

Research Highlights

Over a ten-month period beginning in July 2016, Motivation Education & Training, Inc., a grantee of the U.S. Department of Labor's National Farmworker Jobs Program, performed a comprehensive assessment of federal and state employment standards and their applicability in the agricultural workplace, updating a printed reference work produced by MET in 1988. The revised material was published on the organization's website in April 2017.*

Not unexpectedly but lamentably nonetheless, close to *half* of the legal protections enacted for the benefit of American workers still either exclude large segments of the agricultural workforce or don't apply to agricultural labor at all. And despite a modest decline in exclusions, exceptions and exemptions among the state provisions cataloged, farmworkers remain particularly vulnerable to longstanding coverage inequities in *federal* law, some of which date back to the 1930s.

DOUBLE STANDARDS IN FEDERAL LAW

Minimum Wage. When first enacted in 1938, the Fair Labor Standards Act (FLSA) excluded farmworkers from the minimum wage entirely, and its application to workers on only the nation's largest farms has been unchanged since 1966. Unless they employ more than 500 worker-days of farm labor in a calendar quarter, agricultural employers across the country are exempt from paying the federal minimum wage.

This provision also relieves farm employers — even those that exceed the 500 worker-day threshold — from paying the federal minimum to local, piecework-paid hand harvest workers employed in agriculture for less than 13 weeks a year.

Overtime Pay. The 1966 amendments to the Fair Labor Standards Act explicitly denied agricultural employees the right to the law's overtime pay protections, an exception that remains on the books 51 years later.

Child Labor. Both the Fair Labor Standards Act's child labor provisions and the associated regulations adopted by the U.S. Department of Labor make explicit distinctions between agricultural and non-agricultural employment. As a consequence, farm employers are subject to considerably less-stringent restrictions on the use of minors, and children employed in farmwork are far more susceptible to exploitation than their non-farm counterparts.

To start with, the FLSA child labor provisions generally permit any child 14 years of age or older to perform agricultural labor outside local school hours without consideration of the maximum hours and time-of-day limitations that apply to children of the same age employed in other occupations. Moreover, while federal law bars the employment of most minors under the age of 14, farming operations may employ 12- and 13-year-olds in non-hazardous activities with the consent of their parents, or where their parents are employed on the same farm.

This same exception allows children as young as 10 to perform non-hazardous labor on farms not subject to payment of the federal minimum wage, with parental consent. For certain periods of time and under prescribed circumstances, even farm establishments where the minimum wage

* Motivation Education & Training, Inc., *Federal and State Employment Standards and U.S. Farm Labor*, Brian R. Craddock, ed., <https://metinc.weebly.com/>, April 2017.

applies may hire 10- and 11-year-olds, provided they obtain a special child labor waiver from the Department of Labor.

Unemployment Insurance. Ever since the nation's unemployment insurance system was established under the Social Security Act in 1935, agricultural employers have enjoyed distinctly more favorable tax treatment — and agricultural workers correspondingly fewer benefits — than their non-agricultural peers. Farm wages weren't subject to UI taxes at all until amendments to the Federal Unemployment Tax Act (FUTA) took effect in 1978, putting in place a two-tiered coverage disparity that remains unchanged to this day: while most other employers are compelled to pay UI taxes if they pay at least \$1,500 in wages in a calendar quarter, or employ even one worker for any part of a day in 20 or more different weeks during the year, farm employers are *exempt* unless their quarterly payroll tops \$20,000 or they employ 10 or more workers in at least 20 different weeks.

Farmworkers who can't document wages from one or more of these larger farm establishments, and who don't have any non-farm earnings, generally don't qualify for unemployment benefits, except in states that have broadened UI coverage beyond the minimum requirements of FUTA. California, Rhode Island and Puerto Rico currently collect unemployment taxes from virtually all agricultural employers, while the other 48 states follow the dual-track federal standard that leaves a significant segment of the agricultural labor force ineligible for jobless benefits.

Social Security. In a situation similar to the one just described, farm labor was not covered by the Social Security Act at all until 1950, and inequities built into that law and the Federal Insurance Contributions Act (FICA) decades ago still limit the amount of contributions farmworkers and their employers pay into the Social Security system, as well as the amount of benefits farmworkers may qualify for during periods of disability and upon retirement.

First, agricultural employers whose annual agricultural payroll expenditures amount to less than \$2,500 are generally not required to pay FICA taxes on their employees' behalf — or to withhold FICA contributions from their employees' pay — except in the case of individual employees who earn at least \$150 in wages during the year. There are no such coverage thresholds for most other classes of workers.

