



Extension

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Legal Guide for New Hampshire Agricultural Producers



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Legal Guide for New Hampshire Agricultural Producers

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AUTHORS

Amy Manzelli, Esq. BCM Environmental & Land Law, PLLC
Jason Reimers, Esq. BCM Environmental & Land Law, PLLC
Stephen Wagner, Esq. BCM Environmental & Land Law, PLLC
Rachel Armstrong, Esq. Farm Commons, Duluth, MN
Erin Hannum, Esq. Farm Commons, Duluth, MN

Project Managers

Seth Wilner, Extension Field Specialist, Food & Agriculture, University of New Hampshire Cooperative Extension, Sullivan County
Pamela Bruss, Extension Program Associate, Food & Agriculture, University of New Hampshire Cooperative Extension, Sullivan County

Contributors

Andy Pressman, National Center for Appropriate Technology
University of New Hampshire Cooperative Extension
Heather Bryant, Extension Field Specialist, Food & Agriculture
Pamela Bruss, Extension Program Associate, Food & Agriculture
Jeremy DeLisle, Extension Field Specialist, Food & Agriculture
Elaina Enzien, Extension Field Specialist, Food & Agriculture
Ann Hamilton, Extension Field Specialist, Food & Agriculture
George Hamilton, Extension Field Specialist, Food & Agriculture
Nada Haddad, Extension Field Specialist, Food & Agriculture
Michal Lunak, Assistant Professor/Extension State Specialist, Food & Agriculture
Kelly McAdam, Extension Field Specialist, Food & Agriculture
Rachel Maccini, Safety Education Coordinator, Pesticide Safety Education & Urban IPM
Carl Majewski, Extension Field Specialist, Food & Agriculture
Amy Papineau, Extension Program Team Leader, Food & Agriculture
Dot Perkins, Extension Field Specialist, Food & Agriculture
Olivia Saunders, Extension Field Specialist, Food & Agriculture
Becky Sideman, Extension Professor/State Specialist, Food & Agriculture
Mike Sciabarrasi, Emeritus Extension Professor/Specialist, Food & Agriculture
Kenesha Reynolds, State Specialist, Food & Agriculture
Sherrie Fontaine, Extension Program Associate
Seth Wilner, Extension Field Specialist, Food & Agriculture



University of New Hampshire
Cooperative Extension
Taylor Hall
59 College Road
Durham, NH 03924-2621

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Labor and Employment Law

Farm labor matters because getting into trouble for violating labor and employment laws could easily result in penalties and fines. The laws apply differently to the different kinds of farm workers; this section will help you better understand how it affects your farm. We will cover paperwork requirements for farm labor; how to terminate an employee; how to manage migrant, seasonal and foreign workers; what laws and regulations are required for child labor on the farm; requirements for workers compensation; unemployment insurance and different workplace safety requirements, as well as better understanding the CSA for farms.



Correctly Classifying Your Farm Labor Matters

Correct classification of farm labor matters because getting into trouble for violating labor and employment laws could easily result in extensive penalties and fines.

The law applies differently to the different kinds of farm workers. Some examples of legal requirements applicable to employees include:

- ④ **Minimum Compensation:** which establish not only a minimum wage for your employees, but also regulate when you must pay your employees; See generally, [NH Chapter 279, Minimum Wage Law](#); [29 U.S. Code, Title 29, Chapter 8, Fair Labor Standards](#)
- ④ **Record Keeping:** such as work authorization forms, tax forms, and wage and hour records;
- ④ **Workplace Safety:** which establish the general duty to furnish a workplace safe from recognizable hazards;
- ④ **Notices:** requiring employers to inform employees of certain important details of their employment;
- ④ **Payroll:** which establish the employer’s withholding requirements;
- ④ **Workers’ Compensation and Unemployment Insurance:** requiring employers to provide these protections under most circumstances.

REGULATIONS CITED FOR LABOR AND EMPLOYMENT LAW

<p>Correctly Classifying Your Farm Labor Matters 26 U.S.C. § 3306(c)(1) 29 C.F.R. § 570.2 RSA 276-A:4 RSA 282-A:9, IV(a)</p> <p>Legal Classifications For Farm Workers RSA 275:4, II RSA 281-A:2, VI(b)(1) 29 C.F.R. § 553.101 29 C.F.R. § 779.214 29 U.S.C. § 203(e)(4)(A)</p> <p>Paying Your Farm Labor RSA 275:42(I) and (II) RSA 279:1 RSA 279:21 26 U.S.C. § 61 29 U.S.C. § 203(f) 29 U.S.C. § 206 29 U.S.C. § 213(a)(6) RSA 275:43; 49 RSA 279:27 RSA 282-A:117-a</p> <p>Managing Migrant, Seasonal, and Foreign Workers 8 U.S.C. § 1188 29 U.S.C. §§ 1801-1871 29 U.S.C. § 1802 29 U.S.C. § 1802(6) 29 U.S.C. § 1802(7) 29 U.S.C. § 1802(8) 29 U.S.C. § 1802(10) 29 U.S.C. § 1811 29 U.S.C. § 1821(a), (b), (g) 29 U.S.C. § 1821(d), (1), (2) 29 U.S.C. § 1823(a), (b) 29 U.S.C. § 1841 29 U.S.C. § 1851-1853 29 U.S.C. § 1851(a) 29 U.S.C. § 1853(a)(1) 29 U.S.C. § 1854</p>	<p>Terminating an Employee RSA 276-A:3 RSA 276-A:4, I, II.A, V, VI, VII, VIII RSA 276-A:5 29 C.F.R. § 570.71 29 C.F.R. § 570.72 29 C.F.R. § 570; 570.2 RSA Chapter 281-A RSA 281-A:4, 5, 7</p> <p>Unemployment Insurance RSA 282-A:8 RSA 282-A:9, IV(a) RSA 282-A:19 26 U.S.C. § 3301 et seq. 26 U.S.C. § 3306(a)(2) 40 C.F.R. § 170 40 C.F.R. § 170.112 40 C.F.R. § 170.120 40 C.F.R. § 170.130 40 C.F.R. § 170.150 40 C.F.R. § 170.160 40 C.F.R. § 170.240 40 C.F.R. § 170.3 29 C.F.R. § 1910 29 C.F.R. § 1910.101-119 29 C.F.R. § 1910.272 29 C.F.R. § 1910.266 29 U.S.C. § 203(e)(4)(A) 29 U.S.C. § 213(c)(6)(G)</p>
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Resources
www.gpo.gov/fdsys

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Correct classification also matters because many of the laws that apply to employees allow exemptions for small agricultural businesses. Taking advantage of exemptions requires employers to understand the manner in which these exemptions will apply.

The following are the most useful exemptions a farm should consider:

- ④ **Minimum Wage and Overtime Exemption:** If a farm uses less than 500 person-days in every calendar quarter during the previous calendar year, the farm is exempt from New Hampshire and federal minimum wage and overtime requirements.
- ④ **Unemployment Insurance Exemption:** A farm employer is not required to carry unemployment insurance on its employee if in the current or preceding calendar year, the farm paid less than \$20,000 for such labor in any quarter and employed fewer than 10 or more people in each of 20 different weeks. [RSA 282-A:9, IV\(a\); 26 U.S.C. § 3306\(c\)\(1\)](#).
- ④ **OSHA Inspection Exemption:** A farm is exempt from on-site OSHA inspections if it employs 10 or fewer employees currently and at all times during the last 12 months.
- ④ **Child Labor Exemption:** Child labor regulations do not apply to the employment of one's own children who are under the age of 21. [29 C.F.R. § 570.2](#); [RSA 276-A:4](#). A farm owner/manager can hire his/her own children and not be subject to the New Hampshire and federal child labor laws.

Incorrectly classifying your farm labor can subject the farm to unanticipated liability and fines. For example, a farm hired a farm worker to perform several odd jobs on the farm, including roof repair, weeding, watering, and other crop care. The farm classified this worker as an independent contractor. In reality, the farm worker is very likely an employee.

Because the farm miscategorized the farm worker by mistake, it failed to take out required insurance policies on the worker and does not subject the worker's wages to payroll taxes. If the farm worker was injured on the

farm, the worker could go after the farm for injuries. The Department of Labor and other government regulatory bodies can audit the farm and impose fines and penalties on the farm for failing to comply with the law. In fact, if a farm's actions are determined willful, the farm owner/manager could even face prison time.

The bottom line: Misclassifying a farm worker is no joke. It can cost a farm a great deal of time, money, and even subject the farm owner/manager to prison time.

Legal Classifications For Farm Workers

Farm labor in New Hampshire can be divided into four major classes:

- 1) employee;
- 2) intern;
- 3) independent contractor; and
- 4) volunteer.

For most farm workers, the law presumes employee status. So, it is the farm employer's responsibility to prove that a farm worker should be classified differently.

The different types of worker statuses have specific legal definitions. The law contains specific standards (sometimes known as tests) to determine under what circumstances a term should apply.

Employee

The law broadly defines employee, meaning most workers may fall into the category of an employee. The term "employee" is defined in different ways throughout New Hampshire law. Perhaps the clearest definition is that an "employee" is any one "who performs services for pay for an employer." [RSA 281-A:2, VI\(b\)\(1\)](#) (defining employee for purposes of worker's compensation insurance). Another definition is that "employee" "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment." [RSA 275:4](#).

Whether or not a written agreement exists has nothing to do with whether farm labor is an employee or some other status. A written agreement can be used for an employee, or for any other status of farm worker. Not having a written agreement does not make farm labor not an employee. In other words, farm labor can still be an employee even if no written agreement exists.

It is rare that farm laborers commonly considered volunteers, apprentices or similar terms are correctly considered not to be employees. Usually, they are employees.

Intern

The most important consideration with respect to interns is that only under very specific circumstances will an intern not also be an employee. Most interns will be employees.

An intern meeting the test laid out below is a type of farm labor that is not considered an employee, and therefore things required for an employee may not be required for an intern. The most basic thing required for employees is that employees must be compensated for their time. Interns are not required to be compensated.

For an intern to not also be an employee, the internship must be for training or educational purposes.

The following six criteria must be satisfied for an intern to not also be an employee:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded,

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Typically, number four is the most challenging hurdle for a farm to overcome. Farms have historically used “interns” for free labor instead of paid laborers. In that case, the above standard is not met, and employment laws may be being violated unless the intern is paid a legal wage.

Independent Contractor

The law specifically defines independent contractors as workers who are not:

1. An integral part of the business utilizing their services;
2. Involved in a permanent or long-term relationship with the business;
3. Dependent on the business’s facilities or equipment;
4. Closely directed by the business;
5. Shielded from liability or loss, generally holding their own workers compensation and related insurance policies;
6. Dependent on the business for initiative, judgment or foresight;
7. Part of the same business organization or operation.

For purposes of New Hampshire law requiring employers to provide employees with workers’ compensation insurance and unemployment insurance, an independent contractor is someone who meets all of the following standards:

- a) The person possesses or has applied for a federal employer identification number or Social Security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

- b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.
- c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.
- d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.
- e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.
- f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
- g) The person is not required to work exclusively for the employer. [RSA 275:4, II](#)

Volunteer

A volunteer is one who donates time and labor to a public agency “without promise, expectation or receipt of compensation for services rendered.” [29 C.F.R. § 553.101](#); see also [29 U.S.C. § 203\(e\)\(4\)\(A\)](#). A non-profit farm can host a volunteer because it is a non-profit organization designed to benefit the public. A for-profit farm, however, is not likely an organization included within the definition of volunteer, and will not likely be able to classify a farm worker as a volunteer. Pursuant to federal law, one who is working to further a business's commercial purpose may not be classified as a volunteer. [29 C.F.R. § 779.214](#).

Farm Apprenticeship: Not a Legal Classification

An apprentice is not a legal definition. New Hampshire state law does not include any farm-related occupations as registered apprenticeship programs. For that reason, a farm cannot legally classify a farm worker as an apprentice because such classification is not available by law.

Traditionally, farm apprenticeships have been the key educational tool to passing on essential skills and techniques to future farmers. Today, mentor farms often classify beginning farmers as apprentices and legally treat these farm workers as interns. A farm doing this must consider whether the apprentice meets the definition of an intern, as described above. Remember, the only way to be an intern is for the circumstances to meet the six-part intern test.

If a mentor farm cannot prove the farm worker meets the six-part intern test, the apprentice is most likely an employee for legal classification purposes. In that case, the mentor farmer would be the apprentice's employer, the apprentice would be an employee, and the term “apprentice” would be a job title rather than a legal classification.

Classifying Workers on New Hampshire Farms - Employees vs. Interns, Volunteers, and Independent Contractors



Classifying Workers on New Hampshire Farms—Employees vs. Interns, Volunteers, and Independent Contractors

By: Rachel Armstrong and Erin Hannum

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GETTING STARTED

Getting Started

Classification: Facts, Not Titles, Matter

Farmers often ask: What's really the difference between an employee and an intern or volunteer under the law? And, what is an independent contractor? How do I know what type of worker I have, legally speaking?

The first thing to know is job titles don't matter; calling someone an independent contractor doesn't make them one, necessarily. The substance of the worker's tasks are what matters: How are tasks assigned? What does the worker expect in return? Who controls the worker's time? These and many other questions determine the legal classification of the position. **There are four main classifications of workers: (1) a volunteer, (2) an independent contractor, (3) a non-employee intern, and (4) an employee.**

The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers' compensation, withhold and pay taxes, and so on. Oftentimes, what farmers call interns, volunteers, independent contractors, and so on are in fact “employees” in the eyes of the law. Misclassification is common in many industries, including farming. If a worker is in fact an employee and the farmer doesn't properly classify them as such, the farmer risks having to pay back wages, taxes, and even penalties.

The good news is that farmers can be proactive. By learning the factors that the law takes into consideration, farmers can craft their worker arrangements to both suit their needs and fulfill their legal obligations. It's helpful to keep in mind that employment law shares the farmer's goal of treating their workers well. Employment law ultimately serves to protect workers—all workers—to ensure fairness, and prevent coercion and exploitation in the workplace. To facilitate this goal, the law will assume that anyone doing work for the farm business is an employee. **The farmer may classify a worker as something else if, and only if, the specific criteria for another classification are met.**

Using This Guide

This guide helps farmers better understand the legal definitions and criteria for classifying their workers. The first step is to walk through the summary flowchart that follows. The flowchart will lead the farmer to an initial determination of which of the four categories their worker(s) fall into. Note that if you have more than one person working on the farm, you may need to walk through

“The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers' compensation, withhold and pay taxes, and so on.”

USING THIS GUIDE

the flowchart for each worker as the classification could be different. The sections that follow provide detailed explanations and criteria for each of the classifications.

The various categories and criteria may feel overly nuanced or abstract at first. To help ground this all in reality, we'll be following the stories of Amanda and Ralph throughout the guide.



Farmer Amanda is a beginning farmer. She has a small CSA and is looking into labor issues, including whether she can rely on some of her CSA members to do some of the farm work and help out with packing and such. She's ultimately looking to grow and expand her business, and hopefully start selling at farmers' markets and even restaurants to diversify and better improve profits.



Farmer Ralph is also a beginning farmer. He sells his products mostly at farmers' markets and to local upscale restaurants. He's a retired math professor, and doesn't depend at all on the farm's income for his livelihood. It's really just a hobby. Ralph's main priority is to teach new farmers the ropes and pass on his legacy in this way. He loves teaching and really wants to help and train young farmers so they can go out and start their own farm businesses.

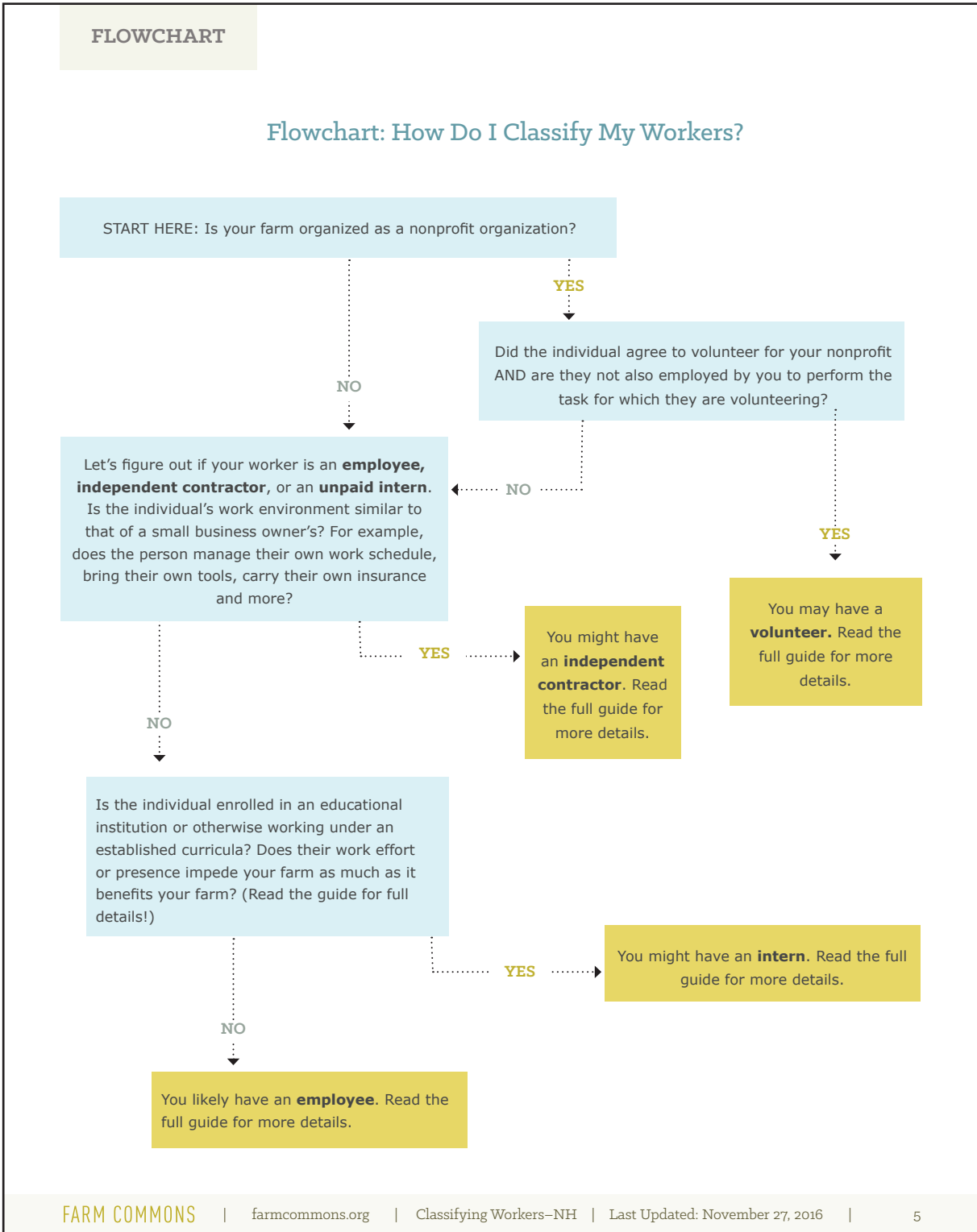
Other resources are referred to throughout that provide more detail on specific legal issues. In particular, this guide is part of a series of guides on New Hampshire employment law:

Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist

Classifying Workers on New Hampshire Farms—Employees vs. Interns, Volunteers, and Independent Contractors

Managing Risks of Farm Interns and Volunteers in New Hampshire

Be sure to check out these and other relevant legal resources for sustainable farmers, which are all available for free on Farm Commons' website—www.farmcommons.org.



VOLUNTEERS

Details: What Do the Classifications Mean?

Volunteers

Legal definition

What is a volunteer? The law defines a volunteer as someone who performs service for charitable or humanitarian reasons for a nonprofit or public agency without expecting compensation.

Does your farm meet the six criteria for a volunteer?

Folks are often willing to work on farms for “free.” Some want job training, others simply appreciate the opportunity to be out in nature and see where their food comes from. Is this okay? Yes, so long as the farm meets certain criteria. Both the US Department of Labor Wage and Hour Division (US DOL) and the New Hampshire Department of Labor (NH DOL) consider the following six factors when determining whether someone is a true volunteer.

1. The farm must be operating as a nonprofit organization

The harsh reality is that there’s no such thing as a “volunteer” for a for-profit business. New Hampshire law defines an employee as someone who an employer directs or permits to work for her so the employer can retain a profit. Likewise, a for-profit operation is traditionally motivated by profits. Someone who does work at a for-profit farm is generally helping the farm meet that end. The fact that the worker isn’t paid is not relevant—the farm is being helped and the farm owner is permitting the work. That means the worker is an employee (unless they are an intern or independent contractor).

The federal definition of a volunteer is someone who is motivated by charitable or humanitarian reasons *for a public agency* with no expectation of receiving compensation for her services. So, volunteering for a for-profit business just doesn’t work under the dominant legal paradigm.

The reasoning behind this is again about preventing exploitation and coercion of workers. As the theory goes, the business owner is effectively making money off the worker, so the worker deserves pay. Otherwise the economic and power dynamic is just not equitable.

With that said, there is one scenario when a for-profit farm can have a “true volunteer.” This would be the case if someone is motivated solely by play and

VOLUNTEERS

leisure and the farm benefits in no way from their efforts. For example, let's say a mother and her young child come to Amanda's farm to pick raspberries simply for the joy of it. They take home all the proceeds of their efforts—baskets of raspberries they picked themselves. Even if they get carried away and *accidentally* pick a couple extra baskets, the farm only benefits indirectly. This would be a “true volunteer.”

Aside from this one-off scenario, the farm can only have non-employee volunteers if it is organized and run as a nonprofit. Like a volunteer, the nonprofit is by definition motivated by charitable and humanitarian reasons.

2. The volunteer must work less than full time

This factor protects the workers from coercion and exploitation. If a volunteer works full time for a nonprofit farm, they may become dependent on the farm for their livelihood. Let's say the nonprofit farm has “volunteers” that work full time and the farm provides them room, board, and essentially all they need for their livelihood. This puts these workers in a potentially exploitative situation. The workers may feel pressured to do everything the farmer says to protect their living arrangement, even if unfair working conditions prevail. This is precisely the type of arrangement that employment laws protect. Nonprofit farms should be careful not to create such a dependency relationship. The best way to do this is to have the volunteers work only part time. This provides them opportunities to create a livelihood outside of the farm.

3. The volunteer must offer the services freely, without pressure or coercion

The volunteer needs to have some level of autonomy. As the name depicts, a volunteer must “voluntarily” agree to the tasks at hand. While the farmer can provide instruction and direction, the farmer cannot force a volunteer to do arduous or repulsive tasks such as shovel horse manure for hours on end—unless, of course, the volunteer freely volunteers to do it!

In addition, the non-profit farm cannot force a regular employee to perform volunteer services for free. Forcing an employee to volunteer is by no means volunteering! With that said, the farm can have a one-off event, such as a weekend fundraiser, and open up volunteer opportunities to regular employees. However, the farmer cannot require employees to participate or make it in any way a condition of continued employment.

VOLUNTEERS

4. The volunteer must not receive or expect to receive compensation from the nonprofit farm

This gets to the heart of the legal definition of a volunteer—someone who does not expect compensation for the services offered. If the worker expects compensation in return, they are not a volunteer. This brings up a couple key points.

First, farmers who provide some compensation to volunteers—whether in the form of cash or in-kind payments—should tread cautiously. By paying volunteers some compensations, the farmer risks making it look more like an employee arrangement. The “volunteer” begins to expect this compensation. Farmers in New Hampshire who are required to pay minimum wage to their employees (i.e., farms with 500 or more man-days or farms assigning non-agricultural tasks to their volunteers), should strongly consider providing at least the minimum wage to volunteers. If at least the minimum wage isn’t possible, no compensation at all may be better as it will look less like an employment arrangement.

In addition, as mentioned earlier, a non-profit farm cannot suddenly require a regular employee to do the work they regularly do for free. For example, let’s say the farm is running low on cash. The farmer can’t ask the employee to work for free for a couple weeks to get the farm through a tough time. The law sees this as unfair to the employee expects compensation for their work. The farm will need to figure out another way to make payroll.

5. The nonprofit farm cannot leverage its unpaid volunteers to unfairly compete with other farms

In addition to protecting the workers, the law is also interested in protecting overall fairness in the marketplace. Nonprofit farms gain a bit of an advantage over for-profit farms given they don’t have to pay their volunteers. They can, in turn, undercut their prices. This runs counter to how the free market system is supposed to work, so the law does not allow this! If a nonprofit farm is using its volunteer base to get an upper hand at the market, the law may step in and say that the volunteers must be treated and paid as employees. What can the nonprofit farm do to prevent this? First, the nonprofit farm should be sure that the tasks assigned to volunteers are typical of volunteer tasks. Basically, they should be more tangential than essential to the farm’s core operations. While the volunteer base can offer a significant help to the nonprofit farm, the volunteers should not be running or even playing a critical role in the operation. In

Minimum wage refresher:

New Hampshire law fully exempts agricultural labor from minimum wage requirements. Federal law provides an exemption for agricultural labor based on farm size. Farms with less than 500 man days of agricultural labor in each calendar quarter of the previous year do not have to pay minimum wage. Those with 500 or more man days do. Note that these exemptions only apply to agricultural labor. For more details on these exemptions, see pages 9-13 of the *Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist*.

VOLUNTEERS

addition, the farm should be sure to charge the going market rate for its products.

6. The volunteer's work must be informal

This factor goes hand-in-hand with the previous factor. The volunteer's work should be informal. This means that if the volunteer doesn't show up, the farm's regular operations won't be significantly affected. In other words, the volunteers should not be fulfilling essential duties of the organization that would otherwise be done by paid employees. One way the law gauges this factor is to see if regular employees are being displaced by volunteers. If they are, it's looking more like an employee. To be on the safe side, the nonprofit farm should continually ask itself whether volunteers are displacing their employees. In addition, if the volunteer is being told to come in at a specific time for a specific duration on a specific day, the law will most likely see this as an employee. Farmers should extend flexibility and forgiveness to volunteers and not become overly dependent on them.

Now What?



Farms that do meet the volunteer criteria

“This is terrific! I already looked into setting my farm up as a nonprofit with my mission to train the next generation of sustainable farmers! What now?”

Farmers like Farmer Ralph who have a non-profit farm and feel they meet these criteria should review *Managing Risks of Interns and Volunteers in New Hampshire* for more information on the legal aspects of hosting volunteers.



Farms that don't meet the volunteer criteria

“Okay, clearly I cannot have unpaid volunteers as I am operating my farm as a for-profit. So what does this mean?”

Farmers like Amanda will most likely need to treat their workers as employees. First, however, they can review the criteria in the next two sections for independent contractors and interns to see if they might qualify.

INDEPENDENT CONTRACTORS

Independent Contractors

Legal Definition:

What is an independent contractor? The law defines an independent contractor as someone who performs a specific service for another while having **control** over precisely how the work is done.

Does your farm meet the six criteria for an independent contractor?

Farmers may be asking, what are the benefits of classifying workers as independent contractors? The main benefit in New Hampshire is that unlike for employees, the farm isn't required to get workers' compensation coverage or pay payroll taxes for independent contractors. When farm budgets are tight, the flexibility that independent contractors allow can seem attractive. However, if the farm misclassifies a worker as an independent contractor, it potentially faces penalties and fines at both the state and federal level.

The New Hampshire Department of Labor (NH DOL) sets forth six criteria for determining whether a worker is an independent contractor. These criteria mirror those considered by the US Department of Labor (US DOL) and the IRS. Misclassification of independent contractors has become a heated issue in the past several years. In 2014, the US DOL and the NH DOL entered a Memorandum of Understanding where they agreed to work together to crack down on the misclassification of independent contractors. Farmers must be particularly cautious that they are following the legal criteria for independent contractors if they choose to have independent contractors.

As we'll see, the key word in defining an independent contractor is "control." Before getting into the details of the legal criteria, it's helpful to start with an example of an independent contractor—a plumber. The plumber comes to your house, brings her own tools, and her skills and expertise to determine what needs to be done to reach your goal of fixing your pipes. She doesn't take orders from you. Also, she likely has other clients, and has business skills to build her plumbing business. You hire her for a specific project, and while you may call her back when things break, you don't have a permanent or ongoing relationship. This is a true independent contractor. With this in mind, let's turn to the criteria.

INDEPENDENT CONTRACTORS

1. The worker controls *how* the work gets done

A worker is more likely to be an independent contractor if the farmer provides little to no instruction to the worker for how the task gets done and simply cares about the end result. In other words, the employer may set the goal or overall objective, but typically the independent contractor sets tasks and controls implementation to meet the broader objective. That's because the law assumes that independent contractors are already skilled at the services they provide. They know best *how* to do the work. If the farmer trains or instructs the worker on the specifics for *how* to pull weeds or *how* to transplant tomatoes, it's likely an employee.

Another aspect of this factor is that the independent contractor typically conducts tangential tasks and not the core or day-to-day tasks of the farm operation. For example, core tasks like harvesting crops on a daily basis would not be appropriate for an independent contractor. However, a farmer may hire an independent contractor to install or fix the irrigation system or build an equipment shed, as these are more one-off projects.

2. The worker controls *when* the work gets done and sets her own schedule

The independent contractor is also typically not working full time and they set their own schedule. So if you're telling your workers exactly when to arrive and how long they must work out in the field, they're likely employees. With that said, the farmer can set a deadline or a time when the project needs to be completed. The farmer can also specify a range of hours such as a maximum number of hours they can work. With that said, independent contractors are typically paid for the services they provide. **They often bid out the project and their pay is typically not based on an hourly, weekly, or monthly rate.** On the other hand, some true independent contractors are paid by the hour. That is acceptable when the rest of the criteria clearly show the individual is still operating an independent small business, such as the example of a plumber.

3. The worker is free to assign work to others

Independent contractors can choose to hire and pay assistants if that's what it takes to get the job done. If any assistants are hired, these folks must be supervised by the independent contractor and not the farmer.

INDEPENDENT CONTRACTORS

4. The worker is in business for herself

An independent contractor is generally someone who demonstrates business skill and initiative. Like the plumber, she's building her client base to run an independent business. The independent contractor typically has her own specialized tools and equipment rather than using the farm's tools and equipment.

5. The worker takes full responsibility for the completion of the work

The independent contractor is ultimately responsible for the satisfactory completion of the work. The farmer can hold them legally or contractually responsible if they fail to complete the work. Unlike an employee, the independent contractor has a stake in the success of the project or tasks assigned. They should have the potential to earn profit or conversely suffer loss.

6. The worker makes her service available to the general public

An independent contractor typically has a number of clients and doesn't work solely for one farm. After all, they're operating a business and to be successful they need a broad client base. If the worker primarily works for the farm, or is essentially "full-time," it's most likely an employee and not an independent contractor.

Now What?

Farms that do meet the independent contractor criteria



My neighbor Alex has a hay baler and I was thinking about hiring him to bale some hay for me this season. I am sure I can meet the above criteria. What next?

Independent contractors are not covered by employment laws such as workers' compensation, minimum wage, and others. As with any contract relationship, farmers should write down the terms of the agreement as a best practice.



Farms that do not meet the independent contractor criteria

"We now realize that our day-to-day workers clearly don't meet the criteria for independent contractors. What do we do now?"

INTERNS

If you don't meet the criteria, you likely don't have an independent contractor. In all likelihood, the worker is an employee. First, there's one more option: interns. Read the following section to confirm your status there. Or, assume you have an employee and skip to the last section.

Interns

Legal definition:

What is an intern? Unfortunately, the law does not provide a precise definition of an intern; however, the legal criteria for an intern emphasizes the **educational** dimension of the arrangement. In addition, the intern should be the sole beneficiary, or at least the primary beneficiary, of the internship program.

Does your farm meet the legal test for a non-employee intern?



"I love having college students working on my farm over the summer. And I provide them extensive training. What about having interns instead of employees?"



"What if I decide not to form a nonprofit and therefore can't have volunteers. Can I run my educational farm as a for-profit with interns instead of employees?"

These are tough questions, as the law surrounding non-employee interns is rather complex. Like Amanda and Ralph, farmers are attracted to offering "intern" positions because they want to offer a lot of education. However, farmers are often under the impression that because education is such a strong component, the intern is different than a regular employee. This is a misimpression. **Simply providing education to a worker does not mean the worker is not an employee.** Even if the farmer calls the worker an "intern," the law will treat the worker as an employee unless they meet the legal test for interns. The legal intern test is quite robust.

With that said, the law surrounding non-employee interns is in a bit of flux. Up until the past few years, the US Department of Labor (US DOL) was the authoritative voice throughout the country on interns.

INTERNS

They have established a set of six factors that must be met for a worker to be a non-employee intern. However, interns in various industries have recently been filing lawsuits against their employers throughout the country. In these cases, the interns have argued that they are employees and have a right to wages and all the other benefits and privileges of employees. As a result, federal courts in certain parts of the country have weighed in. One court in particular—the Second Circuit Court of Appeals—has said that the US DOL’s criteria is too robust. Instead, this court created its own set of criteria, which has since been adopted by a few other courts around the country. In New Hampshire, it remains to be seen whether the federal court’s lenient approach or the US DOL’ strict approach will win (if and when a federal lawsuit is filed by interns in that region). It may be quite a while before this all gets settled—which will likely depend on if and when then US Supreme Court weighs in and provides clarity once and for all.

What does this all mean for farmers in New Hampshire? It means there’s a level of uncertainty in the law. Uncertainty in the law can be confusing and frustrating, as it carries risks. What are the risks here? If the farmer treats their workers as non-employee interns and the law determines otherwise, the farmer risks having to pay back wages (i.e., if the state and federal agricultural labor exemptions to minimum wage do not apply), back taxes, penalties, and lawsuits.

With this in mind, farmers basically have two options. Farmers who are risk adverse and want to play it safe should follow the US DOL’s strict approach. Farmers who are less risk adverse can choose to take the more lenient approach established by the federal courts. We’ll briefly cover each of these approaches now.

For more details on these criteria and the state of the law on interns, see Farm Commons’ resource *Managing Risks of Interns and Volunteers in New Hampshire*.

US DOL’s strict approach: *All* of these six factors must be met in order for the worker to be considered an intern and not an employee.

1. The farm provides training that is similar to a classroom educational experience
2. The farm gets no immediate advantage from the worker
3. The farm has separate staff whose primary role is to run the internship program

INTERNS

4. The position is not a trial period for a future paid position
5. The overall experience is for the benefit of the worker, not the farmer
6. The worker understands that the position is unpaid or less than minimum wage

Some federal courts' lenient approach: Some federal courts have adopted an approach that differs from the DOL's strict approach in four significant ways.

1. Not all of the US DOL's factors need to be met
2. The intern, not the farmer, must be the "primary beneficiary" of the internship program
3. The farm can benefit from the arrangement, so long as the intern is the "primary beneficiary"
4. Education must be the focus of the internship experience

Now what?

Farms that do meet the legal criteria for interns



"This is great! I'm nearly certain I meet all of the DOL's six criteria. I'm already working in partnership with a college and I'm certain I'll be able to arrange academic credit for my interns. My mission is to help young aspiring farmers and I'm willing to dedicate my time and energy toward providing training to interns so they can start their own farms."

Farmers should read *Managing Risks of Interns and Volunteers in New Hampshire* for more information on the legal aspects of interns.



Farms that do not meet the legal criteria for interns

"I don't think I meet these criteria. I know I can't risk the harm of an enforcement action. What do I do now?"

Farmers uncertain if they meet the non-employee intern criteria should read *Managing Risks of Interns and Volunteers in New Hampshire* for more information. If these criteria are not met, the farm's interns are legally classified as employees.

EMPLOYEES

Employees

Legal Definition

What is an employee? New Hampshire law defines an employee as someone who an employer directs or permits to work for her so the employer can retain a profit.

Employee is the default category

The bottom line: If someone performs work for a for-profit business the assumption is that he or she is an employee. That is, unless that person can be classified as an independent contractor or a non-employee intern. Again, for-profit businesses generally cannot have volunteers, so that is not an option.

Now what?

What must farmers do when they have employees? They must follow all applicable state and federal employment laws. For a detailed overview of these requirements, see *Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist*.

Remaining Questions?



Farmer Amanda still has some questions, which are common to many farmers.

What about the websites and programs that help me find travelers and vacationers who work on my farm in exchange for housing and food?

Everything in this guide applies to worker networking services. The above are your options: independent contractors, interns, employees, or volunteers. There's nothing else. No matter how the farmer finds the worker, they will fit into one of the above categories. Again, farmers should work under the assumption that everyone who performs work for a farm is an employee. The worker can only be classified as something else if the worker meets the criteria for a volunteer, intern, or independent contractor.



What about work trade and in-kind payment arrangements (i.e., room and board)? Do those affect their classification?

CONCLUSIONS

Work trade and in-kind arrangements do not affect the classification as described in this guide. Farmers can certainly pay their employees in room and board to meet any minimum wage requirements; however, that is a separate issue. For more details on in-kind arrangements, see the Farm Commons resource: *Managing Risks of Interns and Volunteers in New Hampshire*.



What if my workers don't care how they are classified?

It does not matter. By law, someone cannot waive their right to protections provided under employment laws. Unlike other areas of law, employment law is simply nonnegotiable. This is because of the overarching policy reasons behind employment laws, including the prevention of coercion and oppression in the workplace.



What if I still don't know which classification my workers fall into?

Farmers who still have questions or are left with uncertainty as to the proper legal classification of their workers can seek further assistance from the following:

- **New Hampshire Department of Labor**
- **United States Department of Labor**
- **Internal Revenue Service**
- **An attorney familiar with agricultural employment laws in New Hampshire**

Conclusion

Employment law can seem overwhelming and complex. A key takeaway is that when in doubt, play it safe. If you treat your workers like they are employees, you are going a long way to minimize your liability risks.

For further guidance, be sure to check out other Farm Commons' related materials on employment law in New Hampshire:

Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist

Managing Risks of Farm Interns and Volunteers in New Hampshire



Do you have questions or thoughts on how to improve this document? Please email us. We'd love to hear from you!

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Was this resource not quite what you were looking for? Do you still have more questions? Send your questions to Farm Commons and we will do our best to feature an answer in our blog. Read the most recent questions and answers in our “Rachel Responds” column.

Classifying Workers in New Hampshire: The Short Version

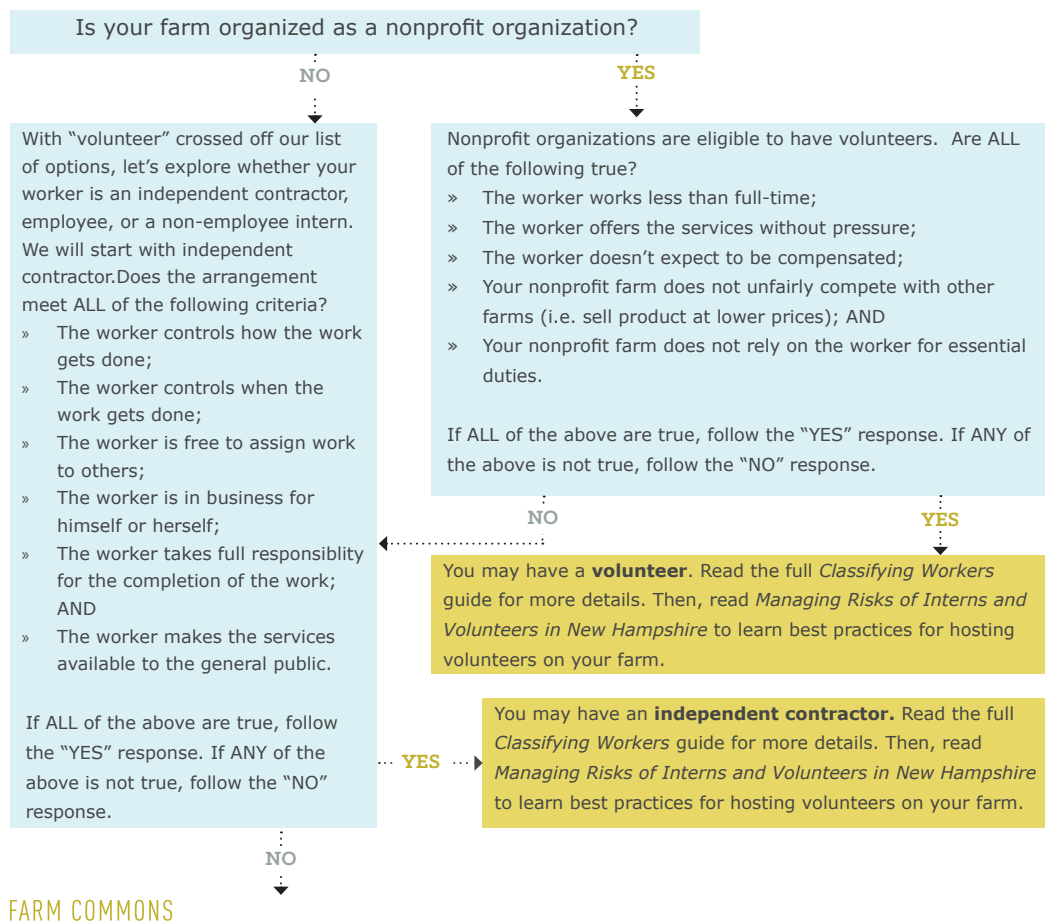
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Classifying Workers in New Hampshire: The Short Version

What's really the difference between an employee and an intern or volunteer under the law? And, what is an independent contractor? How do I know what type of worker I have, legally speaking?

The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers' compensation, withhold and pay taxes, and so on. Oftentimes, what farmers call interns, volunteers, independent contractors, and so on are in fact “employees” in the eyes of the law. Misclassification is common in many industries, including farming. Farmers can craft their worker arrangements to both suit their needs and fulfill their legal obligations when they know the rules.

The flowchart will lead the farmer to an initial determination of which of the four categories their worker(s) fall into. The full *Classifying Workers in New Hampshire* guide provides detailed explanations and criteria for each of the classifications.



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At this point, we know the worker is not a volunteer and not an independent contractor. We have one more step: let's explore the complex issue of whether the worker is an intern.

Does the arrangement meet ALL of the following criteria for an **intern**?

- » The farm provides training that is similar to a classroom educational experience;
- » The farm gets no immediate advantage from the worker;
- » The farm has separate staff whose primary role is to run the internship program;
- » The position is not a trial period for a future paid position
- » The overall experience is for the benefit of the worker, not the farmer; AND
- » The worker understands that the position is unpaid or less than minimum wage.

YES

You may have an intern who does not fall under employment laws. We like to call this type of worker a **non-employee intern**.

Non-employee intern jobs generally do not have to follow employment laws such as minimum wage, and workers' compensation.

Read the *Classifying Workers* guide in full before following this pathway. There are many nuances to the non-employee intern rules.

Non-employee interns involve risks and legal obligations. To learn how to manage the risks of having non-employee interns, read *Managing Risks of Interns and Volunteers in New Hampshire*.

NO

Interns aren't right for my work

You likely have an **employee**. You can give the worker any title you wish (including "intern") but legally speaking, all employment laws including minimum wage, workers' compensation, and more must be followed.

Treating a worker like an employee and following employment laws is always a solid risk management strategy.

To understand basic employment laws at the time of hiring and whether they apply to your farm read the *Checklist for Hiring a Farm Employee in New Hampshire*.

NO,

But I'd still like to have interns

How risk-adverse you are? Do you want to play it absolutely safe and not risk having to pay back wages, payroll taxes, and penalties?

YES

NOT NECESSARILY

Some courts have recently taken a more lenient approach for interns. You may decide to take a risk and rely on this approach. Is the intern the "primary beneficiary" of the internship and is education the focus of the program?

NO

YES

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Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist



Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist

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By: Rachel Armstrong

Executive Director and Attorney, Farm Commons

rachel@farmcommons.org

www.farmcommons.org

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INTRODUCTION

Introduction

Hiring a farm employee is an exciting moment. It means the farm is getting large enough and stable enough to take on additional help. On the downside, the paperwork requirements of hiring feel much less exciting. Getting familiar with the process early is a tremendous help. Farm owners should start preparing well before the new employee begins the first day of work. This checklist will help farmers understand the basic paperwork process for hiring a farm employee.

Although it's a useful starting point, this checklist does not explore every single area of farm employment law. It does not address workplace safety laws, in-kind wage rules, minor children, discrimination, and many other employment law matters. It's simply a concise checklist of select legal issues at the time of hiring. Farmers should also consult Farm Commons' other employment law resources for more information.

Farm Commons aims to help farmers get started, but moving through the checklist can lead to more questions than answers. On the positive side, knowing the right questions to ask is half the battle. Calling the relevant agency such as the New Hampshire Department of Labor, New Hampshire Department of Employment Security, Internal Revenue Service, or United States Department of Labor is an excellent next step when complications arise. Agency employees are trained experts and able to answer most questions. Some farmers will prefer to contact an attorney with experience in farm employment law, which is always a good choice, as well.

This resource does not explore every single area of employment law.

