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**U-PICK – ARE AGRITOURISM WORKERS EXEMPT FROM THE WAGE
AND HOUR PROTECTIONS OF THE
FAIR LABOR STANDARDS ACT?**

Sarah M. Everhart*

INTRODUCTION

Pursuant to the Fair Labor Standards Act (“FLSA” or “the Act”), employer must pay workers at least the minimum wage and overtime pay for all hours worked in excess of forty hours in a standard workweek, unless the worker fits within one of the law’s exemptions.¹ The FLSA contains a complete exemption for agricultural workers from the overtime pay provision and a partial exemption from the minimum wage provision.² The exemptions from the minimum wage and overtime pay are not the only exemptions in the FLSA for agriculture,³ but they are the focus of this Article and are referred to herein as “FLSA’s agricultural exemptions.” Although the complete exemption has been modified in the years since the passage of the FLSA, farm workers still do not enjoy the full wage and hour protections of the FLSA.⁴

The FLSA’s agricultural exemptions create “... a class of second class workers...”⁵ The FLSA’s agricultural exemptions were passed, in part, to maintain a low-paid minority labor workforce on

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¹ 29 U.S.C. §§ 206–07 (2012).

² *Id.* § 213(a)(6), (b)(12) (2012).

³ *Id.* § 213(b)(5), (b)(10), (b)(13), (b)(14), (b)(16), (g), (h), (i), (j) (exemptions in the FLSA for workers employed in fields closely related to agriculture, including exemptions from the child labor provisions of FLSA, which can be located in 29 U.S.C. § 213(c)). There are also exemptions from minimum wage and overtime for bona fide executive, administrative, professional and outside sales employees. *See Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T. OF LAB., WAGE & HOUR DIV. (July 2008), https://www.dol.gov/whd/overtime/fs17a_overview.htm.

⁴ *See infra* Part II.A.

⁵ Vernon M. Briggs, Jr., *Agricultural Exemptions from the Fair Labor Standards Act*, Vol.II BRIGGS PAPERS AND SPEECHES. Paper 29, Page 1 (February 1981).

southern farms.⁶ Currently, the racial composition of hired U.S. farmworkers has shifted to mostly Hispanic farmworkers.⁷ Based on a 2014 National Agricultural Workers Survey (NAWS), by the U.S. Department of Labor, 74% of farmworkers surveyed prefer to use a language other than English and 27% admitted they cannot speak English at all.⁸ Additionally, according to the NAWS survey the average level of formal education completed by U.S. farmworkers was eighth grade.⁹ Today's farmworkers, many of which lack language skills and formal education, remain a vulnerable group of workers that are exempted from many of the FLSA's protections.¹⁰

Whether or not a farm worker is eligible for the FLSA's agricultural exemptions depends on whether the nature of his or her work fits within the statute's definition of agriculture.¹¹ The FLSA's definition of agriculture was created to be purposefully broad to include many forms of farming and farming related pursuits,¹² but both federal and state courts have narrowly applied the FLSA's agricultural exemptions to only those types of labor, which fit within the definition.¹³

The FLSA's agricultural exemptions are not difficult to apply to workers performing typical farm work.¹⁴ However, the rise in popularity of diversifying farms with agritourism has transformed many traditional operations into a new type of business that embodies both traditional farming and agricultural themed entertainment.¹⁵ To run agritourism farms, employers need workers to perform both

⁶ Mark Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEXAS L. REV. 1335, 1373–1375 (1987).

⁶ 29 U.S.C. § 202(a) (2012).

⁷ FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2013–2014: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, U.S. DEPT. OF LAB., EMPL. & TRAINING ADMIN. 20 (Dec. 2016), https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Compliant.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See infra* Part II.A-B.

¹¹ 29 U.S.C. § 203(f) (2012).

¹² *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260 (1955).

¹³ *See infra* Part III.A.

¹⁴ *See infra* Part II.B.

¹⁵ *See infra* Part I.

typical farm labor that neatly fits within the FLSA's agricultural exemptions, as well as, potentially non-exempt labor that is more akin to that performed in the hospitality industry such as giving tours.¹⁶ Unfortunately, the courtroom decisions and regulatory guidance on the application of the FLSA's agricultural exemptions, while instructive in the general interpretation of the law, do not include any guidance on the application of the exemptions to agritourism workers.¹⁷ This legal gray area is detrimental for agritourism workers, their employers, and the rural economies in which the operations are located.¹⁸

Workers who are covered by the FLSA not only have the benefit of the law's full wage and hour act protections, but also the full understanding of their entitlement to these rights, i.e. the knowledge that they are entitled to the minimum wage and/or overtime wages for hours worked in excess of forty hours per week.¹⁹ By contrast, agricultural workers are accustomed to not having wage and hour act protections.²⁰ So, when asked to perform agritourism duties, they will most likely not know that performing non-exempt work entitles them to the FLSA's wage and hour protections.²¹ Without this knowledge and given the inherent vulnerability of the majority of farmworkers, it is unlikely farmworkers will assert their rights and demand the wages they are entitled to for the work performed.²² Further, because of the interconnected relationship between agritourism and agriculture and the lack of clear guidance available on this subject, neither workers nor their employers fully understand when workers are performing non-exempt work.²³ In other words, it is not clear where farm work stops and arguably non-exempt agritourism work begins.²⁴ The lack of clarity on when and if agritourism workers are eligible for the FLSA's

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part III.A.

¹⁸ See *Labor Audit a Nightmare Scenario for Farm Market*, FRUIT GROWERS NEWS (Jan. 8, 2008), <http://fruitgrowersnews.com/article/labor-audit-a-nightmare-scenario-for-farm-market>.

¹⁹ 29 U.S.C. §§ 206–07.

²⁰ See *infra* Part II.A.

²¹ See *infra* Part II.A-B.

²² See *infra* Part II.A-B.

²³ See *infra* Part II.B.

²⁴ See *infra* Part III.A–B.

agricultural exemptions leaves these workers at risk for being underpaid and unfairly treated.²⁵

The confusion surrounding the classification of agritourism workers can also have costly consequences for farm employers.²⁶ Employers who are found to have incorrectly applied an exemption to the FLSA are subject to strict fines and penalties.²⁷ Additionally, farm employers nationwide are being encouraged to diversify their operations, and agritourism is a popular form of farm diversification.²⁸ However, in assessing the economics of agritourism, a farm employer must consider the increased cost of the labor.²⁹ Farm employers who are unsure of which workers on an agritourism farm are eligible for the FLSA's agricultural exemptions will be unable to fully assess the economics of the decision, and this could lead to an employer being less likely to pursue lucrative forms of diversification.³⁰ When successful, agritourism can provide much needed additional income to farms, which can help to preserve farms and farming lifestyles.³¹

Employers who are apprehensive of adding agritourism to their operations, out of fear of running afoul of labor laws or because of not being able to fully understand the economic impact of the decision, will be less likely to diversify their operations.³² Agritourism has been shown to be beneficial for rural economies by generating much needed tourism based revenue that strengthens rural communities.³³ Therefore, any hampering of growth in the agritourism industry

²⁵ See *infra* Part III. C.

²⁶ See *infra* note 27 and accompanying text.

²⁷ See 29 U.S.C. § 216(a) (2012).

²⁸ See *infra* Part I.

²⁹ DORA ANN HATCH, AGRITOURISM: A NEW AGRICULTURAL BUSINESS ENTERPRISE, LSU AGRIC. CTR. RES. & EXTENSION 3-4, http://sustainagga.caes.uga.edu/documents/LSUAgritourism_Pamphlet1.pdf.

³⁰ See *infra* Part III. C.

³¹ JAMES A. MAETZOLD, AGRITOURISM ALTERNATIVE ENTERPRISES, CONSERVATION, SUSTAINABILITY AND PARTNERSHIPS FOR FARMS, RANCHES AND RURAL COMMUNITIES, USDA NAT. RES. CONSERVATION SERV., https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009287.pdf (last visited Apr. 15, 2017).

³² See Kimberly L. Jensen et al., *Analysis of Factors Influencing Agritourism Businesses Perceptions and Expansion*, 45 J. FOOD DISTRIBUTION RES. 118, 122-23 (2014).