Secondly, in applying the \$2,500 rule, farm establishments are allowed to ignore the wages paid to local hand harvest workers who are employed on a piecework basis and who worked in agriculture for less than 13 weeks the previous year. This provision creates a loophole that may significantly reduce the Social Security earnings credits of an establishment's agricultural employees, and thus their future eligibility for disability and retirement benefits.

Occupational Safety and Health. Under authority of the Occupational Safety and Health Act of 1970, the U.S. Department of Labor has adopted numerous worker safety regulations affecting the agricultural workplace, including standards applicable to temporary labor housing, hazardous substances and certain farm equipment, and requirements for the provision of toilets, handwashing facilities and drinking water for workers in the field.

The Occupational Safety and Health Act itself contains no exemptions, exclusions or exceptions that would otherwise leave any segment of the agricultural workforce unprotected — or let any class of agricultural employers “off the hook.” For the last 41 years, however, Congress has included a provision in the Labor Department's annual funding bill that prohibits OSHA from enforcing any rule, regulation, standard or order authorized under the Act against any farm

operation that employs 10 or fewer employees currently and at all times during the last 12 months, and that hasn't operated an active temporary labor camp during the preceding 12 months.

Labor Relations. From its inception in June 1935 to this day, the National Labor Relations Act — which affirms the right of American workers to full freedom of association, self-organization and representation of their own choosing, establishes election procedures to determine the workers' wishes regarding union representation, and prescribes legal mechanisms for preventing unfair labor practices — does not apply to anyone employed as an agricultural laborer.

INEQUITIES BY STATE

Minimum Wage. Forty-five states and Puerto Rico have enacted laws creating an hourly wage floor for workers in their respective jurisdictions. Of that number, only nine provide minimum wage coverage to agricultural workers to essentially the same extent as non-ag workers, while 22 offer farmworkers at least partial protection, and 15 — or roughly *a third* — exclude farmworkers from coverage altogether. Alabama, Louisiana, Mississippi, South Carolina and Tennessee have no minimum wage laws on the books.

Overtime Pay. Of the 34 jurisdictions that require employers to pay some form of enhanced compensation to their employees for hours of work beyond the standard workweek, only Puerto Rico requires time-and-a-half for virtually all agricultural workers working more than 40 hours a week. No fewer than 24 states exclude farmworkers from their overtime laws entirely.

Child Labor. Dating back to the early twentieth century in most cases, there are laws regulating the employment of minors in all 50 states and Puerto Rico. Amazingly, the child labor laws in 14 states — Alabama, Delaware, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, North Carolina, North Dakota, Oklahoma, Rhode Island, Tennessee and Texas — *do not apply* to employment in agriculture.

In one state — Alabama — children employed in accordance with the state child labor law are exempt from attending public school. Since, as noted above, Alabama's child labor law doesn't apply to agricultural services, the parents of minors performing farmwork are effectively relieved from the obligation to enroll their children in school and assure their attendance.

Workers' Compensation. Economic compensation for injury or death sustained by employees on the job has been embedded in state law across the country for more than a century, yet only 14 states require agricultural employers to provide workers' compensation coverage to their farm employees on the same basis and to the same extent as employers in other industries. Specifying certain minimum payroll volumes or workforce thresholds before workers' comp insurance is mandatory, the laws in 21 states are substantially more lenient on employers in the farm sector.

At the opposite end of the spectrum, no fewer than 16 states — *just under a third* — categorically exempt agricultural establishments from providing workers' compensation or occupational disease coverage to their employees.

Labor Relations. Of the 17 states with general labor relations legislation recognizing workers' rights to organize and bargain with their employers over wages and other working conditions, Florida, Hawaii, Puerto Rico and Wisconsin are alone in not explicitly excluding farmworkers from those protections.

Arizona, California and Kansas remain the only three states with single-purpose statutes that spell out the labor rights of agricultural workers specifically, and prescribe a process for holding farm union elections and resolving disputes over representation. The laws in Arizona and Kansas, however, apply only to farm establishments that employ six or more workers over certain minimum time periods, and the agency responsible for enforcing the law in Kansas can be activated only when a complaint is filed with the state agriculture secretary.

Fair Employment Practices. A large majority of states have enacted comprehensive civil rights legislation that includes prohibitions against discrimination in employment. While most of those statutes apply without regard to the industries or occupations involved, the fair employment provisions in Delaware and Pennsylvania do not apply to individuals employed in agriculture.