The Summary Checklist

- Determine whether you must comply with Chapter 275 of the New Hampshire Statutes.
- Prepare to maintain records including hours worked and wage payments made, and post notices.
- Secure a workers' compensation policy and post notice.
- Verify eligibility to work in the United States.
- Set up to withhold federal income tax.

CH 275 & NOTICES

- ☐ Set up to withhold Social Security and Medicare contributions from employee's wages.
- ☐ Arrange to pay the farm's contribution to the employee's Social Security and Medicare account.
- ☐ Arrange to pay federal and state unemployment tax, if required.
- ☐ If you plan to offer less than the minimum wage (to interns, for example), verify your eligibility.
- ☐ If you do not plan to provide overtime, verify your eligibility.

The Detailed Checklist

- ☐ Determine whether you must comply with Chapter 275 of the New Hampshire Statutes.

New Hampshire law provides many protections for employees including mandatory lunch times, mandatory days of rest, set pay frequencies and many other rules detailed in Chapter 275 of the New Hampshire Statutes. Included in this law is the obligation to display a poster notifying employees of the minimum wage and of all employment policies such as vacations, holidays, and more. The New Hampshire Department of Labor has a website with [links to the required posters and notices](#). **All the protections and obligations of Chapter 275 only apply to farms with 5 or more persons employed.** Farms with 5 or more individuals on the payroll must review Chapter 275 in detail and comply with it, including posting required notices. Farms with fewer than 5 individuals on the payroll do not have to post these notices or adhere to the other rules of Chapter 275. Farms subject to Chapter 275 should also pay close attention to the Chapter's rules requiring recordkeeping, including keeping records of all hours worked, wages paid and deductions made from wage payments.

- ☐ Prepare to maintain records including hours worked and wage payments made, and post notices.

Farm employers must keep records including the full names, addresses, and occupations of all employees, except the farmers' children. This is a federal law

WORKERS' COMP

so it applies to farms regardless of whether Chapter 275 above applies. For each pay period, the farm must prepare documentation of the payments. For each individual, the farm must record the person's rate of pay, the total hours worked, and total wages received in that pay period. If the farm employs more than "500 man days" of labor (explained in detail in the minimum wage section), then the farm must also keep the following records for each employee, which must be kept for at least three years:

1. Social Security number.
2. Time and day of week when employee's workweek begins.
3. Hours worked each day.
4. Total hours worked each workweek.
5. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
6. Regular hourly pay rate.
7. Total daily or weekly straight-time earnings.
8. Total overtime earnings for the workweek.
9. All additions to or deductions from the employee's wages.
10. Total wages paid each pay period.
11. Date of payment and the pay period covered by the payment.

The law does not require farms to use specific timesheets, necessarily. However, the farm must have some way to collect the information above so it can be reported on paystubs. A detailed timesheet regularly kept by the employee is the best way to collect accurate information. Detailed timesheets are also essential to demonstrate that the farm is eligible for exemptions from New Hampshire's Chapter 275 (detailed above) or the federal 500 man day exception (detailed below).

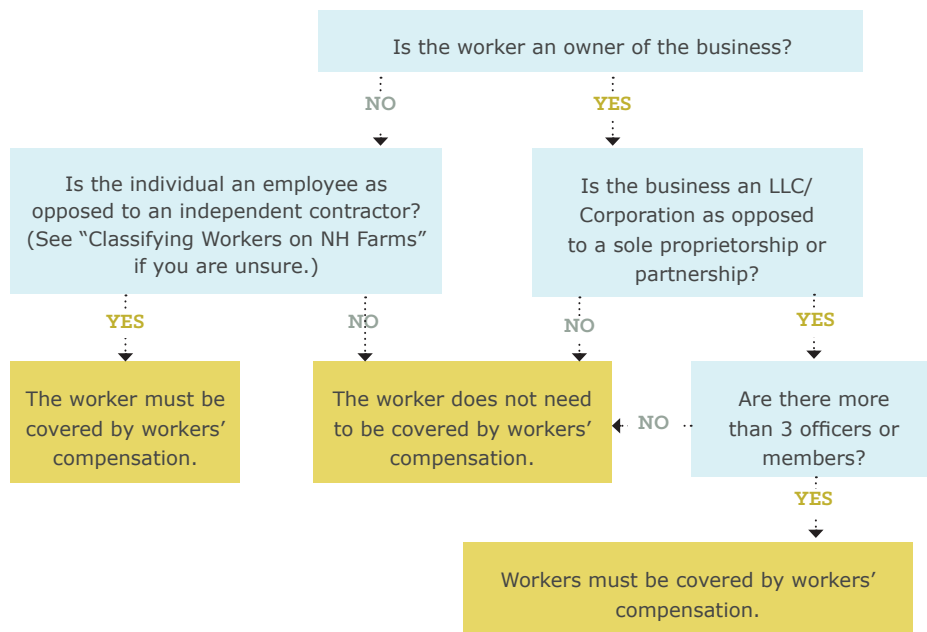
 Secure a workers' compensation policy and post notice.

New Hampshire requires that every business, including farm businesses, provide a workers' compensation insurance policy that covers each employee from the first day of work. This rule applies to part-time workers and employees of nonprofits. The workers' compensation rule also applies to family members who are employed

WORKERS' COMP

by the farm business. Farm business owners do not have to cover themselves if the farm is a sole proprietorship or partnership. If the farm is organized as an LLC or corporation, the LLC members or corporate officers are required to cover themselves when the operation reaches or exceeds 4 members or officers. (Note, farm LLCs and corporations must still provide coverage for all employees immediately upon hire. The exception for members or officers only applies to members or officers.)

Workers' compensation is purchased through private insurance companies. The cost of the policy is determined by a number of factors including the classification of the labor performed, the frequency of injuries by workers performing that labor, and the total dollar value of the business' payroll, among other factors. For farm businesses that use only traditional employees and pay cash (not in-kind) wages, a quote is easy to come by. Farm businesses that pay wages in the form of food and lodging may have a harder time determining the value of their payroll and will need to work more closely with their insurance agent. Likewise, farms seeking coverage for interns, volunteers, and other non-traditional employees may need to work closely with their insurance agent to ensure coverage is secured for all individuals performing work for the farm. The following flowchart outlines a New Hampshire farm businesses' employment obligations.



PAYROLL TAX

Businesses are required to post a notice for employees stating that the employer is working under RSA 281-A, the New Hampshire workers' compensation law. The farm's workers' compensation insurance company should provide a copy of the necessary notices for the farm's usage.

☐ Verify eligibility to work in the United States.

Farms may only hire individuals who are eligible to work in the United States. The employer satisfies the duty to verify eligibility by properly completing Form I-9 (for employees not hired through a worker program). This form is available from the U.S. Citizenship and Immigration Services agency. It is available [online and instructions are included](#). The form is not submitted to the agency. Rather, the employer copies the necessary documentation and keeps the form on file. The completed forms should be kept for the longer of the following: a) three years after the worker began employment, or b) one year after the worker leaves the position. The forms and documentation must be available if an enforcement agency inspects the farm.

☐ Set up to withhold federal income tax.

Farms are required to withhold a percentage of an employee's wages and remit the withheld portion to the IRS for federal income tax purposes. A farm must begin withholding income tax when either of the following happen: The farm pays a total of \$2,500 or more in wages to all employees, OR any individual employee receives cash wages of \$150 per year or more. Most farms with an employee will have to withhold federal income tax.

To begin the withholding process, the farm needs a completed [IRS form W-4](#) from the employee. This form allows employees to choose the number of withholding exemptions. Form W-4 is not sent into an agency; it remains in the farm's files. The farm then uses the tax tables in [IRS Publication 15](#) (Employer's Tax Guide) to determine withholding per paycheck based on the individual's pay, exemptions, and payment frequency. The farm must record the amount withheld and remit it to the IRS. The due date is dependent on the total tax owed. For most farms, the tax must be deposited monthly. The IRS uses an online system, the Electronic Federal Tax Payment System (EFTPS), and deposits must be made electronically.

PAYROLL TAX

Farms must register with the EFTPS system ahead of time as it can take a few days to receive the passwords.

- ☐ Set up to withhold Social Security and Medicare contributions from employee's wages.

Most farms are required to withhold Social Security and Medicare tax from the worker's paycheck. The same rules apply as for withholding federal income tax: the obligation begins when the farm's total payroll for employees exceeds \$2,500 or an individual's wage exceeds \$150 per year. Where the amount of income tax to withhold is determined by using the IRS's tables, Social Security and Medicare tax is calculated as a percentage of the employee's wages for that pay period. The most recent percentage will be listed in [IRS Publication 51](#) (Agricultural Employer's Tax Guide). Currently, 6.2% of wages are withheld for Social Security and 1.45% for Medicare. Each time the employee receives a paycheck, a portion of the Social Security and Medicare taxes are withheld. This is then remitted to the IRS through the same EFTPS process used for remitting withheld income taxes.

- ☐ Arrange to pay the farm's contribution to the employee's Social Security and Medicare account.

The checklist item above explains that a portion of Social Security and Medicare tax owed by the employee must be withheld from the employee's paycheck. This checklist item discusses the Social Security and Medicare tax owed by the employer. **These are two different taxes- the employee is taxed and the employer is taxed.** The employee's tax is deducted from wages. The employer's tax is paid by the employer, and may not be deducted from wages. The taxes go to the same agency for the same ultimate purpose, but are separate.

The farm is taxed at the same threshold where the employee must be taxed. (See the \$2,500 or \$150 rule above.) Currently, the farm is taxed at the same rate as the employee, although this may change. Currently, 6.2% of wages are withheld for Social Security and 1.45% for Medicare. The most recent percentage will be listed in [IRS Publication 51](#) (Agricultural Employer's Tax Guide).

Although the employee's and employer's share of the Social Security and Medicare taxes are technically separate, they are deposited at the same time through the

UI TAX

IRS's EFTPS process.

Farms who work with a payroll service provider can escape the details of withholding and remitting taxes. Payroll service providers help employers determine which taxes are owed and assist in coordinating payment of the taxes. Farmers who can afford a payroll service may find it well worth the money.

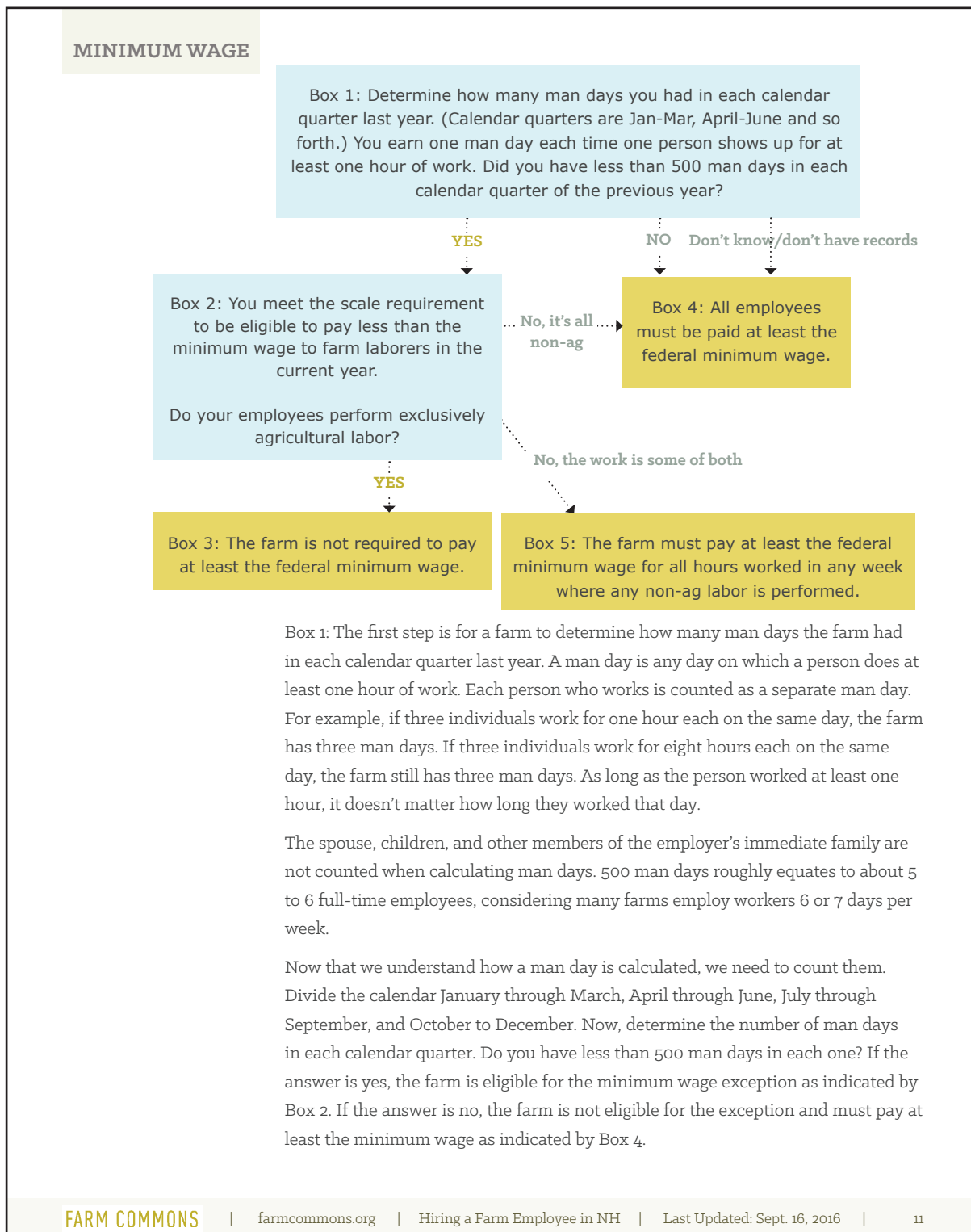
☐ Arrange to pay federal and state unemployment tax, if required.

Unemployment tax is paid by the farm and is not deducted from an employee's wages. This tax contributes to a compensation fund available to individuals who have become unemployed. Most employers are required to pay unemployment tax immediately; however, farms are exempt until the operation reaches a certain size. New Hampshire and the federal government follow the same rules for farms. When a farm owes unemployment tax to the federal government, the farm will also owe it to the state.

The farm must begin paying federal unemployment tax when either of the following happens: 1) The farm pays wages of \$20,000 or more to farmworkers during any calendar quarter of the previous two years, OR, 2) the farm employed 10 or more workers for any part of a day (even if not at the same time during the day) during any 20 or more weeks in the last year, or in the year before that. After a farm crosses either threshold, the farm must begin paying into state and federal funds. The farm will pay federal unemployment tax on up to \$7,000 of each employee's wages. The tax is determined by percentage; the latest percentage is listed in [IRS Publication 51](#). Federal unemployment tax is paid through the same EFTPS procedures as income withholding and Social Security/Medicare taxes. State unemployment tax is owed on up to \$14,000 of each employee's wages. The current state rate is available by contacting the [New Hampshire Employment Security office](#).

The above unemployment tax rule is for farm businesses assigning farm labor. For non-farm enterprises (which may include diversified farms engaging in separate non-agricultural enterprises such as packing other farmers' produce, hosting on farm events and agri-tourism, and so on as discussed in the minimum wage section), farmers may need to follow the regular unemployment tax rules.

For non-farm businesses in New Hampshire, state unemployment tax is owed when either of the following happens: 1) the business has one or more employees



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MINIMUM WAGE

These calculations require careful recordkeeping. Remember that the 500 man day rule applies to the previous year. To determine federal minimum wage obligations this year, we need to determine the farm's man days last year. If records were not kept last year or are not detailed enough, we will have a hard time demonstrating compliance with the law. In that case, the safe choice is for the farm to act as if the minimum wage applies as indicated by Box 4.

Box 2: We arrive at box 2 because we know we are at the appropriate size- we are under the 500 man day threshold. Thus, we know we are eligible to pay less than the federal minimum wage. Now, we have one more question to ask to determine if we can actually pay less than the minimum wage.

The 500 man day exemption applies only to agricultural labor. If an employee spends any time working on something that is not deemed agricultural, the minimum-wage exemption does not apply. It does not apply with respect to all work that employee does during that workweek. This means that if a farm employee spends even one hour of time on a non-agricultural task, the employee must be paid at least the minimum wage for all hours worked in that week.

Whether work is agricultural labor under the law is not always intuitive. That's because it's based on legal definitions. It is also because the definition of "agricultural" has not been litigated very much in either the courts of New Hampshire or federal courts. Litigation helps clarify legal definitions. For now, we're left with a broad definition that does not account for the realities of modern and direct to consumer farms.

Diversified farms are prevalent in New Hampshire and throughout the country. These farms typically engage in activities—such as selling at farmers' markets, making value added products, organizing on-farm events and so on—that fall outside the traditional scope of farming activities. Unfortunately, the legal definition of agricultural labor as not yet evolved to meet this new type of diversified farm. Without any statutes or case law for guidance, it can be challenging to draw the line between agricultural and non-agricultural labor.

Agricultural labor is the growing and harvesting of crops, raising of livestock or poultry, and preparing unmanufactured farm products for market and delivery to market. Agricultural labor includes work done on a farm in connection to farming operations. Conversely, most if not all work done off farm is not agricultural labor. Sales at a farmers' market are off the farm and are potentially not agricultural

MINIMUM WAGE

labor. It also may include marketing activities such as pitching products to restaurants and grocery stores.

In addition, some work done on a diversified farm is tangential to agricultural production, for example, making value added products, planning and hosting agritourism or on farm events such as dinners, weddings, and potlucks. These activities most likely do not fall within the agricultural labor definition. Aggregating and packing products from another farm, for example into a CSA box, is a grey area. Most likely, it would not be considered agricultural labor as it's more akin to marketing and value-added production.

The safest route is to assume that off farm and any activities that are tangential to farming are not agricultural labor. A farm can quickly resolve any legal risk by paying at least the minimum wage and paying overtime for any hours worked over 40 in a week. If the farm pays at least the minimum wage plus overtime, there is no need to determine if tasks are agricultural or not.

Box 4: If the work assigned to an individual is non-agricultural, then minimum wage is owed, even if the farm is under the 500 man day threshold.

Box 5: Again, when an employee does non-agricultural labor, the employee is owed minimum wage for the entire workweek, not just for the non-agricultural hours worked. As a reminder, farms need to keep complete records to demonstrate compliance with minimum wage law. Timesheets recording the date, hours worked, and tasks performed are essential, even if no minimum wage is owed. The records are necessary to show that minimum wage is not owed.

Farms may be able to satisfy their minimum wage obligations (in whole or in part) by providing housing, food, and other in-kind wages. Make sure to consult the "Farm Interns and Volunteers in New Hampshire Guide" for more information. Specific rules dictate how in kind wages are valued and additional laws apply when providing housing, especially.

Box 3: If we arrive here, then the hours worked by the agricultural laborer do not fall under minimum wage laws. Where a farm is under the 500 man day threshold last year and assigns only ag labor, the farm is allowed to pay less than the minimum wage. Now, that doesn't mean no rules apply to the wage payment relationship. Of course, the farm is obligated to pay the employee whatever the farmer said the employee would be paid for the work. If a farmer promises to pay \$3 per hour and then pays the employee just \$2 per hour, the farm could certainly be sued by the employee for breaking that promise. The farmer couldn't be sued under minimum wage laws, but laws covering our mutual agreements and

CONCLUSION

contracts still apply.

☞ If you do not plan to provide overtime, verify your eligibility.

Farms are exempt from paying overtime to farm employees under New Hampshire and federal law, regardless of the size of the farm. However, just as with minimum wage, the exemption only applies to agricultural labor. If the employee performs non-agricultural labor, the farm must pay overtime for all hours worked over 40 in that week. If the employee performs exclusively agricultural labor in a week, no overtime is owed for hours over 40.

Conclusion

This checklist illustrates selected, immediate paperwork responsibilities of the farmer at the time of hiring. It also reveals that the farmer's responsibilities don't stop there- the law requires ongoing recordkeeping, withholding, remitting, and payment responsibilities. If a farm creates a clear, consistent system for hiring, tracking payroll and calculating taxes, employment paperwork burdens can be minimized. For farmers who don't enjoy creating these procedures and can afford modest fees, accountants and payroll service providers will be happy to handle this aspect of hiring. To find a local service provider, ask other farmers if they have a recommendation.

This resource guides farmers in the initial steps necessary to hire and employee; it does not discuss many other tax aspects of hiring. For example, employers must keep certain records and must provide specific documentation to employees at the end of the year. Payroll service providers and Small Business Administration offices can help, and the IRS provides information in many publications. Farmers may want to read [IRS Publication 51: Agricultural Employer's Tax Guide](#), [Publication 15-B: Employer's Tax Guide to Fringe Benefits](#) and [Publication 225: Farmer's Tax Guide](#). Farmers working with employees under 18 years of age should also consult child labor laws, such as the [guide from the U.S. Department of Labor](#) and from [the New Hampshire Department of Labor](#).

For more checklists, flowcharts, webinars, and guides on farm law issues, including injury liability, volunteer workers, providing food and lodging, and much more, please see Farm Commons' website: www.farmcommons.org.

Do you have questions or thoughts on how to improve this document? Please contact us.

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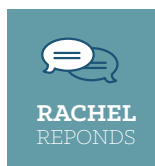
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Was this resource not quite what you were looking for? Do you still have more questions? Send them to Farm Commons and we will do our best to feature an answer in our blog. Read the most recent questions and answers in our “Rachel Responds” column.

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Managing Risks of Interns and Volunteers in New Hampshire



Managing Risks of Interns and Volunteers in New Hampshire

By: Rachel Armstrong and Erin Hannum

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GETTING STARTED

Getting Started

The Reality Of Uncertainty

Spoiler Alert: This guide cannot lay out exactly how to assemble a legally sound intern or volunteer program because the law itself is uncertain. Most folks believe that the law is black and white—all they need to do is find out what the law is and follow it. In legal reality, that’s not always the case. What should the farmer do to move forward? The first step is to learn the facts, which this guide provides. The second step is to carefully weigh the factors and make a personal decision. It’s not an easy process, but it’s a valuable one for every farm considering interns and volunteers.

“The right risk management strategy regarding interns and volunteers is a personal decision that depends on you and your farm.”

Many farmers approach uncertainty, legal or otherwise, by weighing the potential costs against the potential benefits of taking on a level of risk. When thinking about the potential costs, what would a legal enforcement action under a “worst case scenario” mean for the farm? What if a volunteer gets injured while working on the farm and the farmer becomes responsible for hospital bills and has to pay penalties for not carrying workers’ compensation? Aside from the financial implications, what about all the worry and fear of such a scenario happening? As for the benefits, what cost savings does the farm achieve by not having to obtain workers’ compensation or pay minimum wage if required? What about the emotional stress of not being able to make payroll? For other farms, the sense of purpose and community that comes from integrating interns and volunteers into your farm is a significant benefit.

In the end, the right risk management strategy regarding interns and volunteers is a personal decision that depends on you and your farm. Your own financial, emotional, and business considerations all factor into the appropriate strategy for you. This resource can help you understand and assess those factors.

Employment Laws Generally Apply to Farm Interns and Volunteers

Spoiler Alert: As readers will learn, most employment laws such as minimum wage and workers’ compensation apply to interns and volunteers. This is the case even though many farms offer win-win intern and volunteer programs. The interns or volunteers enjoy the time out on the farm, gain skills, and likely enjoy some fresh, healthy farm products. The farmer gets extra help and the joy of working with community members.

OUR GOAL

Although titles like “volunteer,” “intern,” or “apprentice” convey a positive working environment, the fact that these workers do the work on the farm means employment laws generally apply. Such laws may include obligations to provide minimum wage, workers’ compensation, and contribute payroll taxes—depending on whether state or federal agricultural labor exemptions apply.

Our Goal

This guide will explain the laws behind interns and volunteers. It also provides insights and strategies to help farmers reduce liability risks related to interns and volunteers.

To facilitate the process, the hypothetical stories of farmers Amanda and Ralph are weaved in throughout. The guide will follow their decision-making process as they learn about the legal issues and begin to better understand their options for having interns and volunteers.



Farmer Amanda is a beginning farmer. She has a small CSA and is looking into labor issues, including whether she can rely on some of her CSA members to do some of the farm work and help out with packing and such. She’s ultimately looking to grow and expand her business, and hopefully start selling at farmers’ markets and even restaurants to diversify and better improve profits.



Farmer Ralph is also a beginning farmer. He sells his products mostly at farmers’ markets and to local upscale restaurants. He’s a retired math professor and doesn’t depend at all on the farm’s income for his livelihood. It’s really just a hobby. Ralph’s main priority is to teach new farmers the ropes and pass on his legacy in this way. He loves teaching and really wants to help and train young farmers so they can go out and start their own farm businesses.



Interns: Generally Speaking, Interns Are Employees

“We would like interns on our farm, but we hear there might be legal issues to deal with. What is going on?”

The answer is: Yes, there are potential legal issues with having an unpaid intern. Interns are generally covered by employment laws—if the law doesn’t

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allow a farm to have an unpaid employee (or an employee without workers' compensation), the farm can't have an unpaid intern (or an intern without workers' compensation). Amanda, Ralph, and any other New Hampshire farmer will have to read this chapter to determine their obligations.

Although many industries have had interns and volunteers over time, the legal situation escalated in 2011. A number of class action lawsuits were brought by hundreds of interns for back wages totaling millions of dollars. Although the high profile cases were in the movie and publishing industries, lawsuits have happened on small farms. As a result, farmers who have or are thinking about having interns are now paying close attention.

Interns are winning these lawsuits. They're arguing that they're effectively employees and, as such, they have a right to all the protections under laws such as the federal Fair Labor Standards Act and state labor laws which includes receiving at least minimum wage for all hours worked. **Interns are winning their lawsuits because employment laws generally apply to interns.** Interns are often considered employees because they do the work of the business. This means the farm may have to pay the worker minimum wage, carry workers' compensation, withhold and contribute payroll taxes, and comply with various other obligations.

Situations Where Interns Are Not Considered Employees

It is possible to have an intern who is not an employee in isolated circumstances where very specific criteria is met. To complicate things further, different legal standards are evolving to determine whether an intern is an "employee" in the eyes of the law. New Hampshire state and federal courts have not spoken directly to the issue of when an intern is an employee. So, we have to rely on laws that will be persuasive to the courts and guess at what they might do. We'll highlight the two main approaches—one that is conservative for risk adverse farmers and another that is a bit more lenient for farmers that are willing to take on some degree of risk.

Strict approach: The U.S. Department of Labor has adopted stringent criteria for determining if an intern is an employee

Up until the recent lawsuits were filed and the courts have stepped in, the U.S. Department of Labor ("DOL") was the decisive voice nationwide on the legal issue of interns. The DOL has established six criteria for determining whether

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an intern is an employee for the purposes of the federal Fair Labor Standards Act. Some states have adopted the DOL's criteria when interpreting their state's employment laws, as well (more on that below). All six must be met for a farm to legally have an internship position that does not have to comply with employment laws. Here's a brief overview of each of these six criterion:

1. Training must be provided that is similar to a classroom educational experience

First and foremost, the farm must provide training to the intern. What's more, this training has to be structured, or similar to a classroom style education. It can be helpful if a college or university oversees the experience and offers academic credit. However, simply offering academic credit may not be enough on its own to meet this criterion. Fundamentally, the training provided has to be transferrable to other farms across the industry. It can't simply be specific to how that farm operates. In this way, the internship should set the intern up to launch her career in farming or start her own farm operation, not simply to work on that farm. In addition, learning objectives need to be established through set curricula and the intern's achievements must be monitored to be sure the intern is in fact learning something.

2. The farm must get no immediate advantage from the operation of the internship

This is a tough standard to meet. The farm must actually be impeded by the intern, and get absolutely no immediate advantage from the intern's activities. Unlike other staff persons, the intern must receive close and constant supervision. What's more, the intern must perform no work or very minimal work. The supervisor can't tell the intern: "Go pick carrots and come back in an hour." Instead, the supervisor must constantly provide training and feedback and literally trail the intern around the farm watching every task. The intern can only perform work to the extent that she needs to in order to learn the task at hand. It likely doesn't take 8 hours of picking carrots to learn how to pick carrots. Nor does it take 40 hours of weeding to learn how to weed! These sorts of tedious and time-consuming tasks would likely not be appropriate to assign to an intern under this standard.

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3. The farm must have separate staff whose primary role is to run the internship program

The farm must designate an existing staff person or hire an additional person to manage and supervise the intern. If it's an existing staff person, she would have to work more than if the intern were not there. It's not as though the staff are heavily engaged in the farm work and running the internship program alongside what's already being done on the farm. The internship program has to be its own stand alone operation.

4. The internship may not be a trial period for a future paid position

The farmer can't say, "I'll hire you next year if you work for free for the summer to learn how our farm operates." The position can't simply be a trial period, or a training for future work. The internship must serve to set the intern up for a career in the industry, not just a future job for that specific farm.

5. Experience is for the benefit of the intern, not the employer

The intern must be the primary and sole beneficiary of the arrangement. In other words, the offering of training and experience to the intern supersedes any objective of the farmer to make profits or increase efficiency by having an intern. The reality is that it costs money, perhaps even more money than the farm pulls in, to have an internship program. The internship program cannot be a profit-making venture.

6. The intern understands that the position is unpaid or paid at less than the minimum wage

If a farmer chooses to have an unpaid intern, she needs to be sure to clearly communicate the arrangement with the intern. The best way to do this is to get it in writing upfront. Not only will this ensure that the farmer and the intern have a shared understanding that the position is unpaid or paid at less than the minimum wage, it provides proof that this arrangement was agreed to in advance should any issue arise.

Most farmer readers are likely thinking that it's nearly impossible to meet these criteria! Do not fear. While this is the most conservative and least risky approach, as we'll soon see, it can be done. And, there's another option.

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Lenient Approach: Some federal courts in various parts of the country have recently adopted more flexible criteria

One recent and notable intern-related lawsuit is known as the *Black Swan* case, which was filed by interns working on the production of the movie *Black Swan*. In the *Black Swan* case, a federal appellate court in New York (the Second Circuit Court of Appeals) rejected parts of the DOL's strict criteria. The *Black Swan* court said the DOL's approach was far too rigid. Instead, the court created its own test for determining whether an intern is an employee who is entitled to compensation. The court set out seven factors that need to be considered. While many of the court's seven factors mirror the DOL's criteria, there are four key distinctions which make the court's approach more lenient than the DOL's approach.

1. Not all the factors need to be met

First, the *Black Swan* court called its list of factors "non-exhaustive." This means that **unlike what the DOL says, not all of the factors need to be met**. Rather, all the circumstances must be considered on a case by case basis. This makes the test more flexible and open to considering the farmer's intentions and the reality of the intern's experience on the farm.

2. The intern must be the "primary beneficiary" of the internship program

Second, the *Black Swan* court said that the determination of whether a worker is an intern or an employee entitled to compensation ultimately comes down to one question: Who is the primary beneficiary of the relationship? Or, who benefits the most from? **To be a non-employee intern, the intern and not the farmer must be the primary beneficiary of the internship program**. Basically, if the farmer is the primary beneficiary, it's looking a lot more like an employee. This would be the case if the farmer gains significant profits or other rewards from the intern's free labor and isn't going out of her way to train the intern. On the other hand, if the intern is the primary beneficiary, the intern is not an employee. **The intern may benefit the most by getting a wealth of knowledge and experience through robust classroom and hands-on training**.

3. The employer can benefit from having an intern

Third, **unlike what the DOL says, the *Black Swan* court said that the employer can in fact benefit from having an intern**. That is, so long as the

INTERNS

intern is the *primary beneficiary* of the relationship. Under the *Black Swan* court's test, the intern can do significant work on the farm, including tedious tasks like weeding and harvesting for long hours that ultimately help the farm improve profits. That is, so long as the intern's training is the number one priority. This makes it somewhat less of a burden to have an internship program. But this begs the question. How do you really know who benefits most? The answer is the extent and quality of education.

4. Education must be the focus of the internship

The *Black Swan* court really emphasized the education dimension of the internship. Like the DOL, the court said that **it's more likely the intern is not an employee if the training offered is either tied to the intern's formal education program, such as through course credit, or if the type of training is similar to what an educational institution provides, such as clinical or hands-on training.** *Having ties to an educational institution is an important risk management step when building a non-employment intern program.*

Because education is an important part of any non-employment intern program, the structure of the position matters. Farms that accommodate a worker's formal academic commitments, such as offering the intern position in the summer when school's not in session, use a set curriculum, and offer a limited term position will have an easier time arguing that the intern is not an employee. If the intern is not an employee they are not covered by employment laws.

Uncertain Grounds: Federal courts in New Hampshire and other areas of the country have yet to clarify the issue

The federal court in which New Hampshire lies, the First Circuit Court of Appeals, hasn't yet decided the issue. In New Hampshire, it remains to be seen whether the courts' lenient approach or the DOL's strict approach will win (if and when a federal lawsuit is filed by interns in that region). Ultimately, it may come down to whether and when the U.S. Supreme Court takes on the issue, which could be years or quite possibly never. If the U.S. Supreme Court does decide to take on the issue, it could endorse the DOL's strict approach, adopt the more lenient approach taken by some courts, or create its own criteria. Until then, a degree of uncertainty exists. That's simply how the law works in our country, for better or for worse.

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What Does This Mean For The Farmer Who Wants To Have Interns?

These strategies feel uncertain, right? There is a third alternative worth mentioning: Farmers can choose to follow all employment laws for their internship program; then the question of whether the intern is eligible to be treated as a non-employee is moot. *The single best risk management strategy is to simply know and follow all employment laws for every intern.*

Treating interns like employees isn't going to work for some farms. Farms wanting a non-employment intern program should become familiar with *both* the DOL's criteria and the *Black Swan* court's criteria. They can then make a personal decision. **The appropriate approach to a non-employment intern program depends on the farmer's level of risk adversity.**

Risk adverse farmers who want non-employee interns should follow the DOL's stringent approach and meet *all* of the DOL's six criteria. Fundamentally, this means that the interns cannot benefit or help the farm business in any way. The farmer must emphasize education and support to such an extent that she practically doesn't get anything else done. Offering academic credit can help, provided all the other criteria discussed above are present.

Farmers willing to accept risk may choose to follow the *Black Swan* court's more lenient approach to non-employee interns. This means that the farm may benefit from the internship, so long as the intern is the primary beneficiary of the arrangement. The farm may assign tedious tasks and improve profits by having interns so long as training and education is emphasized. This is still not an easy standard to meet, as the farmer must develop structured curricula, accommodate the intern's academic studies, and go out of her way to provide education and support to the intern. Partnering with an academic institution and offering academic credit can certainly help.

Farmers must realize that if they choose this more lenient approach they face the risk of enforcement action by the federal DOL as well as the New Hampshire Department of Labor.

What about farmers who can't meet the DOL or *Black Swan* requirements?



"I don't meet the DOL or *Black Swan* criteria. My farm is a business—all workers need to pull their weight. But, I really want to have young college students working on my farm over the summer. And, I like the idea of calling them "interns" as this seems to make them more open to learning my eccentric farming practices. So now what do I do?"

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While it's unlikely, farmers could check if their "interns" meet the legal criteria of independent contractors, which allows more flexibility than employment. See *Classifying Workers on New Hampshire Farms: Are they Independent Contractors, Interns, Volunteers, or Employees?*

Farmers like Amanda who can't or don't want to meet the criteria for non-employee interns have "employees." They can still call their workers "interns" but they must treat them as employees when it comes to legal requirements. They must follow all applicable state and federal employment laws. To get started, see *Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist ("Checklist")*.

What about farmers who meet the DOL's six criteria, or are willing to take the risk and simply comply with the federal court's lenient approach?



"I meet the criteria. Now what?"

Farmer Ralph is delighted! He's already working in partnership with a college and is certain he can arrange academic credit for his interns. His retirement provides the money he needs to make a living. His mission is to help young aspiring farmers and he's willing to dedicate his time and energy toward training his interns so they can start their own farms. He doesn't care whether his farmers' market or restaurant sales are low. He simply wants to provide his interns with diverse experiences in a variety of market channels. He feels strongly that he meets the DOL's six criteria. Either way, he was thinking about starting a non-profit that is exclusively dedicated to education.

Good news! Farmers like Ralph who most likely meet all six of the DOL's criteria have legally sound non-employee "interns." Note too that farmers who are willing to take the risk and simply meet the *Black Swan* court's lenient requirements may have legally sound "interns"—it's uncertain, hence the risk.

Either way, while it may not be necessary for these farmers to follow employment laws for their interns, these farmers must take special steps to keep detailed records of the internship arrangement. Primarily, this will help them run a more efficient and effective internship program. In addition, the paperwork leaves a trail of proof of the intern program's legitimacy should an enforcement action ever happen. The following provides some examples of documents and records that should be maintained.

Keep records of hours worked, tasks performed, and training curriculum utilized for the internship program

One way to do this is to have the intern keep a log book that the farm then retains or copies at the end of the season. This log book could also provide a way to monitor the intern's progress throughout the program. Either way, these

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records should be accurate and kept on file for at least 3 years .

☞ **File reports and paperwork with affiliated schools or institutions that are providing course credit**

Verification of an academic connection will help support the farm's case that the internship emphasized the structured, classroom style education required under both the DOL's and the *Black Swan* court's approaches. The intern might appreciate this attention as it may help the intern get the academic credit they need.

☞ **Have the intern sign an agreement acknowledging they're a non-employee intern**

Getting the details of the arrangement in writing, including the fact the position is not employment, ensures that the farmer and the intern are on the same page and have shared expectations. Having a shared understanding helps foster good relations throughout the internship, which is undoubtedly a good thing. In addition, having the intern acknowledge the arrangement in writing is required under both the DOL's and the court's approaches.

☞ **Get insurance coverage for worker injuries**

Even though farmers in New Hampshire are not legally required to carry workers' compensation for non-employee interns, it's highly recommended that the farm carry insurance to cover worker injuries. Farming is dangerous and accidents happen. With no insurance, the farmer is subject to huge legal liability and financial risk should an intern get hurt. The best option in New Hampshire is for the farmer to simply carry workers' compensation for interns just as it is required to do for all employees. Another option could be to look into a commercial general liability plan that would cover the intern.

For more on insurance coverage, see Farm Commons resource – *Managing the Sustainable Farm's Risks with Insurance: Navigating Common Options*

What about other options?

Amanda is feeling disappointed so she has a couple of other creative questions.



"I can't follow the DOL or Black Swan court criteria and I don't want to follow all employment laws—those laws are a huge burden. I'm going to have my intern sign an agreement that they aren't an employee. Won't that work on its own?"

Amanda has a nice idea in theory, but it doesn't work in reality. If the law says

INTERNS

Recall that in New Hampshire, an employee must receive at least the minimum wage if the farm has 500 or more man-days in a calendar quarter of the previous year OR if the farmer is assigning non-agricultural tasks to workers.

a work position is employment, it's employment, regardless of any agreement between worker and employer. By law, a worker cannot waive their right to minimum wage or other employment law protections. Unlike other areas of law, employment law is simply nonnegotiable. This is because of the overarching policy reasons behind employment laws, including the prevention of coercion and oppression in the workplace. Basically, employment laws set the baseline or floor for minimum wages, and no one can go under that.



“Can I have an apprentice instead of an intern? Does that change anything?”

Generally speaking, the same rules for interns apply to apprentices, or any other title a farmer might assign to a person for whom they do not want to follow employment law obligations. There is a different legal framework for an apprentice, but it doesn't help much. More often than not apprentices are also considered “employees” in the eyes of the law, and therefore the basic employment laws need to be followed.

There is one exception to the minimum wage requirement specific to apprentices. If market conditions are such that work opportunities will be expanded for a specific trade by paying less than minimum wage, apprenticeship programs do not need to comply with minimum wage requirements. But this is a well orchestrated arrangement, often through trade schools or community colleges. The program first needs to prove the market conditions, including projections of increased opportunities resulting from apprenticeship programs. They'll also need to get government approval. For more information on registered apprenticeship programs in New Hampshire, contact the NH Department of Education Registered Apprenticeship Office.



“Okay, if I choose to follow employment laws, can I still call my worker an apprentice or intern?”

Yes. The bottom line is that regardless of what you call the workers, the farmers should assume they are employees unless the DOL's six criteria are met or the farmer is willing to take the risk and follow the Black Swan court's more lenient approach.

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Volunteers: For-profit farms generally cannot have volunteers



“What if I just use volunteers? Can I call my interns volunteers? I know many farms have volunteers and they aren’t following employment laws. Does this have legal complications?”

Understanding why the law doesn’t allow for-profit farms to have volunteers

Legally speaking, a for-profit business cannot have a volunteer. New Hampshire law defines an employee as someone who an employer directs or permits to work for her so the employer can retain a profit. Likewise, a for profit operation is traditionally motivated by profits. Someone who does work at a for-profit farm is generally helping the farm meet that end. The fact that the worker isn’t paid is not relevant—the farm is being helped and the farm owner is permitting the work. That means the worker is an employee (unless they are an intern or independent contractor). **The federal definition of a volunteer is someone who is motivated by charitable or humanitarian reasons for a public agency with no expectation of receiving compensation for her services.** So, volunteering for a for-profit business just doesn’t work under the dominant legal paradigm.

The reasoning behind this is again about preventing exploitation and coercion of workers. As the theory goes, the business owner is effectively making money off the employee, so the employee deserves a cut in it. Otherwise the economic and power dynamic is just not equitable.



“My CSA members work in return for their share, come and pick their own produce, and have family days where I incorporate picking as a fun activity for kids? Is that somehow prohibited because it’s like volunteering and I’m a for-profit business?”

Good question! The basic rule of thumb in answering Amanda’s question is: if it looks like an employee, it’s an employee; whereas if it looks more like playtime and leisure then it’s not an employee. The following highlights two scenarios to give folks a better idea of how this all plays out in legal reality.

Leisure and enjoyment: It’s okay for folks to pick their own produce or come out to the farm to play

If a farm has CSA members coming out to the farm solely to pick for

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themselves, then they are not actually working for the farm. The farmer is not giving them tasks that are unrelated to the CSA member's own advantage of bringing home fruit and vegetables for themselves.

To illustrate this distinction let's say that a mother and her child come to Amanda's farm to pick some raspberries. They're having so much fun they lost track of time and realize they've picked way more than they could eat themselves. They bring the extras back to Amanda and say, "We can't take these so hopefully you can give them to another member or sell them." In effect, they've benefited Amanda's farm operation. But that's a casual incident. Amanda didn't ask or expect them to pick more, it just happened. This looks more like play and leisure than employment. The mother and child's time spent out on the farm is only accidentally benefitting Amanda's farm operation.

Again, the basic rule of thumb is that if it looks like an employee it's an employee, if it looks more like play and leisure than it's not.

Worker shares: Folks who come out and "volunteer" on the farm in exchange for farm products are most likely "employees."

Let's say instead that farmer Amanda sets schedules, assigns specific tasks, requires a certain level of work in return for a CSA share, tells the CSA members what to do, has expectations in terms of speed and effectiveness of the tasks at hand, and, as a result the operation benefits from the hard work of the "volunteer."

Farms often enter such arrangements with CSA members or other community members and friends where "volunteer" time is required in exchange for farm products. This type of an arrangement is also known as a "worker share", "working sharer", or other title. In the eyes of the law, this is most likely seen as an "employment" relationship. Recall that under the legal definition, an employee is someone who employers direct or permit to work for them under a for-profit business. Unlike a volunteer, the employee expects compensation for her services. In addition, the employee typically has little to no discretion over the work that is assigned or how the work is performed. Based on this, if the farmer sets the schedules and assigns duties for worker shares and folks doing the work expect compensation—here, in the form of farm product—the CSA member or worker share is most likely an employee.

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What does this mean for the for-profit farm that wants to have volunteers?

Employment laws most likely apply to volunteers

In summary, “volunteers” who actually engage in work for a for-profit farm are most likely considered “employees.” This means that all the applicable employment laws must be followed for these workers. To start, review the *Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist* to learn more. In New Hampshire, workers’ compensation is required for all employees at the point of hire. Therefore, the farm must carry workers’ compensation for “volunteers” as if they were employees. Minimum wage must be paid unless the farm meets the “less than 500-man day” federal exemption for agricultural labor. For work shares where the farm is providing farm product in exchange for hours worked, the value of the farm product must be at least equivalent to the minimum wage owed. Federal law sets forth strict guidelines and limitations for how such in-kind payments must be valued and recorded. More detail is in the next section: *Paying In-Kind Wages*.



“It will take time to adapt my volunteer programs to be consistent with employment rules. What can I do to manage risk right now?”

Prioritizing risk management for volunteers—injuries and wages

Following all these employment laws can be overwhelming for farmers with volunteers of any type. After all, even though for-profit farms are motivated to some degree by profits, many also emphasize social and ecological missions such as providing healthy food to the community and adopting conservation measures and sustainable farming practices. This explains why so many folks are willing to volunteer on sustainable farms with joy! The law has yet to catch up with this line of thinking.

Farmers with for-profit operations must realize that they are taking on some level of risk if they do not fully comply with applicable employment laws when having “volunteers.” With that said, a couple areas present particularly high risk. It’s highly recommended that farmers pay close attention to two areas as soon as possible: injuries and minimum wage requirements.