³³ See *infra* Part III. C.

because of the unclear application of the FLSA's agricultural exemptions will hurt rural America.³⁴

Part I of this Article will provide an overview of the nationwide popularity of diversifying farms through agritourism, the reasons farmers choose to incorporate agritourism into their operations, and the positive impact agritourism can have on farms and rural economies.³⁵ Part II includes a historical examination of the FLSA's agricultural exemptions and how the Act currently categorizes and treats farm workers.³⁶ Part III analyzes case law and federal interpretive guidance of the scope and legal interpretation of the FLSA's agricultural exemptions.³⁷ Lastly, Part III.C includes recommendations on how the Department of Labor can address how the FLSA's agricultural exemptions apply to agritourism.³⁸

In 2012, agritourism brought in over 700 million dollars in revenue for farms nationwide.³⁹ However, this evolution in farming requires farm workers to perform many types of labor not typically associated with agriculture.⁴⁰ Therefore, to prevent employers from misclassifying workers as exempt and underpaying them for agritourism work that is not exempt pursuant to the FLSA and/or not diversifying with agritourism out of fear that they will do just that, the legal guidance needs to address whether or not the work performed by agritourism laborers – the work that is now necessary to support a number of our nation's farms and rural economies – is deserving of an exemption from the FLSA. Legal guidance on this subject will benefit farm employers and prevent further, intentional or unintentional, maltreatment and underpayment of "...a class of second class workers..." namely U.S. farmworkers.⁴¹

³⁴ See *infra* Part I.

³⁵ See *infra* Part I.

³⁶ See *infra* Part II.

³⁷ See *infra* Part III.

³⁸ See *infra* Part III.C.

³⁹ 2012 CENSUS OF AGRICULTURE, TABLE 65: SUMMARY BY MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD, USDA NAT'L AGRIC. STAT. SERV. 101 (2012), https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_065_065.pdf [hereinafter USDA 2012 CENSUS].

⁴⁰ See *infra* Part II.

⁴¹ Briggs, *supra* note 5.

I. TOURISM MEETS AGRICULTURE

In recent years, many farmers have diversified their operations with some form of agritourism and opened the farm gates to the public.⁴² Agritourism is a broad term that includes any number of on-farm activities that draw the public onto farms for recreation and/or education.⁴³ The U.S. Department of Agriculture's definition of agritourism encompasses "one or more of these activities: pick-your-own operations, petting zoos, on-farm festivals, corn mazes, hunting, fishing, farm or wine tours, hay rides, horseback riding, harvest festivals, on-farm rodeos, children's educational programs, overnight stays on farms and ranches, hospitality services, wildlife viewing, casual photography, and Christmas tree sales."⁴⁴ Farmers are encouraged to diversify with agritourism as a way to supplement farm income and create a stream of revenue that will be unaffected by the inherent risks (weather, pests, etc.) that are associated with traditional farm income.⁴⁵

According to the 2012 Census of Agriculture (conducted every five years), the number of U.S. farms hosting some form of agritourism rose by forty-two percent from 2007 with just over 33,000 of the nation's 2.1 million farms offering agritourism and recreational activities.⁴⁶ Total farmer income attributable to agritourism has also steadily increased from \$202 million in 2002, \$567 million in 2007, to

⁴² Compare USDA 2012 CENSUS, *supra* note 39, at 100, with 2007 CENSUS OF AGRICULTURE, TABLE 59: SUMMARY BY MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD, USDA NAT'L AGRIC. STAT. SERV. 102 (2007), https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_059_059.pdf [hereinafter USDA 2007 CENSUS].

⁴³ Faqir Bagi, *Agritourism Farms Are More Diverse Than Other U.S. Farms*, USDA ECON. RES. SERV. (Oct. 6, 2014), <https://www.ers.usda.gov/amber-waves/2014/october/agritourism-farms-are-more-diverse-than-other-us-farms>.

⁴⁴ *Id.* (citing USDA ECON. RES. SERV. & NAT'L AGRIC. STATISTICS SERV., AGRIC. RESOURCE MGMT. SURVEY (2012)).

⁴⁵ Dennis Brown & Richard Reeder, *Agritourism Offers Opportunities for Farm Operators*, USDA ECON. RES. SERV. (Feb. 1, 2008), <https://www.ers.usda.gov/amber-waves/2008/february/agritourism-offers-opportunities-for-farm-operators>; Art Latham, *Natural Wonders: Agritourism Offers Farmers a New Way to Bring Home the Bacon*, PERSPECTIVES ONLINE (Fall 2002), <https://projects.ncsu.edu/cals/agcomm/magazine/fall02/natural.htm>.

⁴⁶ USDA 2012 Census, *supra* note 39, at 100; USDA 2007 Census, *supra* note 42, at 102.

\$704 million in 2012.⁴⁷ The amount that individual farms earn from agritourism varies greatly, but the average income associated with agritourism per farm is \$20,670.⁴⁸ This is a relatively high number, considering 75% of farms surveyed in 2012 earned less than \$50,000 in annual gross farm sales.⁴⁹ For successful agritourism operators, the revenue agritourism generates can reduce the need for off-farm employment and lessen a farm's vulnerability to factors beyond their control such as crop losses associated with weather.⁵⁰

The federal government has recognized the importance of agritourism to farm marketing. The 2008 Farm Bill included agritourism as an activity eligible for the Farmers Market Promotion Program (FMPP) and Local Food Promotion Program (LFPP) administered by the U.S. Department of Agriculture (USDA).⁵¹ In 2016, the USDA provided the FMPP with \$13.4 million to support projects for direct farmer-to-consumer marketing projects such as agritourism.⁵² In addition, since 2009, "USDA has invested over \$1 billion in more than 40,000 local [and regional] food businesses and infrastructure projects" including agritourism related projects.⁵³

Agritourism is beneficial to rural communities because the money created through the businesses stay in the rural communities

⁴⁷ 2002 CENSUS OF AGRICULTURE, TABLE 56: SUMMARY BY MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD, USDA NAT'L AGRIC. STAT. SERV. 90 (2007), https://www.agcensus.usda.gov/Publications/2002/Volume_1,_Chapter_1_US/st99_1_056_056.pdf; USDA 2007 CENSUS, *supra* note 42, at 102; USDA 2012 CENSUS, *supra* note 39, at 100.

⁴⁸ Bagi, *supra* note 43.

⁴⁹ 2012 U.S. CENSUS OF AGRICULTURE PRELIMINARY REPORT HIGHLIGHTS: U.S. FARMS AND FAMILIES, USDA ECON. RES. SERV. 2 (Feb. 2014), https://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Highlights.pdf.

⁵⁰ Faqir Singh Bagi & Richard J. Reeder, *Factors Affecting Farmer Participation in Agritourism*, 41 AGRIC. & RES. ECON. REV. 189, 190 (2012).

⁵¹ 7 U.S.C. § 3005 (2013–2015).

⁵² Peter Wood, *USDA Awards \$26.8 Million to Support Farmers Markets and Local Food Promotion Programs*, USDA AGRIC. MARKETING SERV. (Sept. 28, 2016, 2:00 PM), <https://www.ams.usda.gov/press-release/usda-awards-268-million-support-farmers-markets-and-local-food-promotion-programs>.

⁵³ *Id.*

the local farmers and business owners reside.⁵⁴ Additionally, many states view agritourism as a significant component of the tourism economy.⁵⁵ For example, a 2013 study of the projected economic impacts of agritourism in the state of Tennessee found on-site visitor expenditures at agritourism businesses would contribute \$34.2 million directly and, with multiplier effects, over \$54 million to the state's economy.⁵⁶ Further, according to the results of a 2006 study of the economic impact of agritourism in the state of New Jersey, agritourism generated \$90.82 million in revenues statewide (\$57.33 million in farm-revenue and \$33.29 million in non-farm revenue).⁵⁷

The fact that states value agritourism and its associated revenue is evident from the prevalence of agritourism protection statutes passed to protect the agritourism industry from nuisance suits, liability claims, and related costly liability insurance coverage.⁵⁸ Many states now put limits on liability for agritourism operations, with most being added within the last few years.⁵⁹ In addition to adopting agritourism protection statutes, some states have taken other steps to foster and encourage the establishment of agritourism operations such as marketing assistance, tax incentives, and zoning and building regulation exemptions.⁶⁰

Although agritourism is a popular form of farm diversification

⁵⁴ Elizabeth Dooley, Note, *Watch Where You're Steppin' Out Here: Why States Should Adopt Legislation to Promote the Diversified Farming Practice of Agritourism*, 15 *DRAKE J. AGRIC. L.* 455, 461 (2010).

