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

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TABLE OF CONTENTS

Getting Started	3
Classification: Facts, Not Titles, Matter	3
Using this guide	3
Flowchart: How Do I Classify My Workers?	5
Details: What Do the Classifications Mean?	6
Volunteers	6
Independent Contractors	10
Interns	13
Employees	16
Remaining Questions?	16
Conclusion	17

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

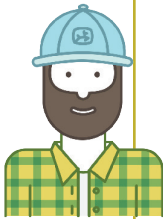
“The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers' compensation, withhold and pay taxes, and so on.”

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:

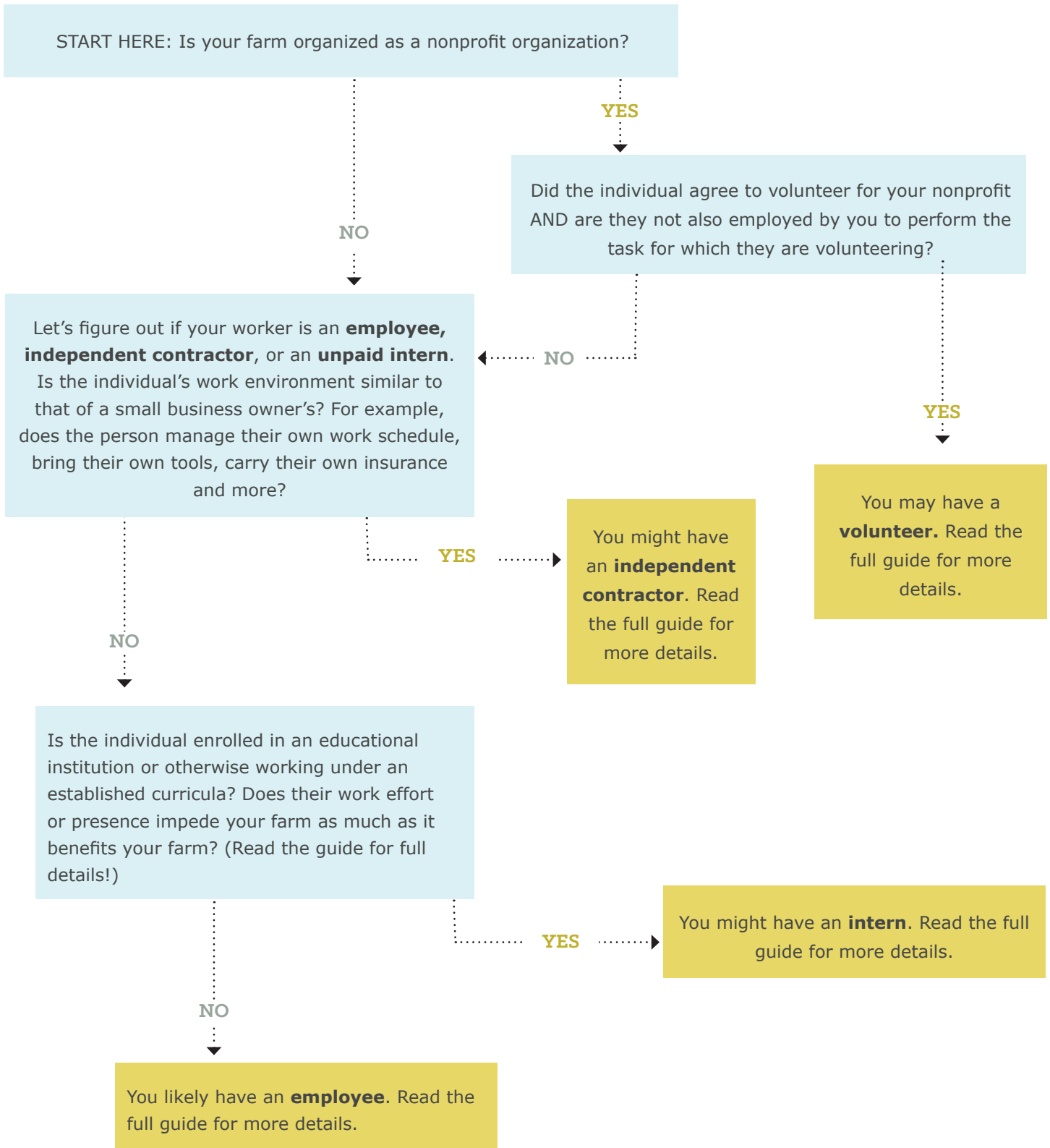
Hiring a Farm Employee in New Hampshire: Tax and Paperwork Checklist

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.

Flowchart: How Do I Classify My Workers?



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

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.

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:

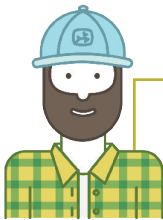
New Hampshire law fully exempts agricultural labor from minimum wage requirements. Federal law provides an exemption for agricultural labor based on farm size. Farms with less than 500 man days of agricultural labor in each calendar quarter of the previous year do not have to pay minimum wage. Those 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*.

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

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.

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.

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?"

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.

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’s 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 the 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

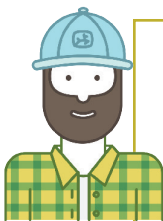
4. The position is not a trial period for a future paid position
5. The overall experience is for the benefit of the worker, not the farmer
6. The worker understands that the position is unpaid or less than minimum wage

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

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?

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



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