☞ Carry workers’ compensation for volunteers

Farming is dangerous and there’s a high potential that injuries will happen no matter what precautions are taken. Even if a volunteer gets hurt and has no intention of suing the farm, the volunteer’s health insurance company will likely

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have a different perspective. Insurance companies have a right to file a claim against a farm where an injury occurs, even if the injured person doesn't want to file the claim. In addition, employers are required to carry workers' compensation for all employees (and volunteers who are actually employees) in New Hampshire. If the farm doesn't have workers' compensation in place, the farm could be fined even if an injury never occurs. To avoid such risks and headaches, farmers should strongly consider carrying workers' compensation for any and all volunteers.

Follow wage requirements if volunteers are paid

In addition, farmers who provide some compensation to volunteers—whether in the form of cash or in-kind payments—run the risk of making it look more like an employee arrangement. Farmers who are required to pay minimum wage to their employees (i.e. farms with 500 or more man-days or farms assigning non-agricultural tasks to their volunteers), should strongly consider ratcheting up any compensation provided to volunteers to at least the minimum wage amount. Otherwise, they may be better off offering no compensation, as it will look less like an employment arrangement.

Keep in mind that taxes, recordkeeping, eligibility to work requirements, and so on all still apply. However, these are not necessarily the highest risk factors considered by most farmers. It's up to each farmer to assess their risk while realizing what's at stake. For more details on all that is required when hiring an employee, refer to the *Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist*.

What about online volunteer matching services?

Many sustainable farms have used online services that connect volunteers to sustainable farmers. These volunteers are often domestic or international travelers who work in exchange for room and board. Farmers may be asking, why can these folks work for free in exchange for room and board? Are these types of work-for-lodging arrangements exempt from employment laws?

The answer is no. **Work-for-lodging arrangements are not any different from what was discussed above for interns and volunteers.** Folks who do work on a for-profit farm under the direction of the farmer for some sort of compensation—including room and board—are employees in the eyes of

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the law and therefore employment laws apply.

This is not to say that work-for-lodging is illegal. It's more accurate to say that the law has not caught up to these innovations. Many online sites and services such as shared rides and shared home-stay services are relatively new and on the fringe of the law. It takes time for the law to adapt itself and apply to new systems and structures. This naturally creates a level of uncertainty. With that said, farmers need to be cautious, as having a work-for-lodging volunteer involves uncertainty and therefore a degree of risk. The farmers could face legal and financial liability in the form of injuries, wage claims, and various enforcement actions.

So what should the farmer do? The truth is that volunteering comes in all shapes and sizes. The answer to what a farmer should do to manage and reduce these risks is going to depend on the individual circumstances of each farm, including the farmer's level of risk adversity, the types of activities the volunteer is engaged in, the duration of the arrangement and so on. The purpose of the guide is to explain what the law is. The risk-managing conclusions are up to you!



Non-profit farms face some limits on having volunteers

“I got it made! I am really going to form a **non-profit now, so I can have volun-teers. Then I'm good, right? Can I structure my volunteer positions however I want?”**

Ralph's idea of setting up a non-profit farm so he can have volunteers will certainly work for him given his mission and dedication to training. But it will only get him so far. For the most part, non-profit farms can have unpaid volunteers. However, non-profit farms need to pay attention to three key limitations.

1. **Non-profit farms cannot ask a regular employee to “volunteer”**

A non-profit farm cannot suddenly require a regular employee to do the work they regularly do for free or require additional unpaid work. This is obviously unfair to the employee who expects compensation for their work. With that said, the farm can have a one-off event, such as a weekend fundraiser, and open up volunteer opportunities to regular employees. However, the farmer cannot

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require employees to participate in such “volunteer” opportunities or make it in any way a condition of continued employment. Effectively forcing an employee to volunteer is by no means volunteering!

2. Non-profit farms cannot provide unpaid volunteers everything they need for their livelihood in exchange for their work

Non-profit farms also need to be cautious about situations where they’re providing “volunteers” everything they need for their livelihood in exchange for their work. This is based on a U.S. Supreme Court opinion, which is known as the *Alamo* case. The *Alamo* case is the strongest legal guidance we have to go on to determine when it’s acceptable for non-profits to have volunteers. The background facts of the case help put these guidelines in perspective.

The *Alamo* case involved a non-profit organization that ran a set of commercial operations including making and selling clothing, distributing candy, and raising animals to sell as meat. The organization ran these operations to help train and rehabilitate previously homeless folks with drug dependency issues. The organization provided these folks food, shelter, and job training. In exchange, the recipients “volunteered” for the non-profit’s different commercial operations. The Supreme Court said this was not okay. Here’s why. The “economic reality” was that the non-profit provided these folks everything they needed for their livelihood. They were dependent on the arrangement for their survival and couldn’t simply leave. This type of arrangement put the workers in a potentially coercive power structure, which is precisely why employment laws exist.

The takeaway is this: **If the non-profit farm provides everything its volunteers need—such as room, board, and clothing for long periods of time—it risks creating an employment relationship.**

3. Non-profit farms cannot use unpaid volunteers to compete at an unfair advantage with other farms

Non-profit farms must also be sure not to undercut prices to give them a leg up over other farms. This is again based on the Supreme Court’s insights in the *Alamo* case. The court pointed out that the “economic reality” of how the non-profit was structured gave the non-profit an unfair advantage over competitors. Because the non-profit wasn’t paying the workers minimum wage, it was able to sell its candy, clothing, and meat products at a far lower price point than their competitors. The court said this isn’t fair to others engaged in

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commerce. Based on this economic reality, the court said that the “volunteers” were actually employees and that the non-profit was required to pay them minimum wage and follow other employment laws.

The lesson here is that **non-profit farms can't leverage their unpaid volunteers as a way to compete at an unfair advantage with other farms.** The farm must play fair, or it loses its privileges as a non-profit to have volunteers.

What does this mean for the non-profit farm that wants to have volunteers?

Farmers who have or are thinking about having a non-profit farm will want to be careful about how they structure volunteer arrangements. First, they must not require regular employees to “volunteer” for free. Second, it's recommended that the non-profit farm not provide their volunteers with everything needed for a livelihood—such as room, board, clothing, and so on. The non-profit farm may want to consider making its volunteer positions part-time or temporary as this will less likely appear as though the volunteers are depending on the non-profit entirely. Finally, the non-profit farm must be careful not to compete with an unfair advantage with for profit farms. A simple way to do this is to price the items the non-profit farm sells at market-level prices.

Paying In-Kind Wages



“I'm finally accepting the fact that my workers are employees. And, I did the calculations and I don't meet the federal “500 man-day” agricultural labor exemption to minimum wage. I understand that I legally have to pay all my employees at least minimum wage. But, I don't have a lot of cash flow. I've decided I want to pay wages in the form of food and lodging. Is this okay?”

In a word, yes, it's okay to pay wages in the form of food and lodging. The good news is that if minimum wage is not owed at all, in-kind wages can be offered without having to jump through any hoops. In this case, farmers need to at least be sure to keep records proving that they are exempt from the minimum wage requirements. In addition, if in-kind compensation is provided on top of a cash payment of at least the minimum wage, there are no legal restrictions on how in-kind payments must be made. In other words, if the farmer pays her employee \$7.25 per hour in cash and on top of that provides lunchtime meals as a bonus, the farmer doesn't have to comply with the legal requirements for valuing and recording the costs of the lunches provided (discussed below). Where in-kind payments are used to achieve at least the minimum wage, the rules below apply.

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Minimum wage refresher

Farms with less than 500 man days of agricultural labor in each calendar quarter of the previous year do not have to pay minimum wage. Those with 500 or more man days do. In addition, these exemptions only apply to agricultural labor. The federal definition of agricultural labor is very limited and likely does not include tasks that are off-farm or tangential to farming—including agritourism, value-added, packing other farms' products, and so on. Diversified farms that assign their workers such non-agricultural tasks must pay these workers at least minimum wage for the entire workweek in which non-ag labor is performed.

New Hampshire farmers who are obligated to pay their workers at least the minimum wage and who provide in kind wages to meet all or a portion of that obligation must follow federal rules.

When in-kind wages are paid to cover minimum wage owed, additional rules apply. The law has strict guidelines and limitations on how to value and account for in-kind payments made to cover minimum wage requirements. Before we dive into the legal requirements, we need reframe the lingo that we'll be using. Most folks think of an in-kind payment as just that, a payment. Typically, when making in-kind payments farmers add up all the in-kind payments and then top it off with cash to cover anything remaining. However, the law thinks of it differently. The law assumes that a cash payment is being made to cover the minimum wage. So it thinks of the payment of in-kind wages as a *deduction* from the cash wage. Along these lines, the farmer would say: "I owe you \$200 in minimum wage. I'm offering you lodging that is equivalent to \$100 and meals that are equivalent to \$50, so I'm deducting the \$150 from the \$200 in cash owed." It's really all the same in the end. However, this guide is using the phrase "deduction from wages" because that's how the law thinks about it.

Deduct only in-kind payments that are allowed by the law and authorized and agreed to by the employee

The law specifically sets out what can and cannot be deducted from an employee's paycheck. Specific types of in-kind wage deductions that are permitted by the law include **meals, housing, and transportation**. Nevertheless,

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the farmer cannot make deductions for these items unless the worker willingly authorizes it and actually uses or takes these items when offered. For example, if the farmer prepares daily lunches for her workers, she cannot automatically deduct the value of these meals from all her workers' paychecks. She can only make the deduction for employees that actually eat each of the meals offered. Farmers providing meals will therefore have to keep track of who eats what, whether through a log book or some other system.

A farmer cannot deduct items that would simply be for her own convenience or benefit. Examples of such items include tools and equipment used on the farm. Requiring the employee to pay for these items financially benefits the farmer as she's passing on a necessary business expense. A farmer can deduct from wages for such items if, and only if, the farmer has already fulfilled her obligation of paying any minimum wage owed AND the education does not financially benefit the farmer AND the employee willingly authorizes it.



“I would like to account for the value of the education I provide when I determine an intern's wage. Can I deduct for educational value?”

Education and training provided to workers falls into the category of something that's primarily beneficial to the farmer. Sure, the worker benefits from learning general farming practices. But it's really the farm that benefits the most by having well trained, efficient workers. The farmer could certainly put a value on the education and training she'll provide and use that added value as a marketing piece to attract good workers. Another option would be to run a separate educational series and charge employees tuition for it. However, the farm cannot force its workers to participate in these trainings. That would for all intents and purposes be the same thing as deducting it from their wages!

Have the worker sign an agreement acknowledging the in-kind payment arrangement

Any in-kind arrangement that the farmer has with an employee to fulfill the minimum wage obligation must be in-writing and signed by employee at the get go. Getting the arrangement in writing helps ensure that the farmer and the employee have a shared understanding of the details. This alone can help prevent unmet expectations or disagreements. In addition, it provides written proof that wages were in fact paid if an issue were to ever arise.

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Properly assess the value of the lodging and meals

“Okay, so I want to deduct for meals and lodging. I have to follow the federal rules because the meals and lodging are helping me satisfy my minimum wage obligations. But how do I value it?”

The federal rules set out a very specific method for determining the value of in-kind payments. Here's the rule:

Farmers can deduct the *lesser* of two things:

- + The fair market value, or;
- + The actual cost to the farmer in providing it

This is easier to understand through an example. Let's say that Farmer Amanda has a mobile home on her property that's completely paid off. She wants to let one of her workers stay there in exchange for work. How much can she deduct for this lodging?

The first step is to determine the fair market value. The question to ask is what do mobile homes in Amanda's area rent out for? If she's in a rural area of New Hampshire, it might not be much. If she's near the heart of Manchester or some bustling small town, it will, of course, be more. Let's say the going rate is \$400 a month for Amanda's area. The next step is to determine what it actually costs Amanda to have this mobile home. Let's say she's already paid it off in full, so her costs are minimal. Perhaps Amanda is only paying utilities for operation, which run her about \$75 a month. This is the lesser of the two. Therefore, \$75 a month for lodging is all that Amanda can deduct from the minimum wage she owes her worker. (Please note that Amanda's valuation must comply with 29 CFR 531.3, which is not discussed in detail here. This is a simplified example.)

Basically, the farmer cannot profit from offering in-kind wages. If Amanda deducted more than it cost her to provide housing, she would profit. Farmers providing lodging will need to do some research on rent prices in their specific area to provide evidence of the going rate. They'll also have to be honest about what the lodging actually costs them. Bottom line, they'll need to keep records to support the value that is being deducted in case an issue or discrepancy about wages paid were to ever arise—including a tax audit or a wage claim.

This same formula applies to meals. Let's say that Amanda offers lunches and

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dinners for her workers. What can she deduct for these meals? First, she'll need to determine what the fair market value is for lunch and dinner in her area. Let's say it's \$8 for lunch and \$10 for dinner for a comparable meal at the diner down the road. Now Amanda needs to figure out how much it costs her to make the meal. This includes her costs of the ingredients, including any products from the farm, as well as her time to make the meal. If it's less, say \$5 a meal, she can deduct only \$5 per meal as in-kind wages. Farmers will need to keep records of how they valued the meals provided in case a dispute or discrepancy arises.

Most farmers are probably thinking: "This is way too cumbersome! Is it even worth it?" That question can only be answered by each individual farmer. The best route is to play it safe and be conservative by following the required method for valuing in-kind payments as well as keeping records sufficient to show you are complying with the requirements. Alternatively, a farmer may simply decide it's not worth it and simply pay any minimum wage owed in cash and provide in-kind payments as a bonus.

Itemize deductions on each pay stub

Any deductions made for in-kind wages must be itemized on the pay stub that is provided to the employee at each pay period. This is required by law as it provides the employee the opportunity to see what has been taken each time. In addition, it provides yet another way to prove that in-kind payments were in fact made.

Investigate tax obligations

Wages paid in anything other than cash for agricultural labor are exempt from FICA (i.e. social security and Medicare tax) as well as federal income tax withholding obligations. This means that the farmer would not need to withhold federal income tax on the non-cash wages. In addition, neither the farmer nor the employee would need to pay social security and Medicare taxes on non-cash wages. However, taking advantage of this exemptions comes with a whole new set of limitations and recordkeeping obligations. What's more, it raises a huge risk for an audit. For more details on the risks and requirements of utilizing this exemption, see Farm Commons' resource—*Paying In-Kind Wages: The Federal "Commodity Wage" Exception to Payroll Taxes*.

Some farmers who provide enough cash to meet the minimum wage obligation would like to exclude lodging and meals from wages in order to reduce their tax burden. This is an entirely different issue with its own set of criteria and is beyond the scope of this guide. Farmers who are in this situation should seek the advice of a tax attorney or accountant or contact the IRS.

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New Hampshire farms providing lodging to their workers need to pay attention to a number of other laws

An array of laws come into when farmers provide housing to their workers. These include zoning, federal Occupational Safety and Health Act (OSHA), and the federal Migrant and Seasonal Farmworker Protection Act.

Look into the local zoning code

Most, if not all, zoning ordinances have something to say about housing and occupancy of residences. Some zoning laws include restrictions on how many people may in on the property or how many non-related people may live in a single residence. Zoning laws could also have limitations or prohibitions on temporary structures such as RVs, tents, and yurts. Bottom line, farmers who provide housing to their workers will need to look into their zoning ordinance to be sure their plans coincide with what is permitted. While farmers could play the game of wait and see, they run the risk of costly fines and disputes down the road. They could even be forced to take down a structure that doesn't comply with the ordinance. One approach would be to get a copy of the ordinance and read it yourself. However, these ordinances are not always a fun and straightforward read. Farmers could also ask neighbors or other farmers who house workers. Or, they could call the local zoning office to ask their questions directly.

Determine whether by providing housing to workers the farm is subject to the federal Occupational Safety and Health Act (OSHA)

Farmers must be aware that by providing housing to their workers, they may subject their farms to an inspection under the federal Occupational Safety and Health Act, commonly known as OSHA. Although OSHA is not generally enforceable against smaller farms, that exception does not apply when housing is provided in a "temporary labor camp." Temporary labor camps are defined broadly. Basically, they include any housing that is provided to a temporary worker as a condition of employment. In other words, it's a temporary labor camp if the worker, for all intents and purposes, has no other choice than to live in the housing provided by the farm based on the location or other circumstances of the job. For example, this could be the case if the farm is located in a rural area, and there's practically no other affordable place nearby to live. If this is the case, the farmer will want to be sure that they are in full compliance with OSHA housing standards.

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Farmers wanting to learn more about OSHA enforcement when providing housing, as well a basic overview of the housing standards, can refer to Farm Commons' resource—*Paying In-Kind Wages: OSHA Impacts When Providing Housing*. Farmers may also want to contact the Department of Labor's OSHA office in Concord, which oversees OSHA compliance and enforcement in New Hampshire. In addition, WorkWISE NH provides free, on-site OSHA consultation services to eligible employers.

Determine whether the farm is subject to the federal Migrant and Seasonal Farmworker Protection Act

In addition, when a farmer provides housing to “migrant workers,” the farmer may subject the farm to the federal Migrant and Seasonal Agricultural Worker Protection Act (called the MSPA). Despite what many may believe, “migrant workers” are not limited to out-of-state or foreign workers. Migrant workers include anyone who must stay overnight away from their regular home in order to make it feasible for them to work on the farm. A migrant worker could be someone who regularly lives just an hour or two away from the farm, if such a lengthy drive makes it impractical for them to fulfill their obligations on the farm each day they're required to work.

A few exemptions to the MSPA are available. Just as for the federal minimum wage, farms that have fewer than 500 man-days in each calendar quarter of the previous year are exempt. In addition, farms that are exclusively owned and run by a single farmer or his or her immediate family members (i.e. legal spouse, children (biological, step, adopted, foster), and parents) are also exempt. Finally, if the housing provided is also provided to the general public, the farm is exempt from having to comply with the MSPA.

Farmers who provide housing to “migrant workers” and don't meet one of the available exemptions must arrange for an inspection of the housing provided and obtain a certification of occupancy. They must do this *each year*. The farmer must also maintain certain housing conditions and follow recordkeeping and disclosure requirements. The MSPA is also overseen by the Department of Labor in New Hampshire. Farmers wanting to learn more about the applicability and requirements of the MSPA can refer to Farm Commons' resource—*Paying In-Kind Wages: Migrant Worker Laws and Providing Housing*.

CONCLUSION

Conclusion

This guide provides an overview of selected legal standards and requirements for farmers who have or want to have interns and volunteers. This area of law carries a level of uncertainty. With this uncertainty, farmers have the opportunity to strategically choose the approach they want to take.

Farmers who have a high level of adversity to risk may want to take a conservative approach. This basically means either following the DOL's strict criteria for having interns OR treating their interns as though they were "employees" and following all applicable employment laws. Farmers who are willing to take on some degree of risk may choose to follow the more lenient approach taken by the *Black Swan* court. Regardless, farmers who choose to have unpaid interns will want to be sure to emphasize the education dimension. A good option is to partner with a college or academic institution and offer credit. However, this alone is likely not enough to have a legally sound internship. In addition, farmers who choose to have unpaid interns will want to be sure to keep accurate records of the hours worked and activities performed by the interns as well as the curriculum and training provided. This will provide proof of the legitimacy of the program should a dispute or enforcement action arise.

As for volunteers, the law is pretty clear that for-profit businesses are not permitted to have unpaid volunteers. To play it safe, for-profit farms may want to consider following all applicable employment laws for volunteers who work on their farm. This includes carrying workers' compensation for these volunteers as well as paying minimum wage unless the farm falls within the federal agricultural labor exemption.

This guide also discusses some basic guidelines for paying workers in-kind wages. Farmers who have or are thinking about having worker shares or otherwise paying their workers in-kind should review and follow the *Paying In-Kind Wages* section of this guide in detail.

CONCLUSION

Additional resources are referred to throughout this guide. These resources offer more thorough details on specific legal issues. In particular, this guide is part of a series of guides on New Hampshire employment law:

Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist

Classifying Workers on New Hampshire Farms: Are they Independent Contractors, Interns, Volunteers, or Employees?

Managing Risks of Farm Interns and Volunteers in New Hampshire

Be sure to check out these and many more resources on employment law and other legal issues that are relevant to sustainable farmers. All of Farm Commons' resources are available for free download at www.farmcommons.org.



Do you have questions or thoughts on how to improve this document? Please email us. We'd love to hear from you!

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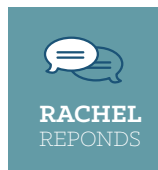
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Managing Risks of Interns and Volunteers in New Hampshire: The Short Version

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Managing Risks of Interns and Volunteers in New Hampshire: The short version

What should farmers know about interns?

Generally speaking, interns are employees under the law and employment laws must be followed. This means that if farmers are required to provide minimum wage, workers' compensation and the like for employees, the same must be provided for interns.

There are situations where interns are not considered employees. This area of law is in a state of flux. Risk adverse farmers should follow the federal Department of Labor's 6 criteria for when an intern is not an employee. Farmers more comfortable accepting the risk of losing a wage claim, enforcement action, or lawsuit might consider following the Black Swan test, named for the lawsuit that established it.

DOL's Six Criteria

Unless an internship meets ALL of the six criteria, the intern is an employee:

1. Training must be provided that is similar to a classroom educational experience
2. The farm must get no immediate advantage from the intern's presence
3. The farm must have person(s) whose primary role is to run the internship program
4. The internship may not be trial period for a future paid position
5. Experience is for the benefit of the intern, not the employer
6. The intern understands that the position is unpaid or paid at less than the minimum wage

Black Swan Test

Unless an internship meets ALL of the three criteria, the intern is an employee:

1. The intern and not the farmer must be the primary beneficiary of the internship program
2. Education must be the focus of the internship
3. Training should be tied to the intern's formal education program, such as through course credit, or if the type of training is similar to what an educational institution provides, such as clinical or hands-on training

Farmers who host interns that are employees should follow all employment laws, including minimum wage and workers' compensation. For more information, see the *Checklist for Hiring a Farm Employee in New Hampshire*.

Farmers who host non-employee interns don't necessarily need to follow employment laws. But they should understand other legal obligations and best practices including:

1. Keep records of hours worked, tasks performed, and training curriculum for the internship program
2. File reports and paperwork with affiliated schools or institutions that are providing course credit
3. Have the intern sign an agreement acknowledging they're a non-employee intern
4. Get insurance coverage for worker injuries

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What should farmers know about volunteers?

Non-profit organizations: Volunteers are not considered employees and employment laws do not apply, generally speaking.

For-profit businesses: Volunteers are employees and all employment laws should be followed, generally speaking. Any person who is allowed to do the work of a for-profit business, regardless of whether the person is paid or not, is generally defined as an employee under the law. Employment laws such as minimum wage and workers' compensation likely apply.

For both non-profit and for-profit farms, **the more a volunteer position looks like employment, the more likely it is employment.** A position looks like employment when the individual:

- Keeps a regular schedule,
- Is directed in his or her tasks, and
- Is compensated for his or her labor in some way, among other factors.

For example, let's say that a mother and her child go to a farm to pick raspberries at their leisure and pick a few extra pints for the farmer to sell. The mother and child were not scheduled to work, didn't follow the farmer's direction in picking, and were not compensated so it is unlikely they are employees.

Both non-profit and for-profit farms need to manage the risks of a volunteer program. Core risk management strategies include the following.

1. Insurance. Volunteer positions can be hazardous. Farms should make sure they have coverage for injuries to volunteers, which may require either a workers' compensation policy or a liability policy depending on the volunteer program. Farmers should contact their insurance agent for more information.
2. Minimum Wage. If a farm provides any compensation to volunteers, the farm should consider providing at least the equivalent of minimum wage for all hours worked. Volunteer programs run the risk of falling under employment laws such as minimum wage. Complying with these laws helps manage that risk.

Make sure to read the complete *Managing Risks of Interns and Volunteers in New Hampshire* guide to more fully understand the complexity of intern and volunteer laws.

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Paying Your Farm Labor

When determining compensation for your farm labor, it is necessary to classify each worker to understand the state and federal legal requirements surrounding paying each person. It is also important to properly classify each farm worker to determine which federal and state exemptions apply to both hourly and overtime rate minimums.

Employee

We will start by analyzing how a farm must pay an employee. The New Hampshire state wage and hour laws define a farm employer as one who employs five or more persons. [RSA 275:42\(I\)](#). An employee is defined as one who may be permitted, required, or directed by any employer to engage in any employment for direct or indirect profit. [RSA 275:42\(II\)](#). New Hampshire adopts the federal minimum wage and overtime requirement, which means that an employer must pay an employee \$7.25 per hour worked, unless an exemption applies. [RSA 279:21](#); [29 U.S.C.S. § 206](#). Also, an employer must pay its employees overtime pay for hours worked in excess of 40 hours in one workweek. [RSA 279:21](#). The overtime rate must be at least one and a half times their regular pay rate (commonly referred to as “time and a half”), unless an exemption applies. [RSA 279:21](#).

Agricultural Employment Exemption to Minimum Wage and Overtime

An exemption to minimum wage and overtime rates exists for agricultural work performed for a farm. A farm is exempt from paying minimum wage and overtime rates when it is within the 500 person-day exemption. [29 U.S.C.S. § 213\(a\)\(6\)](#). This federal exemption allows a small farm the financial ability to have farm employees perform agricultural work without paying the required minimum wage and overtime. It also allows the farm to host apprentices, legally classified as employees, without the overhead of employing more expensive farm workers.

New Hampshire exempts agricultural employment from minimum wage requirements, so that the federal

minimum wage applies. [RSA 279:1](#). Federal law affords a generous exemption to agricultural employers through the 500 person-day exemption. This exemption exempts farms from paying minimum wage to their workers performing agricultural tasks if the farm utilized less than 500 person-days in every calendar quarter, a three-month period, during the previous calendar year. [29 U.S.C.S. § 213\(a\)\(6\)](#).

A person-day is accrued when one employee works at least one hour in a day. A farm can use 499 person-days before the farm must meet the minimum wage and overtime requirements. [29 U.S.C.S. § 213\(a\)\(6\)](#). In practical terms, a farm can use eight employees working five days a week for 12 weeks (totaling 480 person-days) and still be within the 500 person-day exemption. A determination as to which side of the exemption an employer falls demands clear and credible record keeping by the employer. It also requires the employer to know the legal meaning of “agricultural” for these purposes because only agricultural labor qualifies for the person-day exemption.

“Agricultural Employment” and the Minimum Wage Exemption

The definition of agriculture for purposes of wage exemptions includes primary farming activities, such as cultivating, tilling, milking, growing or harvesting crops, raising livestock, fur-bearing animals, and poultry, and beekeeping. [29 U.S.C.S. § 203\(f\)](#). The definition also includes secondary farming activities. [29 U.S.C.S. § 203\(f\)](#). Work can be considered agricultural, provided it is performed by a farmer, on a farm, as an incident to or in conjunction with the farming operation. Generally, work necessary to sustain a farm, building a fence, a silo, or a terrace, qualifies as agricultural work if done for the farming operation.

It is important to understand the difference between a farm stand on the farm and farmers’ market booths. Secondary farming activities are defined in such a way as to include staffing a farm stand. However, selling produce at a farmers market does not fit within the definition of “agricultural employment.” A farm employee selling produce would not be considered exempt from

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minimum wage and overtime requirements pursuant to the definition of agricultural employment. The take away: If your farm wants to fit within the 500 person-day exemption, be sure the labor performed fits within the definition of “agricultural employment.”

Weekly Pay Periods

A farm is required to pay its employee on a weekly basis. [RSA 275:43](#). If a farm wants a different pay schedule, the farm must submit a request to the N.H. Department of Labor Commissioner. [RSA 275:43](#) (“except that it shall be at least once each calendar month.”) If employees are paid on a weekly basis, wages must be paid within 8 days after the end of the work week. If employees are paid on a biweekly basis, wages must be paid within 15 days after the end of the second work week.

Is Farm Product Compensation?

Your farm may be interested in compensating its employees with farm products, as opposed to cash wages. Compensation can take the form of goods and services. [26 U.S.C. § 61](#). This method of payment is called “in-kind” compensation for IRS purposes. When payment in-kind is offered, it must be of comparable value to the cash that the farm would have received by a customer.

In-kind compensation (payments in goods and services) is most likely considered compensation subject to payroll and income tax. In-kind compensation must be included in a farm worker’s gross wages, and is subject to the same tax consequences as cash wages. [26 U.S.C. § 61](#). For example, if a farm does not pay their farm worker in cash wages, but rather provides the worker food, housing and farm training, the fair-market value of this in-kind compensation is likely subject to payroll and income tax. It is always a good idea to speak with the farm’s tax specialist or attorney to determine whether such benefits are in-kind compensation or deductible business expenses.

Paying Independent Contractors

A farm must satisfy several requirements when it hires the services of an independent contractor. First, a farm must carefully consider whether a particular farm worker is actually an independent contractor by looking to the factors listed in the previous section.

Second, make sure you satisfy the tax requirements. When hiring an independent contractor, the farm must request the contractor’s Tax Identification Number. This can either be the contractor’s Federal Employer Identification Number (known as an “EIN”) or, if the contractor does not have an EIN, the contractor’s Social Security Number. The contractor must complete a W-9 form and provide the completed W-9 form to the farm. Remember, when preparing tax documents, such as the W-9 form, make sure the document is up to date for the tax year at issue.

At the end of the calendar year, the farm employer must provide a specialized form of tax return, called a 1099-MISC, to certain independent contractors. If a farm paid an independent more than \$600 over the course of the tax year, the farm should submit to the contractor a 1099-MISC including a total amount paid over the tax year.

Paying Interns

A farm must consider several issues when hosting an intern. First of all, if the intern is paid anything more than a stipend, the intern’s wage is likely subject to payroll and income tax. A stipend is a payment to a farm worker to defray the farm worker’s expenses associated with the farm work. For examples, reimbursement to the farm worker for the farm worker purchasing new work gloves, driving to the supply store for the farm, etc. This is an issue to discuss with the farm’s attorney or tax specialist.

A best practice when hosting an intern is to create an agreement that clearly establishes the terms of the internship. This agreement should be fairly comprehensive, and include in writing all relevant terms. Have both the mentor farm and the intern sign the document.

The document could include the following items:

- ④ **Goals of the internship:** Include realistic goals that the intern can achieve.
- ④ **Method(s) of training:** This should incorporate the farm’s training program.
- ④ **Compensation agreements,** if any.
- ④ **Housing and meal arrangements:** Consider having a

separate lease agreement if the intern will reside on the farm for the duration of the internship, and incorporate that in the Internship Agreement.

- ④ **Farm policies:** This could include a list of common farm policies, or incorporate a separate document listing the present farm policies.
- ④ **Workplace Safety:** If the farm has a workplace safety training program, incorporate that into this agreement.

Paperwork

As an employer, your farm has certain federal and state recording and paperwork requirements. Paperwork errors can cost a farm up to \$1,000 or more in fines and penalties. Below is a list of the most frequently required paperwork and recordings:

- ④ **I-9 Work Authorization Form:** The I-9 is a form required by the federal government. Each employer with one or more employees is required to complete an I-9 for each employee. This form is designed to assure the employer and government that the employee is legally able to work in this country. First, the employee fills out the employee portion of the I-9 form before or on the day of hire. Next, the farm is to complete the employer portion of the form within three days of hire. The farm must obtain and keep copies of the required supporting I-9 documents, such as a driver's license, passport, and Social Security card. The I-9 and related documents must be kept in a separate file from the personnel file. The farm must keep the I-9 on file for three years from the date of hire, or one year after the employee's termination.
- ④ **Tax Form Requirements:** A farm must provide a W-4 to the employee prior to the first payday. The employee must fill out the W-4 and return the document to the farm.
- ④ At the end of the calendar year, the farm employer must provide to its employees a W-2 Wages and Tax Statement form. The entries on Form W-2 must be based on wages paid during the calendar year. The farm must provide this form to each employee for the employee to completely file personal taxes.

Issuing this form in a timely manner is important.

- ④ **New Hampshire Record keeping Requirements:** New Hampshire law requires an employer keep careful and accurate records of employee-related information. An employer must retain a record of hours worked, wages paid, and, if appropriate, an employee's classification for all employees. Farms should keep this information on file for a period of no less than three years. These records should be kept in an orderly fashion, and remain open for inspection by the Department of Labor Commissioner at any reasonable time. [RSA 279:27](#).
- ④ **Deductions from employee's paycheck must be in writing:** New Hampshire law requires that any deductions from an employee's paycheck must be in writing, [RSA 275:49](#), and signed by both the farm and the employee. If a farm plans to deduct from an employee's paycheck a certain amount for food, housing, training, or other such items, that agreement must be put in writing, [RSA 275:48\(b\)](#) and [RSA 275:48\(d\)\(5\)](#), and signed by both the farm and the employee, or no deductions are allowed. It is a best practice for the farm to keep this document on file at least a year after termination of employment.
- ④ **Minimum Wage Requirements and Employer Policies:** New Hampshire law requires that an employer display a poster that notifies its employees of minimum wage requirements. [RSA 279:27](#). Also, a farm employer must provide its employees by either written notice or by posting a detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees' expenses, pension and any other fringe benefits. [RSA 275:49](#). Post this information in a conspicuous location that will be viewed by all farm employees.
- ④ **Register the Farm Employee with the New Hampshire Employment Security Office:** A farm must register each new employee with the New Hampshire Employment Securities Office within 20 days of the date of hire. A "New Hire" is anyone hired for the first time or rehired, and independent

contractors performing \$2,500 or more of services.

[RSA 282-A:117-a](#).

- ④ **Create an Employment Contract:** It is a best practice to create an employment contract that memorializes the terms of the employment. This document can be used to satisfy New Hampshire law and reduce confusion surrounding employment terms. The document should be in writing, provide clear terms, carefully reviewed, and signed by both the employer and the employee.

An employment agreement can include the following terms:

- ④ Pay rate;
- ④ Hours the employee is to work;
- ④ Pay period and pay day;
- ④ Applicable farm policies;
- ④ Employee's job description;
- ④ Applicable wage withholdings and deductions.

Managing Migrant, Seasonal, and Foreign Workers

A farm's labor needs vary throughout the year, depending on its activity and production. Farms often look to foreign and migrant workers to help with the busy seasons. Laws protect the treatment of these types of employees because farms have had a history of unfair employment practices over migrant, seasonal, and foreign workers.

Migrant and Seasonal Agricultural Worker Protection Act (Migrant & Seasonal Act)

This body of law protects workers from mistreatment and abuse while working on a farm. It is common for a farm to underestimate the application of the Migrant & Seasonal Act. Migrant and seasonal workers are broadly defined. Migrant agricultural workers are those who are employed on a seasonal or temporary basis and who are required to be absent overnight from their permanent place of residence. [29 U.S.C. § 1802\(8\)](#). Seasonal agricultural

workers are the same as migrant workers, except they are not required to be absent from their permanent residence overnight. [29 U.S.C. § 1802\(10\)](#). Migrant and seasonal workers are not defined by citizenship; rather, a United States citizen can be a migrant worker.

Exemptions from the Migrant & Seasonal Act

A farm is exempt from Migrant & Seasonal Act if:

- ④ **The farm is a family business:** If the farm is owned or operated exclusively by the owner of the farm or an immediate family member, the Migrant & Seasonal Act does not apply. However, if anyone besides an immediate family member recruits, transports, or hires workers, the exemption is lost.
- ④ **The farm is a small business:** If during the previous calendar year, the farm did not use more than 500 person days of agricultural labor during any calendar quarter (three month period), the Migrant & Seasonal Act does not apply. A "person day" is any day an employee works at least one hour of agricultural labor. For example, if five employees each work one hour during the day, five person days have been used. In context, a farm can have eight employees work agricultural labor for five days a week for three months and still be within the 500 person-day exemption.

Migrant & Seasonal Act Requirements

Generally speaking, the Migrant & Seasonal Act requires non-exempt agricultural employers to meet certain minimum employment, health, safety, housing, and transportation requirements in their hiring of migrant and seasonal agricultural workers. See generally [29 U.S.C.S. §§ 1801-1871](#).

An "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker. [29 U.S.C. § 1802\(2\)](#)

The following are specific requirements under the Migrant & Seasonal Act:

④ All Employers Must Register with the U.S.

Department of Labor: Any person who engages in “farm labor contracting” must have a certificate of registration from the U.S. Department of Labor that specifies those activities the person is authorized to perform. [29 U.S.C. § 1811](#). Farm labor contracting includes recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker. [29 U.S.C.S. § 1802\(6\)](#). Remember, this definition is broad and requires agricultural employers of migrant or seasonal agricultural workers to register unless the employer is exempt from the Migrant & Seasonal Act.

④ The Agricultural Employer Must Inspect Farm

Labor Contractor’s License: Generally, farm labor contractors are those who provide workers for another’s agricultural operation. [29 U.S.C.S. § 1802\(7\)](#). All farm labor contractors must be licensed by the Department of Labor. [29 U.S.C.S. § 1811](#). Farms using a farm labor contractor must take steps to determine that the contractor has a valid license. [29 U.S.C. §§ 1811; 1842](#).

④ Farm Must Disclose the Terms and Conditions of

Employment to Migrant and Seasonal Workers: A farm must disclose in writing to the worker certain information at the time the worker is being recruited (for migrant workers) or offered employment (for seasonal workers), including: place of employment, wages, crops, kind of activities the worker will be doing, period of employment, benefits provided to the employee and the cost to be charged for such benefits, the existence of a strike or other concerted work stoppage, whether any business in the area has an agreement to pay a commission to the employer for any sales the business receives from the workers, and whether workers’ compensation insurance is paid by the State and the contact and details of the insurance. [29 U.S.C. § 1821\(a\)](#).

④ **Farm Must Post Federal Laws In a Conspicuous Place:** The farm must hang a poster provided by the Department of Labor which sets forth the workers’ statutory protection in a conspicuous location. The information should be in English and any language common to the migrant and seasonal workers. [29 U.S.C. § 1821\(b\)](#); [29 U.S.C. § 1821\(g\)](#).

④ **Farm Must Keep Records For Three Years:** The employer must keep and preserve records for three years about the following: pay rate, the number of piecework units earned, the number of hours worked, total pay period earnings, specific sums withheld and the reasons for such withholding, and the net pay. [29 U.S.C. § 1821\(d\)\(1\)](#). This information must also be provided in writing to the worker for each pay period. [29 U.S.C. § 1821\(d\)\(2\)](#).

④ **Payment on Piece-rate Basis:** Payment in this manner must equate to at least minimum wage if the farm must comply with certain minimum wage requirements. For example, if the farm is not exempt from the minimum wage and overtime state and federal requirements, the migrant and seasonal worker is entitled to minimum wage. When paying a worker in this manner, it is imperative the farm maintains accurate records for three years to comply with the Migrant & Seasonal Act. [29 U.S.C.S. § 1821\(d\)](#).

④ **Farm Must Provide Safe and Healthy Housing to Migrant Workers:** The farm is responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing. [29 U.S.C. § 1823\(a\)](#). This includes providing certification that state safety and health standards are met, and posting a copy of the certificate of occupancy. [29 U.S.C. § 1823\(b\)](#).

④ **Farm Must Provide Safe Transportation of Migrant and Seasonal Workers:** Vehicles, not including certain farm vehicles used in the course of farm employment, used to transport farm workers must pass state inspection, be covered under insurance, and be driven by a licensed driver. [29 U.S.C. § 1841](#).

Penalties for Violating the Migrant & Seasonal Act

The penalties for violating the MSAWPA are substantial. [29 U.S.C. §§ 1851 – 1853](#). Anyone who willfully and knowingly violates the Migrant & Seasonal Act is subject to criminal sanctions of up to one year in prison and a fine up to \$1,000 or both. For subsequent violations, the individual can receive up to three years in prison and a fine up to \$10,000. [29 U.S.C. § 1851\(a\)](#). In addition, civil penalties of up to \$1,000 for each violation may be assessed by the Department of Labor. [29 U.S.C. § 1853\(a\)\(1\)](#).

Additionally, a farm may be liable to an aggrieved migrant or seasonal worker in a civil action. [29 U.S.C. § 1854](#).

Foreign Workers Under the H-2A Agricultural Visa

The H-2A program allows farms that meet specific requirements to bring foreign nationals to the United States to fill temporary agricultural jobs. See H-2A Temporary Agricultural Workers form. To use a foreign national under this program, the farm must petition the U.S. Department of Labor on the farm worker's behalf. See H-2A and I-129, Petition for a Nonimmigrant Worker.

The farm petitioner must demonstrate the following for a foreign national to qualify for H-2A status:

- ④ Offer a job that is of a temporary or seasonal nature.
- ④ Demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work.
- ④ Show that the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.
- ④ Generally, submit with the H-2A petition, a single valid temporary labor certification from the U.S. Department of Labor. [8 U.S.C.S. § 1188](#).

A farm must take three steps before using the H-2A program:

- 1) The farm must submit temporary labor certification to the U.S. Department of Labor.

- 2) The farm must submit Form I-129 after receiving a temporary labor certification for H-2A employment. Generally, the original temporary labor certification must be submitted as initial evidence with Form I-129.
- 3) If the farm's Form I-129 is accepted, prospective workers outside the United States must then apply for a visa and/or admission. These prospective workers can either
 - a) Apply for an H-2A visa with the U.S. Department of State at a U.S. Embassy or Consulate abroad, then seek admission to the United States with U.S. Customs and Border Protection at a U.S. port of entry; or
 - b) Directly seek admission to the United States in H-2A classification with Customs Border Protection at a U.S. port of entry, if a worker does not require a visa.

Terminating an Employee

New Hampshire is an “at-will” state, which means an employer may terminate an employee for any reason at all, including no reason. The at-will rule is a default rule, so it can be changed (on purpose or inadvertently) by contractual terms promising a period of employment. So, if creating an agreement with your farm worker, make sure it states that the farm worker's job is “at-will.” Doing so will enable the farm to terminate the farm worker more easily.

Bear in mind that a farm can “promise” employment in other ways, and those “promises” could take away the at-will nature of employment. For example, promises may also be made through employee handbooks or manuals. They may say things like “Apple pickers work from June through October” which could be interpreted to be a promise of employment through October.

Be sure the termination does not qualify as a wrongful termination, or one that is against public policy. See *Cloutier v. Great Alt. & Pac. Tea Co.*, [121 N.H. 915 \(1981\)](#). Courts have carefully considered termination against

public policy. Termination against public policy can include retaliatory actions for employee complaints about discriminatory employment practices, because the employee asserted rights as entitled under the law, or because of the employee's race, national origin, gender, sexual orientation, among other discriminatory reasons. *Porter v. City of Manchester*, 151 N.H. 30 (2004). If a farm is found to have terminated an employee for one of these reasons, a court may award monetary damages to the employee. In that case, a farm will have to pay monetary damages to the employee, which could include money your farm is not prepared to part with.

When in doubt, consult with an attorney about terminating an employee prior to sending them on their way.

Child Labor

Child labor laws originate from the federal Fair Labor Standards Act ("FLSA"). Federal restrictions generally apply to children below the age of 16. 29 C.F.R. § 570, et. seq. New Hampshire has adopted the majority of the federal law with respect to child labor. RSA 276-A:3, et. seq.

An exemption applies under both federal and state law: Child labor obligations do not apply to the employment of one's own children under age 21. 29 C.F.R. § 570.2; RSA 276-A:4(II)(a). Under this exemption, youths may work at any time in any job on a farm owned or operated by their parents.

Together, the federal and state laws dictate the manner in which children can be employed on the farm, including what work a child can perform at what age, how many hours a week a child can work, and whether a child can work during school hours. RSA 276-A:4. The following outlines specifics in detail.

Under 18 (who has not yet graduated high school or received a GED):

- ④ Employer must obtain from the parent or legal guardian and maintain on file signed written permission to employ the youth. RSA 276-A:4, VIII.
- ④ May not work in any "particularly hazardous" work, which is defined in a following section. There's an

exception that allows work in "particularly hazardous work only for "an apprenticeship, vocational rehabilitation, or training program approved by the commissioner" of the N.H. Department of Labor.

RSA 276-A:4, I.

- ④ Proof of age must be verified with any of the following documents: a birth certificate, a passport, a baptismal certificate, an immigration record, or a religious or official record bearing the minor's age. The employer must keep a record of the date of birth on file for all minors under the age of 18.
- ④ Generally, youths older than 16 and under 18 are subject to the following time limits:
 - No more than six consecutive day. RSA 276-A:4, VI, VII.
 - No more than 30 hours per week during full school weeks. RSA 276-A:4(VI)(a).
 - No more than 40-1/4 hours during a four-day school week. RSA 276-A:4(VI)(b).
 - No more than 48 hours during vacations or school weeks of three days or less. RSA 276-A:4(VI)(c), RSA 276-A:4(VII).