⁵⁵ Latham, *supra* note 45; see, e.g., *Agritourism Signed into Law*, N.Y. ST. ASSEMBLY (Sept. 6, 2006), <http://assembly.state.ny.us/comm/Rural/20060906>.

⁵⁶ KIM JENSEN ET AL., A SNAPSHOT OF TENNESSEE AGRITOURISM: 2013 UPDATE, U. TENN. DEP'T AGRIC. & RESOURCE ECON. 27 (2013), <https://ag.tennessee.edu/cpa/CPA%20Publications/2013%20Agritourism%20Study%20Final%20Report%206%2020%2013.pdf>.

⁵⁷ BRIAN J. SCHILLING ET AL., THE ECONOMIC IMPACT OF AGRITOURISM IN NEW JERSEY: A 2006 ASSESSMENT, RUTGERS U., N.J. AGRIC. EXPERIMENT STATION (Sept. 17, 2007), http://foodpolicy.rutgers.edu/docs/pubs/Econ_Impact_AT_NJ_2006.pdf.

⁵⁸ *Agritourism – An Overview*, NAT'L. AGRIC. L. CTR., <http://nationalaglawcenter.org/overview/agritourism> (last visited Apr. 15, 2017).

⁵⁹ *Id.* For specific state statutes, see Amie Alexander & Elizabeth Rumley, *States' Agritourism Statutes*, <http://nationalaglawcenter.org/state-compilations/agritourism> (last visited Apr. 15, 2017).

⁶⁰ See SHANNON MIRUS, AGRITOURISM: A LEGAL UPDATE, NAT'L. AGRIC. L. CTR., http://www.agmrc.org/media/cms/Agritourism_Mirus_5AF3CC3E0B12C.pdf (last visited Apr. 15, 2017).

that can bring much needed money to rural areas,⁶¹ workers at agritourism operations are a new kind of worker that does not fit within the existing parameters outlined in the FLSA for agricultural labor.⁶²

II. HISTORY OF FLSA AND EXEMPTIONS FOR AGRICULTURAL WORKERS

Congress enacted the FLSA in 1938 in response to the Great Depression when American people were struggling with unparalleled levels of unemployment.⁶³ The FLSA was designed to eliminate labor conditions “detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers.”⁶⁴ To accomplish this goal, the FLSA regulates wages, determines reasonable working hours, mandates overtime pay, and regulates child labor within interstate commerce.⁶⁵ The legal authority for the FLSA is derived from the Commerce Clause of the U.S. Constitution.⁶⁶ The FLSA’s purpose is “to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work.”⁶⁷

Despite farm workers being the type of worker that the FLSA was created to protect (i.e. historically low paid and subject to long hours), the general Congressional reaction to the FLSA’s agricultural exemptions was not that the exemptions were inappropriate but rather that they were not broad enough.⁶⁸ Those testifying in favor of the exemptions cited the inherent peculiarities of farming that justified treating farm workers differently from other workers, such as Congressman Francis D. Culkins of New York, who explained:

⁶¹ USDA 2012 CENSUS, *supra* note 39, at 100; USDA 2007 CENSUS, *supra* note 42, at 102; *see also* JENSEN ET AL., *supra* note 56.

⁶² *See infra* Part II.B.

⁶³ Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act’s Exemption of Agriculture Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 356 (2005).

⁶⁴ 29 U.S.C. § 202(a) (2012).

⁶⁵ Canny, *supra* note 63, at 364.

⁶⁶ 29 U.S.C. § 202(b); U.S. CONST. art. I, § 8, cl. 3.

⁶⁷ *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting *Message of the President to Congress* (May 24, 1934)).

⁶⁸ Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLIN. L. REV. 649, 652–53 (1989).

The farmer is a seasonal worker. His job is subject to the changes in season and to changes in weather. He works longer hours during some seasons than he does in others. To write into this bill, even remotely, any qualification on that process is doing violence to our whole economic structure.⁶⁹

Despite the justifications given by legislators and special interest groups at the time, many scholars believe farm workers were exempted from the FLSA because of the political makeup of the U.S. Congress at the time of the Act's passage.⁷⁰ At the time of the FLSA's passage, the U.S. Congress was controlled by southern congressmen representing agrarian states that were not supportive of labor rights for farm workers for racial and economic reasons.⁷¹ In late 1930's the majority of U.S. farms were family operations without hired labor and which also meant they would not subject to the FLSA.⁷² The large farms with hired labor were located in the south and southwestern United States "specializing in cotton, citrus, sugar, fruits, and vegetables..."⁷³ The majority of workers on these farms were nonwhite⁷⁴ and typically paid much less than the federal minimum wage.⁷⁵ "For the agrarian, rural South, the [FLSA's] agricultural exemption significantly reduced the federal intrusion, and protected that portion of the southern society and economy still most dependent on cheap black labor."⁷⁶

This injustice was recognized by New Jersey Representative Hartley, who testified on the FLSA as follows:

We are told that this measure will raise the wages and lower the working hours of the exploited workers of America. If that is the case then why is it that the

⁶⁹ *Id.* at 653 (citing 82 CONG. REC. 1476 (1937)).

⁷⁰ *Id.* at 654-55; *see also* Canny, *supra* note 62, at 366-68.

⁷¹ *Id.*

⁷² Mark Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEXAS L. REV. 1335, 1375-1376 (1987).

⁷³ *Id.* at 1377.

⁷⁴ *Id.* at 1376.

⁷⁵ *Id.* at 1380.

⁷⁶ *Id.* at 1375.

poorest paid labor of all, the farm labor whose weekly average for 1937 was \$4.76 has been omitted from this bill? The answer is that the votes of the farm bloc in the House, the best organized bloc we have here, would have voted against the bill and defeated it.⁷⁷

After the passage of the FLSA, farm workers remained completely exempted from the FLSA's wage and hour protections until the law was partially amended in 1966.⁷⁸

A. *Agricultural Workers and the Fair Labor Standards Act*

Individuals subject to the FLSA include those “engaged in commerce or in the production of goods for commerce” or “employed in an enterprise engaged in commerce or in the production of goods for commerce.”⁷⁹ “Virtually all employees engaged in agriculture are covered by the Act [FLSA] in that they produce goods for interstate commerce.”⁸⁰ However, the way agricultural workers have been treated under the FLSA has varied since its enactment.⁸¹ The original FLSA agricultural exemptions which exempted all agricultural employees from receiving the benefit of the federal minimum wage and overtime pay for hours worked in excess of the forty-hour work week were modified in 1966 and minimum wage protection was extended to cover agricultural employees with certain exceptions.⁸²

Currently, there are five main exemptions or types of farm workers that are not legally required to be paid the minimum wage or overtime pay.⁸³ The first exemption applies to workers employed by a small farm employer.⁸⁴ A small farm employer is “one who did not,

⁷⁷ Canny, *supra* note 63, at 367 (quoting 83 CONG. REC. 9257 (1938)).

⁷⁸ *Id.* at 365 (citing S. REP. NO. 89-1487, at 5 (1966)).

⁷⁹ 29 U.S.C. § 202(a); *id.* § 203(b), (s) (2012). See *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T. OF LAB., WAGE & HOUR DIV. (July 2009), <https://www.dol.gov/whd/regs/compliance/whdfs14.htm>.

⁸⁰ *Fact Sheet #12: Agricultural Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T. OF LAB., WAGE & HOUR DIV. (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

⁸¹ See *infra* notes 83–87 and accompanying text.

⁸² Canny, *supra* note 63, at 365.

⁸³ 29 U.S.C. § 213(a)(6).

