

Big Changes to New York Farm Employment Laws

Richard Stup, Ph.D.
Agricultural Workforce Specialist
rstup@cornell.edu
agworkforce.cals.cornell.edu



Legal Disclaimer

- Richard Stup is not a lawyer and cannot give legal advice. If you need legal advice for a specific question or situation, seek the services of a competent attorney.
- All information provided here is for educational and discussion purposes only.



Content Disclaimer

- This is a huge amount of information, we can't cover everything in detail today.
- Some information and decisions continue to change. There was much discussion about many details.
- Not everything is clear even now, some things will take time and court decisions to resolve.
- Work with your industry organizations to continue addressing regulatory and legislative improvements.
- Most changes went effect January 1, 2020.
- View and subscribe at agworkforce.cals.cornell.edu



Change

Change is great, you go first



Topics

- A Little Background...
- Disability, Paid Family Leave (PFL), Worker's Compensation, and Unemployment
- Overtime
- Day of Rest
- Union Formation and Collective Bargaining
- Seasonal Housing Inspections
- Questions



Background



The Triangle Shirtwaist Factory Fire

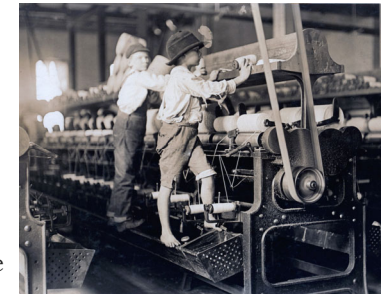
- 600 immigrant women worked in cramped conditions for 12 hour days, every day. On the top 3 floors of an 8-story building.
- Fire started on March 25, 1911 from a cigarette dropped in a waste bin.
- One staircase door was locked from the outside to prevent theft.
- The elevator could only transport 12 people at a time and was disabled by the fire after only 4 trips.
- A history of suspicious fires.
- Started movement for safety and labor reforms.

HUNDRED AND FIFTY PERISH IN FACTORY FIRE:
WOMEN AND GIRLS, TRAPPED IN TEN STORY BUILDING,
LOST IN FLAMES OR HURL THEMSELVES TO DEATH



Federal Fair Labor Standards Act of 1938

- Depression era, highly controversial act at the time
- Minimum wage
- Overtime and hours worked
- Employer recordkeeping
- Child labor restrictions
- Employees who are **employed in agriculture** as that term is defined in the Act **are exempt** from the overtime pay provisions.



National Labor Relations Act, 1935

- "...a federal law that grants employees the right to form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities."
- "Excluded from coverage under the Act are public-sector employees (employees of state, federal and local governments and their sub-divisions), agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered)."
- NLRA does not directly apply to ag workers in NY but the state does use it as guidance information.



A 40-Year Battle in New York

- Worker advocates and elected representatives pushed for New York state legislation for decades that would grant farm employees: overtime, collective bargaining, and other rights.
- The 2018 election made passing the legislation possible.
- Senate hearings took place in 2019, industry organized the Grow NY campaign.
- Ultimately, compromise legislation was enacted.



Governor signs FLFLPA into law on July 17, 2019

The Farm Laborer Fair Labor Practices Act (FLFLPA) of 2019

- Find the legal text here: <https://www.nysenate.gov/legislation/bills/2019/s6578>
- NY State Department of Labor (NYSDOL) website here: <https://www.labor.ny.gov/immigrants/farm-laborer-fair-labor-practices-act.shtm>
- NYSDOL's Farmworker Rights and Employer Responsibilities fact sheet: <https://www.labor.ny.gov/formsdocs/dipa/p748.pdf>



NY Pay Notice and Work Agreement

- New York requires employers to provide all new employees with written notice of pay information in the employee's language.
- NYSDOL provides Form LS309 to help farms comply and to communicate clearly about pay and work conditions. You are not required to use LS309 but must still communicate the required information in writing.
- Webpage with LS309 in 8 languages: <https://labor.ny.gov/immigrants/agriculture-labor-program/services-for-agriculture-employers.shtm>
- **To do: Update your work agreements for 2020 for all employees to reflect the new requirements from FLFLPA.**
 - (Don't put your FEIN on the LS309, it's not needed.)