Under 16

The requirements above for Under 18, plus the following:

- Generally, youths under 16 are required to obtain a “certificate” from their school. [RSA 276-A:4, II. A](#) “certificate” is a form from the school with portions to be completed by the youth, the parent or legal guardian, and the employer and submitted to the N.H. Department of Labor. [RSA 276-A:5](#). However, youths under 16 performing “farm labor” are not required to obtain a certificate. [RSA 276-A:4, II\(c\)](#).
- Youth workers under 16 are not allowed to “work in a dangerous area in manufacturing, construction, and mining and quarrying occupations, or in woods and logging.” [RSA 276-A:4, III](#).
- Generally, youths under 16 are subject to the following time limits:
 - No work earlier than 7 o’clock a.m.;
 - No work later than 9 o’clock p.m.;
 - No more than three hours per day on school days and eight hours per day on non-school days; and
 - No more than 23 hours per week during school weeks and 48 hours per non-school weeks. [RSA 276-A:4, IV](#).

However, for youths under 16 “in agricultural work” an employer can apply to the N.H. Department of Labor for permission to suspend the restriction on hours of work. [RSA 276-A:4, IV](#).

In addition, if an employer is subject to federal regulations, meaning the farm employs more than 500-person days in a quarter, where a “person day” is any day an employee works at least one hour of agricultural labor, the following restrictions also apply:

- May not be employed during school hours (unless for a career exploration program);
- No work after 7 o’clock p.m., except from June 1 through Labor Day, when evening hours are extended to 9 o’clock p.m.; and
- No more than 18 hours per week during school weeks and 40 hours per non-school weeks

29 CFR § 570.123, 29 CFR § 570.35,
29 CFR § 570.36, 29 CFR Subpart E-1

Under 12

All the requirements for Under 18 and Under 16, plus the following.

Youths under 12 may work only in the following ways:

- ④ In the employ of parents, grandparents, or legal guardian;
- ④ In work that is “casual,” which means “infrequent or of brief duration or productive of little or sporadic income or not commonly held to establish an employer-employee relationship” [RSA 276-A:3, VII](#); or
- ④ Door-to-door delivery of newspapers. [RSA 276-A:4, V](#).

“Particularly Hazardous” Activities in Agriculture ([29 CFR § 570.71](#))

Youth employees 16 and younger are prohibited from performing the following activities, which have been deemed “particularly hazardous,” unless the youth is an immediate family member of the farm owner/operator:

- ④ Operating a tractor over 20 PTO horsepower or connecting/disconnecting an implement to or from such a tractor.
- ④ Operating or assisting to operate, in any manner, the following machines:
 - ④ Corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea-viner;
 - ④ Feed grinder, crop dryer, forage blower, auger conveyor, or the unloading mechanism of a non-gravity type self-unloading wagon or trailer;
 - ④ Power post-hole digger, power post driver, or non-walking type rotary tiller;
 - ④ Trencher or earthmoving equipment;
 - ④ Fork lift;
 - ④ Potato combine; and

- ④ Power-driven circular, band, or chain saw.
- ④ Working on a farm in a yard, pen, or stall occupied by a:
 - ④ Bull, boar, or stud horse maintained for breeding purposes; or
 - ④ Sow with suckling pigs, or cow with newborn calf with umbilical cord present.
- ④ Felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than six inches.
- ④ Working from a ladder or scaffold and painting, repairing, or building structures, pruning trees, picking fruit, and so on at a height over 20 feet.
- ④ Driving a bus or automobile when it is transporting passengers or riding on a tractor as a passenger or helper.
- ④ Working inside:
 - ④ A fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere;
 - ④ An upright silo within two weeks after silage has been added or when a top unloading device is in operating position;
 - ④ A manure pit; and
 - ④ A horizontal silo while operating a tractor for packing purposes.
- ④ Handling, including cleaning or decontaminating equipment; applying, disposing, or returning empty containers; or serving as a flagman for aircraft applying agricultural chemicals classified by federal law with the word “poison” with the “skull and crossbones” on the label or including the word “warning” on the label.
- ④ Handling or using a blasting agent, including but not limited to: dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord.
- ④ Transporting, transferring, or applying anhydrous ammonia. [29 C.F.R. § 570.71](#).

Note that exemptions exist when certain “particularly hazardous” activities are performed by student learners, vocational and technical school students, and youth who

have completed training courses provided by certification providers. [29 CFR § 570.72](#).

Workers’ Compensation

Workers’ Compensation is a state-sponsored insurance program that provides medical benefits and money to employees injured as a result of an on-the-job accident, injury, or occupational disease. See generally [RSA Chapter 281-A](#). Workers’ Compensation is designed to protect workers and dependents from hardships related to injuries or death arising from the work environment. It is intended to be a program that protects both the employer and the employee in the event of workplace injury, illness, or death. The employee receives money (usually on a weekly or biweekly basis) and medical benefits in exchange for forfeiting the common law right to sue the employer. The employer is protected because Workers’ Compensation is an exclusive remedy, meaning the employee can recover only from the policy, and the ability to bring a civil suit against an employer is limited. In that respect, the employer’s liability is limited and determined.

State law governs Workers’ Compensation laws. New Hampshire requires each employer to carry a Workers’ Compensation policy on all its employees. [RSA 281-A:5](#). There are no state exemptions to carrying a policy on employees; meaning, unlike the federal law, New Hampshire state law requires *all* employers provide coverage on all employees, regardless of occupation or annual wage payout. The law more protective of the employee will govern.

Under the New Hampshire Workers’ Compensation laws, every employer subject to Workers’ Compensation laws must comply with certain requirements to avoid penalties. Here are a few:

- ④ Each employer must take out a Workers’ Compensation policy to cover each employee, [RSA 281-A:5](#), including family members and part-time employees.
- ④ Each employer must purchase a Workers’ Compensation policy that covers the new employee from his/her job commencement. [RSA 281-A:5](#).

- ④ Each employer must keep posted in a conspicuous place on the premises, a notice that the employer is working under the provisions of the New Hampshire Workers' Compensation laws. [RSA 281-A:4](#).

The consequences for failing to provide Workers' Compensation coverage are expensive and serious. Violations of the Workers' Compensation laws can amount to a penalty up to \$2,500. [RSA 281-A:7](#).

In addition, a civil penalty of up to \$100 a day per employee could be assessed for noncompliance.

[RSA 281-A:7](#).

Workers' Compensation for Volunteers, Interns, and Independent Contractors

Even though a farm may be exempt from carrying a Workers' Compensation policy on its volunteers, interns, and independent contractors, it is always a good idea to consider coverage of these farm workers. With specific regards to volunteers and interns, farms must weigh the costs and benefits of not carrying a policy. Consider this: Workers' Compensation is an exclusive remedy. Farming is a dangerous occupation. Workplace accidents by beginning farmers are likely. Workers' Compensation will protect the farm against liability in the instance of an accident or injury by the volunteer or intern. This protection could save the farm money and protect against future lawsuits.

Independent contractors warrant a slightly different analysis when determining whether coverage under the farm policy is a good idea. Consider whether carrying a Workers' Compensation policy on the independent contractor would take that person outside the realm of that legal classification or raise red flags that could lead to an audit. On the other hand, if the worker is clearly an independent contractor performing a dangerous job on the farm premises, taking out a Workers' Compensation policy on the worker should be considered.

As always, speak with your attorney and policy provider about all your options.

Unemployment Insurance

New Hampshire unemployment benefits provide temporary compensation to those workers unemployed through no fault of their own who meet the eligibility requirements of New Hampshire law. All employers are subject to the New Hampshire Unemployment laws when the employer either

- 1) has or had one or more employees during some portion of a day in 20 different calendar weeks in either the current or preceding calendar year, whether or not such weeks are or were consecutive; or
- 2) paid out \$1,500 or more in gross wages during a calendar quarter (3 month period) during the current or previous year. [RSA 282-A:8](#).

An employer employing workers for performance of agricultural labor is exempt from unemployment law compliance. [RSA 282-A:9, IV\(a\)](#). Agricultural labor is broadly defined by statute, and includes:

- ④ Raising or harvesting any agricultural or horticultural commodity,
- ④ Operating, managing, conserving, improving or managing a farm and its tools and equipment,
- ④ Producing or harvesting syrup or maple sugar or any agricultural commodity, or raising and harvesting mushrooms or poultry or operation or maintenance of waterways, and
- ④ Handling and preparing any agricultural or horticultural commodity for market performed as an incident to ordinary farming operations.

[RSA 282-A:19](#).

The Federal Unemployment Tax Act (FUTA), [26 U.S.C. § 3301 et seq.](#), however, still applies. A farm is exempt from federal unemployment law compliance if employees are performing agricultural labor *unless and until* the farm either:

- ④ Pays wages of \$20,000 or more in a quarter in the previous or current calendar year; or
- ④ Employs 10 or more persons for some part of a

day for 20 different calendar weeks (not necessarily consecutive weeks or the same persons) in the previous or current calendar year. [26 U.S.C. § 3306\(a\)\(2\)](#).

A farm must be careful when determining whether it is subject to federal unemployment taxation.

It is a best practice to carefully record agricultural labor and non-agricultural labor performed by each farm employee. Agricultural labor is exempt, with exceptions, from unemployment tax, but non-agricultural labor will be subject to federal unemployment tax laws. This is always good to keep in mind to avoid timely and costly audits.

With regards to Workers' Compensation and Unemployment insurance, a farm is typically not responsible for carrying policies on independent contractors working on the farm. In fact, when determining whether a worker is an independent contractor, for legal classification purposes, who retains policies over this worker is a factor. There may be some instances, however, when the farm would be wise to carry a Workers' Compensation policy on an independent contractor. For example, a farm could consider taking out a policy for the contractor if the facts clearly show that all the Independent Contractor factors are met, and the contractor is hired to do a particularly dangerous job. If this is the case, the farm would certainly want to speak with a lawyer about such a circumstance to make a final determination.

A farm can also take out a Workers' Compensation policy on an intern. Such a policy is not required when hosting an intern, but is recommended if the intern is working on the farm. Farming is a dangerous occupation, and beginning farmers are learning the farm. It would be wise for a farm to consider taking a policy out to cover its farm interns. A farm will need to speak with their attorney and policy provider to determine whether this would be a best practice under the farm's circumstances.

Workplace Safety Requirement

Worker Protection for Agricultural Pesticides

The Environmental Protection Agency has a Worker Protection Standard (WPS) for agricultural pesticides designed to reduce the risk of pesticide poisonings and injuries among agricultural workers and pesticide handlers. [40 C.F.R. § 170](#), et seq. Requirements include:

- ④ Restricted-entry intervals during and after pesticide application, [40 C.F.R. § 170.112](#) ;
- ④ Notification of pesticide applications, [40 C.F.R. § 170.120](#);
- ④ Use of personal protective equipment, [40 C.F.R. § 170.240](#);
- ④ Pesticide safety training, [40 C.F.R. § 170.130](#) ;
- ④ Decontamination supplies, [40 C.F.R. § 170.150](#), and;
- ④ Emergency medical assistance. [40 C.F.R. § 170.160](#)

Those farm workers covered include:

- ④ **Pesticide handlers:** Those who mix, load, transfer or apply agricultural pesticides; dispose of pesticides or pesticide containers; act as a flagger; clean, handle or repair pesticide application equipment; or assist with the application of pesticides in any way. [40 C.F.R. § 170.3](#)
- ④ **Agricultural workers:** Those who perform tasks related to the cultivation and harvesting of plants on farms or in greenhouses, nurseries, or forests. Workers include anyone employed for any type of compensation (including self-employed) doing tasks – such as carrying nursery stock, repotting plants, or watering – related to the production of agricultural plants on an agricultural establishment. [40 C.F.R. § 170.3](#)

Note: There are changes coming to the WPS. See [Federal Register, Docket No. 2015-25970](#). These rules went into effect January 2, 2016 and compliance is required by January 2, 2017 for most of the new requirements.

Occupational Safety and Health Act (OSHA)

New Hampshire adopted the federal occupational safety laws. The federal Occupational Safety and Health Act (OSHA) mandates that all employers have a “general duty” to provide to each employee a workplace free from recognizable hazards that cause or are likely to cause death or serious physical harm to employees.

[29 C.F.R. § 1910](#), et seq.

OSHA provides general regulations as well as specific mandates that apply to agricultural operations. [29 C.F.R. Part 1910](#); [29 C.F.R. Part 1928](#). All farms must comply with OSHA requirements. However, Congress has established that farms with 10 or fewer employees at all times during the previous 12 months will not be subject to OSHA inspections.

Applicable OSHA requirements include, but are not limited to the following:

- A farm is prohibited from removing required guards.
- Standards for storage and handling of anhydrous ammonia and other toxic substances: Detailed container, storage, and labeling requirements required when keeping and using toxic substances on the farm. [29 C.F.R. § 1910.101 – 119](#).
- Grain handling facility standards: Employers must provide to employees working in grain handling facilities requisite training and safety equipment. The facility must meet minimum ventilation and safety standards. [29 C.F.R. § 1910.272](#).
- Logging operation standards: The employer must provide to the employee certain personal protective equipment and supplies required for the job that are in serviceable condition. [29 C.F.R. § 1910.266](#).

It is always a good idea to speak with an attorney or OSHA consultant to make sure a farm is complying with minimum safety requirements.

CSA: Volunteers and the CSA Model

Farms sometimes seek help from the community to keep CSA operating costs down. Farms often classify these farm workers as volunteers, and offer a CSA share in exchange for the help. As detailed previously, a volunteer has a specific definition, and applies only to certain organizations. CSA helpers might technically be “employees.”

Non-profit Farms and the CSA Model

If the farm is an organization that can host a volunteer, as discussed previously, the farm could offer the volunteer a CSA share as a stipend. A stipend is classified, under the Department of Labor, as a “nominal fee” to be provided to a volunteer for his/her volunteered services. Federal law allows for a nonprofit to pay a volunteer a nominal fee for services. A “nominal fee” is an incidental or insubstantial amount paid to the volunteer. [29 U.S.C. § 203\(e\)\(4\)\(A\)](#); [FLSA Opinion Letter 2005-51](#). To calculate what exactly would be a nominal fee, Congress established the 20% Test. [29 U.S.C. § 213\(c\)\(6\)\(G\)](#). In order to be considered a nominal fee, the total stipend must not exceed 20% of what you would have to pay a worker to perform the service and the amount cannot be tied to productivity or hours worked. If the value of the CSA share is within 20% of what the farm would have paid a regular farm employee, the stipend is not compensation and not subject to withholding tax. [FLSA Opinion Letter 2005-51](#).

For-profit Farms and the CSA Model

A for-profit farm likely cannot consider farm workers volunteers. That said, a person providing labor to a for-profit farm in exchange for a CSA share or a set amount of farm products is most likely an employee for classification purposes. The CSA share is compensation for his/her labor.

The take-home is this: It is not likely possible for a for-profit farm to consider someone working for their CSA share to be a volunteer. The farm should classify this arrangement as an employer-employee relationship and follow the applicable laws governing that classification.

Legal Organizational Structures

A farmer may create one of a variety of business entities under New Hampshire law in order to do business. There are many important legal considerations when choosing and forming a business entity.

This chapter discusses the most common ways to organize an agricultural business and provides a general overview of the benefits and drawbacks of each.



A Farmer’s Options for Organization

A farmer or farmers may create one of a variety of business entities under New Hampshire law in order to do business. There are many important legal considerations when choosing and forming a business entity. Among the most significant differences among the various types of legal entities relate to the following:

- ④ the protections against the farmer’s personal liability for the actions and obligations of the business entity;
- ④ the means of transferring ownership to new owners, partners, or others;
- ④ the ease with which the business will be able to attract outside investors;
- ④ how and who makes business decisions;
- ④ how profits and losses are shared amongst owners;
- ④ death, disability or unexpected withdrawal of an owner; and
- ④ how the business entity will be taxed.

Some entities are easier to form than others, and some are formed without any formalities at all. As a general rule, the easier-to-form businesses offer the least protection for a farmer in the event the business incurs unforeseen debt or liability. This chapter discusses the most common ways to organize an agricultural business and provides a general overview of the benefits and drawbacks of each. This chapter is not intended to cover every detail of starting a business or to suggest a particular type of business organization for your particular business needs. Before you make decisions that will have lasting effects, it is advisable to consult an attorney to assist you in determining what business entity would be most suitable for your particular business.

The following chart summarizes business organization options, which are

REGULATIONS CITED FOR LEGAL ORGANIZATIONAL STRUCTURES

Registering a Trade Name RSA 349-1:1	Limited Liability Company RSA 304-C RSA 304-C:26 RSA 304-C:31 RSA 304-C:66 RSA 304-C:110 RSA 304-C:194 RSA 304-C:191 29 U.S.C. § 501(c)
Tax RSA 77-A:1, I RSA 77-A:6, I RSA 77-E:1, III RSA 77-E:5, I	Corporation and S-Corporation RSA 293-A RSA 293-A:2,02 RSA 293-A:2,06
General Partnership RSA 77-A:1, I RSA 77-A:6, I RSA 77-E:1, III RSA 77-E:5, I RSA 304-A RSA 304-A:15, I RSA 304-A:56	Non-Profit Corporation RSA 21:34-a RSA 292 RSA 292:1-3
Limited Partnership RSA 77-A:1, I RSA 77-A:6, I RSA 77-E:1, III RSA 77-E:5, I RSA 304-A RSA 304-B RSA 304-B:2 RSA 304-B:4 RSA 304-B:8 RSA 304-B:18 RSA 304-B:19 RSA 304-B:24 RSA 304-B:26 RSA 304-B:29-34 RSA 304-B:44	Lease RSA 477:7
Resources www.sos.nh.gov/corporate/tradenameleader.htm www.irs.gov/forms-pubs/about-form-w7 www.sos.nh.gov/corporate/tradenameleader.htm www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online http://www.sos.nh.gov/corporate/PDF/Form_1_V-2.0.pdf http://www.sos.nh.gov/corporate/PDF/Form_LP-1_(09-2015).pdf www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Apply-for-an-Employer-Identification-Number-EIN-Online www.irs.gov/pub/irs-pdf/f1023.pdf	

then discussed in more detail.

TYPE OF ENTITY	Limited Liability for Participants?	Form of Federal Taxation	N.H. Registration Requirements	Means of Raising Capital
SOLE PROPRIETORSHIP	No limited liability. Owner is personally liable for farm business expenses, debts, etc.	Personal income of owner.	None if the farm operates under owner's name, otherwise register a trade name.	Personal loan to owner.
GENERAL PARTNERSHIP	No limited liability. Owners are personally liable for business expenses, debts, etc.	Pass-through to owners as personal income.	Must register the business name as a trade name.	Active partner(s) buying equity.
LIMITED PARTNERSHIP	No limited liability for general partner, yes for limited partners.	Pass-through to partners as personal income.	Must register the business name as a trade name.	Partner (active or silent) buying equity; business loans.
LIMITED LIABILITY COMPANY	Limited liability for all members.	Pass-through to members as self-employment income, or can elect to be taxed as corporation.	Registration with State through appropriate form, Operating Agreement recommended.	Sale of equity to members (managing member or investment members); business loans.
CORPORATION	Limited liability for shareholders.	Double taxation: corporation is taxed and shareholders are taxed.	Articles of Incorporation.	Sale of equity to investors; business loans.
S-CORPORATION	Limited liability for all investors.	Pass-through to owner as personal income.	Articles of Incorporation.	Sale of equity to investors (limited to 35 total share-holders); business loans.
NON-PROFIT CORPORATION	Limited liability for members, shareholders, uncompensated board members, and officers.	Salaries taxed as wage income.	Articles of Agreement.	Tax-deductible donations and business loans.

Sole Proprietorship

Many farms in New Hampshire operate as a personal or family business. By default, a business in New Hampshire will be treated as a sole proprietorship for taxation, legal liability, and other purposes. As a sole proprietor, the business owner has unlimited liability for the business's debts, obligations, and liabilities, including any court judgments. A sole proprietor in New Hampshire has sole control over every aspect of the business. The sole proprietorship is the easiest way to form a farm business.

There are few formalities involved with carrying on as a sole proprietor. Here are a few of the most common considerations:

- ④ Choose a name for your farm business so that you can gain name recognition.
- ④ Register your farm name as a trade name with the New Hampshire Secretary of State. Using a trade name allows the business owner to use a name other than the owner's personal name. Registering a trade name is required if the business name is anything other than the name of the business owner. **RSA 349:1, I.** Registering a trade name costs \$50, and the application can be found here: <https://sos.nh.gov/corporation-ucc-securities/corporation/forms-and-fees/trade-name-forms-and-laws/>

④ Consider obtaining a tax identification number (TIN), also known as an employer identification number (EIN), from the Internal Revenue Service (IRS). This is not mandatory for all sole proprietors, but is required if you hire employees, have certain retirement plans, buy an existing business, or you wish to file for bankruptcy. You may also want to obtain a TIN to establish business legitimacy as an independent contractor. You may apply to the IRS online at: www.irs.gov/forms-pubs/about-form-w7. The income of a sole proprietorship is taxed at the federal level as self-employment income, and many business expenses may be written off as deductions. On the state level, the business is subject to the Business Profits Tax if gross business income exceeds \$50,000. [RSA 77-A:1, I](#); [RSA 77-A:6, I](#). The business may also be subject to the New Hampshire Business Enterprise Tax (BET). The BET is imposed if the business has gross business receipts or an enterprise value tax base in excess of stated thresholds. These threshold amounts are subject to change annually. Please review the Department of Revenue's website (<https://www.revenue.nh.gov/>) for the latest threshold amounts. [RSA 77-E:1, III](#); [RSA 77-E:5, I](#).

Transferring a sole proprietorship to a new owner often involves an inventory of assets and debts, a sales contract, and, if real property is involved, deeds.

A lot of businesses are operated as sole proprietorships. However, before deciding on a sole proprietorship, consider whether this is the best option for your business. Most importantly, consider the liabilities involved with operating a farm. Farming is often risky, and farms are costly to operate. Farm operations often have substantial debt. As a sole proprietor, the farm's liabilities (e.g., debts to suppliers, judgments awarded to someone injured on the farm) extend to the owner, personally. That means if the farm cannot pay its bills, a creditor can pursue the owner of the farm for payment from the owner's personal assets. A creditor can attach the debt to property owned by the sole proprietor, reach into assets held jointly, such as joint bank accounts, garnish wages if the sole proprietor has income from another source, and other methods of debt recovery.

General Partnership

A general partnership is created when two or more partners conduct a business jointly. [RSA 304-A:6, I](#). In a general partnership, all partners are personally liable for the obligations and actions of the partnership. [RSA 304-A:15, I](#).

A general partnership can be created expressly, through written or oral agreement, or implied through conduct of the partners. Generally, an implied general partnership can exist when individuals work together to operate a business and share the income or debts of that business even in the absence of an agreement to form a partnership.

When two or more people want to enter into a general partnership, it is a good idea to have the partnership terms memorialized in written partnership agreement signed by all partners.

At the least, a partnership agreement should include the following provisions:

- ④ **Business Purpose Statement:** Carefully explain your business purpose so each partner understands the direction of the business.
- ④ **Principal Place of Business:** Include in your agreement where your business operates.
- ④ **Term of Business:** Determine the term of your partnership. If there is no set term, state just that.
- ④ **Capital Contributions:** Include each partner's capital contribution to the partnership.
- ④ **Profit and Loss Sharing:** This provision sets forth the percentages of each partner's entitlement to the partnership's profits and responsibility for its losses.
- ④ **Distribution of Profits:** Determine how and when to distribute profits of the partnership.
- ④ **Management of the Partnership:** Include in the agreement how the partnership is to be managed, and detail what percentage of votes are required for all different types of decisions the partnership will make over its course of operation.
- ④ **Transferring Partnership Interest:** Detail how partnership interest can be transferred and to whom such interest can be transferred. If there are specific voting requirements, include them in this provision.

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- ④ Any desired provisions for the future transfer of the business.

Just like a sole proprietorship, there are some important considerations to facilitate the operation of the partnership, including the following:

- ④ Choose a name for your farm business to facilitate name recognition.
- ④ Registration of your farm name as a trade name with the New Hampshire Secretary of State is required of a partnership. Registering a trade name costs \$50, and the application can be found here:
<https://sos.nh.gov/corporation-ucc-securities/corporation/forms-and-fees/trade-name-forms-and-laws/>
- ④ Partnerships must obtain a tax identification number (TIN), also known as an employer identification number (EIN), from the Internal Revenue Service (IRS) online at www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online

The income of a general partnership is taxed at the federal level as self-employment income based on each partner's ownership share. Many business expenses may be written off. On the state level, the partnership is subject to the Business Profits Tax if the partnership's gross business income exceeds \$50,000. [RSA 77-A:1, I](#); [RSA 77-A:6, I](#). The partnership will also be subject to the New Hampshire Business Enterprise Tax (BET). The BET is imposed if the business has gross business receipts or an enterprise value tax base in excess of stated thresholds. These threshold amounts are subject to change annually. Please review the Department of Revenue's website (<https://www.revenue.nh.gov/>) for the latest threshold amounts. [RSA 77-E:1, III](#); [RSA 77-E:5, I](#).

State law governs the ways in which partners join and leave a partnership, how assets are divided upon dissolution or the withdrawal of a partner, and numerous other contingencies that may come about in a partnership. [RSA 304-A](#). This statute also provides a method for converting a general partnership into another type of business entity, such as a limited liability company or limited partnership. [RSA 304-A:56](#).

Whether a general partnership is the best choice for your business involves important considerations. Most importantly, consider the liabilities involved with

operating a farm. Farming is often risky, and farms are costly to operate. Farm operations often have substantial debt. As a general partnership, the farm's liabilities (e.g., debts to suppliers, judgments awarded to someone injured on the farm) extend to the owner, personally.

That means if the farm cannot pay its bills, a creditor can pursue the partners of the business for payment from their personal assets. A creditor can attach the debt to property owned by the partners, reach into assets held jointly, such as joint bank accounts, garnish wages if a partner has income from another source, and other methods of debt recovery.

Limited Partnership

Limited partnerships are regulated in New Hampshire primarily under [RSA 304-B](#), though [RSA 304-A](#) is also applicable to limited partnerships to the extent that the provisions of [RSA 304-A](#) and [RSA 304-B](#) are inconsistent. Limited partnerships provide certain limited liability status to non-managing partners of a business. To organize as a limited partnership, the business must have at least one general partner and one limited partner. General partners control the business operations, and, though limited partners may be involved in certain decision-making, limited partners are usually people who have invested in the business venture and who will make a return on their investments as set forth in a partnership agreement. See [RSA 304-B:19, II](#), for a list of actions that a limited partner may take while still maintaining the status of "limited" partner.

This business structure allows for a business to seek investment partners (i.e., limited partners) whose liability will only extend to the level of their investment in the business. In a limited partnership, the general partner's liability is not limited, and the general partners remain personally liable for the actions and obligations of the partnership. [RSA 304-B:24](#). In a limited partnership, it is the limited partner's liability that is limited; a limited partner is not personally liable for the actions and obligations of the partnership. [RSA 304-B:19](#). Note also that a limited partner can lose its limited liability status if the

limited partner steps into a managerial role in the business operation. [RSA 304-B:19](#). It is important to understand that to maintain the status as a limited partnership, the general partner(s) manage the daily operations of the business, and the limited partners do not.

There are certain registration requirements to form a limited partnership in New Hampshire. These requirements include the following:

- The entity's name must contain the words "Limited Partnership" or the abbreviation "L.P." [RSA 304-B:2](#). For example, the Long Grove Farm Limited Partnership. There is a form to file to reserve the LP's name that is available from the Secretary of State at <https://startabusiness.org/wp-content/uploads/NH-Name-Reservation.pdf>
- File a Certificate of New Hampshire Limited Partnership, which is available from the Secretary of State at <https://sos.nh.gov/corporation-ucc-securities/corporation/forms-and-fees/domestic-and-foreign-limited-partnership/domestic-forms/>
- This form requires the limited partnership's name, address, New Hampshire agent's address, and the names and addresses of general partners. Note that it does not require limited partners to be named. See [RSA 304-B:8](#) (not listing limited partners as a requirement for forming a limited partnership). The limited partnership must maintain a registered office in this state as well as a registered agent within the state. [RSA 304-B:4](#).
- Submit a \$100 filing fee to the Secretary of State.
- Limited partnerships are required to obtain a tax identification number (TIN), also known as an employer identification number (EIN), from the Internal Revenue Service (IRS). You may apply to the IRS online at <https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online>

Although [RSA 304-B](#) allows a partnership agreement to be either written or oral, it is highly recommended that the partners execute a written partnership agreement.

A basic partnership agreement would include the following provisions:

- **Business Purpose Statement:** Carefully explain your business purpose so each partner understands the direction of the business.
- **Principal Place of Business:** State where your business operates.
- **Term of Business:** Determine the term of your partnership. If there is no set term, state just that.
- **Capital Contributions:** Include each partner's capital contribution to the partnership.
- **Profit and Loss Sharing:** This provision determines each partner's profit and loss percentage. [RSA 304-B:29](#).
- **Distribution of Cash and Assets:** Determine how and when to distribute cash and assets of the partnership. [RSA 304-B:30-31](#).
- **Management of the Limited Partnership:** Include in the agreement how the partnership is to be managed, and detail what percentage of votes are required for all of the different types of decisions the partnership will make over its course of operation. [RSA 304-B:18](#); [RSA 304-B:24, I](#); [RSA 304-B:26](#).
- **Withdrawal of a Partner:** Determine in the partnership agreement the partner withdrawal process for both general and limited partners. This process is covered by New Hampshire statute to some extent. [RSA 304-B:32-34](#).
- **Dissolution of Limited Partnership:** Detail when and how the partnership can be dissolved. New Hampshire law also provides dissolution methods, as well. [RSA 304-B:44](#).

The partnership agreement is not filed with the Secretary of State. An advantage that a limited partnership provides over a general partnership is that it may make it easier to attract investors (i.e., limited partners), as the limited partners are protected from personal liability and their exposure is generally limited to the capital they invest in the business. A limited partnership also allows general partners to focus their efforts on running the business.

With regard to federal taxes, limited partnerships are taxed similarly to general partnerships. The profits and losses in a limited partnership flow through the business to the partners, all of whom are taxed on their personal income tax returns. On the State level, the partnership is subject to the Business Profits Tax if the partnership's gross business income exceeds \$50,000. [RSA 77-A:1, I](#); [RSA 77-A:6, I](#). The partnership will also be subject to the New Hampshire Business Enterprise Tax (BET). The BET is imposed if the business has gross business receipts or an enterprise value tax base in excess of stated thresholds. These threshold amounts are subject to change annually. Please review the Department of Revenue's website (<https://www.revenue.nh.gov/>) for the latest threshold amounts. [RSA 77-E:1, III](#); [RSA 77-E:5, I](#).

An important difference from a general partnership is that the limited partners in a limited partnership share in the profits and losses but do not participate in the daily operation or control of the business. Limited partners may leave or be replaced without dissolving the limited partnership. Overall, it is a business structure that allows certain flexibility to those interested in investing in the partnership.

Just the same as the general partnership, the general partners in a limited partnership maintain personal liability for business debts and obligations. That means if the farm cannot pay its bills, a creditor can go after general partners personally for these farm debts. A creditor can attach the debt to property owned by a general partner, garnish wages if a general partner has income from another source, and reach into the general partner's assets held jointly with non-partners, such as joint bank accounts.

The issue of personal liability for company debts should be discussed carefully when determining how to best structure the farm operation.

Limited Liability Company

The Benefits of Limited Liability

A limited liability company (LLC) is a business entity that is governed by [RSA 304-C](#). One or more persons may form an LLC. Like limited partnerships and other

"limited" liability entities, a primary benefit of LLC formation is the limitation of liability for all or certain participants. An LLC is formed by "members," and for all members of an LLC, their personal liability is limited.

Business owners often have to face unfortunate circumstances, like lawsuits by employees and customers, or claims by vendors or suppliers that money is owed. A business owner will usually want to protect personal assets from any troubles that the business may experience. If not, a business owner may have to sell a home or personal vehicle, or liquidate personal bank accounts, to satisfy a legal obligation of the business.

The LLC model provides a layer of protection to its members for all liabilities incurred by the business. To take advantage of this limited liability, though, the members must actually treat the business as a completely separate entity from their personal lives. This means, for example, that funds cannot be commingled; no business money goes into personal accounts and no personal money goes through business accounts. This is true of other "limited" liability business structures, as well.

Members of the LLC

You may be a lone entrepreneur, working independently to pursue your business goals. Or you may be joining with one or more other people. You may be working with family members, friends, or even other businesses. All of these could be members in an LLC. It is important to identify who will be a member of your LLC at the onset of your enterprise, and to make sure that each person involved is given their share of rights and responsibilities within your business, to be allocated among the members however you all decide is fair.

It is equally important to think about who will be members of your LLC in the future. Do you hope that you will be able to pass along your business to your spouse or children in the future? Do you intend to sell your business some day? Do you hope to grow your business and invite new members to join over time? Preparing for these possibilities now will save you from struggling to adjust in the future. They are further examples of what will be included in the Operating Agreement discussed below.

A member has no ownership interest in LLC-owned property. [RSA 304-C:26](#). This means that the members will want to carefully consider what property to bring into the LLC. Once the LLC owns the property, the members, personally, no longer have ownership of the property. Members can, however, retain ownership of real and personal property, while the LLC enjoys full use and enjoyment, by creating lease agreements that lease certain property from the member, individually, to the LLC.

Liability Between Members

What about liability between members of the LLC? As a default rule, if one member of the LLC makes a mistake that harms the business, for example agreeing to sell a crop at too low of a price, that member will not be liable to the other members as long as the conduct was reasonable. Of course, reasonable can mean different things to different people. To avoid confusion on this issue, the members can agree ahead of time on what type of conduct will make a member vulnerable to liability to the other members.

Agreement on issues like this will help preserve harmony among the members in the future. This is but one example of what an attorney will discuss with you and write into an operating agreement.

Who is Responsible for Making Management Decisions?

If you are the only member of your LLC, it makes sense that the management of the business will be in your hands. But if more than one person join together to form a business, it is critical to come to an understanding about who will be responsible for business decisions and to what degree that responsibility will be shared. For example, if there are two members, and one is primarily an investor while the other has more experience in the industry, you might agree that the experienced member should have the sole authority to make management decisions. Members who want to distribute management responsibility equally among all members have that option as well.

Some LLCs choose a specified group of members to make all of the management decisions. Still others hire managers who are not members of the LLC. The LLC business format is very flexible and can accommodate any arrangement of members and responsibilities that you can envision. An attorney can help to put your desired plan into writing.

Managers and members must act on behalf of the LLC. Managers and members have a duty of loyalty and care to the LLC, and are not to put personal interest over the interests of the LLC. [RSA 304-C:66](#) and [110](#). Always keep the LLC bank accounts separate from personal or related LLC accounts. Manage the books separately. Speak to an accountant about these issues for further clarity.

The Operating Agreement

LLCs are extremely flexible, and the operating agreement can be tailored to the liking of the members. A good operating agreement will serve the LLC members as an instruction manual of how to run many aspects of the business. It should address issues such as the following:

- ④ Which members and/or managers are involved in the day-to-day operations of the business;
- ④ What happens when a member leaves or dies;
- ④ To what extent are members liable to each other;
- ④ How new members may join;
- ④ How the LLC should be taxed;
- ④ Who makes management decisions;
- ④ How profits are distributed; and
- ④ Whether managing members or managers are paid a salary.

The operating agreement should also document who invested what into the business (i.e., money and other assets, including equipment or herds), what each member's interest is, and other foundational points of organization. Assets that are property of the LLC at the time of formation should be listed in your operating agreement, attributed to the member who owned the assets prior to formation or the member who purchased the assets.

Registering the LLC

You must register your LLC with the State. Each LLC must file a Certificate of Formation with the New Hampshire Secretary of State that includes the following:

- ④ The name of the LLC;
- ④ The address of its registered office and the name and address of its registered agent;
- ④ The nature of the primary business or the purpose of the LLC;
- ④ Whether the LLC will be managed by its members or by persons, who may also be members, appointed as managers under the operating agreement; and
- ④ Any other information the members or managers decide to include. [RSA 304-C:31](#).

LLCs must also file an Annual Report with the Secretary of State that includes much— but not all—of the same information included in the Certificate of Formation. See [RSA 304-C:194](#) for those requirements. The fee for filing a Certificate of Formation is \$100, and the fee for an Annual Report is \$100. See [RSA 304-C:191](#). Depending on the actions of the LLC there are other forms and fees that must be filed and paid during the life of the LLC, and many of these forms may be filed on line. See [RSA 304-C:191](#) for a list of forms and fees.

Taxes

In New Hampshire, LLCs are not taxable entities. Each member must separately file a personal tax return with the IRS, and any distributions of profits will be reported as income to the individual member. This is different from a traditional corporation that is taxed just like an individual and, on top of that, each shareholder (the equivalent of an LLC member) of the corporation who receives profits from the corporation must also report that income. This concept is often referred to as “double taxation.” One of the biggest advantages of the LLC business type is that it avoids double taxation by taxing income only once, at the individual level.

For federal income tax purposes, an LLC can be classified as a partnership or as an S-Corporation. Partnerships are not taxable entities at the federal level, and therefore, LLCs classified as partnerships will not be taxed directly. The members must report any LLC income on Schedule K with their individual income tax returns. This is the most common method of taxation for New Hampshire LLCs. This election should be specified in the operating agreement.

If you wish to have your LLC classified as an S-Corporation, your business must meet specific criteria set by the federal government. Under the S-Corporation taxation system, members are not taxed based on distributions of LLC profits, but rather on the business income regardless of whether there have been distributions. In order to have a business classified as an S-Corporation, your LLC operating agreement must be more formal to accommodate the federal requirements.

New Hampshire Corporation and S-Corporation

The formation and operations of a New Hampshire Corporation (other than the other types discussed in this chapter) is governed by [RSA 293-A](#). The term “S-Corp” (short for S-Corporation) is not a creature of New Hampshire law but a federal-tax option available to a Corporation or LLC at the time of or any time after their formation.

A Corporation, as opposed to an LLC, has a more rigid management structure and is taxed by the IRS as a separate entity. The Corporation and S-Corp offer substantially similar benefits of the LLC and LLP structures, but require compliance with more formalities. **In order to form a Corporation under New Hampshire law, there are a few requirements to consider:**

- ④ The farm must file with the New Hampshire Secretary of State the Articles of Incorporation, and submit a \$100 fee upon application. The Articles of Incorporation must set forth:
 - ④ The number of shares the corporation is authorized to issue.

- ④ The street address of the corporation's initial registered office and the name of its initial registered agent at that office.
- ④ The name and address of each incorporator.
- ④ The Articles of Incorporation may include additional information, including, but not limited to, the following:
 - ④ The names of the initial directors.
 - ④ Provisions imposing personal liability for debt upon shareholders in certain circumstances.
 - ④ Provisions limiting or eliminating certain liability of directors and officers.
 - ④ Provisions regarding indemnification.
 - ④ The incorporators or Board of Directors of a Corporation must adopt initial bylaws for the corporation. The bylaws of a Corporation typically contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the Articles of Incorporation. [RSA 293-A:2.02](#); [RSA 293-A:2.06](#).

The S-Corp is a pass-through entity for federal tax purposes, whereas a Corporation is subject to double taxation. This means that the business itself is not responsible for paying taxes. Rather, the credits and deductions of the company are passed through to the shareholders (owners) to file on their individual tax returns. Typically, the income will be subject to the self-employment tax. Credits and deductions are split to reflect each shareholder's proportionate interest in the business, with certain exceptions. For example, business expenses are not tax deductible for shareholders who have no direct participation in the S-Corp. It is advisable to consult a tax attorney or tax specialist about the tax consequences of the S-Corp before determining if this is the best fit for your business.

Non-Profit Corporation

There are two types of "non-profits." First, New Hampshire law provides for the formation of a New Hampshire non-profit corporation. Second, there is

federal non-profit status bestowed by the Internal Revenue Service (IRS). Although many New Hampshire non-profits seek and obtain IRS non-profit status in order to have donations made to them be tax-exempt for donors, a New Hampshire non-profit corporation is not required to obtain tax-exempt status from the IRS. Also, a New Hampshire non-profit corporation is not the only type of business entity that is eligible to obtain federal non-profit status.

Other types of entities, including certain types of LLCs, may obtain federal non-profit status, though this is beyond the scope of this discussion.

New Hampshire Non-Profit Corporation

New Hampshire state law—[RSA 292](#)—governs the formation and management of a registered non-profit corporation. A non-profit corporation is not owned by an individual. The non-profit must be for a charitable, religious, civic, educational, social or scientific purpose. The statute provides many possible purposes for which a non-profit may be formed, including "[t]he promotion of agriculture," which would probably include most farming-related non-profit corporations. Nevertheless, there are other listed purposes that might also be relevant for certain farm-related activities, such as the following:

- ④ The planting, cultivation, and protection of shade, ornamental, and forest trees.
- ④ The promotion of the growth and prosperity of cities, towns, and villages, including provision for recreational and athletic facilities for public use; and
- ④ The protection or propagation of fish and game. [RSA 292:1](#).

There are many requirements in the statute ([RSA 292](#)) that the incorporators of a New Hampshire non-profit corporation must follow.

There are, however, three key elements of a non-profit corporation:

- ④ A non-profit must file Articles of Agreement;
- ④ A non-profit must enact bylaws; and
- ④ A non-profit elects a Board of Directors.

To register a non-profit corporation, the organization must submit to the New Hampshire Secretary of State their Articles of Agreement, and include a \$25 filing fee. A copy of the Articles must also be filed in the office of the clerk of the town or city in which the mailing address of the corporation is located.

The statute requires that the Articles contain certain specific information, including, but not limited to the following:

- ④ The name of the corporation. [RSA 292:3](#) provides additional guidance with regard to the name. Note that there is a particular requirement with regard to farmers' markets. A non-profit's name may only include the name "farmers' market" if the entity meets the definition of "farmers' market" in [RSA 21:34-a](#).
- ④ The object for which the corporation is established.
- ④ Provisions for establishing criteria and procedures for membership and participation in the corporation.
- ④ Provisions for the disposition of the corporate assets in the event of dissolution.
- ④ A business address.
- ④ The amount of capital stock, if any, or the number of shares or membership certificates, if any, and provisions pertaining to the treatment of those shares or certificates. [RSA 292:2](#).

The Articles may provide for a Board of Directors, or the directors may be elected by a process set out in the bylaws. The initial bylaws of a non-profit must be approved by a two-thirds majority of the signers of the Articles of Agreement, who may or may not be the directors. A non-profit also has officers that are often appointed at the first meeting of the Board of Directors.

The bylaws should describe the process by which directors are elected and by which officers of the non-profit are appointed. Generally speaking, the Articles of Agreement establish the organization, set out the purpose, and establish the overall scheme of the non-profit, and the bylaws are the internal governing rules of the non-profit. The statute—[RSA 292](#)—provides more detail on amending the bylaws, amending the Articles

of Incorporation, changing the non-profit's name and other matters. Whether certain tasks may be done by the Board, by the shareholders, or by the members is sometimes required by the statute; the statute in many instances offers options that should be considered when drafting the Articles. There is no requirement that the non-profit have members or shareholders, but the statute provides the options. Be aware that [RSA 292](#) does not explicitly state what is required in every instance; rather the statute provides flexibility in many instances. An attorney can help draft Articles of Agreement and bylaws.

The advantages of incorporating as a non-profit include the following:

- ④ Shareholders and members are protected from personal liability for the obligations and liabilities of the corporation;
- ④ Non-profits have the option of limiting or eliminating personal liability of officers and directors with regard to many actions; and
- ④ Non-profits have more freedom than for-profits to focus on social missions.

Federal Non-Profit Status

A registered New Hampshire non-profit, and certain other business entities, may apply to the IRS for tax-exempt status under [26 U.S.C. § 501\(c\)](#). This is generally known as "501(c)" status. Only certain kinds of non-profit corporations may qualify, usually depending on how a corporation's income is expended and the detail under which the non-profit operates. Becoming a 501(c) non-profit takes time and effort.

The first step to becoming a 501(c) non-profit is to become a New Hampshire non-profit, or other type of eligible entity, as discussed above.

The second step is to contact the IRS to obtain an employer identification number (EIN), a.k.a. tax identification number (TIN).

The third step is to submit a completed IRS Form 1023. The Form 1023 is a long and detailed application, much

more detailed than the Articles of Incorporation or bylaws of a New Hampshire non-profit. The IRS Form 1023 can be found here:

www.irs.gov/pub/irs-pdf/f1023.pdf

The more complete the Form 1023 is, the higher the likelihood that the IRS will approve the form and in a speedier manner. Consulting an attorney or tax specialist can greatly improve your chances at receiving federal 501(c) tax-exempt status.

Here are a few most recognizable advantages of operating as a 501(c) entity:

- ④ A 501(c) non-profit is exempt from paying business income tax at the federal and state level.
- ④ A 501(c) non-profit can receive grants and government money perhaps easier than a for-profit farm. Sometimes foundations and government agencies limit their grants to public charities and organizations.
- ④ A 501(c) non-profit can receive tax-deductible donations from people and businesses. This can be helpful for raising money.
- ④ Creditors are limited to the assets of the nonprofit organization. The founders, directors, members, and employees are generally not personally liable for the nonprofit's debts, subject to certain exceptions.

