paid on a piece rate basis in traditionally piece-rated occupations, and were engaged in agriculture less than thirteen weeks during the preceding calendar year
- Non-local minors, 16 years of age or under, who are hand harvesters, paid on a piece rate basis in traditionally piece-rated occupations, employed on the same farm as their parent, and paid the same piece rate as those over 16.

Employee Classifications

- Issue: obligation to pay employment taxes
- Employee vs. Contractor
 - Employee (required to pay ESC, FUTA, SUTA, etc.)
 - Generally, if you provide direction, tools, time parameters, etc., classify as employee (I-9, etc.)
 - Contractor (contract rate only)
 - Generally, contractor provides own tools, schedule, etc.
- Unpaid Intern vs. Employee
 - Unpaid Intern: must have association with education structure, generally non-profit
 - Employee: business gets economic benefit
- Pay your summer labor!

Typical FLSA Ag Problems

- Not keeping/maintaining records of the names and permanent addresses of temporary agricultural employees, dates of birth of minors under age 19, or hours worked by employees being paid on a piece rate basis.
- Failing to pay overtime to employees whose jobs are related to agriculture but which do not meet the definition of agriculture contained in the Act.
- Agricultural employers who utilize the services of a farm labor contractor are almost always in a situation of joint employment with the contractor in regard to the employees. Joint employment means that both the contractor and the farmer are responsible for complying with the minimum wage, overtime, recordkeeping, and youth employment provisions of the law. If either party fails to comply with the law both parties may be held liable.

E-Verify – North Carolina

- **HB 36** - Passed in 2011. The phase-in period began in October 2012.
- Effective July 1, 2013—employers with 25 or more employees will be required to use E-Verify to check work authorization for all new hires.
- Employers who hire temporary seasonal workers for fewer than 90 days within a consecutive 12-month period and private employers with 24 or fewer employees are not required to use E-Verify.

New Hire Paperwork

- I-9, W-4 forms, notice of workers' comp coverage
- New hire report – within 20 days of hire
- Acknowledgement of receipt of policy HB
- Consent for drug testing / search policy, if applicable
- Consent for background checks, if not already obtained
- Agreements regarding pay, benefits, schedule, work location, and so on (with employment-at-will disclaimers)

Clear Policies

- Treat employees according to known rules and standards
- Establish clear employee policies
- Put them into writing
- Follow them as consistently as possible
- Avoid Exceptions

Documentation

- Good documentation can help prove that
 - a particular employee was treated fairly and was not singled out;
 - the employer acted according to known rules;
 - what happened was predictable both from the policy and from past practice; and
 - the alleged violation or problem occurred just as the employer has said.

Work Separations

- Establish clear employee policies
- Put them into writing
- Follow them as consistently as possible
 - Avoid exceptions
- Fairness and due process are the main considerations
- Give consistent treatment according to known standards

H2A Particulars

Adverse Effect Wage Rate (AEWR)

- Pay rate 3 state average of all agriculture wages survey by USDA-NASS
- 2019 AEWR on Dec 26, 2018.
 - North Carolina \$12.25
 - Virginia \$12.25
- employers must pay their H–2A workers and workers in corresponding employment at least the highest of: (i) The AEWR; (ii) the prevailing hourly wage rate; (iii) the prevailing piece rate; (iv) the agreed-upon collective bargaining wage rate, if applicable; or (v) the Federal or State minimum wage rate, in effect at the time the work is performed. -> 20 CFR 655.200– 655.235

THANKS FOR INVITING ME!

Robert “Andrew” Branan
Extension Assistant Professor
Department of Agriculture and Resource Economics
North Carolina State University
Campus Box 8109
4336 Nelson Hall
Raleigh, NC 27695
rabrana2@ncsu.edu
919 515 4670