⁸⁴ *Id.* § 213(a)(6)(A).

during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor.”⁸⁵ A “man-day” is any day during which an employee performs agricultural work for at least one hour.⁸⁶ Five hundred man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter.⁸⁷

The second exemption applies to workers who are the immediate family member (parent, spouse, child, etc.) of the farm employer.⁸⁸ Although this exemption may sound narrowly tailored, “[a]ccording to the Farm Labor Survey (FLS) of the National Agricultural Statistics Service (NASS), hired farmworkers make up a third of all those working on farms; the other two-thirds are self-employed farm operators and their family members.”⁸⁹ Another exemption is for workers principally engaged on the range in the production of livestock.⁹⁰ Lastly, the final two exemptions are for hand harvest workers, the first of which applies to local hand harvest laborers who commute daily from their permanent residence, are paid on a piece rate basis in traditionally piece-rated occupations, and were engaged in agriculture fewer than thirteen weeks during the preceding calendar year.⁹¹ Additionally, non-local minors (16 years of age or under) who are hand harvesters commuting daily from their permanent residence, paid on a piece-rate basis in traditionally piece-rated occupations, employed on the same farm as their parent, and paid the same piece rate as those over sixteen years of age are exempted.⁹² Therefore, unless an agricultural worker fits within one of these exemptions, they must be paid the minimum wage.⁹³ Further, pursuant to the FLSA, all workers employed in agriculture are exempted from the requirement of overtime pay for hours worked in excess of a forty-hour work week.⁹⁴

⁸⁵ *Id.*

⁸⁶ *Id.* § 203(u).

⁸⁷ 29 C.F.R. § 780.305(a) (2017).

⁸⁸ 29 U.S.C. § 213(a)(6)(B); *see also id.* § 203(s)(2).

⁸⁹ *Background*, USDA ECON. RES. SERV., <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx> (last updated Sept. 27, 2016).

⁹⁰ 29 U.S.C. § 213(a)(6)(E).

⁹¹ *Id.* § 213(a)(6)(C).

⁹² *Id.* § 213(a)(6)(D).

⁹³ *Id.* § 213(a).

⁹⁴ *Id.* § 213(a)(1).

Although the FLSA establishes the federal standard for minimum wage and overtime pay, states have the authority to adopt wage laws that provide greater protection for workers.⁹⁵ Currently, twenty-nine states and the District of Columbia have a minimum wage higher than the federal minimum.⁹⁶ In states that have not adopted their own minimum wage, the minimum wage requirements of the FLSA apply.⁹⁷

By contrast, few states have enacted their own overtime pay laws. Only four states (California, Hawaii, Maryland and Minnesota) offer any overtime pay to farm workers.⁹⁸ All other states follow the FLSA's total exemption from overtime pay requirements for workers in agriculture.⁹⁹ Based on the 2014 NAWS, farm workers work on average 44 hours per week.¹⁰⁰ In other words, the average farm worker is working in excess of the standard 40 hour work week and, assuming their employer is taking advantage of the FLSA's exemption for

⁹⁵ *See id.* § 218(a). The FLSA explicitly allows state and municipal governments to set a minimum wage higher than the federal minimum or maximum hours lower than the federal maximum. *Id.*

⁹⁶ *Minimum Wage Laws in the States – January 1, 2017*, U.S. DEP'T. OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/whd/minwage/america.html> (last updated Jan. 1, 2017). Wyoming and Georgia have adopted minimum wage rates that are lower than the federal minimum wage and apply to workers, such as farm workers, who are exempt from the FLSA. *Id.*

⁹⁷ 29 U.S.C. § 218(a).

⁹⁸ Alejandro Lazo, *California Farmworkers to Get Overtime Pay After 8 Hours Under New Law*, WALL ST. J. (Sept. 12, 2016, 8:27 PM), <https://www.wsj.com/articles/california-farmworkers-to-get-overtime-pay-after-8-hours-under-new-law-1473726418>. California Assembly Bill 1066, signed by Governor Brown, states that agricultural workers shall be paid overtime after eight hours on the job or forty hours in a single week. Assemb. Bill 1066, 2015–2016 Reg. Sess. (Cal. 2016). Minnesota mandates that agricultural workers be paid overtime after working more than forty-eight hours per work week. MINN. STAT. § 177.25 (2016). Maryland mandates that agricultural workers be paid overtime if they work more than sixty hours in a work week. MD. CODE ANN., LAB. & EMPL. § 3-420(c) (2016). Hawaii mandates that agricultural employees must receive overtime if they work more than forty hours in a week. HAW. CODE R. § 387-3(a) (2013).

⁹⁹ *See supra* note 98 and accompanying text.

¹⁰⁰ FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2013–2014: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, U.S. DEPT. OF LAB., EMPL. & TRAINING ADMIN. 20 (Dec. 2016), https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Co mpliant.pdf.

agriculture, does not receive overtime compensation for the hours worked in excess of 40 per week.¹⁰¹

The exemptions from the FLSA apply on a week by week basis meaning that when an employee in the same workweek performs work which is exempt and also engages in work that is not exempt but covered by the FLSA, he is not exempt that week, and the wage and hour protections of the FLSA, i.e. minimum wage and overtime pay are applicable.¹⁰² In application, this means that an employer cannot separate exempt and non-exempt covered work within a work week.¹⁰³ It is easy to see how agritourism workers, can be underpaid if they are assigned both exempt (farm-related) and arguably non-exempt (tourism-related) tasks within the same work week and then paid a wage that is either below the minimum wage or not provided overtime pay.¹⁰⁴ This type of mistake will not only result in unfairly compensating workers, but also subject employers to potentially costly legal battles, fines, and penalties.¹⁰⁵ To reduce the likelihood of workers being underpaid and employers making unintentional and expensive violations of the FLSA, the farm community should be provided sufficient legal guidance to help them correctly apply the FLSA's agricultural exemptions.

There is an additional exemption in the FLSA, unrelated to agriculture that may apply to some agritourism operators.¹⁰⁶ The FLSA exempts employees working at seasonal amusement or

¹⁰¹ *See id.*

¹⁰² 29 C.F.R. § 780.11 (2005); *see, e.g.*, *NLRB v. Kelly Bros. Nurseries, Inc.*, 341 F.2d 433, 437 (2d Cir. 1965) (explaining that an employee is outside of FLSA's agricultural exemption if he spent part of week performing tasks outside of the definition of agriculture); *Adkins v. Mid-America Growers, Inc.*, 167 F.3d 355, 359 (7th Cir. 1999) (noting that a worker who does any nonexempt work in a week is entitled to the statutory protections of the FLSA); *Hodgson v. Wittenburg*, 464 F.2d 1219, 1221 (5th Cir. 1972) (noting "an employee's performance of both exempt and non-exempt activities during the same work week defeats any exemption that would otherwise apply.").

¹⁰³ *See* 29 C.F.R. § 780.10 (2017).

¹⁰⁴ *See Labor Audit a Nightmare Scenario for Farm Market*, FRUIT GROWERS NEWS (Jan. 8, 2008), <http://fruitgrowersnews.com/article/labor-audit-a-nightmare-scenario-for-farm-market> (explaining that if an employee's time is divided between exempt and non-exempt work—regardless of the proportion—that employee is non-exempt).

¹⁰⁵ *See* 29 U.S.C. § 216(a) (2012).

¹⁰⁶ *Id.* § 213(a)(3).

recreational establishments from overtime and minimum wage requirements.¹⁰⁷ To qualify for the exemption, the establishment must meet one of the following seasonal requirements “it does not operate for more than seven months in any calendar year; or during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year....”¹⁰⁸ Although amusement or recreational establishments are not defined in the statute, the Department of Labor (DOL) in regulatory guidance provides that they are “establishments frequented by the public for its amusement or recreation” and “[t]ypical examples of such are the concessionaires at amusement parks and beaches.”¹⁰⁹

There is no precedent for claiming this exemption in the agritourism context, however it has been asserted in other mixed use operations.¹¹⁰ In order for a typical farm which operates year round and does not have the primary purpose of amusement or recreation, to qualify for the exemption, the agritourism component must be separate from the primary farming operation.¹¹¹ An amusement and recreational establishment, found in association with other uses, can qualify for the exemption, if “(a) [i]t is physically separated from the other activities; (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units.”¹¹² Therefore, it may be possible for an agritourism operator to qualify an agritourism component of a farming operation for the seasonal recreation and amusement exemption if the operator meets the criteria outlined in the law and is able to keep the two businesses physically and functionally separate. However, given the blended nature of agritourism and farming, in most instances, it will difficult for an employer to achieve this type of separation.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 213(a)(3)(A)–(B).

¹⁰⁹ 29 C.F.R. § 779.385 (2017).

¹¹⁰ *See* Feagley v. Tampa Bay Downs, Inc., 2012 U.S. Dist. LEXIS 81757, at *17 (S.D. Fla. June 13, 2012); McMillan v. BSA-Aloha Council, 2012 U.S. Dist. LEXIS 83346, at *30 (D. Haw. June 15, 2012).