A non-profit can hire unpaid volunteers and interns. If a farm wants to reach out to beginning farmers or those interested in learning farming skills, a non-profit can take on such people at little or no cost to the farm. A for-profit farm, in contrast, cannot easily take on a volunteer or intern because of relevant federal and state labor laws.

Incorporating as a non-profit is not the right structure for most farm or agricultural organizations. Some difficult hurdles to consider when determining whether the non-profit structure is possible for your farm include:

- ④ A non-profit farm must operate for a public purpose. A non-profit farm cannot operate solely as a for-

profit business. Rather, it must have a larger purpose such as education, community support through food, or the like. This is a commitment in which a farm must be willing and able to enter.

- ④ Paperwork can be difficult. A nonprofit must keep detailed records and submit periodic filings to the New Hampshire Secretary of State and IRS by certain deadlines in order to remain in good standing and retain its tax-exempt status.
- ④ Founders, board members, employees, and others cannot retain ownership in the non-profit. A non-profit is not owned by any founder, incorporator, board member, employee, or any other person. This means the non-profit organization cannot be passed on from one generation to the next.
- ④ All financial documents of the non-profit are open to the public.

The Lease Option: Protect Your Farmland from Business Liabilities

Many farmers own the farmland on which their farm operates. It seems an obvious relationship; the farm owner operates the farm on the farmland and considers this land a farm asset. Although this method of operation seems to be the default, all landowners should consider what legal effect this has on the farm.

Operating the farm with such a large asset (i.e., the farmland) potentially exposes the farmland to attachment by unpaid creditors for unpaid liabilities or court judgments against the farm or landowner personally. An attachment is the legal process, similar to a lien, by which a debt (including a court judgment) encumbers a debtor's property. Creditors and courts can reach the assets of a business to the extent the business owns the assets.

Lease agreements can protect against a farm's creditors and courts from attaching debts and judgments to land on which the farm operates. When a business is structured as a limited liability entity (for example, LLC, LLP, C-Corp, non-profit), creditors can only reach the

assets of the business. Farmland that is leased to an LLC, for example, is not an asset of the LLC, though the lease itself is.

A lease might be useful in the following way: The landowner, often the farm owner, leases the farmland to the business entity through a formal lease agreement. The lease can cover the entire farm or a portion of the farm. Assuming the farm business formalities are met, the business creditors of the farm business will not likely be able to reach the farmland to satisfy the farm business's debts or judgments because the farmland is not an asset of the farm business that the farm business owns. The farm business's interest in the farmland only extends to what the lease offers.

When creating a valid commercial lease, remember the following:

- ④ The lease must be signed by the landowner and acknowledged by the tenant (farm business) before a justice, notary public or commissioner and must contain the mailing address of the tenant. [RSA 477:3](#).
- ④ If the lease is a term greater than seven years, the lease must be recorded at the county registry of deeds to be valid against third parties, i.e. future purchaser of the leased property, foreclosure, and other such events. [RSA 477:7](#).
- ④ If leasing between the farmer, personally, and the farmer's business entity, make sure to memorialize the agreement in writing and mind all the lease formalities. Keep checkbooks separate, follow the terms of the agreement, and treat the relationship as it is an arms-length transaction. Commingling funds and not following the terms of the agreement could compromise limited liability status.
- ④ For tax purposes, the monthly rent the farm business is to pay the landowner should be fair market value. This allows the business to write the cost of rent off as a business expense.

Taxation and the Farm Business

This section discusses federal and state taxation in broad terms. Taxes that are covered and may apply to farmers in New Hampshire include: interest & dividend tax, business enterprise tax, business profits tax, meals & rooms tax, real estate transfer tax, current use tax, farm structures and land under farm structures tax.



Farmers, whether considering forming a business organization or working as a sole proprietor, should consult with a trusted and competent tax professional before forming their entity. A tax professional can also help farmers track the tax basis of each asset the farm business holds (for depreciation and other purposes). An accountant can also determine whether transferring an asset to the control of the business will incur a capital gain or income tax. Accountants and related professionals are sometimes available through commercial banks, or farm service agencies.

Federal Taxation

The Internal Revenue Service (IRS) approaches taxation of business entities in three different ways.

- ④ **Pass-through entities:** The IRS allows some business organizations to be classified as “pass-through” entities that report the business income and expenses to the IRS but do not incur their own tax liability. The business itself will not incur any business income tax because the tax liability “passes through” to the individual owners.
- ④ **Double-taxation entities:** Other corporate entities must pay tax on business income before that income can be distributed to owners in the form of a dividend. When owners receive a dividend, they must include that dividend as income on their personal income tax returns. This is referred to as “double taxation.”
- ④ **Disregarded entities:** In some circumstances, the IRS completely disregards the business’s status as a separate entity and treats the business as a sole proprietorship for tax purposes. The IRS, for instance, will usually treat an LLC that is wholly owned by a single individual as a disregarded entity.

REGULATIONS CITED FOR TAXATION AND THE FARM BUSINESS

State Taxes

RSA 77-A
RSA 77-E

Business Enterprise Tax

RSA 77-E:1, III
RSA 77-E:1, IX
RSA 77-E:5
RSA 77-E:6

Business Profits Tax

RSA 77-A: 1, IV
RSA 77-A:2
RSA 77-A:4
RSA 77-A:4,II9a)
RSA 77-A:6
RSA 77-A:7

Interest and Dividend Tax

RSA 77-1
RSA 77-3
RSA 77-4
RSA 77-5
RSA 77:18

Meals and Rooms Tax

RSA 78-A:3
RSA 78-A:4
RSA 78-A:6
RSA 78-A:7
RSA 78-A:8
RSA 78-A:9

NH Code of Administrative

Rule Rev 701.23

NH Code of Administrative

Rule Rev 706.04

Real Estate Transfer Tax

RSA 78-B:1
RSA 78-B:2
RSA 78-B:4
RSA 78-B:8

Current Use Tax

RSA 79-A:1
RSA 79-A:7
RSA 79-A:7, I
RSA 79-A:7, IV
RSA 79-F
Current Use Rules Cub
301.04
Current Use Rules Cub
303.02
Current Use Rules Cub
304.01(b)(3)
Current Use Rules Cub
304.17

Farm Structures Tax

RSA 79-F:2
RSA 79-F:3
RSA 79-F:4
RSA 79-F:5

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See the New Hampshire Business Organizations chapter for information on various types of business entities and their tax treatments. Also, for further understanding federal income tax laws as they relate to farmers, see the following resources:

- <http://extension.psu.edu/business/ag-alternatives/farm-management/understanding-your-federal-farm-income-taxes>
- www.irs.gov/pub/irs-pdf/p225.pdf

State Taxes

New Hampshire does not impose an income tax on individual income reported on IRS Form W-2. New Hampshire does, however, tax corporate dividends, investment income, business profits, and business enterprises, among other things.

Note, that although the IRS allows some business organizations to be classified as “pass-through” entities, New Hampshire tax law does not recognize pass-through tax treatment. Companies that are pass-through entities at the Federal level are still subject to the New Hampshire Business Profits Tax and Business Enterprise Tax. **RSA 77-A** and **77-E**. Speak with a tax specialist about how this New Hampshire state tax affects your business.

State taxes that may be of interest to farmers and food businesses include the following, each of which are discussed in basic terms below:

- ④ Business enterprise tax;
- ④ Business profits tax;
- ④ Meals and rooms tax;
- ④ Real estate transfer tax;
- ④ Current use tax, and
- ④ Farm structures and land under farm structures tax.

It is advisable to consult a tax professional if your business is subject to one or more of these taxes, with the exception of the real estate transfer tax, which applies to most real estate transactions.

Business Enterprise Tax

New Hampshire assesses a business enterprise tax on the enterprise tax base of all for-profit businesses (and New Hampshire non-profits that are not recognized by the IRS as 501(c) entities) that do business within the state. **RSA 77-E:1, III**. The enterprise tax base is the sum of all compensation paid or accrued, interest paid or accrued, and dividends paid by the business enterprise, after certain adjustments and apportionment. **RSA 77-E:1, IX**. The business may also be subject to the New Hampshire Business Enterprise Tax (BET). The BET is imposed if the business has gross business receipts or an enterprise value tax base in excess of stated thresholds. These threshold amounts are subject to change annually. Please review the Department of Revenue's website (<https://www.revenue.nh.gov/>) for the latest threshold amounts. **RSA 77-E:5**. Every business must also file a declaration of its estimated business enterprise tax for the subsequent tax year, unless the estimated tax is less than \$260. **RSA 77-E:5**. Any business required to file an estimated tax declaration must also pay its estimated tax quarterly. **RSA 77-E:6**.

The Business Enterprise Tax return due date depends on the form of the business entity. Corporate returns must be filed by the 15th day of the 3rd month after the end of the taxable period. **RSA 77-E:6**. Other entities must file a return by the 15th day of the fourth month after the end of the taxable period. **RSA 77-E:6**.

For more information visit the following websites:

- ④ The New Hampshire Department of Revenue's Business Enterprise Tax
<http://revenue.nh.gov/faq/business-enterprise.htm>
- ④ New Hampshire Business Enterprise Tax Statutes
www.gencourt.state.nh.us/rsa/html/V/77-E/77-E-mrg.htm
- ④ New Hampshire Business Enterprise Administrative Rules
http://www.gencourt.state.nh.us/rules/state_agencies/rev2400.html

Business Profits Tax

New Hampshire taxes business profits at 7.7 percent. The rate will change for taxable periods ending on or after December 31, 2021. **RSA 77-A:2**. Depending on the type of business entity, business profits subject to the tax are defined in the statute. **RSA 77-A:1, III, IV**. The statute describes what additions and deductions may be made to arrive at the tax due. **RSA 77-A:4**. For example, a sole proprietorship, partnership, and LLC may deduct a certain amount of compensation related to services provided by the sole proprietor, a partner, or a member. **RSA 77-A:4, III(a)**.

Any business with gross business income greater than \$50,000 is required to file a Business Profits Tax return, as well as any business that realizes a gain or loss on the sale or exchange of an interest in the business even if that business's gross business income is below \$50,000. **RSA 77-A:6**. Every business must also file a declaration of its estimated business profits tax for the subsequent tax year, unless the estimated tax is less than \$200. **RSA 77-A:6**. Any business required to file an estimated tax declaration must also pay its estimated tax quarterly. **RSA 77-A:7**. The sale of agricultural land development rights can constitute business income as proceeds from the sale of business assets. Rev 302.08.

The Business Profits Tax return due date depends on the form of the business entity. Corporate returns must be filed by the 15th day of the 3rd month after the end of the taxable period. **RSA 77-A:6**. Other entities must file a return by the 15th day of the fourth month after the end of the taxable period. **RSA 77-A:6**.

For more information visit the following websites:

- ④ The New Hampshire Department of Revenue's Business Enterprise Tax FAQ:
<http://revenue.nh.gov/faq/business-profits.htm>
- ④ New Hampshire Business Profits Tax Statutes:
www.gencourt.state.nh.us/rsa/html/V/77-A/77-A-mrg.htm
- ④ New Hampshire Business Profits Rules:
www.gencourt.state.nh.us/rules/state_agencies/rev300.html

Interest and Dividend Tax

Under New Hampshire law, interest and dividends are taxed as individual income at a rate of five percent.

RSA 77-1. Certain newly issued stock and returns of capital, as characterized by Federal tax law, are not taxable. **RSA 77-4**. Individuals whose gross income from interest and dividends is less than \$2,400 are exempt, and the first \$2,400 is exempt from the Interest and Dividend Tax. **RSA 77-3** and **RSA 77-5**.

A tax return must be filed with the New Hampshire Department of Revenue on or before the fifteenth day of the fourth month following the end of the taxable period. **RSA 77-18**. For businesses owing \$500 or more in taxes, a declaration of estimated tax for the subsequent period must also be filed. **RSA 77-18**. Where a declaration of estimated tax must be filed, the taxpayer must also file 1/4 of the estimated tax every quarter. **RSA 77-18**. For more detail, speak with a tax specialist about your particular circumstances.

More information can be found at the following websites:

- ④ The New Hampshire Department of Revenue's Dividend and Interest Tax FAQ:
<http://revenue.nh.gov/faq/interest-dividend.htm>
- ④ New Hampshire Income Tax Statutes:
www.gencourt.state.nh.us/rsa/html/V/77/77-mrg.htm
- ④ New Hampshire Interest and Dividends Tax Rules:
www.gencourt.state.nh.us/rules/state_agencies/rev900.html

Meals and Rooms Tax

New Hampshire imposes a 9% tax on room rentals and a tax of up to 9% on meals costing more than \$0.35. **RSA 78-A:6**. This tax applies to meals, regardless of whether the meal is eaten in or taken out, served by restaurants, snack bars, vending machines, convenience stores, and any other establishment in which meals are served. **RSA 78-A:3**. The responsibility for collecting this tax falls on restaurants and hotels. **RSA 78-A:7**.

The Meals and Rooms Tax is administered by means of a Meals and Rooms license. **RSA 78-A:4**. A monthly

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tax return must be filed by each registered business, and renewed every two years. **RSA 78-A:8**. A license holder must file the monthly return even if it did not collect any meals and rentals tax during the previous month. **RSA 78-A:8**.

Seasonal businesses may become exempt from filing during their off-season by applying to the New Hampshire Department of Revenue. **RSA 78-A:9**.

Businesses can qualify as seasonal only if they operate for one continuous season during the year. **Rev 701.23**. A business must be open for a consecutive series of months to qualify as “seasonal.” **Rev 706.04**.

More information can be found online:

- ④ NH Department of Revenue Meals and Rooms Booklet
<https://www.revenue.nh.gov/forms/2019/documents/2019-mr-booklet-print.pdf>
- ④ NH Department of Revenue Meals and Rental FAQ
<http://revenue.nh.gov/faq/meals-rooms.htm>
- ④ New Hampshire Tax on Meals and Rooms Statute
www.gencourt.state.nh.us/rsa/html/V/78-A/78-A-mrg.htm
- ④ New Hampshire Meals and Rentals Tax Rules
www.gencourt.state.nh.us/rules/state_agencies/rev700.html

Real Estate Transfer Tax

New Hampshire taxes the transfer, sale, or granting of real property, or an interest in real property. **RSA 78-B:1**. The tax rate is \$0.75 per \$100 of the price or consideration of the sale or transfer for transfers where consideration is \$4,000 or less. **RSA 78-B:1**. Transfers of \$4,000 or less require the minimum tax be paid. **RSA 78-B:1**. The tax is assessed upon both the buyer and the seller of the property, with a minimum charge of \$20 imposed on each party. **RSA 78-B:1; RSA 78-B:4**. The tax must be paid at the Register of Deeds in the county where the property is located. **RSA 78-B:8**. Certain transfers are exempt from this tax. See **RSA 78-B:2**.

Of note, when transferring a farm property into an LLC so that the LLC owns it, not the individual, such transfer

may or may not be exempt from paying the real estate transfer tax, depending on the circumstances.

For more information:

- ④ New Hampshire Real Estate Transfer Tax Statute:
www.gencourt.state.nh.us/rsa/html/V/78-B/78-B-mrg.htm
- ④ New Hampshire Real Estate Transfer Tax Rules:
www.gencourt.state.nh.us/rules/state_agencies/rev800.html

Current Use Tax

New Hampshire law provides favorable property tax rates if the property is kept in its traditional use, such as open space, forestry, agriculture, as opposed to taxing a property at its “highest and best use” as a developable property. See **RSA 79-A:1**. This status and the lower taxation rate is called “current use.” Parcels of contiguous land 10 acres or more in size that are in current agricultural use, forestry use, or are unproductive, are eligible to be assessed as being in current use and taxed at a rate lower than the assessed property value of the land.

Smaller parcel of undeveloped land can qualify for current use assessment if the parcel is actively devoted to the growing of agricultural or horticultural crops with an annual gross income from the sale of crops normally produced thereon totaling at least \$2,500. **Cub 304.01(a)(5)**. The landowner must prove to the local assessor that the \$2,500 gross income level was achieved in the previous year. **Cub 304.01(a)(5)**.

Placing land in current use is a commitment and should be carefully considered because if the use changes and the land is taken out of current use, the land is subject to a Land Use Change Tax (LUCT). **RSA 79-A:7**. Once development begins, the land no longer qualifies for current use taxation. The LUCT is triggered by the beginning of construction of, for example, a road, building, or utility; the excavation of topsoil, gravel, or minerals for a non-agricultural purpose; or the sale of excavated materials. **RSA 79-A:7, IV**. The LUCT is assessed at 10 percent of the value of the land as assessed at ordinary rates. **RSA 79-A:7, I**.

“Curtilage” refers to the land beneath and surrounding the structure, including a groomed yard and the land necessary to provide support and service to the structure. **Cub 301.04**. This land may be eligible for reduced taxation under **RSA 79-F**, Taxation of Farm Structures and Land Under Farm Structures. See section below for details.

More information can be found online:

- ④ The State of NH Current Use Criteria Booklet:
<https://www.revenue.nh.gov/current-use/documents/2019-booklet.pdf>
- ④ New Hampshire Current Use Statute:
www.gencourt.state.nh.us/rsa/html/V/79-A/79-A-mrg.htm
- ④ New Hampshire Current Use Tax Rules:
http://gencourt.state.nh.us/rules/state_agencies/cub.html

Farm Structures and Land Under Farm Structures Tax

New Hampshire law allows New Hampshire towns to adopt a method for the assessment of farm structures and the land under such structures to be assessed at a rate similar to the Current Use assessment rate. **RSA 79-F:2**. Under this system, qualifying farm structures are to be assessed at no more than their replacement costs minus depreciation. **RSA 79-F:4**. The land under a qualifying farm structure shall be assessed at no more than ten percent of its fair market value, provided that such land is contiguous to at least 10 acres of open space land. **RSA 79-F:4**.

Qualifying farm structures are structures which are used exclusively for agricultural purposes, including: housing livestock; storing feed; livestock bedding; crops; fertilizer; farm equipment in active use; or to boil maple sap or store fuel wood used to boil maple sap. **RSA 79-F:3**. Land and qualifying farm structures which have been assessed under this Farm Structures Tax law will be subject to a Use Change Tax if they are used in ways which cause them no longer to qualify for the requirements of the law. **RSA 79-F:5**.

The landowner having qualifying farm structures in a town that has adopted the Farm Structure Tax law must fill out Department of Revenue Form PA-48, found here: <https://www.revenue.nh.gov/forms/2017/documents/pa-48-print.pdf> before April 15 of the tax year in which the assessment is to be granted. **RSA 79-F:4**.

More information can be found online:

- ④ New Hampshire Taxation of Farm Structure and Land Under Farm Structures Statutes:
<http://www.gencourt.state.nh.us/rsa/html/V/79-F/79-F-mrg.htm>

For additional information on all topics above, contact:

New Hampshire Department of Revenue
109 Pleasant Street
Concord, New Hampshire 03301
Phone: (630) 230-5000

Interstate Commerce: Sales and Transit Regulations

There are several federal agencies involved in regulating farming operations including the United States Department of Agriculture (USDA), the Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA). This chapter will outline responsibilities of each and how it applies to sales and transit.



Federal Law Often Applies to Agriculture

The United States Constitution empowers Congress to regulate commerce among the states (i.e., “interstate commerce”). See **U.S. Const. Art. I, § 8, Cl. 3**. This section is known as the Commerce Clause. Under the law, very few commercial activities are *clearly* not part of interstate commerce; a great many commercial activities are *very likely* to be part of interstate commerce, and a great many more commercial activities are *certainly* part of interstate commerce.

Pursuant to the Commerce Clause, all farmers and food producers who intend to transport their produce across state lines must comply with federal regulations governing the transportation and sale of food products. See *Wickard v. Filburn*, 317 U.S. 111 (1942). Many farmers or food producers who intend to operate on a purely local level must also operate under these same laws. *Id.*

The Commerce Clause has been interpreted by the U.S. Supreme Court as allowing Congress to regulate any economic activity that has a “substantial effect” on interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). To determine if an activity is subject to federal laws that are validly enacted pursuant to Congress’s Commerce Clause authority, the court essentially considers whether, in the aggregate, the purely in-state activity will have a substantial effect on interstate activity. *Id.* at 22. If so, then Congress may regulate that in-state activity under the Commerce Clause. As a result, Congress’s ability to regulate under the Commerce Clause often extends into agricultural activities, even when those activities might appear to be local and non-economic. Many of those federal statutes, or the powers conferred by them, are discussed below.

Federal jurisdiction is broadly construed and may apply to an operation regardless of clear intentions to conduct business only on a small and localized

REGULATIONS CITED FOR INTERSTATE COMMERCE

U.S. Const. Art. I, § 8, Cl. 3

USDA Oversight

www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/slaughter-inspection-101/slaughter-inspection-101

www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs/cis

www.ncsl.org/documents/agri/foodsafetylaws.pdf

www.ams.usda.gov/grades-standards

FDA Oversight

29 U.S.C. § 341

29 U.S.C. § 392

21 C.F.R. § 1240.61

21 C.F.R. § 110.5

www.fda.gov/AboutFDA/Transparency/Basics/ucm194879.htm

www.fda.gov/Food/ResourcesForYou/Industry/ucm322302.htm#Inspections

www.fda.gov/Food/ComplianceEnforcement/FoodCompliancePrograms/default.htm

www.fda.gov/food/guidanceregulation/federalstatefoodprograms/ucm2007965.htm

www.fda.gov/downloads/Food/GuidanceRegulation/UCM209789.pdf

EPA Oversight

7 U.S.C. §§ 136-136y

21 U.S.C. § 342

42 U.S.C. §§ 300f-300j-26

www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities

www.fda.gov/iceci/inspections/fieldmanagementdirectives/ucm096030.htm

www.epa.gov/pesticide-tolerances/setting-tolerances-pesticide-residues-foods

FIFRA

www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities

FDCA

www.fda.gov/regulatoryinformation/legislation/federalfooddrugandcosmeticactfdca/default.htm

Food Quality Protection Act

www.epa.gov/laws-regulations/summary-food-quality-protection-act

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scale. Familiarity with the federal agencies involved and the regulations that apply once federal jurisdiction is established is an essential part of doing business.

Federal Agencies Involved

The primary federal agencies involved in regulating farming operations include the United States Department of Agriculture (USDA), the Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA). The Centers for Disease Control and Prevention (CDC) and the Department of Health and Human Services (DHHS) also have some involvement.

The USDA inspects meat, poultry, and egg products that will be sold in interstate commerce and regulates labeling and packaging. The FDA oversees all other foods, including wild game, which is not included in the definition of “meat” for purposes of the USDA’s oversight.

The EPA regulates the use of pesticides, among other activities. The CDC has numerous programs related to agriculture, including programs about diseases and occupational safety. DHHS is involved with food and health.

USDA Oversight

A central responsibility of the USDA is to inspect and regulate meat, poultry, and egg products destined for interstate commerce. The USDA’s Food Safety and Inspection Services (FSIS) enforces laws that are intended to ensure that meat, poultry, and eggs are safely packaged and safe for consumption. See:

www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/slaughter-inspection-101/slaughter-inspection-101.

For example, FSIS physically inspects for disease all animals slaughtered at federally inspected slaughtering

facilities. Id. Only meat from federally inspected facilities may be shipped interstate, though a growing FSIS program allows meat from state-inspected slaughterhouses to be shipped interstate under certain circumstances. See: www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs/cis.

However, as of 2017 New Hampshire is not a participating state because New Hampshire is not one of the 27 states that have their own state inspection programs. Thus, New Hampshire defers to the federal meat, poultry and other food safety requirements. See: www.ncsl.org/documents/agri/foodsafetylaws.pdf.

Additional products and practices that fall within the USDA’s regulatory range include processed foods, processed egg products, baked goods, honey, maple syrup, and dairy farming. See www.ams.usda.gov/grades-standards.

For more information, contact the USDA at:

U.S. Department of Agriculture
1400 Independence Ave., S.W.

Washington, DC 20250

Information Hotline: (202) 720-2791

or visit the following websites:

USDA Website:

www.usda.gov/wps/portal/usda/usdahome

FSIS Website:

www.fsis.usda.gov/Regulations_&_Policies/index.asp

FDA Oversight

The FDA is generally responsible for food safety under the authority of the Federal Food, Drug, and Cosmetics Act (FDCA), which empowers the FDA to regulate food, animal feed, veterinary drugs and pesticides. To learn about the range of products regulated by the FDA, see

www.fda.gov/AboutFDA/Transparency/Basics/ucm194879.htm.

The FDA's regulatory authority extends to food labeling and food safety, covering all stages of the operation, from the growing and raising of farm products to their final consumption. See **21 U.S.C. § 341**.

All foods are subject to FDA regulation except meats and meat food products. **21 U.S.C. § 392**. The FDA does, however, regulate game meats, such as venison, ostrich, and snake. FDA ICECI Investigations Operations Manual (2015), Exhibit 3-1, page 104. The regulations are intended to assure that foods are safe to eat, pure, wholesome, and produced under sanitary conditions.

FDA inspectors may inspect any establishment where food is processed, packaged, or held for distribution into interstate commerce. See: <https://www.fda.gov/food/compliance-enforcement-food>

Also subject to inspection are products after shipment, the vehicles used to distribute the food, equipment, finished products, containers, and labeling.

The FDA has certain specific food compliance programs regarding specific topics, including the following: Acidified and Low Acid Canned Foods, Color Additives, Dietary Supplements, Food Ingredients and Packaging, Foodborne Illness, Food Labeling and Nutrition, Infant Formula, Pesticides and Chemical Contaminants, and Seafood. See:

www.fda.gov/Food/ComplianceEnforcement/FoodCompliancePrograms/default.htm

The FDA also has jurisdiction over dairy products in interstate commerce. **21 C.F.R. § 1240.61**; see also:

www.fda.gov/food/guidanceregulation/federalstatefoodprograms/ucm2007965.htm

FDA inspectors may visit on-farm dairy processing plants. Id. Inspections are based upon the federal Pasteurized Milk Ordinance. See: <https://www.fda.gov/media/114169/download> and **21 C.F.R. § 110.5** (Good Manufacturing Practices), both of which offer guidance for most dairy processing activities.

For more information, contact the FDA at

U.S. Food and Drug Administration

10903 New Hampshire Avenue

Silver Spring, MD 20993-0002

1-888-INFO-FDA (1-888-463-6332)

or visit the FDA website:

www.fda.gov/Food

EPA Oversight

The EPA implements the nation's pesticide law, under which it establishes the lawful uses and use conditions for pesticides, including those used in food production. **7 U.S.C. §§ 136 to 136y**. EPA's regulatory oversight arises under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the FDCA (discussed above). See: **<https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities>**.

The EPA is also responsible for regulating the amount of an agricultural pesticide that can legally remain in and on foods. See: **www.epa.gov/pesticide-tolerances/setting-tolerances-pesticide-residues-foods**.

If residue levels in the food exceed the tolerance, the food is considered adulterated under the FDCA. **21 U.S.C. § 342**. Pesticide use restrictions are enforced by state agencies under contract to EPA, while FDA enforces pesticide tolerances.

The EPA also has the responsibility for developing national standards for drinking water from municipal water supplies. **42 U.S.C. §§ 300f-300j-27**.

For more information, contact the EPA at:

Environmental Protection Agency

5 Post Office Square - Suite 100

Boston, MA 02109-3912

Phone: (617) 918-1111

Fax: (617) 918-1809

Or visit these websites:

EPA Website: **www.epa.gov/**

FIFRA: **www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities**

FDCA: : **<https://www.fda.gov/regulatory-information/laws-enforced-fda/federal-food-drug-and-cosmetic-act-fdc-act>**

Food Quality Protection Act: **www.epa.gov/laws-regulations/summary-food-quality-protection-act**

Weights and Measures

Uniformity in weights and measures is important for all farmers to adhere to. New Hampshire has adopted the national regulations from the National Conference on Weights and Measures, which is detailed in this chapter.



NH Agricultural producers must comply with state laws and rules pertaining to Weights and Measures when offering products for sale. The NH Department of Agriculture, Division of Weights & Measures (here, referred to here as the “Division”) regulates commodities sold by weight or measure in state commerce to help ensure consumers and businesses receive accurate quantities. The following is a summary of those rules most likely to pertain to agricultural producers as set forth in NH Rules and Regulations CHAPTER Agr 1400 WEIGHTS AND MEASURES, NH [RSA 438](#), and NIST Handbook 130. This summary includes rules pertaining to sale of commodities and those pertaining to annual certification and licensure of scales and other commercial devices.

**REGULATIONS CITED FOR
WEIGHTS AND MEASURES**

NH Rules and Regulations:
Agr 1400

WEIGHTS AND MEASURES
Agr 1411
Agr 200
RSA 438
NIST Handbook 44
NIST Handbook 130

Sale of Commodities

The purpose of these regulation is to require accurate and adequate information about commodities so that purchasers can make price and quantity comparisons.

All nomenclature, procedure, and methods of sale of commodities in this state shall comply with the National Institute of Standards and Technology Handbook 130 and all amendments to such handbook, unless otherwise provided in chapter Agr 1400.

1. **Systems of Weights and Measures:** The International System of Units (metric system) and the system of weights and measures in customary use in the United States (inch-pound system) are jointly recognized, and either one or both of these systems shall be used for all commercial purposes in the state.
 - i. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by NIST are recognized and shall govern weighing and measuring equipment and transactions in the state.

- ii. Commodities in liquid form shall be sold only by liquid measure or by weight. Commodities not in liquid form shall be sold only by weight, by measure of length or area, or by count. The method of sale shall provide accurate and adequate quantity information that permits the buyer to make price and quantity comparisons. These provisions shall not apply to:
 - 1) commodities when sold for immediate consumption on the premises where sold,
 - 2) vegetables when sold by the head or bunch,
 - 3) commodities in containers standardized by a law of this state or by federal law,
 - 4) commodities in package form when there exists a general consumer usage to express the quantity in some other manner,
 - 5) concrete aggregates, concrete mixtures, and loose solid materials such as earth, soil, gravel, crushed stone, and the like, when sold by cubic measure, or
 - 6) unprocessed vegetable and animal fertilizer when sold by cubic measure.
- 2. **Net Weight:** “Net weight” means the weight of a commodity excluding any materials, substances, or items not considered part of the commodity. Materials not considered part of the commodity include, but are not limited to, containers, wrappers, packaging materials, labels, individual piece coverings, coupons, etc. Whenever any commodity is sold by weight, the net weight of the commodity shall be employed.
- 3. **Labeling of Packages of Commodities:** Packages of commodities introduced into intrastate commerce, or offered for sale or sold in intrastate commerce, shall be plainly and conspicuously labeled to show the identity of the commodity, unless that can be plainly seen through the wrapper or container; the net contents stated in terms of weight, measure, or count; and if the commodity is offered for sale or sold in a place other than on the premises where it was packed, labeled to show the name and place of business of the manufacturer or grower; and the name and place of business of the packer, if the packer is different from the manufacturer or grower.
 - i. When a packaged consumer commodity is measured in terms of count only, or in terms of count and some other appropriate unit, weight or measure, and the individual units are fully visible to the purchaser, the packages shall be labeled in accordance with NIST Handbook 130, Uniform Laws and Regulations, IV Uniform Regulations, A, Uniform Packaging and Labeling Regulation, provided that the labeling on packages confined to intrastate commerce and containing 6 or fewer items shall not be required to include a statement of count; and the labeling on packages that might enter interstate commerce shall include a statement of count unless the count is one.
 - ii. Any package being one of a lot containing random weights of the same commodity, at the time it is offered or exposed for sale at retail, shall bear on the outside of the package a plain and conspicuous declaration of the price per kilogram or pound and the total selling price of the package.
- 4. **Posting of Prices by Grocery Stores.** Here, the term “grocery store” means any establishment or section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption. The term includes delicatessens that offer prepared food in bulk quantities only. The term does not include establishments which handle only prepackaged, non-potentially hazardous foods; roadside markets that offer only fresh fruits and fresh vegetables for sale; food service establishments; or food beverage vending machines.
 - i. Any person who offers items for sale in a grocery store shall mark clearly upon the package of each item sold in packaged form the price of such item, or shall place under the shelf containing the item a uniform shelf tag, or a larger sign indicating item price. A uniform shelf tag shall include:
 - The regular price of each individual item (the price numbers shall be at least 7/16 of an inch in height);
 - The unit price; and
 - The name of the item or a description of the item.

- ii. Snack items (defined as: any prepackaged food item weighing 4 ounces or 113 grams or less and any prepackaged beverage item 2 liters or less in volume and designed for immediate consumption) and cold beverages (defined as: prepackaged liquid items, including ice cream products, artificially cooled to temperatures of less than 40 degrees F, whether sold individually or in clusters of more than one) may be priced individually or priced using a shelf tag as described in the above paragraph. Displays of snack items and cold beverages containing more than one item of a similar commodity, such as candy bars or ice cream novelties (including ice cream bars, ice pops, ice cream sandwiches, ice cream cones and other similar ice cream products), may be priced using a placard or shelf tag which is adjacent to the display and which lists the price of each or all of the items in the particular display.
5. **Bulk Food Commodities:** The price of food commodities sold from bulk shall be computed in terms of the price of whole units such as kilograms, pounds, ounces, gallons and liters, and not in terms of fractions or decimals of units and shall be posted, displayed and advertised as such. When the price of food commodities is posted, displayed or advertised in terms of the price of a whole, supplemental posting, display or advertising of the price in terms of a fraction or a decimal of the unit shall be permitted if such posting, display or advertising is in print no larger than that used to post the whole-unit price and if the mathematical conversion of the price per decimal or fraction of the unit to the price in terms of the whole unit computes to the whole-unit price to the nearest cent.
 - i. If a retailer elects to provide a container for a food commodity sold from bulk, the weight of the container shall not be included when the commodity is weighed for the purpose of computing the cost to the customer. However, the retailer may make a separate charge for the container if such separate charge is conspicuously posted, displayed and advertised in association with the whole-unit price of the commodity.
 - ii. If a retailer computes the net weight of a food commodity through a computer, cash register or other electronic device, the customer shall receive a receipt that includes the net weight, price per unit and total price.
 6. **Bulk Candy:** Candy sold from bulk, such as lollipops and individually wrapped candies, shall be sold by net weight. The weight of the sticks and other materials used to convey the candy shall not be included in the net weight. If the candy is pre-packed in containers or wrappers bearing a declaration of weight, measure or count, it shall not be sold from bulk.
 7. **Bread:** Bread kept, offered or exposed for sale, whether or not packaged or sliced, shall be sold by weight. If the bread is in a display or cabinet, the posting of its weight shall be closely and conspicuously associated with the posting of the price and both postings shall be in a size and location such that they can be read by a customer standing in a reasonable location. If the bread is wrapped, the price and weight may be displayed on the wrapper so long as customers have access to the wrapped bread.
 8. **Dry Volume Containers For Fruits and Vegetables:** If a merchant offers for sale, exposes for sale or sells fruit or vegetables by dry volume, the size of the container holding the fruit or vegetables shall be proportional to the quantity of fruit or vegetables being exposed, offered or sold and shall not mislead the customer as to the quantity of the fruit or vegetables being offered for sale or sold.
 9. **Berries and Small Fruits:** “Small fruits” includes, but is not limited to, cherries, currants, and cherry tomatoes. “Berries” includes all fruit whose names end in the term “berry.” Berries and small fruits shall be offered and exposed for sale and sold by weight or by volume. If sold by volume, they must be in measure containers that are either open or else covered by uncolored transparent lids or other wrappings that do not obscure the contents, and have capacities of 250 milliliters, 500 milliliters, or 1 liter OR ½ dry pint, 1 dry pint, or 1 dry quart. If two or more measure containers are placed in a shipping package, the

crate or package shall show the number of measure containers and the quantity of contents of each.

10. **Other Fresh Vegetables and Fruits:** See the accompanying factsheet provided by the Division for permissible methods of sale for specific vegetables and fruits.
11. **Sale of Ice:** Ice shall be sold only by weight. Except in the case of ice dispensed by a vending machine, each package of ice kept, offered for sale or sold in any place other than on the premises where the ice was packed, shall show the net weight and the name and place of business of the manufacturer, packer or distributor. In the case of ice dispensed by a vending machine, the net weight of the package of ice dispensed and the name and place of business of the manufacturer, packer or distributor shall be posted clearly and conspicuously near the coin slot on the front panel of the vending machine.
12. **Butter, Oleomargarine, Margarine, Butter-Like, and/or Margarine-Like Spreads:** Shall be offered and exposed for sale and sold by weight. “Butter-like and/or margarine-like spreads” are those products that meet the Federal Standard of Identity for butter or margarine and oleomargarine, except that they contain less than 80 % fat and may contain other safe and suitable ingredients.
13. **Flour, Corn Meal, and Hominy Grits:** Wheat flour, whole wheat flour, graham flour, self-rising wheat flour, phosphated wheat flour, bromated flour, corn flour, corn meal, and hominy grits, whether enriched or not, shall be packaged, kept, offered, or exposed for sale and sold by weight.
14. **Meat, Poultry, Fish, and Seafood:** Shall be sold by weight, except that whole shellfish in the shell may be sold by weight, measure, and/or count. Shellfish are aquatic animals having a shell, such as mollusks (for example, scallops) or crustaceans (for example, lobster or shrimp).
 - i. When meat, poultry, fish, or seafood is kept, offered or exposed for sale from bulk (e.g., direct service counters) by the portion or piece according

to a pre-determined fixed weight, the product identity and net weight shall be displayed, as well as the unit price at which it is offered for sale.

This information shall appear on a label or sign immediately adjacent to the meat, poultry, fish, or seafood and must be presented in an easy-to-read type style and color. The font size of the net weight and unit price declaration shall be equal to or greater than the font size used for the product identity. This unit price shall be in terms of the unit price per kilogram or per pound and not in common or decimal fractions, although a supplemental declaration of a price per unit (i.e., price per ounce) is permitted. Similar or competing commodities kept, offered, or exposed for sale from bulk in any single display or facility shall have unit prices posted or advertised in the same terms uniformly and consistently expressed (i.e., all in either prices per kilogram or prices per pound; not in differing units) to readily facilitate value comparison.

- ii. When meat, poultry, fish, or seafood is combined with some other food element to form a distinctive food product, the quantity representation may be in terms of the total weight of the product or combination, and a quantity representation need not be made for each element provided a statement listing the ingredients in order of their predominance by weight must also appear on the label.
 - iii. A declaration of identity for meat cuts shall be limited to generic terms, such as those listed in the Uniform Retail Meat Identity Standards. Refer to NTSI Handbook 130 – Uniform Regulation for the Method of Sale of Commodities for permissible abbreviations.
15. **Sale of Meat by Carcass, Side, or Primal Cut:** The seller of a carcass, side, quarter, or primal cut on a gross or hanging weight basis shall provide to the buyer a written statement prior to and at the time of delivery providing details of weight, grade, price, and other information as stated in NTSI Handbook 130 – Uniform Regulation for the Method of Sale

- of Commodities. This shall not apply to the sale of any carcass, side, quarter, or primal cut of meat that individually or collectively has a gross or hanging weight of 22.6 kg (50 lb) or less. The buyer shall have the right to cancel any carcass, side, quarter, or primal cut meat contract until midnight of the third business day after the day on which the buyer executed the contract or after the day on which the seller provided the buyer with a fully executed copy of the contract, whichever is later.
16. **Fluid Milk Products:** All fluid milk products, including, but not limited to milk, lowfat milk, skim milk, cultured milks, and cream, shall be sold in terms of fluid volume.
 17. **Other Milk Products:** Cottage cheese, cottage cheese products, and other milk products that are solid, semi-solid, viscous, or a mixture of solid and liquid, as defined in the Pasteurized Milk Ordinance of the U.S. Public Health Service, as amended in 1965, shall be sold in terms of weight.
 18. **Factory Packaged Ice Cream and Similar Frozen Products:** Ice cream, ice milk, frozen yogurt, and similar products shall be kept, offered, or exposed for sale or sold in terms of fluid volume.
 19. **Pickles:** The declaration of net quantity of contents on pickles and pickle products, including relishes but excluding one or two whole pickles in a transparent wrapping, which may be declared by count, shall be expressed in terms of liquid measure. Sales of pickles from bulk may be by count.
 20. **Ready-to-Eat Food:** Restaurant style food offered or exposed for sale, whether in restaurants, supermarkets, or similar food service establishments, that is ready for consumption, though not necessarily on the premises where sold. Ready-to-Eat Food does not include sliced luncheon products, such as meat, poultry, or cheese when sold separately. Ready-to-Eat Food sold from bulk or in single servings packed on the premises may be sold by weight, measure, or count (count includes servings).
 21. **Mulch:** Any product or material except peat or peat moss that is advertised, offered for sale, or sold for primary use as a horticultural, aboveground dressing, for decoration, moisture control, weed control, erosion control, temperature control, or other similar purposes. All mulch shall be sold, offered, or exposed for sale in terms of volume measure in SI units in terms of the cubic meter or liter or in U.S. customary units in terms of the cubic yard or cubic foot.
 22. **Animal Bedding:** Packaged animal bedding of all kinds, except for baled straw, shall be advertised, labeled, offered for sale and sold by volume in either a compressed or an uncompressed package. A package of compressed animal bedding shall be advertised, labeled, offered, and exposed for sale and sold on the basis of the “Useable Volume,” meaning the volume of the product that can be recovered from a package by the consumer after it is unwrapped and, if necessary, uncompressed. If unit pricing is provided for use by retail customers to make a value comparison, it shall be in terms of the price per liter. A quantity declaration shall be in terms of the largest whole unit of the milliliter, liter, or cubic meter. A declaration may also include the quantity in terms of largest whole unit of the cubic inch, cubic foot, or cubic yard only. The terms “Useable Volume” must appear in the quantity declaration on a package of compressed animal bedding. The display of a net or gross weight, pre-compression volume, compressed volume, or supplementary dry measure quantities (e.g., dry pint, dry quart, or bushel) anywhere on the package is prohibited.
 23. **Baler Twine:** Baler twine shall be sold on the basis of length in meters or feet, and net mass or weight by kilograms or pounds.
 24. **Potpourri:** Potpourri packaged in advance of sale shall be sold by weight, except when sold in a decorative container or sachet, which may be sold by count. Potpourri sold from bulk shall be sold by weight or by dry volume.
 25. **Other Commodities:** See the accompanying factsheet provided by the Division for permissible methods of sale for commodities not addressed here, or contact the Division.

26. Presentation of Price: Whenever an advertised, posted, or labeled price per unit of weight, measure, or count for any commodity includes a fraction of a cent, all elements of the fraction shall be prominently displayed, and the numerals expressing the fraction shall be immediately adjacent to, of the same general design and style as, and at least one half the height and width of, the numerals representing the whole cent.

27. Terms for Unit Pricing: The declaration of the unit price of a particular commodity in all package sizes offered for sale in a retail establishment shall be uniformly and consistently expressed in terms of:

- Price per kilogram or 100 g, or price per pound or ounce, if the net quantity of contents of the commodity is in terms of weight.
- Price per liter or 100 mL, or price per dry quart or dry pint, if the net quantity of contents of the commodity is in terms of dry measure or volume.
- Price per liter or 100 mL, or price per gallon, quart, pint, or fluid ounce, if the net quantity of contents of the commodity is in terms of liquid volume.
- Price per individual unit or multiple units if the net quantity of contents of the commodity is in terms of count.
- Price per square meter, square decimeter, or square centimeter, or price per square yard, square foot, or square inch, if the net quantity of contents of the commodity is in terms of area.

28. Exemptions to Terms for Unit Pricing:

- **Small Packages:** Commodities shall be exempt from the above Unit Pricing provisions when packaged in quantities of less than 28 g (1 oz) or 29 mL (1 fl oz) or when the total retail price is 50 cents or less.
- **Single Items:** Commodities shall be exempt from the above Unit Pricing provisions when only one brand in only one size is offered for sale in a particular retail establishment.
- **Variety and Combination Packages:** Variety and Combination Packages shall be exempt from the above Unit Pricing provisions.

29. Price Advertising of Bulk Commodities:

Whenever a bulk commodity is advertised in any manner and the price of the commodity is stated in the advertisement, there shall be closely and conspicuously associated with the statement of price a declaration of the basic unit in terms of weight, measure or count. That declaration of the basic unit shall not include any qualifying term, such as “jumbo”, “giant” or “full” that tends to exaggerate the amount of the commodity.

30. Misrepresentation of Quantity: No person shall represent the quantity of a commodity displayed or offered for sale in a manner calculated or tending to mislead or deceive another person.

31. Misrepresentation of Pricing: No person shall misrepresent the price of any commodity or service sold, offered, exposed, or advertised for sale by weight, measure, or count, nor represent the price in any manner calculated or tending to mislead or in any way deceive a person.

32. Location of Weighing and Measuring Devices: A retail point-of-sale device shall not be placed in a location where objects or the movements of retail staff can interfere with customers’ observation of the weighing or measuring operations or the indicators displaying weights or measures.

Uniform Open Dating Regulation

This regulation prescribes the manner of date labeling, the method of determining the appropriate date, required records, responsible persons, and the foods subject to this regulation. This regulation provides for the permissible sale of a regulated food after the expiration of the date on the label. This regulation does not apply to any food that is not prepackaged.