Disability, Paid Family Leave (PFL), Worker's Compensation, and Unemployment



Farms Are Regular Employers Now

- The 2019 Farm Laborers Fair Labor Practices Act (FLFLPA) changed the definition of an employee in New York:

(C) THE TERM "EMPLOYEE" SHALL ALSO INCLUDE FARM LABORERS. "FARM LABORERS" SHALL MEAN ANY INDIVIDUAL ENGAGED OR PERMITTED BY AN EMPLOYER TO WORK ON A FARM, EXCEPT THE PARENT, SPOUSE, CHILD, OR OTHER MEMBER OF THE EMPLOYER'S IMMEDIATE FAMILY.



Disability Insurance Required

- Provides coverage for **off-the-job** injury or illness in the form of cash payments.
- Required for all eligible employees, full and part-time.
- State's Disability webpage:
<http://www.wcb.ny.gov/content/main/DisabilityBenefits/Employer/complyWithLaw.jsp>
- Employers may deduct from employees to pay for benefits, up to 1/2 of 1% of wages paid, but not in excess of 60 cents per week.
- Purchase through your existing insurance carrier. Cost is approximately \$2 to \$5 per month per employee.
- NY State Insurance Fund (NYSIF) also provides: <https://ww3.nysif.com/>



Penalties for Noncompliance with Disability Benefits Mandatory Coverage Requirements

- Section 220 (2) of the Disability Benefits Law – The Board shall impose upon an employer a penalty of 1/2 of one percent of the employer's payroll during the period of noncompliance PLUS an additional sum of \$500 for each period of noncompliance.
- Section 220 (1) of the Disability Benefits Law – Not securing required disability benefits insurance is a misdemeanor, punishable by a fine of not less than \$100 nor more than \$500 or imprisonment for up to one year or both. A second violation of the Law within five years may result in a fine of not less than \$250 nor more than \$1,250. A third or subsequent violation of the Law within five years may result in a fine of up to \$2,500.
- Liability for Claims Against an Uninsured Employer Under the Disability Benefits Law, Section 213 (1)
- In addition to the penalties assessed under Section 220, subdivision 2, the employer is liable for either the total value of any disability benefits claims paid by the Special Fund for Disability Benefits during the period of noncompliance OR one percent of the employer's payroll during the period of noncompliance, whichever is greater.



New York Paid Family Leave



Benefits for 2020

60% Wage Benefits

Receive 60% of your average weekly wage, up to a cap.



Up to 10 Weeks of Leave

Can be taken all at once, or in full-day increments.



Strong Protections

- ✓ Return to same or comparable job.
- ✓ Continued health insurance.
- ✓ No discrimination or retaliation.



Who Can Request PFL?

Generally, Employees Who:

- ✓ Work for a private employer in New York State, or a public employer who has opted in.
- ✓ Meet the time-worked requirements:
 - Full-time (regularly work 20 or more hours/week), after 26 consecutive weeks of employment.
 - Part-time (regularly work fewer than 20 hours/week), after 175 working days.



- <https://paidfamilyleave.ny.gov/>

Paid Family Leave (PFL)

- PFL is usually sold as a rider on a disability policy by private carriers and by NYSIF.
- Premiums for PFL insurance can be fully funded by employees, or the employer can elect to pay for the benefits.
- Employers must allow employees to return to the same or a comparable job. (It's up to the employer to figure out how the work gets done while the employee is out on PFL.)
- Employers prohibited from discriminating against employees for requesting disability or Paid Family Leave.



