



FARM COMMONS

Managing Risks of Interns and Volunteers in New Hampshire

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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.

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.

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

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.

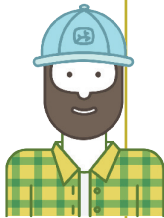
Our Goal

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

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

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 they 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.

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 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.

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

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.

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?

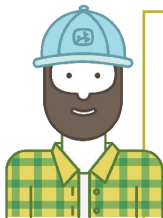


“I don't meet the DOL or *Black Swan* criteria. My farm is a business—all workers need to pull their weight. But, I really want to have young college students working on my farm over the summer. And, I like the idea of calling them “interns” as this seems to make them more open to learning my eccentric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

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

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

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.

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

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.

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

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?

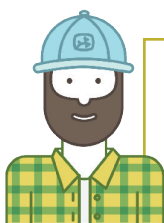
Many sustainable farms have used online services that connect volunteers to sustainable farmers. These volunteers are often domestic or international travelers who work in exchange for room and board. Farmers may be asking, why can these folks work for free in exchange for room and board? Are these types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

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 nonprofit now, so I can have volunteers. 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

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

Nonprofit 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 nonprofit 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 nonprofit 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 nonprofit 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

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 nonprofit 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.

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,

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.

☞ **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

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.

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

An array of laws come into play 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 live 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.

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

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.

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.



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