¹¹¹ 29 C.F.R. § 779.305.

¹¹² *Id.* The “no interchange of employees” requirement refers to the “indiscriminate use of the employee in both [exempt and nonexempt] units” and not to employees occasionally helping in another unit. *Id.*

An employer accused of wrongdoing pursuant to the FLSA and claiming an exemption has the burden to show the exception applies.¹¹³ Under these circumstances, employers face “a heightened burden of proof [and t]he employer must do more than merely meet the usual preponderance of evidence standard in order to prevail; he must show that the employee fits ‘plainly and unmistakably’ within the exemption’s terms.”¹¹⁴ Employers found to have violated the FLSA are subject to civil penalties and, in case of repeat offenses, criminal consequences.¹¹⁵ Additionally, an employer who is found to have improperly paid a worker must pay the worker the back wages which are found to be due and an additional amount equal to the back wages as liquidated damages.¹¹⁶ This form of double damages for violations of the FLSA makes the law a financially damaging law for employers to violate, which discourages the underpayment and maltreatment of workers.

B. The FLSA’s Definition of Agriculture

The FLSA defines agriculture as:

[F]arming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities...the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.¹¹⁷

FLSA’s definition of agriculture includes both a “primary” and a

¹¹³ *Id.* § 780.402(a).

¹¹⁴ *Sejour v. Steven Davis Farms*, 28 F. Supp. 3d 1216, 1224–25 (N.D. Fla. 2014) (citing *Hagadorn v. M.F. Smith & Assoc., Inc.*, 1999 WL 68403, at *2 (10th Cir. Feb. 12, 1999)).

¹¹⁵ 29 U.S.C. § 216(a).

¹¹⁶ *Id.* § 216(b).

¹¹⁷ *Id.* § 203(f).

“secondary” meaning of agriculture.¹¹⁸ The Supreme Court has interpreted the definition to “embrace the whole field of agriculture,” but “meant to apply only to agriculture.”¹¹⁹ In other words, the definition is meant to include many types of agriculture but not to apply to industries other than agriculture.

The Supreme Court first addressed the scope of the definition and the exemption for agricultural workers in *Farmers Reservoir & Irrigation Co. v. McComb*.¹²⁰ In *Farmers Reservoir*, the Court reasoned that the meaning of “agriculture” has “two distinct branches” that include not only a “primary meaning” of “farming in all its branches,” but also a secondary and “broader meaning” to include “any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with ‘such’ farming operations.”¹²¹ The Court reasoned,

[a]griculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process....Economic progress...is characterized by a progressive division of labor and separation of function....Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farms in other situations. The question is whether the activity in the *particular case* is carried on as part of the agricultural function or is separately organized as an independent productive activity.¹²²

The U.S. Department of Labor has also promulgated regulations dividing the definition of agriculture into primary and secondary branches.¹²³ Primary agriculture is defined as “farming in all its

¹¹⁸ Pacheco v. Whiting Farms, Inc., 365 F.3d 1199, 1203 (10th Cir. 2004).

¹¹⁹ Maneja v. Waialua Agr. Co., 349 U.S. 254, 260 (1955).

¹²⁰ 337 U.S. 755 (1949).

¹²¹ *Id.* at 762–63.

¹²² *Id.* at 760–61 (emphasis added).

¹²³ 29 C.F.R. § 780.105(a) (2017).

branches.”¹²⁴ Activities in primary agriculture are those that traditionally are considered agricultural, “such as cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry.”¹²⁵ To decide whether an activity fits within the primary definition of agriculture, the court or regulatory agency may consider (1) the “nature and purpose of the operations”; (2) “the character of the place where the employee performs his duties”; (3) “the general types of activities there conducted”; and (4) “the purpose and function of such activities.”¹²⁶ After applying these considerations, even non-typical farming activities such as fish farming have been found to fit within the primary definition of agriculture.¹²⁷

Secondary agriculture includes “any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with ‘such’ farming operations.”¹²⁸ The Supreme Court has reasoned “the line between practices that are and those that are not performed as an incident to or in conjunction with such farming operations is not susceptible of precise definition.”¹²⁹ “The regulations and case law have eschewed a ‘mechanical application of isolated factors or tests’ and instead look at the overall circumstances.”¹³⁰

III. DOES AGRITOURISM FIT WITHIN THE SECONDARY MEANING OF AGRICULTURE?

Given that application of the FLSA’s agricultural exemptions cannot be done based on isolated factors or a test¹³¹, deciding whether an agritourism related task falls within the secondary meaning of agriculture is no easy feat, and agritourism workers have little in the

¹²⁴ *Pacheco*, 365 F.3d at 1203 (quoting 29 U.S.C § 203(f)).

¹²⁵ 29 C.F.R. § 780.105(b).

¹²⁶ *Id.* § 780.109.

¹²⁷ *Id.*

¹²⁸ *Id.* § 780.105(c).

¹²⁹ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 408 (1996) (quoting 29 C.F.R. § 780.144 (2011)).

¹³⁰ *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1186 (10th Cir. 2004) (citing 29 C.F.R. § 780.145 (2006)).

¹³¹ *Id.*

way of legal guidance to help them know whether they are performing work that would make them ineligible for the FLSA's protections.

A. *Courts Have Interpreted the FLSA's Agricultural Exemptions to Apply to Many Types of Work Related to Agriculture*

*Maneja v. Waialua Agricultural Co.*¹³² is the seminal case in which the U.S. Supreme Court analyzed a variety of different types of employment on a farming operation and decided which roles fit within the FLSA's agricultural exemptions. In *Maneja* the farming operation in question was a Hawaiian sugar plantation which consisted of sugarcane fields, railroads and railcars to ship the sugarcane and a sugarcane processing facility.¹³³ The employer in *Maneja* argued that all of the employees on the plantation were agricultural workers and were exempt, pursuant to the FLSA, from the requirement of overtime pay.¹³⁴

The Court analyzed each job type on the plantation and found the field workers, those who loaded and unloaded sugarcane, those who worked on the company's railroad moving the sugarcane, equipment and employees from the fields to the processing facility and those who worked in the equipment repair shops repairing agricultural equipment to be agricultural workers and thereby exempt from the requirements of the FLSA.¹³⁵ Despite the nature of some of the work not being typical agricultural work, the Court found the work fit within the FLSA's definition of agriculture because of the relationship of the work to the agriculture operation.¹³⁶ In holding that the railroad workers were performing agricultural labor, the Court reasoned that it was important to consider the function performed by the work and the overall contribution of the work to the agricultural operation rather than dismissing the work as being a method not typically associated with agriculture.¹³⁷ Further, in analyzing the farm equipment repairman in *Maneja* the Court found "...the very necessity of

¹³² 349 U.S. 254 (1955).

¹³³ *Id.* at 256–57.

¹³⁴ *Id.* at 256.

¹³⁵ *Id.* at 262–71.

¹³⁶ *Id.* at 263.

¹³⁷ *Id.* at 261.

integrating these tasks with Waialua's main operation—without which the entire farming operation would soon become hopelessly stalled—is a strong reason to consider the repairmen within the exemption.”¹³⁸

Next, the Court considered whether the workers who processed the sugarcane fit within the secondary meaning of agriculture as work which is “incident to or in conjunction with farming.”¹³⁹ In its analysis of the sugarcane processing workers, the Court considered the legislative history of the FLSA agriculture exemptions.¹⁴⁰ The sponsors of the FLSA were adamant that they did not want a farm to be a façade for an industrial operator who could then use the agriculture exemption to gain a competitive advantage over other industrial operators.¹⁴¹

To aid in their analysis the Supreme Court borrowed from a Department of Labor Wage and Hour decision and created a seven-part test to determine whether a particular processing activity is incidental to or in conjunction with agriculture:

- (1) The size of the ordinary farming operations [. . .];
- (2) The type of product resulting from the operation in question [. . .];
- (3) The investment in the processing operation as opposed to the ordinary farming activities [. . .];
- (4) The time spent in processing and in ordinary farming [. . .];
- (5) The extent to which ordinary farm workers do processing [. . .];
- (6) The degree of separation by the employer between the various operations [. . .];
- (7) And the degree of industrialization.¹⁴²

In addition to the seven-part test, the Court considered the ordinary practice of farmers in the type of operation in question and held that whether a practice is ordinary “...has a very direct bearing on whether

¹³⁸ *Maneja*, 349 U.S. at 263–64.