Alabama protects workers only against age discrimination, and Mississippi has no state civil rights laws at all.

NOTABLE CHANGES, 1988-2017

Comparing statutory law over the nearly thirty-year period between its first comprehensive inventory of labor legislation and the update completed this year, MET's research staff noted several interesting, if not significant, trends and developments worth reporting as part of this brief recap of our findings.

Child Labor. Changes in the state child labor laws are a mixed bag. Montana's Child Labor Standards Act (1993) extended protections to the agricultural sector for the first time, South Dakota narrowed or lifted most of the agricultural exceptions to its child labor law, and blanket ag exemptions were largely repealed in Virginia, Washington and West Virginia. On the other hand, child labor exceptions for farmwork were *added* in Arkansas, while North Carolina lowered the minimum age for farm employment from 14 to 13 and South Carolina repealed former criminal penalties for child labor violations. Inscrutably, Michigan in 2011 transferred responsibility for enforcement of the child labor laws from the state wage hour division to the education department.

In a positive development on a related front, since 1988 the age range subject to compulsory school attendance was *expanded* in no fewer than 25 states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, New Hampshire, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, Virginia, West Virginia and Wyoming.

Fair Employment Practices. New laws protecting workers from various forms of job discrimination emerged in several states over this period, including the Arkansas Civil Rights Act of 1993, Indiana's law prohibiting discrimination against disabled persons (1992), and wage discrimination provisions in Iowa (2009). Likewise, the laws in many states added new grounds for workplace discrimination claims, to include a worker's sexual orientation (11 states), gender identity (6) and gender expression (5). In nearly every state civil rights statute, the term "handicapped" was changed to "disabled."

Somewhat to the contrary, Louisiana's Age Discrimination in Employment Law was repealed in 1997, the Texas Human Rights Commission was abolished and its functions transferred to the Texas Workforce Commission in 2003, and West Virginia's equal pay law was made applicable only to state employees in 2016.

Farm Labor Contractor Registration. One state — Idaho (2002) — enacted a law requiring licensing of farm labor contractors. Similar laws in two states — Illinois (1997) and Massachusetts (2011) — were repealed.

Housing. The federal regulations governing temporary housing provided to employees by their employers are no longer covered by the OSHA-approved state plans in Alaska, Indiana, Iowa, Kentucky, Minnesota, South Carolina and Utah, leaving enforcement in the hands of the U.S. Department of Labor.

The migrant labor camp law in Florida was amended in 1993 to guarantee the right of access to migrant labor camps and residential migrant housing by invited guests and others. Oregon added a provision to its state labor laws in 1989 requiring farm labor contractors who provide housing to their workers to register with the state labor department and obtain a license endorsement authorizing housing activity. The scope of Virginia’s migrant labor camp law was broadened in the early 1990s, to apply to housing used as living quarters for “one or more persons” rather than “more than 10.”

Income Tax. A state income tax was enacted in Alabama (2006) and Connecticut (1991), both of which join Colorado, Hawaii, Pennsylvania and West Virginia in requiring income tax withholding from farmworkers’ wages on the same terms as non-agricultural wages. California, Georgia, Louisiana, Mississippi, Montana, Ohio, Puerto Rico, South Carolina and Wisconsin generally exempt ag wages from withholding.

Labor Relations. Idaho’s Agricultural Labor Act — previously one of only four such laws in the nation — was repealed in 2003.

Minimum Wage. The state minimum wage laws and their applicability to farm labor have evolved considerably across the U.S. — some for better, others for worse. A few noteworthy examples:

- Through a ballot initiative in 2006, Arizona voters enacted a statewide minimum wage, which applies to agricultural and non-agricultural workers equally.
- A constitutional amendment approved by Colorado voters in 2016 extended coverage of the state minimum wage to all employees covered by the federal minimum wage law, which excludes agricultural workers on all but the largest farm establishments.
- In 2004, Florida voters passed an initiative creating a state minimum wage, but in this case, too, it applies solely to workers covered by the federal minimum wage, thus protecting farmworkers on only the state’s largest farms.
- Iowa enacted a minimum wage law in 1989, but it applies only to employing establishments with a gross annual sales volume of \$300,000 or more, and to agricultural workers only if they work for a large farm establishment subject to the federal minimum wage law.
- Voters in Missouri enacted a minimum wage law in 2006, but it features virtually the same agricultural exemptions found in the federal Fair Labor Standards Act.
- Constitutional amendments approved by Nevada voters in 2004 and 2006 superseded the existing state minimum wage laws, but the minimum wage exception for farmworkers employed by an establishment that uses less than 500 worker-days of ag labor in a calendar quarter is still in effect.