Workers Compensation Changes

1. Small farm exemptions were removed, coverage now mandatory for all employers. (Previously farms with less than \$1,200 in annual payroll were exempt.)
 2. Posters must be displayed in English and Spanish. Get them from your carrier or from the Worker's Comp Board.
 3. New notice requirements for farm contractors. Employers should be aware, and make sure their farm contractors are aware, that upon receiving notice of an injury or illness, farm contractors must notify the employer, owner or operator of the farm where the injury occurred.
- Excellent resource from Worker's Comp Board: <http://www.wcb.ny.gov/farmtoolkit/>



Unemployment Insurance

- Now required for essentially all farm employers. (Threshold is if you pay \$300 or more in any calendar quarter.)
- Removes the requirement to pay unemployment insurance for H-2A employees.



Overtime, Day of Rest, and the Wage Board



What is a “calendar week?”

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6	7
NYSDOL's definition shared at Labor Roadshow						
Your farm's payroll week might be...						
8	9	10	11	12	13	14
...different						
15	16	17	18	19	20	21
22	<p>Q. What is a calendar week for purposes of overtime and day of rest? For purposes of compliance with the overtime and day of rest, the term calendar week will mean an established, recurring, consecutive 7 days designated by the employer. A calendar week should not be changed from week to week.</p>					
29						

Weekly Overtime Threshold

- Establishes an overtime threshold of 60 hours per week for farm workers.
- Farm employees must voluntarily agree to work any hours beyond 60. (Best practice is to document this in the work agreement.)
- Any hours worked beyond 60 must be paid at 1.5 times the “**regular rate.**”
- The “regular rate” of pay includes the hourly pay rate plus any other non-discretionary compensation such as incentive payments.
 - For example, a worker normally paid at \$12/hour plus a non-discretionary incentive program that adds the equivalent of another \$1/hour would have a regular rate of pay of \$13/hour and would go to \$19.50/hour overtime rate for hours worked beyond 60 inside a week.





Discretionary vs. Non-discretionary

- A Christmas bonus that is a gift, entirely up to management about whether and how much to pay to employees, would be “**discretionary**” and not included in “regular rate” of pay.
- Compensation is categorized as “**non-discretionary**” if it is agreed on in advance with the employee. For example, a milk quality incentive where employees know in advance how much they get paid if they hit certain quality targets.
- **Payments not included as part of the “regular rate” include:** Pay for expenses incurred on the employer’s behalf; Premium payments for overtime work; True premiums paid for work on Saturdays, Sundays, and holidays; Discretionary bonuses; Gifts; Payments in the nature of gifts on special occasions; Payments for occasional periods when no work is performed due to vacation, holidays, or illness.
- This is not entirely clear and may take some time and court decisions to sort out.



Overtime Coverage

- Most farm employees are included in the overtime provision, including foreign guest workers, interns, and apprentices.
- Simply paying by salary does not eliminate the overtime requirement, the employee must be **exempt** from overtime.
- Immediate family members (parent, spouse, child) of the farm owners are **exempt** from the overtime requirement.
 - This includes owners of LLCs, S- and C-Corps, and partnerships. 
 - Small shareholders may not be included if NSYDOL views the shares as a sham to avoid overtime.
- Are there any other exemptions from overtime? No, unlike other industries there is no exemption for executive, administrative, professional, etc. 



The Temporary Restraining Order (TRO)

- Some industry leaders became convinced that aspects of the FLFLPA were inconsistent and problematic for certain employees. Specifically:
 - Farm family members (definition too narrow)
 - Ownership shareholders, especially smaller % shareholders
 - Executive, supervisory, professional, and administrative employees (traditionally exempt classes under federal FLSA)
- NYSVGA and NEDPA filed a lawsuit on 12/30/19 seeking a TRO halting enforcement only for these types of employees.
- The judge granted the industry groups' request so the FLFLPA cannot be enforced for these specific employees until the next court hearing which is scheduled for January 24, 2020.
- **For all non-family, frontline employees, FLFLPA went into effect on January 1 as scheduled.**



Overtime Best Practices

- Pay hourly whenever possible.
- Track hours accurately, upgrade your systems if necessary.
- Track hours even for those employees paid on salary.
- Be prepared to document hours worked for everyone and amounts paid. Employers must keep true and accurate and contemporaneous time records of daily and weekly hours worked, and payroll records showing rate of pay, gross wages, legal deductions, allowance and net wages for 6 years.