1. **Perishable Food:** Any food having a significant risk of spoilage, loss of value, or loss of palatability within 60 days of the date of packaging is “perishable food”.
2. **“Sell By” Date:** A retail food establishment shall not sell or offer for sale a prepackaged perishable food unless it is identified with a “sell by” date as prescribed by this regulation. A manufacturer, processor, packer, re-packer, retailer, or other person who prepackages perishable food, shall determine a date that allows a reasonable period after sale for consumption of the food without physical spoilage, loss of value, or loss of palatability. A reasonable period for consumption shall consist of at least one third of the approximate total shelf life of the perishable food. This responsible party shall place or attach to each package of perishable food a date by month and day. However, bakery products with a shelf life of not more than seven days may be dated with the day of the week representing the last recommended day of sale. The “sell by” date shall be displayed with the term “sell by” or words of similar import immediately preceding or immediately over the designated date unless a prominent notice is on the label describing the date as a “sell by” date and indicating the location of the date.
3. **Sale After Expiration of “Sell By” Date:** Perishable food shall not be offered for sale after the “sell by” date unless it is wholesome and advertised in a conspicuous manner as being offered for sale after the recommended last date of sale. The placement of a sign, sticker, or tag is acceptable for such advertising if it is easily readable and clearly identifies the perishable food as having passed the recommended last date of sale. The retailer or final seller is responsible for the advertisement of a perishable food offered for sale after the recommended last date of sale.
4. **Semi Perishable Food:** Any food for which a significant risk of spoilage, loss of value, or loss of palatability occurs only after a minimum of 60 days, but within 6 months, after the date of packaging is “semi perishable food”.
5. **Long Shelf Life Food:** Any food for which a significant risk of spoilage, loss of value, or loss of palatability does not occur sooner than 6 months after the date of packaging, including foods preserved by freezing, dehydrating, or being placed in a hermetically sealed container is “long shelf life food.”
6. **“Best If Used By” Date:** A manufacturer, processor, packer, re-packer, or other person who prepackages semi perishable or long shelf life food may place upon or attach to the package an open date providing it is designated by the “best if used by” date. The “best if used by” date shall be placed upon or attached to each container or package and be limited to the terms “best if used by” or words of similar import followed by or immediately over the date designated by the month and year unless a prominent notice is on the label describing the date as a “best if used by” date and indicating the location of the date. The date shall be designated by the first three letters of the month followed by a numeral indicating the year. The use of the day of the month is permissible provided that the day of the month is placed prior to the month; for example, 30 Jun 81.
7. **Sale After Expiration of “Best If Used By” Date:** A retail food establishment may sell or offer for sale food beyond the designated “best if used by” date provided the food is wholesome and the sensory physical quality standards for that food have not significantly diminished.
8. **Placement of the Date:** The date, whether “sell by” or “best if used by” shall be printed, stamped, embossed, perforated, or otherwise shown on the package, label on the package, or tag attached to the package in a

manner that is easily readable and separate from other information, graphics, or lettering so as to be clearly visible to a prospective purchaser. The date shall not be superimposed on other required information or obscured by other information, graphics, or pricing. Regardless of the type size used, the date shall be easily readable. These requirements do not preclude a supplemental notice elsewhere on a package describing and/or indicating the location of the date.

9. **Factors for the Date Determination:** A person who places either the “sell by” date or “best if used by” date on a package shall determine the date by taking into consideration the food quality, characteristics, formulation, processing impact, packaging or container and other protective wrapping or coating, customary transportation, and storage and display conditions. For purposes of calculating this date, home storage conditions shall be considered to be similar to those in the usual retail store except that the date for refrigerated food may be calculated by using a home storage temperature standard of 40 °F.
10. **Records:** A person who is responsible for establishing the date for perishable, semi perishable, and long shelf life food shall keep a record of the method used to determine the date. A record revision is necessary whenever a factor affecting date determination is altered. Such record shall be retained for not less than six months after the most recent “sell by” or “best if used by” date and shall be available during normal business hours for examination upon request by the division.
11. **Exemptions:** This regulation does not apply to perishable fruits or vegetables in a container permitting sensory examination or to prepackaged perishable foods open dated according to requirements of federal law or regulation.

Licensing of Commercial Devices

1. **Licensure of Weighing, Measuring, Counting and Timing Devices Used Commercially:** Here, “Commercial device” means any weight or measure used for “commercial use”. Commercial devices include, but are not limited to the following: cash

register scales, deli scales, candy scales, jeweler scales, farm stand scales, and vehicle scales used in direct sales. “Commercial use” means “used or employed in establishing the size, quantity, extent, area, or measurement of quantities, things, commodities, or articles for distribution or consumption, purchased, offered, or submitted for sale, hire, or award, or in computing any basic charge or payment for services rendered on the basis of weight, measure, or count.”

2. The following devices shall not be put into commercial use unless they have been licensed by the division:
 - 1) Weighing, measuring and counting devices, with the exception of pre-pack and factory scales, used to determine the weight, measure or count of commodities sold or offered or exposed for sale;
 - 2) Weighing, measuring and counting devices used to compute a basic charge or payment for services rendered on the basis of weight, measure or count; and
 - 3) Devices offering services paid for on the basis of time, including but not limited to, air compressors, clothes dryers and vacuum cleaners for vehicles.
3. Devices described above shall be inspected, tested and certified by a division inspector or a registered New Hampshire service technician before being licensed and put into commercial use. Devices shall be inspected and tested annually and shall display a certification stamp bearing the date of the current year or the preceding year.
4. **Obtaining an Initial Device License:** To obtain an initial device license, the owner of the device shall submit a completed “Application Form for a Weighing and Measuring Device License” (available from the Division), along with the applicable fee (see [RSA 438:10](#) for fee table). For a device to be licensed, the owner shall submit a copy of the placed-in-service report which shows that a registered New Hampshire service technician inspected, tested, and certified the device that the applicant is seeking to license.

5. The signature of an applicant who is an individual, or the signature of a representative of an applicant which is an entity, together with the date of signing, shall be placed below the following preprinted statement:

I certify the following: (1) that all devices being used commercially are provided with this application; (2) that there are no willful misrepresentations or falsifications in the information provided on or with this application; (3) that I understand that if an investigation discloses any willful misrepresentations or falsifications, my application shall be rejected; (4) that if, after issuance of my device license, should an investigation disclose any willful misrepresentations or falsifications, my license may be revoked or suspended and I may be subject to penalties under [RSA 438:40](#).

6. By signing the form, the applicant certifies that there are no willful misrepresentations or falsifications or material omissions in the information provided on the device-licensing application form; and the applicant understands that, if an investigation should disclose any willful misrepresentations, falsifications or material omissions, the application will be denied and any license already issued will be invalid.

7. **Renewing Device Licenses:** The division shall provide via mail, e-mail, or fax to each owner of a device license, a renewal application form containing pre-printed information at least 60 days prior to the expiration of the licensee's license. Owners of licensed devices who have not received such a renewal application form shall notify the division by mail, telephone, e-mail or fax. Device owners wishing to renew their device licenses shall confirm or correct the information on the pre-printed division generated renewal application form, submit proof of certification (such as a placed in service report) with the renewal that the devices have been inspected and certified and display a current year or previous year certification stamp, and pay the division's invoice within 30 days.

8. **Transfer of Device Licenses to Other Devices of the Same Description:** The owner or authorized agent of a licensed device may transfer the license to another device of the same description by submitting copies of placed-in-service reports reflecting the changes; and paying the division's invoice for the difference between the fee for the old device and the fee for the new device, if any.

9. **Destruction of Devices, Transfer of Device Licenses, Adding and Dropping Devices, Change of Contact Information:** The owner or authorized agent of a licensed device shall notify the division by letter, e-mail or fax whenever the owner or authorized agent

- 1) Destroys a licensed device;
- 2) Sells or otherwise transfers a licensed device to a new owner;
- 3) Sells or transfers the owner's business assets, including the device, to a new owner; or
- 4) Drops a device from the division's list of devices licensed for that owner.

The owner or authorized agent of a licensed device shall notify the division whenever the owner or authorized agent adds devices by submitting copies of placed-in-service reports for those added devices. The owner or authorized agent of a licensed device shall notify the division when wishing to make changes to contact information by submitting the changes on the division provided application form for a weighing and measuring device license.

10. **Grounds for Denial of License:** The commissioner shall deny the application for an initial or renewed device license if the applicant has made a willful misrepresentation or falsification on the application form; made a material omission on the application form; failed to pay any charge, fee, administrative fine or civil or criminal penalty for a violation of [Agr 1400](#) or [RSA 438](#) which is due to the commissioner or to a court arising out of proceedings brought by the division; or failed to comply with an order or finding by the commissioner. An application may also be denied if the device intended to be licensed

does not comply with the accuracy requirements for such devices, as determined by a division inspector. The commissioner shall send a notice of the denial of an application for an initial or renewed license by certified mail to the last known address of the licensee or applicant. Every applicant shall be entitled to a hearing pursuant to [Agr 200](#) if the application for an initial or renewed device license is denied.

11. Posting of Device Licenses. Original device licenses shall be posted conspicuously in the places of business where the devices are used most or all of the time. Businesses needing to post licenses in additional remote locations shall photocopy the original license and post the photocopies conspicuously in the additional locations. Copies of original device licenses shall be kept with devices that do not stay in a fixed location, such as the devices on propane, oil and seafood delivery trucks. Device licenses shall be surrendered for inspection upon the request of any division inspector.

12. Prohibited Acts Relating to Device Licenses. The following acts shall be prohibited with respect to device licenses: Displaying or causing or permitting to be displayed any expired, fictitious or fraudulently altered device license; Permitting the use of a device license by anyone other than the owner and agents of the owner; Failing to surrender an expired or invalidated license to a division inspector on demand; Manufacturing, advertising for sale and selling fictitious, facsimile or simulated device licenses which might be mistaken for valid licenses; Possessing fictitious, facsimile or simulated device licenses which might be mistaken for valid licenses, with the exception of possessing photocopies of device licenses made as described above; and Removing a certification stamp from a device.

13. Annual Fees for Licensing Commercial Devices: Owners of commercial weighing, measuring or counting devices shall pay license fees annually as set forth in [Agr 1410.02](#).

14. Fees for the Testing, Certification and Sealing of Commercial Devices: Fees, as set forth in [Agr 1410.04](#), shall be charged for the testing, certification and sealing of devices by the division's inspectors. However, there shall be no fee for the testing, certifying and sealing of scales used by an agricultural business, such as a farm stand or a farmers' market, when the business uses, at a single location or at all its locations taken together, no commercial weighing or measuring devices other than 3 or fewer scales each having a capacity of no more than 100 pounds or 50 kilograms.

Service and Certification by Service Technician

No person shall service any licensed commercial device unless that person holds a valid certificate of registration as a service technician. A registered service technician is an individual who holds a valid certificate of registration from the department of agriculture, markets, and food, who, for hire, installs, services, repairs, reconditions, tests, seals, or calibrates a commercial weighing or measuring device.

Service technicians shall complete and submit to the division a placed in service/inspection report form whenever they install, repair, adjust, rebuild, service, recondition, test, calibrate or certify a weighing, measuring or counting device in commercial use.

Service technicians who test and calibrate a commercial device for the renewal of a device license, or for the removal or replacement of a security seal, shall complete and submit to the division a placed in service/inspection report form.

Service technicians shall notify the division of any weighing, measuring or counting devices used commercially which they find fail to meet the division's requirements.

A certification seal shall be applied to a device by a registered New Hampshire service technician or division official to show that inspection and testing have proven a device correct. Here, "correct" means that in addition to being accurate, the device meets all applicable

specifications, tolerances and technical requirements of NIST Handbook 44 as modified by administrative rule of the commissioner. Service technicians shall affix a security seal to any adjustment mechanism

- 1) At the time the device is being placed into commercial use for the first time;
- 2) When returning a device to commercial use after servicing, repairing or reconditioning it;
- 3) When a device is being tested for renewal of an owner's device license; and
- 4) When the seal has to be broken before an adjustment can be made.

When weighing or measuring devices are tested or calibrated and the devices lack a manufacturer's serial number, service technicians shall request division-issued serial numbers and affix them to the devices.

Violations of RSA 438:40, I and of Administrative Weights and Measures Rules

The purpose of Agr 1411 is to set forth administrative sanctions for violations of [RSA 438](#) and its implementing rules. Such administrative sanctions do not preclude criminal prosecution pursuant to [RSA 438:40, II or III](#). The imposition of such administrative sanctions is not required as a precondition of criminal prosecution.

Violations of [RSA 438:40, I](#) and of Administrative Weights and Measures Rules: Any individual or entity who has done an act or omission prohibited by [RSA 438:40, I](#) or a weights and measures administrative rule shall receive either a written warning of violation issued by the division or a fine imposed by the commissioner. The division shall issue a written warning without the imposition of an administrative fine for a first violation of any provision of [RSA 438:40, I](#) or of a weights and measures administrative rule, unless the individual or entity doing the violation knew or should have known that the act or omission prohibited by the statute or rule was a violation. An individual or entity receiving a written warning of violation issued by the division shall correct the violation described in the written warning; or if the recipient does not understand the written warning of violation or know how to correct the violation, contact the division for the needed explanation.

The commissioner shall impose a "first offense" administrative fine in accordance with the schedule in [Agr 1411.07](#) for a first violation of any provision of [RSA 438:40, I](#) or of a weights and measures administrative rule if the individual or entity doing the violation knew or should have known that the act or omission prohibited by the statute or rule was a violation. Further details regarding violations and administrative sanctions are found in [Agr 1411](#).

Food Labeling

The food labeling chapter covers New Hampshire labeling laws. The labeling requirements vary slightly among the type of product, so careful understanding of the law is important. We will lead you through advertising, organic products, other product labeling requirements. This chapter covers New Hampshire labeling laws in brief.



The labeling requirements vary slightly among the type of product, so careful understanding of the law is important. While this chapter should give you a place to start when determining a compliant label, it is not intended to be a final stop. To assure labeling compliance, check out the laws that relate to the product being labeled.

Advertising of “Native,” “NH Made” and More

Farm stands, farmers markets, retailers, restaurants, and any other person or business selling goods to the public must comply with [RSA 426:5](#). With that law, any goods “sold, offered, or exposed for sale” must not be advertised, labeled, or described as “native,” “local,” “locally grown,” or “locally produced” unless they were grown or produced in New Hampshire. It is misleading to describe goods as “our own” unless they were grown or produced by the operator of the retail location. The chart below explains when and how it is acceptable to use these terms. [RSA 426:5](#).

REGULATIONS CITED FOR FOOD LABELING

Advertising of “Native” or “NH Made”
RSA 426:5

Organic Labeling
7 C.F.R. § 205.300 – 311
7 C.F.R. § 205.662
7 C.F.R. § 205.303
AGR 911.07
AGR 910.07

Homestead Products
RSA 143-A:12, I(a), II, III

Other Products
RSA 184
RSA 184:49
RSA 426:6-a
RSA 427:7
RSA 428:26
RSA 429:14
RSA 429:20
RSA 429:22
RSA 433:2
He-P 2700
Mil 300
9 C.F.R. § 317.2(d)-(m)

TERM	AS USED	THE GOODS DESCRIBED
“Native,” “Local,” “Locally Grown,” “Locally Produced.”	In a banner describing a general display of goods.	The display must contain at least one product grown or produced in New Hampshire.
“Native,” “Local,” “Locally Grown,” “Locally Produced.”	Point-of-Sale signs.	The item identified by the sign must be grown or produced in New Hampshire.
“Native,” “Local,” “Locally Grown,” “Locally Produced.”	Posters identifying a particular farm.	The farm identified must be in New Hampshire.
“Our Own”	Any written material	Grown or produced by the vendor.

Organic Products Labeling

Those producers, processors, and handlers of organic-certified goods must comply with certain labeling requirements. Specific language on an organic label depends on what percentage of the product is actually organic. A product can be 100% organic, organic, or made with organic; the composition of which must be stated on the label. [7 C.F.R. § 205.300 – 311](#). When only a portion of the end product is composed of organic ingredients, the label must define which ingredients are organic. [7 C.F.R. § 205.304](#). It is illegal to mislabel a product as organic, when it is, in fact, not organic as the label declares. [7 C.F.R. § 205.662](#).

A certified producer, processor, or handler may include the USDA Organic Seal on its product and advertisements. [7 C.F.R. § 205.311](#). When the seal is used, product labels and advertisements must also state the name of the certifying agent, which in New Hampshire is likely to be the N.H. Department of Agriculture Markets and Food. See e.g., [7 C.F.R. § 205.303](#). Proposed labels and advertisements should be submitted to the N.H. Department of Agriculture Markets and Food for approval. [AGR 911.07](#); [AGR 910.07](#).

As noted, a product may be labeled as “organic” only if it meets the organic certification requirements and approval, and the N.H. Department of Agriculture Markets and Food is certified to confirm that determination. [RSA 426:6-a](#).

Labeling Specific Products

Some farm products must include specific information in each label. The chart on the following pages includes a few such products. This chart is not intended to be an exhaustive list of all products that require specific labels.

Homestead Food Products

Homestead Food Products are discussed in detail in a subsequent section of this guide.


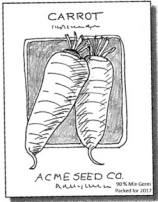
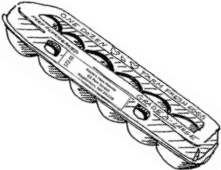
A “homestead food operation” means “a person who produces homestead food products, excluding potentially hazardous food, only in the home kitchen of that person’s primary residence in New Hampshire.” [RSA 143-A:12, I\(a\)](#).

A “potentially hazardous food” means


“foods requiring temperature control for safety because they are capable of supporting the rapid growth of pathogenic or toxigenic microorganisms, and the growth of toxin production of clostridium botulinum. Potentially hazardous foods also include processed acidified and low acid canned foods.” [RSA 143-A:12, I\(a\)](#).

Larger homestead food operations require a license from the N.H. Department of Health and Human Services. [RSA 143-A:12, III](#). Smaller operations do not. The cut off is “selling less than a maximum annual gross sales of \$20,000 of food, excluding potentially hazardous food, from the homestead residence, at the owner’s own farm stand, at farmers’ markets, or at retail food stores.” [RSA 143-A:12, II](#).

LEGAL GUIDE FOR NEW HAMPSHIRE AGRICULTURE PRODUCERS

PRODUCT	LABEL REQUIREMENTS													
<p>MAPLE SYRUP AND MAPLE PRODUCTS</p> 	<p>Name, Address & Zip Code of Packer, Distributor or Producer; True Name of the Product; Volume of Contents (at 60 degrees F); and Grade.</p> <p>RSA 429.14</p> <p>Any labeling on bulk or packaged maple syrup which indicates "state of New Hampshire pure maple syrup", "New Hampshire maple syrup," "New Hampshire syrup," or any other words which imply that the syrup was produced in New Hampshire shall be used exclusively upon maple syrup which is entirely produced within the state of New Hampshire. Any labeling on all other maple products, which states or implies that those products were produced in New Hampshire shall be used exclusively upon pure maple products, which are entirely produced within the state of New Hampshire.</p>													
<p>SEEDS</p> 	<p>The law requires seed packages to be labeled with information relative to germination and purity percentages.</p> <p>RSA 433:2</p>													
<p>EGGS</p> 	<p>All eggs that are offered for sale shall meet the US Grade A standard and shall be plainly and conspicuously marked and identified with the grade and the word "fresh".</p> <p>All eggs that are offered for sale shall be labeled with a weight class statement, or with the term "Not Sized."</p> <p>Labels shall include the name, address, and zip of the producer, packer, or distributor.</p> <p>Labels shall include the net quantity (count).</p> <p>A "Sell By" date is not required, but cartons must be coded to facilitate stock rotation.</p> <p>RSA 428:26</p>	<p>The official weight classes per dozen are as follows:</p> <table border="0"> <thead> <tr> <th>Size</th> <th>Minimum Net Weight*</th> </tr> </thead> <tbody> <tr> <td>Jumbo.....</td> <td>30 ounces</td> </tr> <tr> <td>Extra Large.....</td> <td>27 ounces</td> </tr> <tr> <td>Large.....</td> <td>24 ounces</td> </tr> <tr> <td>Medium.....</td> <td>21 ounces</td> </tr> <tr> <td>Small.....</td> <td>18 ounces</td> </tr> </tbody> </table> <p>*Dozen eggs minus weight of carton.</p>	Size	Minimum Net Weight*	Jumbo.....	30 ounces	Extra Large.....	27 ounces	Large.....	24 ounces	Medium.....	21 ounces	Small.....	18 ounces
Size	Minimum Net Weight*													
Jumbo.....	30 ounces													
Extra Large.....	27 ounces													
Large.....	24 ounces													
Medium.....	21 ounces													
Small.....	18 ounces													
<p>HOMESTEAD FOOD PRODUCT</p>	<p>The following basic information must be included on a home kitchen product:</p> <p>Name, address, and phone number of the homestead food operation Name of the homestead food product Ingredients in descending order of predominance by weight Allergy information</p> <p>Products made by operations exempt from licensure shall also be clearly labeled with the following statement: "This product is exempt from New Hampshire licensing and inspection."</p> <p>Products made by licensed operations shall also be clearly labeled with the following statement: "This product is made in a residential kitchen licensed by the New Hampshire Department of Health and Human Services."</p> <p>RSA 143-A:12, IV</p>													

LEGAL GUIDE FOR NEW HAMPSHIRE AGRICULTURE PRODUCERS

PRODUCT	LEGAL REQUIREMENTS		
<p>HONEY</p> 	<p>Name, Address & Zip Code of Packer, Distributor or Producer; True Name of the Product; Volume of Contents (at 60 degrees F); and Grade, or the term “not graded.”</p> <p>RSA 429:20</p> <p>Any labeling which indicates “state of New Hampshire pure honey”; “New Hampshire honey”; or any other words which imply that the honey was produced in New Hampshire shall be used exclusively upon honey which is entirely produced within the state of New Hampshire. Any labeling on all other honey products, which states or implies that those products were produced in New Hampshire shall be used exclusively upon pure honey products, which are entirely produced within the state of New Hampshire.</p>		
<p>HONEY FLAVORED PRODUCT</p>	<p>A label of any product that contains honey as a flavoring of some other product must include the following: An accurate and descriptive name; The net quantity contents declaration; and The amount of honey the product contains expressed in percentage of volume. The percentage statement or ingredient list shall be in close proximity to the product name. If the product contains honey flavor not derived from real honey, the label must conspicuously state “artificially flavored.”</p> <p>RSA 429:22</p>		
<p>MEAT PRODUCTS</p>	<p>Meat and meat food products must be labeled after the product has been packed and sealed. Meat and meat food products for sale that has been inspected and marked “New Hampshire Inspected and Passed” must be labeled as such by law. RSA 427:7</p> <table border="0" style="width: 100%;"> <tr> <td style="vertical-align: top; width: 50%;"> <p>Principal Display Panel (PDP) Product Name Handling Statement Legend / Establishment Number Net Weight Statement - mandatory for retail sale products. Random weight retail products can have statement on application “net weight applied prior to retail sale” instead of net weight statement. 9 C.F.R. § 317.2(d) - (m)</p> </td> <td style="vertical-align: top; width: 50%;"> <p>Information Panel Mandatory information that is permitted to be displayed off the PDP. Ingredients Statement Signature Line Nutrition Facts 9 C.F.R. Â§ 317.2(f); (g); (m)</p> <p>Mandatory Feature Displayed Anywhere on Labeling Safe Handling Instructions 9 C.F.R. Â§ 317.2(l)</p> </td> </tr> </table>	<p>Principal Display Panel (PDP) Product Name Handling Statement Legend / Establishment Number Net Weight Statement - mandatory for retail sale products. Random weight retail products can have statement on application “net weight applied prior to retail sale” instead of net weight statement. 9 C.F.R. § 317.2(d) - (m)</p>	<p>Information Panel Mandatory information that is permitted to be displayed off the PDP. Ingredients Statement Signature Line Nutrition Facts 9 C.F.R. Â§ 317.2(f); (g); (m)</p> <p>Mandatory Feature Displayed Anywhere on Labeling Safe Handling Instructions 9 C.F.R. Â§ 317.2(l)</p>
<p>Principal Display Panel (PDP) Product Name Handling Statement Legend / Establishment Number Net Weight Statement - mandatory for retail sale products. Random weight retail products can have statement on application “net weight applied prior to retail sale” instead of net weight statement. 9 C.F.R. § 317.2(d) - (m)</p>	<p>Information Panel Mandatory information that is permitted to be displayed off the PDP. Ingredients Statement Signature Line Nutrition Facts 9 C.F.R. Â§ 317.2(f); (g); (m)</p> <p>Mandatory Feature Displayed Anywhere on Labeling Safe Handling Instructions 9 C.F.R. Â§ 317.2(l)</p>		
<p>BUTTER SUBSTITUTE</p>	<p>No specific labeling requirements apply to butter substitutes, but New Hampshire law specifies that the “terms ‘butter’ and ‘cheese’ shall be understood to mean the products usually known by those names, and which are manufactured exclusively from milk, or cream, or both, with salt and with or without coloring matter, and, if cheese, with rennet.” RSA 323:8 XXVI.</p>		
<p>RAW MILK</p>	<p>Raw milk labels must include: Producer’s name, address and zip code; Net amount of the contents; Sell by date; The species of animal that produced the milk.</p> <p>Raw milk must be clearly labeled as unpasteurized. Raw milk containers must be labeled with the warnings, “This raw milk has not been tested for antibiotic residues prior to sale” and, “Raw milk is not pasteurized. Pasteurization destroys organisms that may be harmful to human health.” If the milk is sold only at the farm where it is bottled, the warnings must be posted on a sign “no less than 8 inches by 11 inches in size with contrasting lettering no smaller than 1/2 inch in height.”</p> <p>A milk producer-distributor selling raw milk products must also include labels or signs with the following statement: “Products from this farm made from raw milk are exempt from New Hampshire licensing and inspection.”</p> <p>RSA 184:30, RSA 184.84, V, He-P 2700; Mil 301.03(c)(9), Mil 301.03(g)</p>		

Homestead Operations

A person may produce certain food products in their residential kitchen and sell them to others. This chapter will define a homestead product, help you determine if a license is required, what the labeling requirements are, and what kitchen standards are required.

Depending on the types of food produced, the volume of sales, and the venues from which the foods will be sold, there are various licensing and labeling requirements, as well as certain kitchen set-up requirements. Note that certain labeling requirements apply even if a license is not required to sell certain homestead food products.

What Are Homestead Food Products?

A person who produces food in their home for sale to others may need to obtain a license from the New Hampshire Department of Health and Human Services. To determine whether a license is required, the first step is to determine whether the person produces what the State defines as “homestead food products,” which are limited to foods produced only in the home kitchen of that person’s primary residence in New Hampshire. [RSA 143-A:12, I\(a\)](#).

The term “homestead food products” currently includes the following foods:

- ④ Baked items;
- ④ Double-crusteD fruit pies;
- ④ Candy and fudge;
- ④ Packaged dry products;
- ④ Acid foods such as vinegars and mustards; and
- ④ Jams and jellies.

See [He-P 2301.01\(w\)](#) and [He-P 2310.01\(b\)](#) for a list of the products. Importantly, the term “homestead food products” does not include “potentially hazardous food,” which is defined to include foods that require temperature control to prevent rapid growth of certain pathogens as well as processed acidified and low-acid canned foods. [RSA 143-A:12, I\(b\)](#); [He-P 2301.01\(ah\)](#).



REGULATIONS CITED FOR HOMESTEAD OPERATIONS

Defining Homestead Products

[RSA 143-A:12, I\(a\)\(b\)](#)
[He-P 2301.01\(w\)](#)
[He-P 2301.01\(ah\)](#)
[He-P 2310.01\(c\)](#)
[He-P 2311.03](#)

Homestead License & Requirements

[He-P 2304.05\(a\)\(8\)](#)
[He-P 2311.01\(a\)](#)
[He-P 2311.01\(b\)\(2\)](#)
[He-P 2311.05](#)
[He-P 2311.05\(a\)\(4\)](#)

Labeling Requirements

[RSA 143-A:12, IV](#)
[He-P 2310.01](#)
[He-P 2311.04](#)
[He-P 2311.04\(g\)](#)

Homestead Kitchen Standards

[He-P 2311.06](#)

Resources

www.dhhs.nh.gov/dphs/fp/sanitation/homestead.htm

Examples of potentially hazardous foods include:

- Meat (beef, pork, lamb)
- Poultry (chicken, turkey, duck)
- Fish
- Shellfish and crustaceans
- Eggs
- Milk and dairy products
- Cooked, plant-based foods (e.g., cooked rice, beans, or vegetables)
- Baked potatoes
- Mushrooms
- Raw sprouts
- Tofu and soy-protein foods
- Untreated garlic and oil mixtures

For more information, see

<https://www.dhhs.nh.gov/dphs/fp/homestead.htm>.

The production of “potentially hazardous food” is not eligible to for licensure under [RSA 143-A:12](#), and these foods cannot be produced by either a licensed or non-licensed homestead food operation. [He-P 2311.03](#); [He-P 2310.01\(c\)](#).

Determining Whether a License is Required

For a person who produces “homestead food products,” whether a license is required depends on the following two factors:

- 1) maximum annual gross sales and
- 2) the venues from which the food products will be sold.

No License Required

If a homestead food operation’s annual gross sales are less than \$20,000 and the food products are sold from the homestead residence, the owner’s own farm stand, farmer’s markets, or retail food stores, then no license is required. Note that both circumstances must be satisfied to be exempt from licensure. If both circumstances are satisfied, a homestead food operation may produce “homestead food products” and sell them at the places listed in this paragraph.

License Required

Two different circumstances can give rise to the need for licensure. If annual gross sales exceed \$20,000, a license is required. A license is also required if gross annual sales are below \$20,000 but the person wishes to sell food products to restaurants or other retail food establishments, over the Internet, by mail order, or to wholesalers, brokers, or other food distributors that will resell the food products. For more information, see <https://www.dhhs.nh.gov/dphs/fp/homestead.htm>

Completing the License Application

For homestead operations requiring a license, the license is a Class H license that costs \$150 per year. [He-P 2304.05\(a\)\(8\)](#); [He-P 2311.01\(a\)](#). The license application requires basic information about the homestead food operation as well as the attachment of supporting documentation that includes, but is not limited to, the following:

- ④ The results of water testing (if not on town water);
- ④ A complete list of the products that will be produced;
- ④ Additional documentation about jams and jellies that will not be made using standardized recipes (see below for more discussion of this); and
- ④ A sample finished label that contains all required information (see below).

There are fifteen municipalities in New Hampshire that have their own licensing authorities: Bedford, Berlin, Claremont, Concord, Derry, Dover, Exeter, Keene, Manchester, Merrimack, Nashua, Plaistow, Portsmouth, Rochester, and Salem. While the codes and applications of many of these municipalities are similar to those of the State, differences do exist, including with regard to the cost of the license.

Additional Requirements for Producers of Certain Jams and Jellies

If an applicant intends to produce jams or jellies using recipes that are not from the National Center for Home

Food Preservation (NCHFP), the applicant must include with their application “process review documentation” describing the production of the proposed jam or jelly.

He-P 2311.01(b)(2); He-P 2311.05(a)(4). Such applicants must also comply with the following:

- ④ Submit to a process review by a food processing authority on each product prior to its being produced by the license holder. Once the food processing authority declares in writing that there are no biological concerns with the food after evaluating the scheduled process, the food can be produced;
- ④ Keep records of all pHs on file and available for review by the regulatory authority upon request;
- ④ Keep all process review information on file and available for review by the regulatory authority upon request. **He-P 2311.05.**

Labeling Requirements

There are labeling requirements that apply to homestead food operations that produce packaged products, regardless of whether the food operation requires a license. The labeling requirements are not the same for licensed and non-licensed food operations, and specific labeling requirements also depend on where the products are sold.

Licensed and Non-Licensed Homestead Food Operations

Homestead food products sold in packages must bear individual labels on each package. Each package’s label must include the following:

- ④ name, address, and phone number of the homestead operation;
- ④ name of the product;
- ④ ingredients, in descending order of prominence by weight; and
- ④ allergy information, such as the name of a major allergen contained in an ingredient.

RSA 143-A:12, IV; He-P 2311.04(g). These requirements apply to licensed and non-licensed homestead food operations.

Additional Requirements for Licensed Homestead Food Operations

The labels of products made by licensed homestead food operations must contain the following statement in at least 10-point font:

“This product is made in a residential kitchen licensed by the New Hampshire Department of Health and Human Services.”

These labels must also include the date of manufacture, container size and product lot or batch number to aid in any necessary recall. For more information, see

He-P 2311.04 and <https://www.dhhs.nh.gov/dphs/fp/homestead.htm>

Additional Requirements for Non-Licensed Homestead Food Operations

Products produced in kitchens that are not required to be licensed must be labeled with the following statement in at least 10-point font: “This product is exempt from New Hampshire licensing and inspection.” These labels must also include either a batch number or date of manufacture to aid in any necessary recall. For more information, see <https://www.dhhs.nh.gov/dphs/fp/homestead.htm> and **He-P 2310.01.**

Kitchen Standards for Licensed Homestead Food Operations

Licensed homestead food operations are not subject to the Food Code published by the U.S. Department of Health and Human Services, but must comply with the requirements provided in He-P 2311.06. These standards include, but are not limited to, the following:

- ④ Commercial equipment is not required.
- ④ The kitchen shall have either a two-compartment sink or residential model dish machine and one-compartment sink.
- ④ Backflow devices are not required for sinks with spray hoses.
- ④ Self-closing doors and mechanical ventilation are required for bathrooms that open directly into the kitchen or into a hallway leading to the kitchen.
- ④ Laundry facilities that are in the kitchen may not be used during food production.

Organic Certification

The New Hampshire Department of Agriculture, Markets & Food (NHDAMF) establishes official quality standards for farm products produced for sale in New Hampshire. Any farm product produced for sale in New Hampshire and sold or labeled as “organic” must comply and also meets the standards of the United States Department of Agriculture. This section will review certification, record keeping and use of the seals and logos.



For products to be labeled and sold as ‘organic’ in New Hampshire, the farms or operations producing the products and ingredients and the farms or operations processing the products and ingredients must be certified through an approved certifier. The NH Department of Agriculture, Markets & Food (NHDAMF) is one such approved certifier. NHDAMF establishes official quality standards for farm products produced for sale in New Hampshire, including organic standards. [RSA 425:2, III](#). Any farm product produced for sale in New Hampshire and sold or labeled as “organic” must comply with the applicable standards set forth in [RSA 426](#) and the NHDAMF’s administrative rules ([Agr 910](#) and [Agr 911](#)), which are discussed throughout this chapter.

Organic standards must be met for all farm products that are sold, labeled, or represented as “organic,” “made with organic,” “100% organic,” or similar terms.

New Hampshire’s organic certification program meets the standards of the United States Department of Agriculture (USDA). So, anything certified organic pursuant to the New Hampshire law is also certified organic throughout the United States. See [RSA 426:6-a](#) (requiring that the state’s certification program meet federal requirements); [RSA 426](#) (generally); and [Agr 910](#) and [Agr 911](#) (NHDAMF’s administrative rules fleshing out the certification requirements).

Organic standards are meant to ensure that agricultural practices maintain or improve natural resources, including soil and water quality. The standards integrate cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.

REGULATIONS CITED FOR ORGANIC CERTIFICATION

RSA 425:2,III	Recordkeeping
RSA 426	Agr 911.08
Agr 910	7 CFR 205.13
Agr 911	
7 CFR 205	Use of Official Seals, Logos and Labels
RSA 426:6-b	RSA 426:6-a
	7 CFR 205.301
Organic Certification	7 CFR 205.303
Process	7 CFR 205.304
Agr 910	Agr 911.07
Agr 910.03	
Agr 910.06	
Agr 910:05(b),(c)	
Agr 911	
Agr 911.05,06	
7 CFR 205	
Resources	
"http://www.ams.usda.gov/publications/content/organic-production-handling-standards" www.ams.usda.gov/publications/content/organic-production-handling-standards	
www.ams.usda.gov/sites/default/files/media/Organic%20Practices%20Factsheet.pdf	
www.ams.usda.gov/sites/default/files/media/What%20is%20Organic.pdf	
www.ams.usda.gov/sites/default/files/media/Program%20Handbk_TOC.pdf	
http://www.ams.usda.gov/publications/content/guide-organic-certification" www.ams.usda.gov/publications/content/guide-organic-certification	
www.ams.usda.gov/services/organic-certification/faq-becoming-certified	
http://agriculture.nh.gov/divisions/regulatory-services/organic.htm	
https://www.ams.usda.gov/publications/content/what-organic-certification	
<http://agriculture.nh.gov/divisions/regulatory-services/organic-certification-forms.htm>	
www.ams.usda.gov/sites/default/files/media/NOP-CropDocumentationForms.pdf	
http://www.ams.usda.gov/sites/default/files/media/NOP-DocumentationFormsIntro.pdf" www.ams.usda.gov/sites/default/files/media/NOP-DocumentationFormsIntro.pdf	
www.ams.usda.gov/sites/default/files/media/Labeling%20Organic%20Products.pdf	
www.ams.usda.gov/sites/default/files/media/Organic%20at%20Farmers%20Markets.pdf	
http://1.usa.gov/organic-certification	
www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=organic-agriculture.html.	

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Full details of the federal organic standards are found in the Code of Federal Regulations: [7 CFR Part 205](#). See also, the following factsheets:

- ④ Organic Production and Handling Standards: www.ams.usda.gov/publications/content/organic-production-handling-standards
- ④ Introduction to Organic Practices: [https://www.ams.usda.gov/sites/default/files/media/Organic Practices Factsheet.pdf](https://www.ams.usda.gov/sites/default/files/media/Organic_Practices_Factsheet.pdf)

NHDAMF has established quality standards for farm products that are sold, labeled, or represented as “organic,” “made with organic,” “100% organic,” or similar terms. [RSA 426:6-b](#).

The law contains specific requirements and exemptions and each producer should individually verify the requirements as they pertain to the operation. But, in general, the USDA Agricultural Marketing Service describes the permitted use of these terms as follows:

- ④ “100 percent organic” can be used to label any product that contains 100 percent organic ingredients (excluding salt and water, which are considered natural). Most raw, unprocessed farm products can be designated “100 percent organic.” Likewise, many value-added farm products that have no added ingredients—such as grain flours, rolled oats, etc.—can also be labeled “100 percent organic.”
- ④ “Organic” can be used to label any product that contains a minimum of 95 percent organic ingredients (excluding salt and water). Up to 5 percent of the ingredients may be nonorganic agricultural products that are not commercially available as organic and/or nonagricultural products that are on the National List.
- ④ “Made with Organic _____” can be used to label a product that contains at least 70 percent organically produced ingredients (excluding salt and water). There are a number of detailed constraints regarding the ingredients that comprise the nonorganic portion.

- ④ The specific organic ingredients may be listed in the ingredient statement of products containing less than 70 percent organic contents—for example, “Ingredients: water, barley, beans, organic tomatoes, salt.”

These quality standards apply to producers, handlers, processors, and on-farm processors and to agricultural plant, animal, food, and fiber products. *Id.* According to the statute, the term “organic” means an agricultural plant, animal, food, or fiber commodity produced in accordance with the Organic Foods Production Act of 1990. [RSA 426:6](#). This federal act is the federal law that established the organic program, and with which the New Hampshire laws comply.

According to the Organic Foods Production Act of 1990, the USDA organic regulations recognize four categories of organic products:

- ④ Crops: A plant that is grown to be harvested as food, livestock feed, fiber, or used to add nutrients to the field.
- ④ Livestock: Animals that can be used for food or in the production of food, fiber, or feed.
- ④ Processed Products: Items that have been handled and packaged (i.e., chopped carrots) or combined, processed, and packaged (i.e., soup).
- ④ Wild Crops: Plants from a growing site that is not cultivated.

Information specific to each of these categories of organic products can be found at:

- ④ www.ams.usda.gov/sites/default/files/media/What%20is%20Organic.pdf
- ④ www.ams.usda.gov/sites/default/files/media/Program%20Handbk_TOC.pdf.

Organic Certification Process

See the factsheet: Guide to Organic Certification: <https://www.ams.usda.gov/sites/default/files/media/Guide-OrganicCertification.pdf>

The NHDAMF offers two types of organic certification:

- 1) certification for the individual or facility that handles or processes organic products; and
- 2) the certification of organic commodities.

The first type of certification deals with how organic products and organic ingredients are processed so that the finished product is also organic. It relates mostly to manufacturing, slaughtering, cooking, and other processing. The second certification is all about the raw product: how it is grown, including feed, nutrients, locations, etc.

Certification of Individuals and Facilities

The certification of handlers and processors of organic commodities is provided for in detail in N.H. Administrative Rule Part [Agr 910](#). It applies to both handlers and producers. The term “handler” contemplates those who may not have produced the product. For example, a handler could be the maker of certified organic granola using organic ingredients grown by others. On the other hand, the term “processor” includes those who have produced the bulk of the ingredients of the finished product at the same location where the finished product is made. [Agr 910.03](#). Based on these definitions, a processor could be certified organic for some products, but not for others.

The specific process for certification is very complex and is beyond the scope of this guide. It involves a good deal of paperwork and time. However, following is a general description of a successful certification process:

- ④ Producer or handler adopts organic practices and submits application and fees to certifying agent (in this case, the NHDAMF);

- ④ Certifying agent (i.e., NHDAMF) reviews applications to verify that practices comply with USDA organic regulations;
- ④ Inspector conducts an on-site inspection of the applicant’s operation;
- ④ Certifying agent reviews the application and the inspector’s report to determine if the applicant complies with the USDA organic regulations; and
- ④ Certifying agent issues organic certificate, which is then subject to an annual recertification process, as follows:
 - ④ Producer or handler provides annual update to certifying agent;
 - ④ Inspector conducts an on-site inspection of the applicant’s operation; and
 - ④ Certifying agent reviews the application and the inspector’s report to determine if the applicant still complies with the USDA organic regulations.

See the accompanying factsheet: What is Organic Certification: <https://www.ams.usda.gov/publications/content/what-organic-certification>.

Beyond this overview, the NHDAMF’s administrative rules provide more specific details about applying for organic certification, including, but not limited to, the following:

- ④ The applicant submits to the NHDAMF an application for certification, and the application serves as the “organic system plan” as described and required by federal law in Subpart C—Organic Production and Handling Requirement, [7 C.F.R. 205](#); and
- ④ The applicant pays a certification fee of \$250 (on-farm processors pay \$50) plus an inspection fee that is billed after the NHDAMF’s inspection. [Agr 910.05\(b\)](#). The information that is required on the application is described on the application form and at N.H. Administrative Rule [Agr 910.05\(c\)](#). This certification must be renewed annually. [Agr 910.06](#).

Certification of Commodities (Raw Products)

Producers and handlers may have their agricultural commodities certified organic by meeting certain requirements of the USDA's National Organic Program and applying for certification from the NHDAMF. See:

- ④ www.ams.usda.gov/services/organic-certification-faq-becoming-certified
- ④ <http://agriculture.nh.gov/divisions/regulatory-services/organic.htm>.

As with the certification procedure for handlers and processors, the specific process for certification is very complex and is beyond the scope of this guide. It also involves a good deal of paperwork and time. However, following is a general description of a successful certification process:

- 1) The applicant submits to the NHDAMF an application for certification, and the application serves as the “organic system plan” as described and required by federal law in Subpart C—Organic Production and Handling Requirement, **7 C.F.R. 205**.

The application is available at: <http://agriculture.nh.gov/divisions/regulatory-services/organic-certification-forms.htm>

- 2) The applicant pays a certification fee of \$100 plus the applicable inspection fees as determined using the tables below, by the applicable deadline, if any. Application submission deadlines are as follows:

NHDAMF Administrative Rule Agr **911.05** has certain requirements for different types of organic commodities. Carefully read **Agr 911.05** to ensure that you submit all information that is required to obtain organic certification for your organic product(s); see tables below. This certification must be renewed annually. **Agr 911.06**.

To determine the number of animal units (AUs) per animal type, see table above, right. **Agr 911.05**.

An AU shall be calculated by multiplying the number of animals by its respective AU factor, as in the formula below: # animals of each type x AU factor = total number

ANIMAL TYPE	ANIMAL UNIT (AU) FACTOR
Beef Cow	1.00
Dairy Cow	1.40
Swine	0.20
Sheep	0.10
Turkeys and other fowl	0.01
Chickens	0.0025

APPLICATION	DEADLINE
Field crop production	March 1st of each year
Maple products	February 1st of each year
Other types of organic production	Generally three months before the annual renewal date

AU's for each animal type. Id. For example, a farmer having 400 chickens would be required to pay the inspection fee appropriate to 400 x 0.0025, or 1 AU (\$50). A farmer having 30 swine would be required to pay the inspection fee appropriate to 30 x 0.20, or 6 AU (\$100).