- In 2007, the North Dakota legislature for the first time established a state minimum wage by *statute*, rather than leaving it to the discretion of the state labor commissioner. Notably, neither the new law nor the commissioner’s regulations make any exceptions for agricultural labor.
- The former provision in Rhode Island law excluding individuals employed in agriculture from entitlement to the state minimum wage was repealed in 1994.
- Utah established a statewide minimum wage in 1990, applicable to all workers who are not covered by the federal minimum wage, effectively extending coverage to employees on farms using no more than 500 worker-days of ag labor in a calendar quarter. The law does *not* apply, however, to farmworkers employed in agriculture for less than 13 weeks each year, or to those who are paid on a piecework basis in a traditionally piecework-paid agricultural operation.
- Through a ballot initiative in 1989, the total exclusion of farm labor from the Washington Minimum Wage Act was replaced by a partial exemption, disenfranchising local piecework-paid workers employed in agriculture for less than 13 weeks a year.
- In 2015, the Wisconsin legislature set the state minimum wage by *statute* and essentially equalized coverage for agricultural and non-agricultural workers.

Overtime Pay. As with the minimum wage, there were numerous changes in state overtime requirements noted between 1988 and 2017, but few of which appreciably benefit farmworkers:

- In September 2016, California enacted legislation that will — by 2025 — result in overtime coverage in the state’s agriculture industry on terms identical to those in other sectors of the economy.
- Missouri’s 2006 ballot initiative included employee overtime pay protections, but none are applicable to farmworkers.
- Former overtime pay requirements in New Hampshire were repealed.
- Both New Mexico and North Carolina lowered the threshold after which overtime pay is required — from 48 and 45 hours per week, respectively, down to 40 — but both laws still exclude workers engaged in agriculture.
- Until dire economic straits forced radical changes in the island’s labor laws late last year, employers in Puerto Rico not subject to federal overtime provisions were required to pay *double* time to workers employed after eight hours a day or 40 hours a week. Effective January 1, 2017, overtime pay was scaled back to time-and-a-half.

Paid Family Leave. Virtually unheard-of in 1988, by early 2017 five states had enacted laws requiring employers to provide paid leave to employees who take time off the job to care for an ill or injured family member, to bond with a newborn or newly adopted child, or for similar purposes. The statutes in California and Rhode Island make no distinction between agricultural and non-agricultural workers, but because eligibility in New Jersey and Washington is tied to eligibility for unemployment insurance, many farmworkers in those two states are excluded from paid family leave; New York’s law does not apply to ag labor at all.

Transportation. Joining eight other states, in 2015 Maine enacted statutory provisions regulating the transportation of farm workers by farm labor contractors. North Carolina, in contrast, *rescinded* its detailed state migrant motor carrier regulations in 1991, although the authorizing statute remains on the books.

Whistleblower Protections. Retaliation and other forms of discrimination against employees who discover and report illegal activity engaged in by their employers are now expressly prohibited in 13 states: Connecticut, Florida, Hawaii, Maine, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island and Tennessee. Remarkably, the whistleblower laws in all 13 states apply fully to agricultural workers and employers.

Workers' Compensation. In 2016, farmworkers in New Mexico became eligible for workers' compensation coverage by default, when the state supreme court declared unconstitutional the law's longstanding exclusion of farm and ranch workers.

In a similar development last year in Oklahoma, the "Employee Injury Benefit Act" — passed by the legislature in 2013 as an alternative route employers could use to satisfy state requirements for providing benefits to injured workers — was found unconstitutional. The decision won't mean much to farmworkers, though, since neither statute applies to anyone employed in agriculture except as a machine operator or in an establishment with a gross annual farm payroll of \$100,000 or more.

With the possible exception of domestic workers, no other segment of the U.S. workforce is as systematically and extensively denied the security of the nation's labor laws as are the workers on America's farms and ranches.

As the foregoing overview should make clear, not only do the wage earners who plant, cultivate and harvest the crops that end up on our dining room tables often labor for decidedly second-class wages and under patently unequal legal protections, this decades-old pattern of legislative discrimination is not fading quickly into history.

*Brian R. Craddock
November 2017
Austin, Texas*