¹³⁹ *Id.* at 264.

¹⁴⁰ *Id.* at 268–69.

¹⁴¹ *Id.* at 264.

¹⁴² *Id.* at 264–65.

the milling operation is really incident to farming.”¹⁴³ The Court in *Maneja* found that although the processing of sugarcane on a farm was not uncommon, it was not a “...normal incident to the cultivation of sugarcane....”¹⁴⁴ After applying the facts to the legal elements, the Court found that the sugarcane processing workers did not qualify as exempt under the general overtime exemption for agricultural workers but were exempt under a separate exclusion specific to the processing of sugarcane.¹⁴⁵

For decades, circuit courts across the country have found that nontraditional types of work related to farming qualified as agricultural as defined by the FLSA.¹⁴⁶ The Fifth Circuit found in separate cases that flying a crop duster and performing clerical work qualified as agricultural work if done by a farmer or on a farm and incidental to or in conjunction with the farming operation.¹⁴⁷

In *Brennan v. Sugar Cane Growers Coop. of Fla.*,¹⁴⁸ the Court found laborers who cooked for field workers and maintained labor camp residences performed work which fit within the FLSA’s secondary meaning of agriculture as work that is incident to the primary agricultural operation.¹⁴⁹ The Court reasoned that the work of preparing food and maintaining labor camps was an integral part of the overall farming operation and sufficiently “on the farm” to fit within the secondary meaning of agriculture.¹⁵⁰ The Court held that the labor did not have to actually take place “...right in the middle of the cane fields...” to qualify for the exemption, rather a location in close proximity to the fields was sufficient.¹⁵¹ According to the Fifth Circuit:

¹⁴³ *Id.* at 265–66.

¹⁴⁴ *Maneja*, 349 U.S. at 267.

¹⁴⁵ *Id.* at 270–71.

¹⁴⁶ See *Sariol v. Fla. Crystals Corp.*, 490 F.3d 1277, 1278 (11th Cir. 2007); *Adkins v. Mid-America Growers, Inc.*, 167 F.3d 355, 356 (7th Cir. 1999); *Brennan v. Sugar Cane Growers Coop.*, 486 F.2d 1006, 1010–11 (5th Cir. 1973); *Hodgson v. Ewing*, 451 F.2d 526 (5th Cir. 1971); *Boyls v. Wirtz*, 352 F.2d 63, 63 (5th Cir. 1965).

¹⁴⁷ *Hodgson*, 451 F.2d at 529; *Boyls*, 352 F.2d at 63.

¹⁴⁸ 486 F.2d 1006, 1010–11 (5th Cir. 1973).

¹⁴⁹ See *Wirtz v. Osceola Farms Co.*, 372 F.2d 584 (5th Cir. 1967).

¹⁵⁰ *Brennan*, 486 F.2d at 1010–11.

¹⁵¹ *Id.* at 1010.

[o]ur interpretation of ‘on a farm’ seems to us to be more nearly in line with what that terminology really envisages. The drafters of the section could not anticipate every conceivable factual situation arising in the future under the agricultural exemption, and the statutory language should not be read with such an assumption.¹⁵²

In *Sariol v. Florida Crystals Corp.*,¹⁵³ the Eleventh Circuit considered whether the equipment workers at the Sugar Farms Cooperative were performing agricultural work exempt from the FLSA. The Eleventh Circuit affirmed the lower court’s finding that the work of delivering fuel to farm machinery and maintaining the equipment is work that fits within the FLSA’s secondary meaning of agriculture.¹⁵⁴ The Court explained that the work at issue in the case was “not only incidental to Sugar Farms Co-op’s operations, but...absolutely necessary” and “[w]ithout these services...the farm would grind to a halt.”¹⁵⁵ The Court refused to accept the argument that the work was not agricultural labor as defined by the FLSA because it was done for independent contractors of a cooperative as opposed to directly for a farmer.¹⁵⁶ The Court reasoned that the meaningful part of the analysis was the nature of the activities as opposed to the ownership structure of the cooperative.¹⁵⁷ Because the activities at issue were agricultural, the fact that equipment was operated by independent contractors working for a cooperative did not disqualify the work from the FLSA’s agricultural exemptions.¹⁵⁸

Agritourism workers, attempting to discern if they are performing work that is non-exempt and for which they should be fully paid under the FLSA, will most likely be faced with the task of separating the exempt agriculture work from the arguably non-exempt tourism-related work.¹⁵⁹ This task is complicated by the nature of

¹⁵² *Id.* at 1011.

¹⁵³ 490 F.3d 1277 (11th Cir. 2007).

¹⁵⁴ *Id.* at 1279–80.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1280–81.

¹⁵⁷ *Id.* at 1282.

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* Part II. B.

agritourism.¹⁶⁰ The very essence of agritourism is that it is a form of on-farm entertainment and connects the actual workings of the farm.¹⁶¹

The Seventh Circuit, in *Adkins v. Mid-America Growers, Inc.*,¹⁶² faced a similar challenge when it was asked to separate the exempt agricultural work of growing plants from the arguably non-exempt aspects of selling pots and planters in a flower growing operation. The Court ultimately held that the sale of flower pots and planters by a producer of flowers and flowering plants, even when sold empty, qualified as agriculture work.¹⁶³ The court in *Adkins* reasoned:

[t]he underlying reason why the agricultural exemption includes some nonagricultural activity is that it is not always feasible to separate agricultural from nonagricultural labor. The problem is illustrated by flowers that are sold in pots. If a worker works on such a product more than 40 hours a week, is the overtime agricultural or nonagricultural? It is both, but since the nonagricultural component is minor and inseparable, and since the FLSA does not permit overtime pay to be prorated for a worker who does both exempt and nonexempt work, the employer is given a break and the work classified as entirely agricultural. To deny him the break would burden the efficient integration of closely related activities, especially in situations in which the amount of nonexempt activity is too slight to warrant the expense of a separate work force. But where the nonexempt activity can be feasibly separated from the exempt, the separation is essential to prevent agricultural enterprises from obtaining an artificial competitive advantage over

¹⁶⁰ See *supra* Part I.

¹⁶¹ See *supra* Part I.

¹⁶² 167 F.3d 355, 357 (7th Cir. 1999), *reh'g denied*, 1999 U.S. App. LEXIS 4104 (Mar. 10, 1999).

¹⁶³ *Id.*

enterprises that do not enjoy an exemption from the Fair Labor Standards Act.¹⁶⁴

By contrast, the Court in *Adkins* found work consisting of mowing the lawn and other gardening activities of the company president's residential house located on the same property as the greenhouse to be clearly non-exempt labor.¹⁶⁵ The Court found the "primary purpose [of the activities] was to make the president's home attractive."¹⁶⁶ The Court reasoned "[a] nonagricultural activity that would be undertaken even if the actor weren't engaged in agriculture is not secondary agriculture; its cost is not incurred because of agriculture."¹⁶⁷

Some agritourism activities were considered by the Western District of New York, in *Centeno-Bernuy v. Becker Farms*.¹⁶⁸ The employers in *Centeno-Bernuy* asserted they were not subject to the FLSA based on the 500-man days exemption for minimum wage and the agricultural labor exemption for overtime.¹⁶⁹ The Court found a genuine issue of material fact as to whether they were subject to the FLSA due to the substantial amount of non-exempt work performed by the workers.¹⁷⁰ According to the *Centeno-Bernuy* Court, examples of the non-exempt work included: working at a retail store, building benches for spectators to watch pig races, preparing and running haunted hayrides, building an extension to an on-site café, parking cars for seasonal events, feeding and cleaning petting zoo animals, preparing and supervising bonfires during events, and maintaining the employer's home and yard.¹⁷¹ Given the wide variety of work performed by the farm workers in *Centeno-Bernuy*, the Court, ruling at the summary judgment level, found a genuine issue of material fact as to whether non-exempt work had been done in the same week as exempt work.¹⁷² Due to the subsequent settlement of the case, there is

¹⁶⁴ *Id.* at 358 (citations omitted).

¹⁶⁵ *Id.* at 359.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ 564 F. Supp. 2d 166, 177–78 (W.D.N.Y. 2008).