An AU represents 1,000 pounds of live animal weight. Id. All dairy animals, regardless of age, are calculated at the 1.4 AU factor. Id. An applicant with multiple animal types shall calculate the number of AU per species, then add these figures to get the total number of AU to determine the inspection fee. Id.

For information that must be provided when applying for an organic certification, read NH Administrative Rules Part 911 and visit www.ams.usda.gov/sites/default/files/media/NOP-CropDocumentationForms.pdf

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Inspection Fees for Organic Maple, Horticultural and Agronomic Crops, and Greenhouse Production. Agr 911.05.

PRODUCTION TYPE	Fee: \$50	Fee: \$100	Fee: \$200	Fee: \$300	Fee: \$400	Fee: \$500
Agronomic crops, including hay & pasture; production # acres	50 or less	>50-100	>100-200	>200-300	>300-400	>400
Horticultural crops, including fruits & vegetables; production # acres	10 or less	>10-25	>25-75	>75-100	>100-250	>250
# Maple Taps	1000 or less	1000 -2000	2000 -3000	3000 -5000	5000 -10,000	10,000 or more
# Sq. Ft. controlled environ production	2000 or less	2000 -4000	4000 – 6000	6000 – 10,000	10,000 – 20,000	20,000 or more

Inspection Fees for Organic Livestock Agr 911.05.

PRODUCTION TYPE	Fee: \$50	Fee: \$100	Fee: \$150	Fee: \$200	Fee: \$300	Fee: \$400
Animal Units (AU)	<4 AU	>4-20 AU	>20-40 AU	>40-60 AU	>60-80 AU	>80 AU

Recordkeeping

A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products. While there is not a required format, these records must:

1. be adapted to the particular business that the certified operation is conducting;
2. fully disclose all activities and transactions in sufficient detail as to be readily understood and audited;
3. be maintained for at least five years;
4. be sufficient to demonstrate compliance with the Organic Foods Production Act and its regulations; and
5. be available for inspection and copying during normal business hours.

N.H. Administrative Rule [Agr 911.08](#); [7 CFR 205.103](#)

For more detail on record keeping requirements, see the factsheet: Documentation Forms for Organic Crop and Livestock Producers: www.ams.usda.gov/sites/default/files/media/NOP-DocumentationFormsIntro.pdf

The NHDAMF has the following, additional recordkeeping requirements for certified operations that produce both organic and non-organic agricultural commodities:

1. separate production and sale records for organic and non-organic commodities; and
2. procedures implemented to prevent the commingling and contamination of organic products from non-organic products. [Agr 911.08](#).

Certified operations that sell both organic and non-organic commodities shall maintain records showing:

1. sale records of such products; and
2. the sources of such products. Id.

Use of Official Seals and Logos, Labels

Depending on the level of organic ingredients in a product, a certified processor or handler may include the USDA Organic Seal or the NHDAMF Organic logo, or both, on labels and advertisements. [7 C.F.R. § 205.301](#). Proposed labels and advertisements must be submitted to the NHDAMF for approval. [Agr 911.07](#).

Only products produced and handled by certified organic operations and labeled “100 percent organic” or “organic” may display the USDA Organic Seal (shown below). [7 C.F.R. § 205.303](#). These products may also display the NHDAMF seal (shown below). Products with 70 percent or more organic (but the product is not certified as “100 percent organic” or “organic”) may display the NHDAMF seal, but not the USDA seal.

[7 C.F.R. § 205.304](#). These products must bear the label statement: “Made with organic ___(specified ingredients or food groups(s))”. Products containing less than 70% organic ingredients, may not label those products as organic, except by indicating organic ingredients in the ingredient statement.



USDA Organic Seal



NH Dep't of Agriculture, Markets & Food Logo

Content of the label depends on the product's composition. [7 C.F.R. § 205.301](#). A product's label must be specific when labeling that it is an organic product. Id. If the product is 100 percent organic, it can be marked as such. Id. However, if the product only contains a certain amount of organic product, the label cannot misrepresent

the product's organic content on the label. Id. When only a portion of the end product is composed of organic ingredients, the label must define which ingredients are organic. **7 C.F.R. § 205.303**

Exempt operations (see below) may identify their products as organic, but may not display the USDA seal or the NHDAMF seal on products or advertising.

7 C.F.R. § 205.301, 303, 304, Agr 911.07, RSA 426:6-a

See these factsheets:

- ④ Labeling Organic Products: <https://www.ams.usda.gov/rules-regulations/organic/labeling>
- ④ Organic Labeling at Farmers Markets: www.ams.usda.gov/sites/default/files/media/Organic%20at%20Farmers%20Markets.pdf.

Exempt and Excluded Operations

Any operation whose gross annual income from the sale of organic agricultural products totals \$5,000 or less, is exempt from certification. However, the exemption applies only to the certification process itself. Exempt operations must still comply with organic production and handling requirements.

Handling operations that handle only products containing less than 70% by weight organic ingredients and those that only identify ingredients as organic on the information panel are also exempt from certification but must still take steps to ensure that the organic ingredients do not come in contact with prohibited substances, must follow labeling rules, and must maintain proper production and handling records.

Exempt operations may identify their products as organic, but may not display the USDA seal or the NHDAMF seal on products or advertising.

Products or ingredients produced or handled by exempt operations may be identified as organic by that operation but may not be identified or represented as organic when sold or used as ingredients by other operations.

Operations that sell only pre-packaged organic products (products that are packaged prior to being received and remain in that package) are excluded from certification. Retail food establishments that process raw and ready to eat foods previously labeled as organic are also excluded but still must prevent comingling of organic and non-organic products and must not identify those products as 'certified organic'.

Additional Information

To learn more about becoming certified, visit the following websites or contact the NHDAMF at:

<https://www.ams.usda.gov/services/organic-certification>

Farmers’ Markets in New Hampshire

This chapter covers the definition of a farmers’ market, how to organize a farmers’ market, understanding legal consideration and municipal requirements, market managers responsibilities, links to valuable resources and requirements for vendors.



New Hampshire law defines a “farmers’ market” as:

an event or series of events at which 2 or more vendors of agricultural commodities gather for purposes of offering for sale such commodities to the public. Commodities offered for sale must include, but are not limited to, products of agriculture, as defined in paragraphs I–IV [of [RSA 21:34-a](#)]. “Farmers’ market” shall not include any event held upon any premises owned, leased, or otherwise controlled by any individual vendor selling therein.

[RSA 21:34-a](#), V; see also [RSA 175:1](#) (employing the same definition of “farmers’ market” for purposes of sales of alcoholic beverages). In order for a market to qualify for the protections and rights afforded under New Hampshire law, a farmers’ market must satisfy these criteria.

It is important to note a new law that allows sampling of beer and wine at farmers’ markets as follows: “Free Drinks” – “wine manufacturers, beverage manufacturers, nano breweries, and brew pubs may provide samples for tasting to persons of legal drinking age at a farmers’ market provided they have received written authorization by the town or city’s governing body, which authorization shall remain effective until revoked in writing, and they have provided the commission with a copy of that authorization. Provision of samples shall be restricted to clearly defined areas approved by the commission. Samples shall be limited to one 4-ounce sample per label per person for any beer, specialty beer, or cider, and one 2-ounce sample per label per person for any wine.” [RSA 179:44, II-a](#).

Operating a Farmers’ Market

One of the most important decisions to make prior to opening a farmers market is to determine who will run it. Farmers’ markets may be managed by either the local municipality or by a private organization, and the decision will often depend upon the resources and concerns of the subject

REGULATIONS CITED FOR FARMER’S MARKETS IN NH

RSA 21:34-a
 RSA 175:1
 RSA 179:44, II-a

Operation of a Farmers’ Market
 RSA 292
 RSA 292:4
 RSA 292:6
 RSA 292:6a,b

Resources

<https://nhmunicipal.org/TownAndCity/Article/103>
[www.sos.nh.gov/corporate/ Nonprofitforms.html](http://www.sos.nh.gov/corporate/Nonprofitforms.html)
<http://extension.psu.edu/business/farm/marketing/new-trends-in-agricultural-marketing/farmers-markets/10-principles-of-a-successful-farmers-market>
<http://www.nhfma.org>
<http://www.dhhs.nh.gov/dphs/nhp/wic/csfp.htm>
<http://www.nhinsider.com/press-releases/2009/6/17/nh-dhhs-wic-nutrition-program-distributes-farmers-market-cou.html>
<http://www.nh.gov/labor/documents/employee-contractor-poster.pdf>
<http://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp>
<http://www.nh.gov/labor/workers-comp/employer-information.htm>
https://extension.unh.edu/resources/representation/Resource004139_Rep5905.pdf

municipality. See *Cultivating a Successful Farmers' Market*, C. Christine Fillmore, Esq, New Hampshire Municipal Assoc. (June 2008), available at <https://nhmunicipal.org/TownAndCity/Article/103>.

Many smaller municipalities do not have sufficient resources or volunteer staff necessary to create a market committee. Id. A group of staff or volunteers is often necessary to ensure compliance with the various requirements applicable to farmers' markets. Id. For these and other reasons, a private organization is sometimes better able to effectively operate a local farmers' market. Id. There are several local nonprofit farmers' market organizations in New Hampshire whose sole purpose is to organize, facilitate and promote farmers' markets in their communities. Id.

A farmers' market association should coordinate with the municipality on the location of the market, arrange for traffic control, and obtain and comply with any local permits that are required. Id. Additionally, the association will be responsible for choosing vendors and organizing any logistical details. Id. Vendors are usually required to submit applications to the association with contact information, product lists, proof of insurance and food licenses, and information on how many market days they will participate in. Id. While not required, a farmers' market or a farmers' market association is often organized as a separate business entity, such as a New Hampshire non-profit corporation. See [RSA 292](#) and the Legal Structures chapter herein for guidance in incorporating a non-profit corporation. Although a non-profit corporation is not the only business entity by which a farmers' market may be established, it is the most common. See *Cultivating a Successful Farmers' Market*; see also Legal Structures chapter (discussing other types of business entities).

Several local nonprofit organizations in New Hampshire organize farmers' markets in their communities. *Cultivating a Successful Farmers' Market*. If the nonprofit legal structure suits the particular needs of the organizers' market, they must first incorporate with New Hampshire's Secretary of State by filing Articles of

Agreement, register their trade name with the Secretary of State, obtain a federal identification number from the Internal Revenue Service (IRS), and, if the desire is to become a tax-deductible charitable organization, or 501(c)(3), submit a Form 1023 to the IRS. See Legal Structures chapter. State forms are available from the Secretary of State, and some forms are available on line at <https://sos.nh.gov/corporation-ucc-securities/corporation/forms-and-fees/>. After filing with the Secretary of State, a nonprofit's Articles of Agreement must be filed in the office of the clerk of the town or city in which the mailing address of the corporation is located. [RSA 292:4](#).

A non-profit's membership consists of voting members, which often include farmers and vendors as well as community members and customers. *Cultivating a Successful Farmers' Market*; [RSA 292:6-b](#). The members elect a board of directors to manage the day-to-day activities of the market, as well as to develop rules (such as bylaws) of the market's operations and regulate the types of products that may be sold and the required origin of those products. *Cultivating a Successful Farmers' Market*; [RSA 292:6](#); [RSA 292:6-a](#). The legal and organizational documents associated with incorporating and operating non-profit corporation (or other business entity) provide a written basis for the market's operations upon which the board of directors, members, and stakeholders can rely. See the Legal Structures chapter and associated New Hampshire statutes for details.

With regard to additional legal consideration and municipal requirements, the organizers of a farmers' market should:

- Understand relevant town permits and zoning requirements on subjects as diverse as posting signs to ensure that market business may be conducted on the property;
- Obtain appropriate insurance coverage, which some towns may require, such as commercial liability, directors' and officers' liability, and workers' compensation.

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- ④ Develop market rules, which establish guidelines such as opening and closing times, rent schedules, vendor ratio, and geographic range within which vendors may be selected; and
- ④ Recruit vendors, which typically will involve an application process and determining a vendor balance to ensure a successful variety of agricultural, craft, and prepared foods vendors.

See *Cultivating a Successful Farmers' Market*.

In addition to the New Hampshire Municipal Association, other entities provide additional considerations that may be important to running a successful farmers' market, including:

- ④ Setting a time, location and season that coordinates the needs of farmers, consumers and the local community;
- ④ Choosing a central, visible, and permanent location;
- ④ Having a diversity of products and producers;
- ④ Enacting fair and enforceable rules and regulations that establish
 - ④ A mission statement for the market;
 - ④ Who can sell in the market;
 - ④ What products may be sold in the market;
 - ④ An application and crop plan requirement that ensures the market has production and marketing information for each vendor;
 - ④ Standards of vendor behavior;
 - ④ Market operations information, including season, times of operation, rents, application and space assignment procedures;
 - ④ Rules enforcement procedures, including penalties for failure to comply and a grievance procedure; and
 - ④ Procedures for complying with state and local laws, regulations, and requirements;
- ④ Having a strong market manager who is passionate about the market;
- ④ Having a management structure that allows for vendor input;

- ④ Creating a marketing plan that clearly defines a target audience with a strategy for reaching that audience;
- ④ Ensuring adequate funding, which may include
 - exploring funding opportunities from local businesses, private foundations, municipalities, state and federal grants;
- ④ Keeping in mind that a successful market involves the community in which it serves; and
- ④ Continually self-evaluating.

10 Principles of a Successful Farmers' Market, PennState Extension, available at <http://extension.psu.edu/business/farm/marketing/new-trends-in-agricultural-marketing/farmers-markets/10-principles-of-a-successful-farmers-market>. See also the New Hampshire Farmers Market Association website at www.nhfma.org. Another key to success may be the promotion of the farmers' market through signage and advertisements and press releases in local papers.

A farmers' market should also be aware of opportunities to participate in New Hampshire's Women, Infants, and Children (WIC) Nutrition and Commodity Supplemental Food (CSF) Programs. Information is available at www.dhhs.nh.gov/dphs/nhp/wic/csfp.htm.

To simplify operations, the farmers' market board of directors may delegate the day-to-day duties of running the market to a market manager. The market manager may be employed by the farmers' market or may be a volunteer, depending on the market's business structure and circumstances. There are a number of duties that the board of directors cannot or should not delegate, particularly relating to making sure that the market obtains all appropriate licenses and insurance policies. The board has an affirmative duty to know and understand the business of the market.

The market manager's duties most often include:

- ④ Bookkeeping;
- ④ Enforcing market rules;

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- ④ Handling food stamp sales;
- ④ Filing an annual or biennial report;
- ④ Collecting fees; and
- ④ Maintaining the market site.

It may be possible to hire a market manager as an independent subcontractor so that the market is not responsible for employment taxes or workers compensation insurance. However, it is important to ensure that an independent-contractor manager can actually meet the definition of an independent contractor. See www.nh.gov/labor/documents/employee-contractor-poster.pdf. If the manager cannot meet the Independent Contractor test, the farmers' market may remain liable for payment of income tax withholding, unemployment compensation, and workers compensation.

For a market manager to qualify as an independent contractor, and not an employee, consider the following criteria:

- ④ The independent contractor must possess or have applied for a federal employer identification number or social security number;
- ④ The independent contractor must have control and discretion over the means and manner of the performance of the work, rather than the means or manner by which the work is performed;
- ④ The independent contractor must have control over the time when the work is performed, and the time of performance is not being dictated by the employer, except for completion schedules, a range of work hours or maximum number of work hours to be provided by the independent contractor, and in the case of entertainment, the time such entertainment is to be presented.
- ④ The independent contractor must hire and pay their own assistants, if any, and to the extent such assistants are employees of the independent contractor, supervise the details of the assistants' work.
- ④ The independent contractor must hold itself out to be in business for itself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.
- ④ The independent contractor must be responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
- ④ The independent contractor must not be required to work exclusively for the hiring party.

Id. In addition to this website, see also

<http://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp>
www.nh.gov/labor/workers-comp/employer-information.htm

With regard to independent-contractor status, it is advisable to seek legal counsel.

Vendors

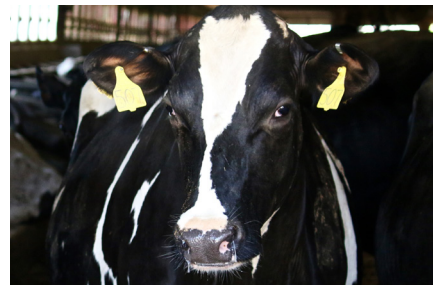
A New Hampshire homestead food license is the most frequently required license for vendors at farmers' markets and is issued and administered by the New Hampshire Department of Health and Human Services. *Cultivating a Successful Farmers' Market*; see also *Homestead Operations* chapter herein. Vendors selling milk products or other animal products should consult the applicable chapters herein.

Becoming a vendor at a farmers' market can be as easy as submitting an application to the association with relevant contact information, product lists, particular preferences, and proof of insurance. *Cultivating a Successful Farmers' Market*. Each vendor should be required to certify to the association or municipality that the vendor has obtained all applicable food handling licenses from the state (and provide current copies of those licenses) and to certify that the vendor will remain in compliance with all food handling regulations. Id. Depending upon local ordinance and regulations, vendors may also be required to obtain a local health license. Id.

For information on how to sell successfully at a farmers market please visit the University of New Hampshire Cooperative Extension Fact Sheet: *Selling Successfully at a Farmers Market*, found at: https://extension.unh.edu/resources/representation/Resource004139_Rep5905.pdf.

Milk and Milk Products Regulations in New Hampshire

This chapter is an introduction to milk regulation in New Hampshire. Obtaining a license or a permit, selling milk products, operating a milk-based business, or otherwise working with milk in compliance with the law is important for the farmer producing and selling milk and raw milk. Learn what is required for permits and licenses.



The New Hampshire Department of Health and Human Services (the “Department”), the Milk Sanitation Board, and some municipal health departments regulate the production and processing of milk and milk products. **RSA 184:30-h, RSA 184:80, RSA 184:82, RSA 184:93, RSA 184:108.** The Department’s statutory authority derives from **RSA Chapter 184.** Those subject to regulation include operators of milk plants, milk producers, milk distributors, and milk producer–distributors. **RSA 184:84.** Others in the milk industry are also regulated.

In addition to **RSA 184**, there are numerous administrative rules that apply to milk. The Department’s administrative rules are available at the Department’s website. The rules pertaining to milk are at “**He-P 2700**” and “**Mil 300**.” Within each group of rules are numerous, detailed rules. This chapter is an introduction to milk regulation in New Hampshire. Obtaining a license or a permit, selling milk products, operating a milk-based business, or otherwise working with milk in compliance with the law requires further research beyond what is contained herein. It may be advisable to consult an attorney who is familiar with food regulation.

Who and What is Regulated

The term “milk plant” means any place, premises, or establishment where milk or milk products are collected, handled, processed, stored, pasteurized, bottled, packaged, or prepared for distribution, except an establishment where milk or milk products are sold at retail only. **RSA 184:79, XIII.**

A “milk producer” is any person who owns or controls one or more cows, sheep, or goats, a part or all of the milk or milk products from which are sold, or offered for sale. **RSA 184:79, IX.** A “milk distributor” is any person who offers for sale or sells to another any milk or milk products for human consumption as such. **RSA 184:79, X.** A “milk producer–distributor” is a producer who is also a distributor

REGULATIONS CITED FOR MILK AND MILK PRODUCTS IN NH

RSA 184:30-e	RSA 184
RSA 184:82	Mil 301
RSA 184	Permits
He-P 2700	RSA 184:88
Mil 300	RSA 184:89
	He-P 2702
	He-P 2702.03
	He-P 2702
Regulations	RSA 184
RSA 184:79, XIII	Mil 300
RSA 184:79, IX	Licenses
RSA 184:79, X	RSA 184:76-77,79
RSA 184:79, XI	RSA 184:84
	He-P 2703
Types of Regulations	RSA 184:85,II
RSA 184	RSA 184
He-P 2700	He-P 2700
Mil 300	Mil 300
Pasteurization	
RSA 184:30-a	
Mil 301.03	
Raw Milk	
RSA 184:30-a	
RSA 184,V(a)	

Resources

www.dhhs.nh.gov/dphs/fp/dairy/documents/dairystartup.pdf

and sells more than an average of 80 quarts of milk a day. [RSA 184:79, XI](#).

Regulated “milk products” include fluid milk, cultured fluid milk, cream, yogurt, raw milk yogurt, sour cream, eggnog, butter, ice cream, and cheese. See www.dhhs.nh.gov/dphs/fp/dairy/documents/dairystartup.pdf.

Types of Regulation, Generally

Regulation generally takes the form of permitting milk producers, and licensing milk plants, milk distributors, and milk producer–distributors. [RSA 184:85](#); [RSA 184:89](#). There are also labeling requirements. See [RSA 184:30-a](#); [RSA 184:84](#) and other subdivisions of [RSA Chapter 184](#). Labeling requirements apply to milk products including milk, cream, butter, and butter substitutes. The labeling requirements vary depending on the type of milk product, thus requiring that any person working with any such product must understand the relevant sections of [RSA Chapter 184](#) that apply to the milk product in question. The Department has adopted administrative rules that provide details beyond what is provided in [RSA Chapter 184](#) with regard to permitting, licensing, and labeling. See [NH Code Admin. R. He-P 2700](#) and [Mil 300](#).

Pasteurization Requirement and Exceptions

Milk products may not be sold, offered for sale or served unless they are pasteurized, though exceptions to the rule exist. [RSA 184:30-a](#). One exception includes direct sales of raw milk or cream from the producer, store, or milk pasteurization plant to the final consumer. [RSA 184:30-a](#); [NH Code Admin. R. Mil 301.03](#). Other exceptions are included in the statute and administrative rules, including additional provisions for raw milk.

Raw Milk

There are several specific requirements for producers and sellers of raw milk products including milk, cream, cheese, and yogurt. Examples of such requirements include, but are not limited to, the following:

- ④ Yogurt made from raw milk must be clearly labeled as having been made with raw milk. [RSA 184:30-a](#).
- ④ Any raw milk product sold by a producer–distributor at the farm, farm stand, or farmers’ market must adhere to labeling requirements found in [Mil 301.03](#) and [RSA 184.84, V](#), including the inclusion of the following statements: “This raw milk has not been tested for antibiotic residues prior to sale” and, “Raw milk is not pasteurized. Pasteurization destroys organisms that may be harmful to human health.” A milk producer–distributor selling raw milk products must also include labels or signs with the following statement: “Products from this farm made from raw milk are exempt from New Hampshire licensing and inspection.”

A milk producer–distributor who daily produces for sale less than 20 gallons of raw milk or processes less than 20 gallons of raw milk into cheese aged at least 60 days, yogurt, cream, butter, or kefir is not required to obtain a milk producer–distributor license (discussed below), provided these products are offered as direct sales from the producer–distributor’s own farm, farm stand, or at a farmers’ market to the food consumer within the state of New Hampshire only. See [RSA 184](#) and the administrative rules under [Mil 301](#) for additional requirements applicable to raw milk.

Permits

New Hampshire regulations require milk producers who offer for sale or sell milk or milk products to obtain a valid producer permit, which is issued by the Department. [RSA 184:88](#). See [RSA 184:89](#) and administrative rules under [He-P 2702](#) for more details. A permit remains valid until revoked for failure to comply with applicable laws and regulations or until six months after operations at the permitted facility have ceased. [RSA 184:89](#); [NH Code Admin. R. He-P 2702.03](#). Permittees must remain in compliance with the requirements of [RSA 184](#) and administrative rules under [He-P 2700](#) and [Mil 300](#).

A permit is also required for a “receiving station,” which includes creameries, cheese factories, condensaries, receiving stations, milk depots, bulk tank collector trucks and processing plants for milk and cream. [RSA 184:60](#), [RSA 184:79](#), [XXVII](#).

Licenses

Milk plant operators, milk distributors, and milk producer–distributors must obtain a license from the Department. [RSA 184:84](#). See administrative rules under [He-P 2703](#) for more details. Producer–distributors that do not sell an average of 20 gallons/80 quarts of milk a day are not required to obtain a license. [RSA 184:79, XI](#). Licenses are valid for one year or a portion thereof, expiring on the first of January after the date the license was issued. [RSA 184:85, II](#). Licensees must remain in compliance with the requirements of [RSA 184](#) and administrative rules under [He-P 2700](#) and [Mil 300](#).

A milk tester is also required to obtain a license. See [RSA 184:76-a](#) and [RAS 184:77](#) for more details.

Additional Department Guidance

In addition to [RSA 184](#) and the administrative rules at [He-P 2700](#) and [Mil 300](#), the Department has issued additional guidance in a document titled “Starting up a Dairy in New Hampshire” (Jan. 1, 2014). The document includes practical guidance such as the following:

- ④ The facilities in which milking takes place or milk is stored must have floors and milking stands made out of an impervious material, such as concrete, metal or tile, that is easily cleaned and in good repair. Floors must be graded to drain. Walls and ceilings of the regulated facilities must be smooth and tight, easily cleanable, light-colored and in good repair. Adequate lighting and ventilation is necessary, as well.
- ④ The requirements for the milk room are the generally the same as the milk parlor.
- ④ The milk room may not open directly into living quarters, and the doors between the milk room and the parlor or barn must be solid, tight, and self-closing. Additional requirements include hot water as well as potable water under pressure, which must be provided in the milk room. Other mandatory inclusions are a two-bay wash sink and a hand sink.

- ④ All doors of the milk room must be tight and self-closing. Outer doors may be screened in warm weather provided the doors open outward. Windows may also be opened provided they are screened.
- ④ A bulk milk tank for cooling and storing the milk is recommended but not necessary.
- ④ All processing of milk, including pasteurization and cheese-making, must be done in a room separate from the milk room. Only raw milk may be stored in the processing room. Milking equipment, buckets, utensils and anything necessary for the operation must be washed and stored in the milk room. The processing room must not open into the barn or milking parlor, nor should this room be located so that it is used for routine traffic in and out of the milk room. The processing room may open into the milk room provided that there is a solid, self-shutting door between the two rooms.
- ④ All milk room and processing room waste which does not go into a sanitary sewer must go into a system that meets the standards of the USDA Natural Resources Conservation Service (NRCS). A copy of the design must be provided to the Department’s Dairy Sanitation Program. A septic system is generally not recommended for milk room and cheese room waste.
- ④ All containers, utensils, and equipment must be made of glass, stainless steel, or other non-toxic and corrosion-resistant metals, or durable plastic, rubber or rubber-like materials which cannot be easily scratched or scored and which are non-toxic.

Animal Health in New Hampshire

New Hampshire’s Department of Agriculture, Food and Markets, and the Division of Animal Industry regulates the health of livestock and poultry. Farms in New Hampshire are regulated regarding infectious and contagious diseases among domestic animals, transportation of animals, importation and testing of bovines and other domestic animals, treatment of equines, commercial feed and accurate labeling, as well as feeding garbage to swine.



Department of Agriculture, Food and Markets, Division of Animal Industry (the “Department”) regulates the health of livestock and poultry. The Department is responsible for the control and eradication of all infectious and contagious diseases of domestic animals and poultry in New Hampshire. See:

<http://agriculture.nh.gov/divisions/animal-industry/index.htm>

Conducted through testing, vaccination and regulation of the entry of animals and poultry into New Hampshire, the goal is protection of people, livestock and poultry from illness. Id.

Regulation takes place through laws and regulations that govern:

- ④ Infectious and contagious diseases among domestic animals;
- ④ Transportation of animals;
- ④ Importation and testing of bovines and other domestic animals;
- ④ Treatment of equines;
- ④ Commercial feed and accurate labeling;
- ④ Feeding garbage to swine; and
- ④ Other topics.

The topics discussed in this chapter are among the more prominent and widespread regulated topics, but it is advisable to consult the statutes and administrative rules for additional topics and additional details on the topics discussed herein.

REGULATIONS CITED FOR ANIMAL HEALTH IN NH

RSA 436:31
RSA 436:77

[Transportation of Poultry](#)
NH Code Admin R 1601:01-02(b)

[Importation of Bovines and Other Domestic Animals](#)
RSA 436:10-13
RSA 436:15-16
Agr 2100
Agr 2103.03
Agr 2104
RSA 436:24-25
RSA 436:93-96

[Registration of Commercial Feed Manufacturers](#)
RSA 435:19-21
RSA 435:23

[Treatment of Equines](#)
RSA 435:11-14
RSA 436:93,III

[Feeding Garbage to Swine](#)
RSA 435:32-40

[Resources](#)
<http://agriculture.nh.gov/divisions/animal-industry/index.htm>
<http://agriculture.nh.gov/publications-forms/documents/reportable-diseases.pdf>

Infectious and Contagious Diseases Among Domestic Animals

The Department has the authority to investigate the existence of infectious and contagious diseases affecting domestic animals and can enter any premises in the State if the Department has reason to believe that there exists or may exist any such disease. **RSA 436:31**. The Department's interests concern all domestic animals, including cattle, equines, sheep, and swine. *Id.* The Department may test for any infectious or contagious disease, including pleuropneumonia, foot and mouth disease, glanders, hog cholera, anthrax, black leg, hemorrhagic septicemia, rabies, scrapie, fowl cholera, and European fowl pest. *Id.*

If a farmer kills a bovine, sheep, or swine because the farmer knows or has reason to believe that the animal has an infectious or contagious disease, or if the farmer learns of it after the killing, the farmer must immediately report it to the municipal board of health and the Department. **RSA 436:77**.

A list of all reportable diseases can be found at:

<http://agriculture.nh.gov/publications-forms/documents/reportable-diseases.pdf>.

Additionally, neurological signs in cattle and reportable diseases must be reported to the State Veterinarian immediately. *Id.* The State Veterinarian is an employee of the Department.

Transportation of Poultry

Poultry and hatching eggs, excluding waterfowl, brought, shipped or otherwise transported into New Hampshire must be accompanied by a certificate of veterinary inspection stating that the shipment originates from a flock or hatchery that is Pullorum free, having been tested by the regulatory official or agency of the state of origin. **NH Code Admin. R. 1601.02**.

Poultry may be transported within New Hampshire as long as the birds or eggs are from flocks that have been tested for Pullorum and that the flocks do not have any contagious or infectious disease. **NH Code Admin. R. 1602.01(a)**. In the event that diseased poultry is transported, the crate, container, and truck must be properly cleaned of all foreign matter and disinfected to insure the elimination of all communicable and infectious diseases before being used again for the transportation of poultry. **NH Code Admin. R. 1602.02(b)**.

Importation of Bovines and Other Domestic Animals

Bovines may not be brought, shipped, or caused to be shipped into New Hampshire without first obtaining written permission from the Department. **RSA 436:10**. An exception applies to those bovines to be immediately slaughtered at a state or federally inspected facility. *Id.* Permits must state the name and address of the importer, number of animals to be imported, and the place where the animals will be quarantined for examination. **RSA 436:11**. Once the animals reach their destination in New Hampshire, the importer or owner must give written notice to the Department within 48 hours of the animals' arrival. **RSA 436:12**. The animals must be held in quarantine until the Department examines them and finds them to be free of tuberculosis or other contagious or infectious disease. **RSA 436:13; RSA 436:15**. If an animal is diseased, it must be immediately slaughtered or, if the disease is curable, held in strict quarantine until released by the Department. **RSA 436:16**.

There are additional requirements for cattle (and buffalo) coming from areas that are not free from Brucellosis or tuberculosis. See **NH Code Admin. R. Agr 2104**. Additionally, a permit and a certificate of veterinary inspection (CVI) by an accredited veterinarian are generally required for the importation of bovines, sheep, goats, swine, and other imported domestic animals. See **NH Code Admin. R. 2100** for details regarding the types of animals and the particular requirements.

Other domestic animals, including asses, mules, sheep, and swine, are subject to the Department's inspection and quarantine. [RSA 436:24](#). If such an animal has an infectious or contagious disease, the animal must be immediately slaughtered or, if the disease is curable, held in strict quarantine. [RSA 436:25](#). A permit from the Department is required for the importation of poultry, swine, ratites, buffalo, camelidae, cervidae, yaks and/or psittacine birds. NH Code Admin. [R. Agr 2103.03](#).

With regard to equines, which include horses, mules, asses, and zebra, each equine imported into New Hampshire must be accompanied by an official interstate health certificate from an accredited veterinarian stating that the equine has tested negatively for equine infectious anemia. [RSA 436:93 through 96](#).

Registration of Commercial Feed Manufacturers

Before manufacturing commercial feed for domestic animals, one must register with the Department. The term "commercial feed" includes all materials, except unmixed seed, that are distributed for use as feed or mixing in feed. [RSA 435:19](#). Although the statute gives the Department the authority to exempt hay, straw, stover, silage, cobs, husks, hulls and other commodities from the definition of "commercial feed," the Department has not done so. Id.

To register with the department, one must obtain a form from them that will require the manufacturer's name, place of business, and the location of each manufacturing facility in New Hampshire. [RSA 435:20](#). The application fee is \$75.00 per product. Id. All registrations expire on December 31 of each year. Id.

There are labeling requirements that include the net weight, list of ingredients, directions, and other information. [RSA 435:21](#). Commercial feed may not be adulterated, including the addition of any injurious substances such as poison, unsafe pesticides, unsafe food additives, drugs that do not conform to the Department's standards, or viable weed seeds in amounts exceeding the limits set by the Department. [RSA 435:23](#).

Treatment of Equines

The term "equine" refers to all members of the equine species, including horses, asses, mules, and zebra. [RSA 436:93, III; RSA 435:11](#). It is prohibited to maltreat an equine, which includes overworking, beating and abandoning. [RSA 435:12](#). Equines must be properly fed and sheltered. [RSA 435:13](#) and [RSA 435:14](#).

Feeding Garbage to Swine

In this context, "garbage" means animal waste from carcasses or offal, or byproducts, but does not include waste from ordinary household operations. [RSA 435:32:I](#). A person must obtain a permit from the Department of Agriculture before feeding garbage to swine unless it is household garbage being fed to a swine for the person's own use. [RSA 435:33](#). Unless the person obtains the approval of another method from the Department of Agriculture or the State Veterinarian, the garbage must be heated to at least 212 degrees Fahrenheit for at least 30 minutes before the garbage is fed to swine. [RSA 435:36](#). A permittee is subject to inspection by the Department or the State Veterinarian. [RSA 435:37](#). See [RSA 435:32 – 40](#) for more details.

Meat and Poultry Safety in New Hampshire

Federal meat and poultry statutes and regulations apply to New Hampshire livestock producers and processors of meat and poultry products. In particular, the Federal Meat Inspection Act (FMIA) applies to animals considered to be livestock, which are cattle, sheep, swine, goats, horses, mules, and other equines. A different statute—the Poultry Products Inspection Act—applies to poultry, which includes any domesticated bird. Learn more details in this chapter of New Hampshire laws for farmers.



New Hampshire does not have its own meat or poultry inspection program, and therefore the federal inspection requirements apply to New Hampshire regardless of whether the meat or poultry will be sold within or outside of New Hampshire. See [9 C.F.R. § 331.2](#). New Hampshire relies on inspections conducted by federal inspectors. Both the federal meat and poultry statutes are enforced by the U.S. Department of Agriculture (USDA). Additionally, the federal Food, Drug and Cosmetic Act (FDCA) applies to food safety, and is enforced by the U.S. Food and Drug Administration (FDA) Anyone in New Hampshire engaged in raising, slaughtering, and distribution of livestock or poultry for sale must comply with the federal laws.

Before livestock or poultry products may be sold to the public, the animals must first be inspected, unless an exemption applies (see below). This entails transporting the animals to a USDA-inspected facility where the animals are inspected, slaughtered, processed, and tagged. Following slaughter, meat and poultry products must be appropriately labeled and handled according to federal safe-handling precautions. [21 U.S.C. § 604](#).

Food Safety and Inspection Service

Inspections take place under the USDA’s Food Safety and Inspection Service (FSIS). Aside from applicable exemptions, all meat and poultry products must be inspected. Unadulterated meat products that are capable of use as human food are stamped “Inspected and Passed,” while adulterated meat products are stamped “Inspected and Condemned.” [Id. 21 U.S.C. § 606](#)

FSIS inspects and assures that meat and meat food products are wholesome, not adulterated, and not misbranded (prohibiting deceptive labels). FSIS is also charged with inspecting poultry and poultry products to ensure those products are wholesome and unadulterated before they are distributed for consumption.

REGULATIONS CITED FOR MEAT AND POULTRY SAFETY IN NH

21 U.S.C. § 601
 21 U.S.C. § 453(e)
 21 U.S.C. § 331.2
 21 U.S.C. § 604

Food Safety and Inspection

21 U.S.C. § 606

Preventing the Distribution of Adulterated Food

9 CFR 301.2
 RSA 146:3
 RSA 146:21

HACCP Implementation

9 CFR 417.2
 9 CFR 417.3(a)
 9 CFR 417.4
 9 CFR 441.10
 9 CFR 120.6

Federal Meat Inspection Act

21 USC 451-472
 21 USC 603
 21 USC 623(a),(b),(d)
 23 USC 601(l)
 9 CFR 303.1
 9 CFR 304.3
 9 CFR 309-311
 9 CFR 381
 RSA 143-A:15-16
 RSA 436:6-a

Labeling Requirements

RSA 146

Preventing the Distribution of Adulterated Food

New Hampshire adopts the federal classification of adulterated meat products. [9 C.F.R. § 301.2](#). Generally, the term “adulteration” refers to meat and poultry articles unfit as human food. *Id.* In addition to the condition of the meat product that may be adulterated because it is filthy, putrid or decomposed, meat may also be adulterated because it contains substances, such as certain additives, that make it unhealthy. *Id.*

According to New Hampshire law [RSA 146:3](#), “food shall be deemed to be adulterated” if:

- ④ If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health. [RSA 146:3, I\(1\)](#).
- ④ If it bears or contains any added poisonous or added deleterious substance other than one which is a pesticide chemical in or on a raw agricultural commodity; a food additive; or a color additive, which is unsafe within the meaning of [RSA 146:21](#); or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of [RSA 146:21](#) or if it is or it bears or contains any food additive which is unsafe within the meaning of [RSA 146:21](#); provided that where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or tolerance prescribed under [RSA 146:21](#), and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed food shall, notwithstanding the provisions of [RSA 146:21](#), not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice, and the concentration of such residue in the processed food when ready-to-eat is not greater than the tolerance prescribed for the raw agricultural commodity. [RSA 146:3, I\(2\)](#).
- ④ If it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food. [RSA 146:3, I\(3\)](#).
- ④ If it has been produced, prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or injurious to health. [RSA 146:3, I\(4\)](#).
- ④ If it is the product of a diseased animal or an animal which has died otherwise than by slaughter or that has been fed upon the uncooked offal from a slaughterhouse. [RSA 146:3, I\(5\)](#).
- ④ If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health. [RSA 146:3, I\(6\)](#).
- ④ If it is or bears or contains any color additive which is unsafe within the meaning of [RSA 146:21](#). [RSA 146:3, I\(7\)](#).
- ④ If any valuable constituent has been in whole or in part omitted or abstracted therefrom. [RSA 146:3, II\(1\)](#).
- ④ If any substance has been substituted wholly or in part therefore. [RSA 146:3, II\(2\)](#).
- ④ If damage or inferiority has been concealed in any manner. [RSA 146:3, II\(3\)](#).
- ④ If any substance has been added thereto or mixed or packed therewith 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. [RSA 146:3, II\(4\)](#).
- ④ If it falls below the standard of purity, quality, or strength which it purports or is represented to possess. [RSA 146:3, III](#).
- ④ If it is confectionery and it bears or contains any alcohol or non-nutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of 4/10 of one percent,

harmless natural wax not in excess of 4/10 of one percent, harmless natural gum, and pectin; provided that this paragraph shall not apply to any confectionery by reason of its containing less than 1/2 of one percent by volume of alcohol derived solely from use of flavoring extracts, or to any chewing gum by reason of its containing harmless non-nutritive masticatory substances. [RSA 146:3, IV.](#)

- ④ Any poisonous or deleterious substance added to any food except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe for purposes of the application of [RSA 146:3, I\(2\)](#); but when such substance is so required or cannot be so avoided, the commissioner shall promulgate regulations limiting the quantity therein or thereon to such extent as the commissioner finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of application of [RSA 146:3, I\(2\)](#). While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of [RSA 146:3, I\(1\)](#). In determining the quantity of such added substance to be tolerated in or on different articles of food, the commissioner shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances. [RSA 146:3, VI.](#)

HACCP Implementation

FSIS established the Hazard Analysis and Critical Control Point (HACCP) system to reduce pathogens in the food supply. [9 C.F.R. § 417.2](#). Federal inspection regulations require HACCP plans for poultry and livestock processing facilities. HACCP implementation requires determination of Critical Control Points

within the manufacturing process or points where contamination could occur. The processor must then establish a plan to control the risks, and to document and maintain records of the safety measures put in place.

Meat and poultry processing plants must develop a HACCP plan for each product they manufacture. At a minimum, the HACCP plan must do the following:

- 1) List the food safety hazards identified in [a hazard analysis described in [9 C.F.R. § 417.2\(a\)](#)];
- 2) List the critical control points for each of the identified food safety hazards, including, as appropriate:
 - i. Critical control points designed to control food safety hazards that could be introduced in the establishment, and
 - ii. Critical control points designed to control food safety hazards introduced outside the establishment, including food safety hazards that occur before, during, and after entry into the establishment;
- 3) List the critical limits that must be met at each of the critical control points. Critical limits shall, at a minimum, be designed to ensure that applicable targets or performance standards established by FSIS, and any other requirement set forth in this chapter pertaining to the specific process or product, are met;
- 4) List the procedures, and the frequency with which those procedures will be performed, that will be used to monitor each of the critical control points to ensure compliance with the critical limits;
- 5) Include all corrective actions that have been developed in accordance with [[9 C.F.R. § 417.3\(a\)](#)], to be followed in response to any deviation from a critical limit at a critical control point;
- 6) Provide for a recordkeeping system that documents the monitoring of the critical control points. The records shall contain the actual values and observations obtained during monitoring; [and]

- 7) List the verification procedures, and the frequency with which those procedures will be performed, that the establishment will use in accordance with [9 C.F.R. § 417.4]. 9 C.F.R. § 417.2(c).

HACCP requires all slaughtering and processing plants to adopt a system of HACCP processing controls to prevent contamination of food. 9 C.F.R. § 417.2(c). Microbial testing must also be conducted for generic *E. coli* to verify that their control systems prevent fecal contamination. 9 C.F.R. § 441.10(d)(6). Tests verify that the controls meet pathogen reduction performance standards set by FSIS for raw meat products. 9 C.F.R. § 441.10(d)(1).

As part of an HACCP plan, processing plants must also adopt and implement a written site-specific Sanitation Standard Operating Procedure. 21 C.F.R. § 120.6. These sanitation standards apply to both livestock and poultry slaughtering facilities and cover the following:

- 1) Safety of the water that comes into contact with food or food contact surfaces or that is used in the manufacture of ice;
- 2) Condition and cleanliness of food contact surfaces, including utensils, gloves, and outer garments;
- 3) Prevention of cross contamination from insanitary objects to food, food packaging material, and other food contact surfaces, including utensils, gloves, and outer garments, and from raw product to processed product;
- 4) Maintenance of hand washing, hand sanitizing, and toilet facilities;
- 5) Protection of food, food packaging material, and food contact surfaces from adulteration with lubricants, fuel, pesticides, cleaning compounds, sanitizing agents, condensate, and other chemical, physical, and biological contaminants;
- 6) Proper labeling, storage, and use of toxic compounds;

- 7) Control of employee health conditions that could result in the microbiological contamination of food, food packaging materials, and food contact surfaces; and

- 8) Exclusion of pests from the food plant. Id.

The basic goal of sanitary condition requirements is to prevent product adulteration through unsanitary conditions.

Federal Meat Inspection Act

The requirements of the Federal Meat Inspection Act (FMIA) generally apply to livestock slaughtering and processing in New Hampshire; poultry slaughtering and processing is subject to a different federal law— the Federal Poultry Products Inspection Act (see below).

Activities Subject to the FMIA

Animals covered by the FMIA must be visually inspected before entering a slaughter facility, or any establishment that prepares meat products. 21 U.S.C. § 603. This is referred to as “ante-mortem” inspection. 9 C.F.R. § 309.1. “Prepared” meat refers to meat that is slaughtered, canned, salted, rendered, boned, cut up, or manufactured or processed. 21 U.S.C. § 601(l). Inspections occur daily at the facilities where meat products are produced and processed. A HACCP plan is also required. 9 C.F.R. § 304.3.

Carcasses and their parts must undergo inspection after slaughter, referred to as “post-mortem” inspection. 9 C.F.R. § 310.1. When an inspector discovers an adulterated or misbranded meat product, or believes either of these conditions applies, the inspector tags the product. 9 C.F.R. § 310.5. The tag may not be removed except by an authorized employee. 9 C.F.R. § 310.4.

Post-mortem inspections determine whether the carcasses of all livestock are adulterated or not and must take place before the carcasses or any parts can be treated and prepared as food. 9 C.F.R. § 311.1. Inspections result

in the culling and separate slaughter of any livestock showing symptoms of disease. [9 C.F.R. § 309.3](#).