Day of Rest Requirement

- Requires a 24 consecutive hour day of rest in each and every calendar week.
- The rest day "should, whenever possible, coincide with the traditional day reserved by the farm laborer for religious worship."
- The day can be moved if weather or crops demand it.
- Document the day of rest. Not required but best practice. Keep a payroll journal or other permanent record system.
- Employees cannot waive their day of rest. They can voluntarily work on their day of rest but must then be compensated for every hour worked at the overtime rate.
- Be sure the 24-hour period doesn't extend over the end and beginning of a new calendar work week, it would be divided into two weeks.



Day of Rest Coverage

- Farm owner and immediate family (parent, child, spouse) are excluded from day of rest requirement.
 - This includes owners of LLCs, S- and C-Corps, and partnerships. Small shareholders may not be included if NSYDOL views the shares as a sham to avoid overtime.
- All farm labors are covered except for the “foreman in charge.”
- Document in the work agreement that “this position is a ‘foreman in charge’ and not subject to the day of rest requirement.

Change?



Farm Laborers Wage Board

- A Farm laborers Wage Board will convene to review farm wages.
- Consists of a representative of Farm Bureau, a representative of AFL-CIO (a major union organization), and a NY citizen chosen by the Commissioner of Labor.
- Board must meet no later than March 1, 2020, must hold 3 hearings, and must provide a report to governor and legislature in December 2020.
- “The overtime rates recommended by the wage board shall not be in excess of sixty hours, and the wage board shall specifically consider the extent to which overtime hours can be lowered below such amount set in law, and may provide for a series of successively lower overtime work thresholds and phase-in dates as part of its determinations.”



Union Organizing and Collective Bargaining



Authorization

- Farm workers are eligible to form unions in New York under:
 - The FLFLPA which takes effect 1/1/2020, and
 - New York Appellate Court Division’s decision in Hernandez v. State of New York & New York Farm Bureau
- This includes all “farm laborers,” except the parent, spouse, child, or other member of the employer’s immediate family.
- All “agricultural employers” including,
 - any employer engaged in cultivating the soil or in raising or harvesting any agricultural or horticultural commodity including custom harvesting operators, and
 - employers engaged in the business of crops, livestock and livestock products as defined in section 301 of the agriculture and markets law, or other similar agricultural enterprises. § 701(2) (b).

Change?



Administration



- The NYS Department of Labor does not have regulatory authority over unions and collective bargaining.
- NY Public Employee Relations Board (PERB), <https://www.perb.ny.gov/> or (518) 457-6410
- A 3-person board, appointed by Governor and confirmed by the Senate.
- Responsibilities include: administering the laws, issuing rulings, providing qualified arbitrators, resolving impasses.
- PERB provides extensive mediation services to resolve conflicts. Even to resolve such early issues as union organizer access to employees.



Rights Extended to Farm Laborers

Following bullets are quoted directly from PERB:

- The right of self-organization, to form, join, or assist labor organizations,
- To bargain collectively through representatives of their own choosing,
- To engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers.
- These rights do not prohibit employees from exercising the right to confer with their employer at any time, as long as the employer does not, during such conferring, attempt, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights. [§ 703]
- Recognizing the unique issues confronting farmers, the FLFLPA forbids strikes, or other concerted slowdowns or stoppages of work by employees. (§ 703).