¹⁶⁹ *Id.* at 176–78.

¹⁷⁰ *Id.* at 179.

¹⁷¹ *Id.* at 178.

¹⁷² *Id.* at 179.

no further analysis on the subject of when agritourism related work would or would not be exempted from the FLSA.¹⁷³

In *Damutz v. Wm. Pinchbeck, Inc.*,¹⁷⁴ the U.S. District Court for the District of Connecticut found that a fireman in a commercial greenhouse was working in agriculture as defined by the FLSA. The Court in *Damutz* reasoned that the fireman's work was essential in the growth of the agricultural product which was cut flowers grown in the steam heated greenhouse.¹⁷⁵

Recently, the U.S. District Court for the District of Connecticut in *Chhum v. Anstett* found an employee who worked and lived on a small farm performed exempted agricultural labor.¹⁷⁶ The employee's work related to taking care of animals and other activities, such as mowing the lawns and repairing the caretaker's house.¹⁷⁷ The Court found the mowing of lawns and repairing of the caretaker's house was exempted work because the work was "...done on and to support the farm, the sole purpose of which was to provide a place for the animals to live."¹⁷⁸

Reviewing the above summarized cases, it is apparent that courts have interpreted the secondary meaning of agriculture¹⁷⁹ very broadly.¹⁸⁰ Courts found work performed in close proximity to a farm or for a business entity rather than a farmer falls within agriculture's secondary meaning.¹⁸¹ Courts have also applied the exemptions to a wide variety of types of work and have not shied away from exempting types of work not traditionally thought of as associated with agriculture such as cooking and cleaning.¹⁸² In general, courts

¹⁷³ *Id.*

¹⁷⁴ 66 F. Supp. 667, 669–70 (D. Conn. 1946).

¹⁷⁵ *Id.*

¹⁷⁶ *Chhum v. Anstett*, 2016 WL 4203389 (D. Conn. Aug. 9, 2016).

¹⁷⁷ *Id.* at *3.

¹⁷⁸ *Id.*

¹⁷⁹ The secondary definition of agriculture is "any practices, whether or not those practices themselves are farming, which are performed by a farmer or on a farm and are incidental to or in conjunction with farming operations." 29 C.F.R. § 780.105(c).

¹⁸⁰ See *supra* notes 135–164, 174–178 and accompanying text.

¹⁸¹ See *Brennan*, 486 F.2d at 1010–11; *Sariol*, 490 F.3d at 1282; 29 C.F.R. § 780.130 (2017).

¹⁸² See *Maneja*, 349 U.S. at 256–58; *Brennan*, 486 F.2d at 1010–11; *Sariol*, 490 F.3d at 1279; see also 29 C.F.R. § 780.158.

have followed the Supreme Court's direction from *Farmers Reservoir & Irrigation Co. v. McComb*¹⁸³ and decided whether work is eligible for the exemptions based on why the work is performed in relation to the primary agricultural operation.¹⁸⁴ Work that is found to be supportive of the primary agricultural operation has generally been found to be exempted and, by contrast, work that is unrelated to the primary agricultural operation or amounting to a separately organized activity has been found to be ineligible.¹⁸⁵ The connection between the farm related work in question and the primary farming operation may be tenuous such as the maintenance of a caretaker house in *Chhum v. Anstett*, but if the court is able to make the connection between the work and the farming operation then the work has been considered agricultural and thereby exempt.¹⁸⁶

Although the case law on the FLSA's agricultural exemptions is illustrative on the general scope and application of exemptions, because there has been no final ruling in the context of agritourism one can only speculate on how a court would apply the law to agritourism operations.¹⁸⁷ Would a court find agritourism work sufficiently related to or "in conjunction" with the primary farming operation to qualify for the FLSA's agricultural exemptions? When would an agritourism operation amount fail to be "incident to" and be considered a separately organized business? Given these lingering questions, legal guidance on this subject is needed to give agritourism workers direction on how the FLSA applies to them.

¹⁸³ 337 U.S. 755, 761 (1949).

¹⁸⁴ See *Maneja*, 349 U.S. at 261; *Brennan*, 486 F.2d at 1010–11; *Sariol*, 490 F.3d at 1280; *Damutz*, 66 F. Supp. at 669–70; *Chhum*, 2016 WL 4203389, at *3.

¹⁸⁵ Compare *Sariol*, 490 F.3d at 1279 (finding fuel delivery to a sugar cane plant to be not only "incidental," but "necessary to" the farm operation and thus within the agricultural exemption), with *Adkins*, 167 F.3d at 359 (finding that workers taking care of the grounds of the president's home were outside the agricultural exception because their work was not incidental to the farming operation).

¹⁸⁶ *Chhum*, 2016 WL 4203389, at *3.

¹⁸⁷ *Centeno-Bernuy*, 564 F. Supp. 2d at 166.

B. The Regulations Pertaining to the FLSA's Agricultural Exemptions Do Not Aid in the Agritourism Worker Analysis

The U.S. Department of Labor has provided regulatory guidance on the types of work that fit within the primary and secondary definition of agriculture in 29 C.F.R. pt. 780, Subpart B.¹⁸⁸ According to the regulations, “a practice performed in connection with farming operations is within the statutory definition only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business.”¹⁸⁹

Pursuant to the regulations, to discern if the work in question constitutes an established part of agriculture is subordinate to the farming operations involved, and does not amount to an independent business, the following criteria, many of which are borrowed from *Maneja v. Waialua Agriculture Co.*,¹⁹⁰ may be considered:

1. Relationship of the activity to farming;
2. Prevalence of practice activity by farmers;
3. Size of the operation;
4. Size of payroll for each type of work;
5. Number of employees and the amount of time spent working in each activity;
6. Extent to which the practice is performed by ordinary farm employees;
7. Amount of capital invested in the activity compared to the amount invested in the farm;
8. Amount of revenue derived from the activity compared to the revenue of the farm;
9. Interchange of employees between the activity and the farm; and
10. Degree of separation between the activity and the farm.¹⁹¹

¹⁸⁸ 29 C.F.R. § 780(b).

¹⁸⁹ *Id.* § 780.144.

¹⁹⁰ 349 U.S. at 254.

¹⁹¹ 29 C.F.R. § 780.145; *see also* LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 5.88 (Thomas Reuters ed., 2017).

Applying the criteria outlined in the regulations to an agritourism operation is a complex exercise and leaves many unanswered questions. Criteria 1-2 are meant to elicit whether or not an activity constitutes an established part of agriculture.¹⁹² In order to be considered agritourism, the activity is going to have some type of connection or relationship to farming, but the criteria is completely open ended as to what type of relationship is needed.¹⁹³ Further, regarding criterion 2, the prevalence of particular agritourism uses is going to vary widely.¹⁹⁴ For example, some agritourism features such as corn mazes are have become prevalent, but whether they have become an established part of agriculture is a difficult question to answer and will vary regionally.¹⁹⁵ Additionally, to disqualify agritourism uses from the secondary meaning of agriculture because they are less widespread runs counter to the Supreme Court's interpretation that the definition of agriculture includes "extraordinary methods" of agriculture, as well as more conventional ones and allows for the modernization of agriculture.¹⁹⁶

Criteria 3-8, are economic elements, meant to illustrate whether an activity is subordinate to the primary farming operations.¹⁹⁷ Although these criteria appear straightforward to apply, agritourism operations are not static and exactly how and when the criteria should be applied is not specified.¹⁹⁸ It is not uncommon for agritourism components of farms to start small and then grow, over time, based on consumer interest.¹⁹⁹ For example, a farm may offer a seasonal amusement that, over the years, becomes an established year-round entertainment offering on a farm.²⁰⁰ In that case, when is an employer supposed to apply criteria 4-8, and what is the tipping point

¹⁹² 229 C.F.R. § 780.145.

¹⁹³ See *supra* Part I.

¹⁹⁴ See *supra* Part I.

¹⁹⁵ *Agritourism: Budgeting for a Corn Maze*, RUTGERS N.J. AGRIC. EXPERIMENTAL STATION, http://agritourism.rutgers.edu/corn_maze (last visited Apr. 15, 2017).

¹⁹⁶ *Maneja*, 349 U.S. at 265; see also *Rodriguez*, 360 F.3d at 1187.

¹⁹⁷ 29 C.F.R. § 780.145.