The FMIA can impose criminal penalties and civil sanctions for improper slaughter and sale of meat or other violations of the FMIA. See [21 U.S.C. § 676](#).

Exemptions to the FMIA

The following are exempt from FMIA inspection:

- 1) **Personal Exemption:** Inspection of the slaughter of animals and preparation of the meat and meat food products “shall not apply to the slaughtering by any person of animals of his own raising, and the preparation by him and transportation” of the “meat and meat food products of such livestock exclusively for use by him and members of his household and his nonpaying guests and employees.” [21 U.S.C. § 623\(a\)](#); [9 C.F.R. § 303.1](#). A federal inspector does not need to be present when animals are slaughtered or processed.
- 2) **Custom Exemption:** This exemption from federal inspection during both slaughter and processing when meat is prepared for the personal use of an individual. These animals must be owned by the individual prior to slaughter. The carcasses, parts, meat and meat food products of the animal must be used exclusively by the owner and members of the owner’s household, non-paying guests or employees. A federal inspector does not need to be present when animals are slaughtered or processed. [21 U.S.C. § 623\(a\)](#); [9 C.F.R. § 303.1](#).
- 3) **Retail Store and Restaurant Exemption:** Meat processing at a retail store where sales of products are made to consumers only is exempt from FMIA requirements. Those activities exempt meat processing activities include the following:
 - a. Cutting up, slicing, and trimming carcasses, halves, quarters, or wholesale cuts into retail cuts such as steaks, chops, and roasts, and freeze such cuts;
 - b. Grinding and freezing products made from meat;
 - c. Curing, cooking, smoking, or further processing of livestock fat, or other preparation of products,

except slaughtering or the retort processing of canned products;

- d. Breaking bulk shipments of products; and
- e. Wrapping or rewrapping products. [9 C.F.R. § 303.1\(d\)](#).

- 4) **Territorial Exemption:** The slaughter and the processing of meat products by any person in any unorganized Territory solely for distribution within such territory is exempt from federal inspection. [21 U.S.C. § 623\(b\)](#); [9 C.F.R. § 303.1\(c\)](#).

These exemptions exempt certain slaughtering and processing from federal inspection, but they do not lift the prohibitions against adulteration and misbranding, which still apply. [21 U.S.C. § 623\(d\)](#).

Federal Poultry Products Inspection Act

The Federal Poultry Products Inspection Act (FPPIA) requires federal inspection of poultry and poultry products capable for use as human food. See [21 U.S.C. §§ 451–472](#). In addition to inspection, a HACCP plan must also be established, as discussed above. [9 C.F.R. § 304.3](#).

Ante-mortem inspections take place on the day of slaughter—or within 24 hours for low volume facilities—to determine if the animal shows symptoms of disease or any condition warranting their being condemned. [9 C.F.R. § 381.70](#). Birds are also inspected post-mortem. [9 C.F.R. § 381.70](#). Post-mortem inspections are on a bird-by-bird basis and occur anytime processing operations are taking place. [21 U.S.C. § 455](#).

Some slaughtering and processing are exempt from the FPPIA requirements and the regulations for inspection, including the following:

- 1) **Personal Use Exemption:** Slaughtering and processing of healthy poultry that one has raised and that will be used exclusively by the producer’s household, nonpaying guests, and employees. [9 C.F.R. § 381.10\(a\)\(3\)](#). Shipping containers of the poultry products must bear the producer’s name and address and the statement “Exempted—P.L. 90-492.” [9 C.F.R. § 381.10\(a\)\(3\)](#).

2) **Territorial Exemption:** Slaughtering and processing of sound and healthy poultry by a person in an unorganized territory solely for distribution within the territory. (New Hampshire is not an unorganized territory.) [9 C.F.R. § 381.10\(a\)\(2\)](#).

3) **Retail Cutting Exemption:** This exemption applies if the retailer’s only processing operation is the cutting up of poultry products on the premises where direct sales to consumers are made. The cutting must be done under such sanitary conditions that do not result in adulteration, and the poultry products being cut must have been derived from poultry that was slaughtered and processed pursuant to the FPPIA. To qualify for this exemption, sales of poultry products to household consumers must constitute at least 75 percent of the retailer’s total sales of poultry products. [9 C.F.R. § 381.10\(a\)\(1\)](#).

4) **Custom Exemption:** The slaughtering and processing of healthy poultry that is exclusively for the use of the producer’s household, nonpaying guests, or employees. The cutting must be done under such sanitary conditions that result in poultry products that are sound, clean, and fit for human consumption. Shipping containers of the poultry products must bear the owner’s name and address and the statement “Exempted—P.L. 90-492.” [9 C.F.R. § 381.10\(a\)\(4\)](#).

5) **On-Premises Poultry and In-State Distribution:** This exemption applies to a producer’s slaughtering and processing of sound and healthy poultry that

- 1) occurs on the producer’s premises;
- 2) involves only birds raised on the premises; and
- 3) the poultry products are distributed only within the same jurisdiction (e.g., birds raised and slaughtered on a New Hampshire farm and the poultry products distributed only within New Hampshire).

The slaughtering and processing must be done under such sanitary conditions that result in poultry products that are sound, clean, and fit for human consumption. Shipping containers of the poultry

products must bear the producer’s name and address and the statement “Exempted—P.L. 90-492.” The producer may not buy and sell off-premises poultry products or slaughter or process more than 20,000 birds in the current calendar year. Also, the slaughtering or processing may not take place at a facility in which takes place the slaughtering or processing of poultry by any other person, unless an exemption is granted. [9 C.F.R. § 381.10\(a\)\(5\)](#).

If—on the farmer’s farm—a farmer raises and slaughters not more than 1,000 poultry during the calendar year, and does not engage in buying or selling poultry products other than those raised on the farm, and does not distribute the products from the 1,000 or less poultry out-of-state, the regulations of the FPPIA do not apply. [9 C.F.R. § 381.10\(c\)](#).

6) **Off-Premises Poultry and In-State Distribution:** This exemption applies to the slaughtering and processing of sound and healthy poultry by a producer who distributes solely within the same jurisdiction in which the slaughtering and processing takes place (e.g., New Hampshire) to household consumers, restaurants, hotels, and boardinghouses for their use in their own dining rooms or in the preparation of meals for sale directly to consumers. The slaughtering and processing must be done under such sanitary conditions that result in poultry products that are sound, clean, and fit for human consumption. Shipping containers of the poultry products must bear the processor’s name and address and the statement “Exempted—P.L. 90-492.” The producer may not buy and sell off-premises poultry products or slaughter or process more than 20,000 birds in the current calendar year. Also, the slaughtering or processing may not take place at a facility in which takes place the slaughtering or processing of poultry by any other person, unless an exemption is granted. [9 C.F.R. § 381.10\(a\)\(6\)](#).

7) **Small Enterprises:** There is an exemption for small enterprises (including producers) who do not fall into one of the above exemptions but who

slaughter sound and healthy poultry or cut up carcasses (or parts) in a jurisdiction (e.g., New Hampshire) solely for distribution within that jurisdiction. The slaughtering or cutting up must be done under such sanitary conditions that do not result in adulteration, and the products must not be misbranded. To qualify for this exemption, the enterprise may not process more than 20,000 birds in the current calendar year. Also, the slaughtering or processing may not take place at a facility in which takes place the slaughtering or processing of poultry by any other person, unless an exemption is granted. [9 C.F.R. § 381.10\(a\)\(7\)](#).

Despite these exemptions, the FSIS still may examine processing facilities of any size to be sure that they are in compliance with the FPPIA, to the extent the applicable exemption requires compliance with sections of the FPPIA. This especially includes the requirement that poultry and poultry products are processed under clean and sanitary conditions. If the facility is not in compliance with the FPPIA, the FSIS may suspend or terminate the facility's exemption from the law and impose penalties. [9 C.F.R. § 381.13](#). These exemptions do not exempt a producer from complying with New Hampshire labeling requirements discussed below.

If a producer is exempt based on the above list, that producer may sell poultry and rabbit to licensed restaurants without inspection pursuant to [RSA 143-A:16](#), which states as follows:

Producer Requirements. – A federally exempt poultry producer may, in a calendar year, sell to licensed restaurants uninspected, processed whole poultry that the producer has raised in a quantity not to exceed the federal limit established in 21 U.S.C. section 464 and a rabbit producer may, in a calendar year, sell to licensed restaurants up to 1,000 uninspected, processed whole rabbits that the producer has raised, provided all of the following conditions are met:

- I. The producer is current with all educational requirements that are established by the commissioner in consultation with the commissioner of agriculture, markets, and food relative to proper methods of slaughtering, processing, packaging, and storing poultry or rabbit on the farm and its subsequent transport to restaurants; and
- II. The producer has registered with the department of agriculture, markets and food by providing his or her name, the name and address of the farm, and phone number, to allow for trace back in the event of disease outbreak. Such registry information shall be protected pursuant to [RSA 436:6-a](#).

Licensed restaurants are authorized for such purchase by [RSA 143-A:15](#), which states as follows:

- I. A licensed restaurant may purchase uninspected, processed, whole poultry or rabbits from rabbit producers or federally exempt poultry producers who provide proof of compliance with the registration and educational requirements of this subdivision. All packaging containing uninspected poultry and rabbits shall be clearly labeled to include, but not be limited to, the following information: the name and address of the farm where the product originates and the date of slaughter.
- II. For at least 90 days from the date of each purchase, the licensed restaurant shall keep on file the receipt of purchase to include the product purchased, the date of purchase, the name of the producer, the name and address of the farm, and phone number.
- III. The licensed restaurant shall clearly label any menu item containing uninspected poultry or rabbit with the following statement:
“This product has been raised and processed on a New Hampshire farm and is exempt from state and federal inspection.”

Labeling Requirements

New Hampshire law governs labeling requirements of meat and poultry products to protect against false or misleading labels. [RSA 146:5](#).

“The term ‘labeling’ means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.” [RSA 146:2, IV](#).

Where specified information must appear on the label, it must appear on the outside container or wrapper of the retail packaging of the product or be legibly displayed through the outside container or wrapper. [RSA 146:2, III](#).

A label must provide accurate, non-misleading information. [RSA 146:1, II](#); [RSA 146:2, VI](#); and [RSA 146:5](#). Obviously, the product cannot be labeled as a product that it is not. A product’s label also may not imply that it is recommended or endorsed by a federal or state agency unless prior approval has actually been obtained. [RSA 146:9](#).

A product may not imitate another product that is subject to another set of regulations, thereby circumventing the purpose and standards set by the regulations. [RSA 146:5](#). Similarly, a product’s label cannot claim to be a product defined and restricted by standards otherwise set by regulations if it falls outside the definition or below the standards. *Id.* If any of these distinctions apply, the product must indicate as such on the label. *Id.*

Containers and packaging also must indicate, as much as they necessarily are able, the kind of product contained within. All packaging must provide the name and place of business of the manufacturer, packer or distributor, in addition to an accurate statement of the quantity of the contents. *Id.* Such information, and any other that is required by statute, must be prominently displayed. *Id.*

Special dietary use claims must be supported by information, also prominently displayed, on the product’s label concerning those claims and the particular dietary properties actually possessed. *Id.* The label must fully inform consumers of the value of its dietary properties. *Id.*

While most misbranding violations amount to civil sanctions, intentional acts can result in a criminal conviction. [RSA 146:18](#). The process of identifying a non-conforming, misbranded product begins when an agent of the New Hampshire Department of Health and Human Services learns of a potentially misbranded product. [RSA 146:17](#). The agent then tags the product and may petition the superior court for a libel for condemnation of the product. [RSA 146:20](#). If the product turns out to be permissibly branded, the agent must remove the tag or other marking. *Id.* However, in the event the court finds the food is either adulterated or misbranded, the court may enter a decree and the product will be destroyed at the expense of the producer and under the agent’s supervision. *Id.* The producer is responsible for all court costs, fees, storage and other expenses. *Id.*

Carcass Composting in New Hampshire

Farmers who conduct the composting of deceased livestock must comply with the practices established and laid out in the “Manual of Best Management Practices for Agriculture in New Hampshire: Best Management Practices for the Handling of Agricultural Compost, Fertilizer, and Manure” (BMPs). The BMPs present guidance to landowners, farmers, and others to help maintain the State’s agricultural base and protect water quality. The New Hampshire Department of Environmental Services (NHDES) requires a permit for certain types of composting facilities. This chapter will help you decide if you need a permit, what the best practices are and how to apply them on your farm.



REGULATIONS CITED FOR CARCASS COMPOSTING IN NH

Env-Sw 608.04(a)
Env-Sw 302

Resources

BMPs for Agriculture in New Hampshire
<https://www.agriculture.nh.gov/publications-forms/documents/bmp-manual.pdf>

The New Hampshire Department of Environmental Services (NHDES) requires a permit for certain types of composting facilities, however, it does not require a permit for farms that compost their own farm’s mortality on-farm, provided it is done in accordance with the BMPs. Id. If a farm composts animals belonging to another person, or if another person does the composting, then a permit is required from the NHDES. Id.; **NH Code Admin. R. Env-Sw 608.04(a)** and **Env-Sw 302**. The composting of butchering wastes and meat-based food waste, as well as mass composting of farm livestock as an emergency animal disease control program, are covered by a different set of BMPs. **BMPs at 29**.

Applicable BMPs require the composting site to be dry and well-drained, and slightly sloped (1–2% best), with good all-weather access. Id. at 28. Although slopes and ground cover may differ and call for minor adjustments, generally the site needs to satisfy the following specifications:

- ④ At least 100 feet and up to 300 feet from any surface water;
- ④ At least 200 feet and up to 400 feet from a wellhead;
- ④ Avoid areas with exposed or shallow distance to bedrock. If the composting site is located on a concrete or impermeable pad, or if the composting site is roofed, or if the composting takes place in a self-contained enclosed vessel and is adequately protected from leaching or runoff of liquids, the above-listed distances may be reduced. A(omit) For most animals a sufficient layer 8 to 12 inches (2–3 feet) of absorbent bulking material under the carcasses is needed to absorb any liquid and prevent runoff and leaching; (moved)

- ④ At least 3 feet above the seasonal high water mark;
- ④ At least 150 feet from homes and other inhabited buildings on abutting property; and
- ④ At least 50 feet from public roads. Id.

For most animals a sufficient layer 8 to 12 inches of absorbent bulking material such as shavings or corn stover under the carcasses is needed to absorb any liquid and prevent runoff and leaching. For larger animals, such as a cow, at least 24 inches is required for this step. 8 to 12 inches of suitable bulking material will be needed to encase the smaller carcasses, and 18 to 24 inches for larger carcasses. A full grown cow will require approximately 12 cubic yards of bulking material. Id. [BMPs 30](#)

Bulking materials include woodchips, shavings, sawdust, chopped straw, silage (corn stover), dry manure or finished compost. ID. The carcass should be placed on its side in the center of the base, and encased in bulking materials on all sides and on top. Id.30 Calves and smaller animals may be lined up in a row if there are multiple carcasses, and layered with at least two feet of bulking materials between layers. For good oxygenation of the pile, a ratio of 2:1 base to height should be established of the pile. In addition, the base should be no more than 12 to 16 feet wide and the height should be no more than 6 to 8 feet. There should be ample space around the pile to use equipment for turning on all sides when necessary.

Once the above layering process has been completed, allow the pile to sit for four to six months without turning. Id. At the end of a minimum of four months, prod the carcasses with a bucket loader to examine the extent of decomposition:

- ④ If soft tissues remain or strong odors are released turn the pile, re-cover with additional bulking agent, and wait another two months.
- ④ If, instead of soft tissue or strong odors, only large bones remain, remove the large bones for return to the next compost batch. (omit)

Once the carcasses thoroughly decompose, the resulting compost may be used to fertilize crops. Id. The Department discourages the use of livestock-mortality compost on human food crops because of bovine spongiform encephalopathy (mad cow disease) and other disease concerns. Id. These same concerns make it inadvisable to spread such compost on land pastured by ruminant animals, such as cattle, sheep and goats. Id.

The entirety of the composting process should be closely monitored and recorded by keeping a logbook, and recording such factors as the starting date, type and amount or volume of bulking materials used, and temperature within the pile. Id. at 30. An internal temperature above 131 degrees Fahrenheit should be obtained and kept for at least three days. This temperature assures destruction of most pathogens and weeds. Id.

NOTE: In the case of contagious disease outbreak, the NH Department of Agriculture must be informed and will be responsible for the proper composting of said animals for the proper destruction of the organisms involved in the outbreak. The above recommendations are only for the composting of animals that have died from common illness, accident or age. See the BMPs for more information.

Land Use and Zoning

This section discusses the intersection of agriculture and land use laws. The first part concerns land use laws generally, including Right-to-Farm laws. The second section discusses at length the most critical land use tool when it comes to agriculture in New Hampshire: agricultural zoning.



Agricultural and Land Use

It is difficult to imagine a profession more intimately connected to and influenced by the land than agriculture. Not surprisingly, agriculture is often impacted by local land use laws. Recently, many of these laws have been enacted as part of an effort to protect against the loss of agricultural land from encroaching commercial and residential development. On the other hand, zoning can sometimes stand in the way of innovations in agriculture such as urban farming. Regardless, the single most important message of this chapter is that a farm or agricultural operation should be familiar with the local land use rules, especially zoning, and how those laws apply to its operation.

REGULATIONS CITED FOR LAND USE AND ZONING IN NH

Nuisance and Right-to-Farm
RSA 432:32-35

Zoning
RSA 21:34
RSA 31:39
RSA 147
RSA 672-677

Nuisance and Right-to-Farm

One consequence of the encroachment of the city onto farmland is that farms get neighbors who are not used to the day-to-day noises, smells, and other aspects of agricultural operations. These neighbors may eventually complain, and these complaints may turn into lawsuits. Typically, the neighbor will claim the farm is a nuisance.

A private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property. *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). To constitute a nuisance, the farmer's (defendant's) activities must cause harm that exceeds the customary interferences with land and be an appreciable and tangible interference with the neighbor's (plaintiff's) property interest. *Id.* Left unchecked, these nuisance suits could pose a serious threat to agriculture in areas experiencing growth.

To address this threat of nuisance suits, all states have enacted Right-to-Farm laws. These laws function to protect agriculture by limiting the circumstances in which a nuisance suit can be brought against a farm or agricultural operation. Kyle Weldon & Elizabeth Rumley, *States' Right-to-Farm Statutes*, National Agricultural Law Center, see (last visited July 1, 2017):

<http://nationalaglawcenter.org/state-compilations/right-to-farm>

While it is not labeled as such, **RSA 432:32–35** is New Hampshire's Right-to-Farm statute. **RSA 432:33** provides:

No agricultural operation shall be found a public or private nuisance as a result of changed conditions in or around the locality of the agricultural operation, if such agricultural operation has been in operation for one year or more and if it was not a nuisance at the time it began operation.

Further, the operation shall not be found to be “negligent or improper when they conform to federal, state and local laws, rules and regulations.” **RSA 432:34**. So, while this law will not completely prevent a farmer from being successfully sued for creating a nuisance, it is much harder for a complaining neighbor to succeed in a nuisance lawsuit, especially where the claimed harm is the impact of normal farming operations on recently developed, adjacent residential or commercial properties.

It is very important to note, however, that the “right-to-farm” does not mean that an agricultural operation can operated in an unfettered way. Certain zoning and other laws and restrictions apply.

Zoning

Zoning Basics

In New Hampshire, state law empowers municipalities to regulate and enforce the use of real estate using their general “police powers.” **RSA 31:39**. The police powers include broad and varied public interests like “public health, safety, morals, comfort, the protection of

prosperity, and the general welfare.” *Piper v. Meredith*, 110 N.H. 291, 294 (1970).

Zoning is authorized by **RSA 672-677**, the state enabling statute. Zoning is one of the most powerful tools a local government has to wield its police power to control the use of land, ideally for the benefit of “that sometimes difficult to define concept of quality of life.” *Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); **RSA 674:16**. Simply put, zoning is the legislative division of a municipality into separate, sometimes overlapping, districts, with each district having different regulations concerning the land use, building size, etc.

Agricultural Zoning Defined

Originating in the 1970s and 1980s in response to the development of agricultural land for non-agricultural purposes, agricultural zoning is now used in municipalities and counties across the United States. The intent of agricultural zoning is to restrict the use of certain land within a municipality to agricultural purposes, even in the face of surrounding developmental pressure.

There are two basic types of agricultural zoning: exclusive and non-exclusive. Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. Ill. U. L. Rev. 419, 423 (2002). *Exclusive* agricultural zoning prohibits any use of the land other than agricultural, except, typically, certain “accessory uses,” such as barns, worker housing, and agritourism—an evolving term subject to dispute that is discussed later in this chapter. *Id.*

Non-exclusive agricultural zoning seeks to preserve farmland in effect by zoning for large lots, and allowing multiple uses beyond agriculture, but also placing severe structure density limitations. *Id.* While agriculture is not the only permitted use, the desired effect (in theory) is that in this district agriculture would be one of the most viable uses of the land given the lot size and limitations on structures that may be built. *Id.* New Hampshire municipalities employ both exclusive and non-exclusive agricultural zoning, with non-exclusive agricultural zoning (large lots) being the most common by far.

Municipal Regulation of Agriculture

In New Hampshire, agriculture is given special recognition and treatment for purposes of state law and local regulation. The declaration of purposes section of the state enabling statute specifically mentions the preservation of and non-interference with agriculture, agritourism, and forestry. [RSA 672:1](#); [RSA 674:17, I\(i\)](#).

[RSA 674:32-a](#) through [RSA 674:32-d](#) concerns the local regulation of agricultural uses of land. Since 2000, New Hampshire law provides agricultural activities special protection in the form of a legal presumption (an assumption in favor of one side that puts the burden on the other side to prove the presumption is wrong) that “whenever agricultural activities are not explicitly addressed with respect to any zoning district or location, they shall be deemed to be permitted there, as either primary or accessory use, so long as conducted in accordance with the best management practices adopted by the commissioner of agriculture, markets, and food and with federal and state laws, regulations, and rules.” [RSA 674:32-a](#). Put simply, if a particular agricultural use is not listed in the zoning ordinance, then that particular use should be allowed by state laws. Even if it is not explicit, however, the municipality can still regulate the use for compliance with generally applicable building and site requirements, such as the following: dimensional standards; setbacks; driveway and traffic regulations; parking requirements; noise, odor, or vibration restrictions; and sign regulations. [RSA 674:32-c, II](#).

Further a municipality can always regulate any agricultural operation determined to be “injurious to public health or safety under [RSA 147](#).” [RSA 674:32-c, III](#). None of these statutory limitations of municipalities’ ability to regulate agriculture can be deemed to affect the regulation of sludge or septage. [RSA 674:32-c, IV](#).

Municipalities are more specifically restricted in regards to certain agricultural activities. While municipalities can regulate the tiling of soil and growing and harvesting of crops and horticultural commodities, be that activity a primary or accessory operation, they cannot prohibit it

in any district. [RSA 674:32-c, I](#). Similarly, Agritourism, as defined in [RSA 21:34-a, II\(b\)\(5\)](#), shall not be prohibited on any property where primary use is for agriculture, but it may be regulated. [RSA 674:32-d](#). [RSA 21:34-a, II\(b\)\(5\)](#) defines agritourism as “attracting visitors to a farm to attend events and activities that are accessory uses to the primary farm operation, including, but not limited to, eating a meal, making overnight stays, enjoyment of the farm environment, education about farm operations, or active involvement in the activity of the farm.” Key to this definition, as discussed further below, is that the activity must be accessory to the primary farm operation. *See id.*

A municipality is also limited in regards to how it may regulate an existing an agricultural operation. Any existing agricultural use may without restriction be “expanded, altered to meet changing technology or markets, or changed to another agricultural use” (as set forth in [RSA 21:34-a](#), so long as that change conforms with all federal and state laws, regulations and rule, including the best management practices. [RSA 674:32-b](#). This general rule is subject to two exceptions. Id. “Any new establishment, re-establishment after abandonment, or significant expansion of an operation, involving the keeping of livestock, poultry, or other animals may be made subject to special exception, building permit, *site plan review*, or other local land use board approval.” [RSA 674:32-b, I](#). Further, “Any new establishment, re-establishment after abandonment, or significant expansion of a farm stand, retail operation, or other use involving on-site transactions with the public,” including agritourism as defined in [RSA 21:34-a](#), may be made subject to the same limitation and may also “be regulated to prevent traffic and parking from adversely impacting adjacent property, streets and sidewalks, or public safety.” [RSA 674:32-b](#). This means that with respect to new, re-established, and significant expansions of agricultural operations involve the public, municipalities are limited to regulating only traffic and parking.

It is important to note that “abandonment,” and “significant expansion” are not defined by state statute. This means that there may be different definitions depending on the municipality. If the municipality does

not have a specific definition, the words shall be given their “common” or “technical” meaning—which is, of course, subject to debate.

Particular Challenges Associated with Accessory Uses and Agritourism

In agricultural zoning, like all zoning, the definitions of certain words and uses is of critical importance and a source of potential dispute. The most commonly referenced definition of agriculture is the state definition, [RSA 21:34-a](#), discussed subsequently. *See, e.g., Forster v. Town of Henniker*, 167 N.H. 745, 748 (2015) (explaining that the Town of Henniker, in its zoning ordinance, defines the word “agriculture” as: “See New Hampshire Revised Statute Annotated Chapter 21:34-a Farm, Agriculture, Farming”).

Many municipalities wisely choose to reference the state definition for agriculture; by doing so, its definition of agriculture can evolve as state law evolves, keeping the municipal ordinances current. If an ordinance fails to define agriculture itself or reference the state definition, the interpreter—a court if a lawsuit is brought—may look to the dictionary. *See, e.g., Kalil v. Town of Dummer*, No. 05-E-68, 05-E-69, 05-E-70, 2007 N.H. Super. LEXIS 71 (N.H. Super. Sept. 12, 2007). In *Kalil*, the Court looked to the dictionary to determine if “agriculture” included construction of buildings. The Court concluded that “[t]he plain language and ordinary use of the word ‘agriculture’ does not require or justify the construction of three buildings on land that has been zoned within the very restrictive Conservation Overlay Zone.” *Id.*, at * 6.

Where municipalities have their own definition of agriculture or related terms, there is a possibility that municipal definitions conflict with the state definitions—the issue there is whether the state definition preempts the municipal definition. In *Forester v. Town of Henniker*, *Forester* argued that the state definition preempted the municipal definition. 167 N.H. 745, 756 (2015). The Court rejected this argument, stating that none of the provisions of [RSA 21:34-a](#); [RSA 674:17, I\(i\)](#); [RSA 672:1, III-b](#); [RSA 672:1, III-d](#); [RSA](#)

[674:32-a](#); [RSA 674:17, I\(i\)](#) preempt municipal definitions. So, if a municipality defines agriculture differently than that state definition, the municipality’s definition will likely be the one that applies.

In New Hampshire, the definitions of agritourism have proven to be particularly quarrelsome. In *Forster v. Town of Henniker*, the plaintiff was a Christmas tree farmer who also used his farm property to host weddings. The Town declared this a violation of the zoning ordinance because the practice of hosting such events constituted a commercial use. On appeal, the zoning board of adjustment determined that this practice was not an accessory use and was not permitted in this zone, and the Superior Court agreed. The Supreme Court looked to the state definitions of agriculture and concluded it did not include agritourism. The Court then considered whether the weddings could be considered an accessory use to the permitted agricultural use. It decided it could not because *Forster* had not presented evidence showing that the practice of hosting weddings and other events has “commonly, habitually and by long practice been established as reasonably associated with the primary ... use in the local area.”

In direct response to this decision, the Legislature then amended [RSA 21:34-a](#) to move the “agritourism” uses from [RSA 21:34-a, VI](#) and incorporate them into the definition of “agriculture” and “farming” in [RSA 21:34-a, II](#). So, agritourism is squarely part of agriculture in the state law. However, it is important to note the definition of agritourism specifies that the tourism activity is “accessory ... to the primary farm operation.” Municipal definitions often use similar language. This is a likely area for future disputes. Further, it is still an open question whether weddings and events can be considered to be agritourism.

Urban Agricultural Zoning

Although much of the history of land use concerns the issue of how to control the inevitable growth of a municipality, many cities in the eastern U.S. are confronting the issue of how to manage land use as the population declines and the city “shrinks.” As the population shrinks,

cities are faced with the problems associated with abandoned or under-used housing and infrastructure.

Many citizens advocate for urban agriculture as a productive use for certain city land; some cities are receptive and encourage urban agriculture in shrinking cities. In terms of law, this tends to take two forms: land banks and urban agricultural zoning. *See generally* Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 Urb. Law 225 (2010). “In general, a land bank is a governmental entity that takes title to tax-delinquent property, secures the property and perhaps demolishes structures on it, and transfers the property back to private ownership with a clear title, to ensure that the property can be put to productive (and tax-paying) use.” *Id.* Urban agricultural zoning refers to a city creating a specific zone for urban gardening and farming, where a formally industrial or residential zone is rezoned to allow only commercial or personal farming and accessory uses. *Id.*

Analogous to agricultural zoning, urban agricultural zoning will likely face the same legal challenges. Although a city may face a more uphill battle because the loss in value may be even greater in the context of urban agriculture as compared to rural agriculture, it will most likely nonetheless prevail.

New Hampshire’s population patterns mirror much of the northeast and some of the Rust Belt states. While New Hampshire cities have not seen the shrinking experienced by cities like Detroit, it is foreseeable that citizens will push for ordinances favorable to urban agriculture for underused or abandoned sections of Manchester or similar areas.

Municipal Laws in New Hampshire

This section provides a broad overview of the boards, commissions, and staff typically found in municipalities and highlights their role as it pertains to development broadly and agriculture specifically.



Zoning Board of Adjustment

If a municipality has a zoning ordinance, then it must have a Zoning Board of Adjustment (ZBA); if not, all its ordinances are invalid and unenforceable. **RSA 673:1, IV**; *Jaffrey v. Heffernan*, 104 N.H. 249 (1962) (zoning ordinance invalid because of failure of ordinance to provide for a ZBA). “The board of adjustment is designed to interpret, to perfect, and to insure the validity of zoning. It does this by deciding the hard cases, by articulating concepts and adding an administrative gloss to the zoning ordinance.” 15-19 *Land Use Planning and Zoning* § 19.03 (2016). The ZBA is like the judiciary (a quasi-judicial appellate board), which means it cannot issue advisory opinions on the meaning of an ordinance; it may only hear an appeal that concerns an interpretation of a zoning ordinance by a zoning officer. 4 P. Salkin, *Anderson’s American Law of Zoning* § 40:5 (5th ed.).

The powers of the ZBA are broad, and include

- 1) hearing and deciding appeals of any alleged error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance;
- 2) granting requests for variance from strict enforcement of the terms of the ordinance under certain conditions;
- 3) granting requests for special exceptions to the terms of the ordinance where provided for in the ordinance;
- 4) and granting equitable waivers from dimensional requirements.

RSA 674:33; **RSA 674:33-a**.

Appeals from ZBAs are also the greatest source of litigation involving New Hampshire municipalities. 15-19 *Land Use Planning and Zoning* § 19.02. **RSA 677** governs appeals from decision of ZBAs. A key requirement to be able

REGULATIONS CITED FOR MUNICIPAL LAWS IN NH

Zoning Board of Adjustment

RSA 673:1,IV
RSA 674:33
RSA 677

Planning Board

RSA 674
RSA 675:1
RSA 677:15

Regional Planning Commissions

RSA 36:47,55-57

Municipal Staff

RSA 673:1,V
RSA 673:16,I

Conservation Commissions

RSA 31-A:1-6
RSA 31:110-113
RSA 36-A:1-5
RSA 155-E:3
RSA 482-A

Agricultural Commissions

RSA 673
RSA 674:44-e,f

Resources

<http://www.nharpc.org>

<https://extension.unh.edu/New-Hampshire-Agricultural-Commission>

https://extension.unh.edu/resources/files/Resource00021_Rep21.pdf

to file certain court appeals is to first file with the ZBA a motion for rehearing; should that motion be denied, or granted but with a second decision reaching the same result on the merits, only then can an appeal be brought to Superior Court. *See* [RSA 677:4](#). The arguments that may be made during an appeal are generally limited to those included in the motion for rehearing. *Id.* The burden is on the party who brought the appeal to show the decision was “unlawful or unreasonable.” [RSA 677:6](#). This can be a high burden, as the trial court gives great deference to the factual decisions of the ZBA. *Id.*

Members of ZBAs are volunteers. They are not paid for their service on the ZBA. They invest their time in serving on the ZBA out of a sense of civic duty, to help bring about certain results in the municipality, or for other reasons. Because members of ZBAs are volunteers, sometimes they are unfamiliar with the laws and procedure they should use. When ZBAs need guidance, they can rely on staff of the municipality, a consultant, and/or a lawyer.

Planning Board

Planning boards are generally tasked with a wide variety of responsibilities. They are responsible for preparing, amending, discussing, and promoting the master plan. [RSA 674:1, I](#). Planning Boards serve considerable roles in all aspects of planning in the municipality, including recommending programs, creating the official maps, presenting at hearings, proposing amendments to the zoning and land use ordinances, and recommending or not the passage of petitioned warrant articles concerning land use proposals. [RSA 675:1](#).

In terms of exercising control of proposed uses, Planning Boards, if authorized by the municipality, are responsible for site plan review, subdivision approval, and innovative land use controls. [RSA 674:43](#). Planning Boards may be authorized to delegate this task in whole or part to a technical committee, staff, or even volunteer members of the community. [RSA 674:43, III](#). The level of review and requirements placed on any given applicant will differ depending on the size of the proposal. [RSA 674:43, IV](#).

Site plan review refers to the process of reviewing a legal use of a tract of land to ensure that the proposed use, while compliant with the zoning and land use ordinances, will not offend the public interest. Site plan review by Planning Boards is more efficient and flexible than enacting extensive ordinances to achieve this purpose for every imaginable use on every type of parcel. Site plan review may require the applicant to address concerns including, but not limited to:

- ④ the health, safety, and prosperity of abutting property owners;
- ④ surface water runoff;
- ④ impact on city services;
- ④ landscape and architectural aesthetics;
- ④ impact to local population; and
- ④ impact on open space.

In other words, the site plan process forces the city and developer to focus on the aesthetics and public-safety aspects of a proposed use before the proposal is constructed rather than as an afterthought. *See generally* 15-30 *Land Use Planning and Zoning* § 30.02.

The purpose of regulations concerning subdivision—the act of dividing parcel of property into smaller parcels—is “to control the division of land and to assure that such developments thereon are designed to accommodate the needs of the occupants of the subdivision.” 15-29 *Land Use Planning and Zoning* § 29.02. A Planning Board has the authority to review a subdivision application if the municipality has enacted subdivision regulations and authorized the board to exercise this power. [RSA 674:35](#). In reviewing the application, the board will determine whether the proposed subdivision complies with the zoning regulations, subdivision regulations, the master plan, and it may rely on the opinions and experiences of its own members.

Finally, a municipality may authorize a Planning Board to exercise innovative land use controls, which include timing incentives, phased development, transfer of development rights, planned unit development, cluster

development, impact zoning, performance standards, flexible and discretionary zoning, inclusionary zoning, and the use of conditional or special use permits. [RSA 674:21, I](#) (see statute for explanations of these controls).

Any decision of a Planning Board may be appealed to the Superior Court. But, if an issue of the appeal concerns interpretation of the zoning ordinance, the appeal must first be brought before the ZBA. [RSA 677:15, I-IV](#). The burden of proof is on the party challenging the decision to demonstrate to the court that the board committed an error of law or, by the balance of probabilities; the Planning Board's decision on the facts was unreasonable. [RSA 677:15, V](#).

Members of Planning Boards, just like ZBAs, are volunteers. They also are not paid for their service on the Planning Board. They also invest their time out of a sense of civic duty, to help bring about certain results in the municipality, or for other reasons. Planning Board members too are sometimes unfamiliar with the laws and procedure they should use. Like ZBAs, when Planning Boards need guidance, they can rely on staff of the municipality, a consultant, and/or a lawyer.

Regional Planning Commissions

When reviewing a proposed use, a local land use board must consider whether the proposed use might have a regional impact by applying several factors, including but not limited to

- ④ the relative number of dwellings proposes;
- ④ impact to traffic;
- ④ location relative to municipal borders;
- ④ anticipated pollution; and
- ④ proximity to shared regional facilities.

[RSA 36:55](#); [RSA 36:56, I](#).

If the board concludes that a project does have regional impact, the board must submit the project to the Regional Planning Commission for review and comment. *Id.* A building inspector can also submit a project for review

by the regional planning commission, even if the land use boards did not. [RSA 36:57, IV](#). The function of the Regional Planning Commission is merely advisory; a Regional Planning Commission cannot supplant or restrict the power of the municipality. [RSA 36:57, I](#). The Regional Planning Commission are also responsible for preparing regional housing assessments, comprehensive development plans, and similar materials. [RSA 36:47](#). Nine Regional Planning Commissions serve the state. Learn more at their association website: <http://www.nharpc.org>.

Municipal Staff

In any given municipality, there are several key staff responsible for exercising the municipality's power over land use. The key method of enforcement of the zoning and land use ordinances is the requirement for a building permit. In smaller municipalities, an applicant obtains this permit from a building inspector. The building inspector is a position that, according to statute, is found in every municipality that has a building code. [RSA 673:1, V](#). The reality is sometimes different, and in some smaller municipalities it may not be clear what member of staff or citizen volunteer is responsible for exercising the duties of this role. Appeals of a building permit decision may be brought to the building code board of appeals, if there is one, or the ZBA, if there is not. [RSA 673:1, V](#). Building code inspectors also typically are responsible for occupancy permits. While a building permit ensures a building is planned to be built to code, an occupancy permit ensures the building actually was built according to the plans and promises submitted to the municipality.

In larger municipalities, a Planning Board may appoint staff to perform or help the board perform some of its roles and responsibilities. [RSA 673:16, I](#). The board may also contract with planners, engineers, architects, and other consultants for such services as it may require. *Id.* An applicant for a permit, site plan approval, or subdivision approval, will often meet first with planning staff for preliminary discussion and review of the proposal prior to proceeding before the full board.

These key staff could include administrators, planners, secretaries, community development personnel, and more.

Conservation Commissions

RSA 36-A:1-6 is the statute governing Conservation Commissions. The statutory purpose of a conservation commission is the “proper utilization and protection of the natural resources and for the protection of watershed resources of said city or town.” **RSA 36-A:2**.

A municipality operating under the town-meeting form of government may establish a Conservation Commission by voting on an article to adopt the provisions of this chapter at a duly warned meeting. **RSA 36-A:1**. A municipality operating under the city-council form of government may establish a Conservation Commission by vote of its city council at a duly warned meeting. *Id.* The number of members and alternate members on a particular Conservation Commissions is determined by the vote creating it, but per statute must be at least 3 members and no more than 7 members.

RSA 36-A:3. A vote at town of the legislative body (town council or town meeting) is necessary if it is determined after the commission of less than 7 members is formed that a larger commission is necessary. *Id.* In cities, the members of the Conservation Commission shall be appointed by the mayor subject to the provisions of the city charter, and in towns the members of the commission shall be appointed by the selectmen. *Id.* Members may serve on multiple boards and commission, such as the Planning Board or Historic District Commission. *Id.*

A Conservation Commission’s duties and powers are prescribed by statute and include both mandatory duties and powers, optional duties and powers, and duties and powers a commission may have if authorized per the procedures of the statute.

The Conservation Commission *must*:

- ④ conduct research independently and through the coordination of third parties into local land and water areas;
- ④ keep an index of all open space and natural, aesthetic or ecological area within the municipality with the plan of obtaining information pertinent to proper utilization of such areas, including municipal properties;
- ④ keep an index of marshlands, swamps and all other wetlands in a like manner, and may recommend to the city council or selectmen or to the department of resources and economic development a program for the protection, development or better utilization of all such areas;
- ④ keep accurate records of its meetings and actions; and
- ④ file an annual report which shall be printed in the annual town or municipal report;

The Conservation Commission *may*:

- ④ advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which in its judgment it deems necessary for its work.
- ④ appoint such clerks and other employees or subcommittees as it may from time to time require.
- ④ acquire land or other property interests (development right, easement, conveyances with conditions, licenses, etc.) by gift or by purchase, with the latter option requiring approval by the municipal governing body) within the borders of the municipality; and
- ④ expend money from its conservation fund without further authorization, unless the expenditure is for a purpose that requires authorization;

The Conservation Commission *may if authorized*:¹

- ④ subject to approval, expend funds for the purchase of interests in land outside the boundaries of the municipality; and

¹ This authorization may be made at the same vote establishing the commission, but it must be included as a separate question on the warrant. **RSA 36-A:4-a, II**.

- ④ expend funds for contributions to “qualified organizations,” as defined in section 170(h)(3) of the Internal Revenue Code of 1986, for the purchase of property interests or facilitating transactions relative thereto to be held by the qualified organization, when such purchase carries out the purposes of this chapter. [RSA 36-A:2-5](#).

These activities may be funded through appropriations deposited in a conservation fund. [RSA 36-A:5](#).

Conservation Commissions also have other specific powers provided by other statutes.

- ④ Manage the town or city forest if authorized by the conservation commission, [RSA 31:110-113](#);
- ④ Work with the state’s Department of Environmental Services to provide local comment and/or intervention on wetland permits, [RSA 482-A](#); and
- ④ Review an application for an excavation and make comments and recommendations on the proposed excavation and restoration plans. [RSA 155-E:3](#).

See generally New Hampshire Association of Conservation Commissions, at <http://www.nhacc.org>.

Unsurprisingly, in exercising these duties, Conservation Commissions work closely with farms and Conservation Commissions often include farmers and members.

Members of Conservation Commissions are also volunteers, and the same considerations apply as with the volunteer nature of members of the Planning Boards and ZBAs.

Agricultural Commissions

A municipality may establish an Agricultural Commission to recognize, promote, and encourage farming and agricultural-based economic opportunities, and conserve agricultural land and resources. Unlike a Conservation Commission, which has some specific regulatory authority, the Agricultural Commission is strictly advisory. Members of an Agricultural Commission work cooperatively with other municipal boards and officials to ensure the concerns and interests of farmers, the agricultural community, and farm and food advocates are better understood and considered in decision-making. A municipality facing pressure from citizens to preserve and encourage local agriculture should consider establishing an Agricultural Commission.

“An agricultural commission may be established in accordance with [RSA 673](#) for the proper recognition, promotion, enhancement, encouragement, use, management, and protection of agriculture and agricultural resources, tangible or intangible, that are valued for their economic, aesthetic, cultural, historic, or community significance within their natural, built, or cultural contexts.” [RSA 674:44-e](#).

It may consist of 3 to 7 members, and up to 5 alternates. [RSA 673:4-b, I](#). Each Agricultural Commission member and alternative must be a resident of the municipality. [RSA 673:4-b, II](#). One member may be a member of the local governing body and one commission member may be a member of the Planning Board. Id. Like Conservation Commission members, members of an Agricultural Commission are not prohibited from serving on other boards. Id. The Agricultural Commission is a public body and, therefore, must keep records. [RSA 673:17](#). The Agricultural Commission’s activities may be funded by an agricultural fund, which consists of appropriate money and gifts that may accumulate from year to year. [RSA 674:44-f](#). See: *UNH Extension, Agricultural Planning & Municipalities*, at (last visited August 27, 2020): <https://extension.unh.edu/tags/agricultural-planning-municipalities>

Although only advisory in nature, an Agricultural Commission may perform many functions, including:

- ④ Conduct inventories of agricultural resources, historic farms and farm buildings;
- ④ Educate the public on matters relating to farming and agriculture;
- ④ Serve as a local voice advocating for farmers, farm businesses and farm interests;
- ④ Provide visibility for farming;
- ④ Give farmers a place to go to for help;
- ④ Help resolve farm-related problems or conflicts;
- ④ Help protect farmland and other natural resources;
- ④ Conduct activities to recognize, promote, enhance, and encourage agriculture, agricultural resources, and agricultural-based economic opportunities;
- ④ Assist the Planning Board, as requested, in the development and review of those sections of the master plan which address agricultural resources;
- ④ Advise, upon request, local agencies and other local boards in their review of requests on matters affecting or potentially affecting agricultural resources. Id.

The following resource contains case studies of dozens of Agricultural Commissions, detailing how they were formed and the activities they have undertaken:

Lorraine Stuart Merrill, NH Coalition for Sustainable Agriculture, *Creating an Agricultural Commission in Your Hometown* (Feb. 2007), available at:https://extension.unh.edu/resources/files/Resource000021_Rep21.pdf

Municipal Enforcement and Agriculture

Not all interactions between municipalities and agriculture are prospective and cooperative. As authorized by state law, discussed in more detail in the Chapter on Zoning and Land Use, New Hampshire municipalities have some authority to regulate agriculture. It is not uncommon for ordinances to overstep this delegated authority or otherwise be invalid. However, even if such an ordinance would not survive a challenge, the uncertainty as to whether or not it is valid can deter agricultural or food operations from even starting. Careful navigation and cultivating good town relations is critical to avoid an enforcement action.

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