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Engaging Labor through Contractors

Given all the regulatory and technical challenges of managing labor and the risks of incurring fines or other penalties for infractions of law, many growers contract with an external entity for services on their land. Engaging workers through farm labor contractors (FLCs, also referred to as crew leaders in some places) and custom operators has increased as farm operators have sought more organizational flexibility, time for other management functions, and relief from legal obligations and exposures to liability.

Contractors can alleviate various difficulties, uncertainties, and costs associated with direct employment, especially the transaction costs of filling and laying off from short-term jobs during peak activity periods. Though dealing with contractors may involve other complications that farmers have to weigh against the burdens of hiring and managing their own employees, about three of five growers in California, for example, purchase services from at least one FLC, custom harvester, or pesticide applicator to supplement or substitute for workers they hire as employees.

Legal Considerations in Contracting

The form in which labor is engaged to work on a farm has important practical consequences. Doubts have increased about whether farmers actually reduce their legal risks as employers by purchasing labor services from contractors. Although FLCs who operate properly and independently do lessen risks for both growers and workers, growers may leave themselves open to joint liability for negligent and unlawful acts committed by contractors with whom they do business, especially those who are poorly equipped or operate unscrupulously.

Farm and ranch operators are liable for harm caused by the negligence of their employees while acting in the scope of employment, but generally not for negligent acts of an independent contractor and its employees. Similarly, labor laws protect employees, not "independent contractors," and such contractors are responsible for lawful treatment of their own employees. When the relationship between grower and labor contractor has the characteristics of employment (rather

than independent contracting), however, all workers hired by the FLC are also considered employees of the grower. In such a position, the grower is jointly liable for labor law violations—such as failure to pay the minimum wage, carry workers' compensation insurance, or withhold mandatory payroll deductions—committed by the FLC in the course of work performed for that grower.

Courts and administrative agencies have used several criteria in deciding whether a farm worker or farm labor contractor is legally independent of the farmer who benefits from services provided. They give little if any consideration to what a grower and worker or FLC call their relationship or one another. Each relationship is characterized case-by-case on the basis of not only explicit agreement but also actual conduct.

There are many intricacies in the determination of whether a worker's employment by an FLC is to be considered joint with a grower, and somewhat different sets of factors are used in connection with various obligations for which a grower may be held jointly liable. But two general factors weigh most heavily in determining whether a worker is an employee or an independent contractor: (1) the degree to which a grower has the *right to control* the details of work, and (2) the extent to which the worker is *economically dependent* on the grower. The more control the grower has (even if not exercised) and the more economically dependent the worker, the more likely their relationship is to be considered employment.

In 1997, the U.S. Department of Labor (DOL) expanded the range of circumstances under which the FLC's client (i.e., the grower or operator) is deemed a joint employer under the Migrant and Seasonal Agricultural Worker Protection Act. "Economic realities" of the relationship among client business, contractor, and worker now weigh more heavily. Much uncertainty about this new standard remains, and case law over time will better define both its meaning within MSAWPA and its influence on the determination of joint employment under other laws.

The new rule replaced DOL's original five-factor test under MSAWPA with a set of eight new criteria for determining the existence of a joint-employment relationship. It directs staff to consider:

- Whether the [grower] has the power either alone or through control of the FLC to direct, control, or supervise the workers
- Whether the [grower] can hire, fire, or modify the employment conditions
- Whether the [grower] supplies housing, transportation, tools and equipment required for the job
- The degree of permanency and duration of the relationship between the parties

- The extent to which the services rendered by the worker are repetitive, rote tasks requiring skills that are acquired with relatively little training
- Whether the work performed is an integral part of the overall business operation of the [grower]
- Whether the work is performed on the [grower's] property
- Whether the responsibilities performed by the [grower] are the type normally performed by employers, such as maintaining payroll records, preparing and / or issuing pay records, paying FICA taxes, providing workers' compensation insurance, or providing field sanitation

Use of FLCs and other contractors also may carry reporting and income tax consequences and payroll withholding obligations for the client business.

Before Getting Started

The importance of growers' carefully selecting the contractors they do business with and clarifying and sticking by the terms of agreement, especially the payment schedule, cannot be overstated. While growers may be primarily concerned about the fees they will have to pay for various services, ignoring the legitimacy or business practices of contractors leaves them at risk of incurring additional costs. There are documents to check and things to ask about from any FLC before shaking hands or signing on the dotted line.

Most critical is to verify that the contractor has (1) a current certificate of federal registration, with specific authorization for transportation and / or housing if he or she provides it, (2) a current state license, and (3) proof of workers' compensation coverage (in most western states). Keeping a copy of the state license is now required in California, and obtaining copies of all these documents is a good idea everywhere. Other items to consider bringing into pre-contract negotiations with contractors, depending on the circumstances, are:

- Federal registration as "FLC employees" of those who hire and supervise for the contractor
- Current registration, safety certification, and liability insurance coverage of vehicles used to transport workers
- Verification of FLC workers' eligibility for employment in the United States, on federal form I-9
- Written disclosure to workers of terms of employment;
- Posting of rights specified by MSAWPA
- Itemized statements with all paychecks showing wage calculation and any deductions
- Provision and maintenance for three years of payroll records
- Posting of pay rates for FLC employees (in some states)