¹⁹⁸ See *supra* note 191.

¹⁹⁹ See generally JIM OCHTERSKI & MONIKA ROTH, *GETTING STARTED IN AGRITOURISM*, CORNELL COOPERATIVE EXTENSION (Feb. 2008), http://www.uvm.edu/tourismresearch/agritourism/saregrant/getting_started_agritourism_cornellext.pdf.

²⁰⁰ *Id.*

at which a subordinate activity is no longer subordinate to the primary operation? Further, farming is inherently economically risky, and profits and losses often fluctuate.²⁰¹ If more revenue is made in one year from the agritourism than the traditional farming practices, is that proof that the agritourism is no longer subordinate to the primary farming operation? Given the annual income fluctuations that many farm businesses face, these criteria are inherently difficult to apply and interpret.²⁰²

Criteria 9 and 10 pertain to whether an activity amounts to an independent business.²⁰³ If after applying the criteria, there is some overlap between the employees of the agritourism and primary farming operations and they are on the same farm, the person applying the criteria will be left with wondering whether or not the criteria have been satisfied.²⁰⁴ If an agritourism operation is physically and functionally separate from the primary farming operation, it may be disqualified from being considered secondary agriculture, but in most cases, agritourism features are interrelated to the underlying farming operation.²⁰⁵ The regulations provide that a separate labor force, such as employees of a farmer who repair the mechanical implements in a repair shop, may qualify as agricultural workers, as long as their work does not amount to an independent business and is related to the primary farming operation as opposed to an unrelated industrial or non-farming activity.²⁰⁶ However, in the agritourism context there will be a certain amount of natural overlap between the agritourism and farming operations.²⁰⁷ Therefore, specificity is needed as to what amount of separation is needed before a separate or independent business has occurred thereby disqualifying it from being eligible for the FLSA's agricultural exemptions. Clearly, given the amount of uncertainty outlined above, the existing regulatory criteria do not provide sufficient guidance for the proper application of the FLSA's agricultural exemptions in the agritourism in the context.²⁰⁸

²⁰¹ *Id.*

²⁰² *See supra* Part I.

²⁰³ *Id.* § 780.145.

²⁰⁴ *Centeno-Bernuy*, 564 F. Supp. 2d at 178–79.

²⁰⁵ *See Adkins*, 167 F.3d at 359 (explaining that the upkeep of the president's home was physically and functionally separate from the farming operation).

²⁰⁶ 29 C.F.R. § 780.158.

²⁰⁷ *See supra* Part I.

²⁰⁸ *See supra* Part III.B.

*C. Recommendations for How the Department of Labor Can
Address Agritourism*

The Department of Labor, in 29 C.F.R. pt. 780, Subpart C, has provided regulatory guidance for certain industries often found in conjunction with agriculture, namely, Forestry or Lumbering Operations²⁰⁹, Nursery or Landscaping,²¹⁰ and Hatchery Operations²¹¹. In these regulations, the Department of Labor has provided specific examples of activities, within each industry, which are and are not eligible for the FLSA's agricultural exemptions.²¹² This regulatory guidance provides much needed specificity as to which workers in each industry are eligible for the FLSA's agricultural exemptions.²¹³ The Department of Labor should address agritourism in the same manner in its regulatory guidance or in an interpretive bulletin.

An appropriate introduction to the subject of how the FLSA's agricultural exemptions apply to agritourism would be for the Department to provide a definition of agritourism such as the one used by USDA.²¹⁴ The Department should explain, as it has done for Forestry, that in order for agritourism to qualify as agriculture it will need to be done "by a farmer or on a farm as an incident to or in conjunction with such farming operation."²¹⁵ For example, the workers on an agritourism operation that is not located on a farm and is operated by a person who exclusively works in the tourism industry as opposed to agriculture will not be considered agricultural employees.²¹⁶

The Department should also provide further guidance as to the "incident to or in conjunction with" portion of the secondary meaning of agriculture as applied to agritourism.²¹⁷ The Department should explain that agritourism work will not be considered to be exempt

²⁰⁹ 29 C.F.R. §§ 780.200–204.

²¹⁰ *Id.* §§ 780.205–209.

²¹¹ *Id.* §§ 780.209–217.

²¹² *Id.* §§ 780.200–217.

²¹³ *Id.*

²¹⁴ *See supra* Part I.

²¹⁵ 29 C.F.R. § 780.200.

²¹⁶ *See id.*

²¹⁷ *See supra* Part. II.B; 29 C.F.R. § 780.105(a).

agricultural work unless it can be shown that the work is performed in conjunction with the farming operations on the farm on which it is being conducted.²¹⁸ For example, the work of hosting, on or near a farm, “farm-to-table” meals featuring farm-grown ingredients for the purpose of educating consumers about the farm’s products and direct marketing the farm’s products to consumers is exempt, as long as it doesn’t amount to a separate business.²¹⁹ In this example, the hosting of the meals is exempt agricultural work, because the purpose of the work is to directly market and sell the farm’s products, and the work is clearly related to the primary farming operation similar to the exempt work of the operation of a farm stand.²²⁰ By contrast, the work of hosting weddings on a farm, rented out for such occasions, is not exempt agricultural work, because the work has no relationship to the primary farming operation other than a shared location.²²¹ This is analogous to a farmer erecting a factory on his farm and attempting to classify the workers as agricultural as opposed to industrial.²²²

Additionally, the Department will need to address when an agritourism component of a farm is no longer subordinate to the primary operation and amounts to a separate business.²²³ For example, if an agritourism operator has a year round recreational establishment located on a ten acre lot consisting of nine acres of parking area, amusement rides, petting zoos, corn mazes and carnival games and one acre of pick-your-own pumpkins, the primary work of the operation is tourism as opposed to agricultural. In that example, the agricultural component of the operation (i.e. the one acre of pick-your-own pumpkins) is subordinate to the primary tourism use of the operation, therefore the workers on the operation will not be considered agricultural.²²⁴

The recommendations provided above are not exhaustive but meant to be examples of the type of legal guidance that the Department should provide to give clarity for workers in the agritourism industry.

²¹⁸ See *supra* Part. II.B; 29 C.F.R. § 780.105(a).

²¹⁹ 29 C.F.R § 779.305 (2017).

²²⁰ See 29 C.F.R. § 780.158(a) (2017).

²²¹ See *id.* § 780.146.

²²² *Id.*; see also *Maneja*, 349 U.S. at 264.

²²³ See 29 C.F.R. § 780.144.

²²⁴ See *id.* § 780.202.

CONCLUSION

The rise in popularity of agritourism means the public is being invited onto farms for a variety of pursuits, and farm workers are being asked to perform jobs that go beyond typical farm work.²²⁵ By its nature, agritourism requires work that is performed on a farm and in conjunction with the farming operations.²²⁶ Therefore, upon first blush it may seem that agritourism work fits neatly within the FLSA's secondary meaning of agriculture.²²⁷ However, given the wide range of work that falls under the umbrella of agritourism, whether or not the work qualifies for the FLSA's agricultural exemptions is a complex question that workers and employers must answer with little to no legal guidance.²²⁸ The uncertainty as to how agritourism fits with the FLSA's agricultural exemptions is putting workers at risk for being underpaid, employers at risk for unintentionally violating the FLSA and stifling the generation of agritourism revenue from reaching rural America.²²⁹ Since the passage of the FLSA, farmworkers, a low paid and mostly minority class of laborers, have received less protections than other workers.²³⁰ The creation of legal guidance addressing how agritourism fits into the FLSA's agricultural exemptions, will not resolve the inequitable treatment of farmworkers but it will prevent an already economically disadvantaged class of workers from being underpaid.²³¹

Therefore, this Article suggests that the Department of Labor add a section to the CFR or issue an interpretative bulletin with information, similar to that provided in Part III, C, regarding how agritourism fits within the scope of the FLSA's agricultural exemptions.²³² This will clarify for agritourism workers whether or not the work they are performing is exempt or subject to the FLSA's wage and hour protections and provide them with the information they need to assert those protections.

²²⁵ See *supra* Part I.

²²⁶ See *supra* Part I.

²²⁷ See *supra* Part III.A.

²²⁸ See *supra* Part III.

²²⁹ See *supra* Part I.

²³⁰ See *supra* Part II.A.

²³¹ See *supra* Part II.A.

²³² See *supra* Part III.C.