Union Certification under FLFLPA

- If only one organization is attempting to organize a workplace, then the choice of employees can come from **dues deduction authorization cards**. The union will be certified without an election based on a majority of employees signing dues cards.
- If two organizations are seeking to organize a workplace then the authorization will still be based on which one gets a majority of signed cards, or other measures possibly including an election, if PERB decides it is necessary.
- The PERB Board has the power to immediately certify a union if it finds that an employer was using unfair labor practices.



Example “Dues Deduction Authorization Card”

Membership — Public Sector

American Federation of State, County and Municipal Employees
Membership and Authorization for Dues Deduction

PLEASE PRINT LEGIBLY.

I hereby apply for membership in Council 4 (hereafter “Union”) and I agree to abide by its Constitution and Bylaws. I authorize the Union and its successor or assign to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of the Union, the amount of dues certified by the Union, and as they may be adjusted periodically by the Union, and to authorize my Employer to remit such amount monthly to the Union.

This voluntary authorization and assignment shall remain in effect in accordance with the applicable collective-bargaining agreement. If the applicable collective-bargaining agreement does not address revocation, then this voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of the Union, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days before and not more than twenty (20) days after the end of any yearly period. The applicable collective bargaining agreement is available for review, upon request. This card supersedes any prior check-off authorization card I signed. I recognize that my authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of my employment.

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses.

Notice: In order to comply with Internal Revenue Service rulings, be advised that your membership dues are not deductible for federal income tax purposes.

	Local Number
	Last Name First Name M.I.
	Street Address Apt. No.
	City State ZIP Code
	Personal e-mail XXX-XX-55# Last 4 digits
	Department Telephone No.
	Signature Effective Date

Contribution Form

Become a PEOPLE MVP for \$8.35/ month (\$100 annually)

Unfair Labor Practices (ULPs)

- State and federal laws identify certain activities as “unfair labor practices” and they may apply to employers, unions, or to employees.
- ULP’s specific to the FFLPA:
 - Employers may not:
 1. Lockout workers as a result of a dispute.
 2. Refuse to continue an expired agreement until new one is in place.
 3. Discourage union organization.
 - Farm employees or unions may not strike or otherwise stop or slowdown farm work.



T-I-P-S Covers What Employers Cannot Say Or Do Under the Federal NLRA

- **T is for Threats.** Employers cannot threaten employees with consequences if they support or vote for the union. Employers can’t discipline, terminate, reduce benefits, or take other adverse action against employees because they support a union.
- **I is for Interrogate.** Employers are not allowed to ask employees questions about the organizing effort, what they think about it, or the names of employees who support the union or attend meetings.
- **P is for Promise.** Employers cannot promise pay increases, greater benefits, promotions or other valuable items in exchange for keeping the union out.
- **S is for Surveillance.** Using spies (whether employees or not), video cameras, or taking photos of people attending a union meeting are all banned as surveillance.



Employers Have Free Speech

- [First Amendment to the U.S. Constitution](#)
 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



F-O-E Outlines What Employers Can Say During A Union Organizing Effort

- **F is for Facts.** Employers can share factual information about the union organizing process and potential collective bargaining process, and other matters such as union dues. They can talk about real, verifiable facts about the financial condition of the business and the industry and implications for employee compensation and benefits. They can also talk about how relationships between management and employees will change if a business becomes a union environment.
- **O is for Opinions.** Employers can make clear their own personal opinions about a union, whether supportive or against. If an employer expresses an opposing opinion, it is important that it not be delivered as a threat. If an employer says to employees during the organizing process: “I’m not in favor of a union and I do not think it is the best thing for our business,” this may or may not be an unfair labor practice, depending on the context and whether it could be received as a threat. If the employer adds to this statement, “but I will respect the law,” then it would most likely not be an unfair labor practice.
- **E is for Examples.** Employers are allowed to share specific examples such as actual union contracts that have been negotiated, news reports of other union activities, or examples of current results from managers and employees working together directly.



Housing Inspections

- Extends worker housing inspections to all **migrant workers**.
 - Previously inspections were only required for housing with 5 or more occupants.
 - This does not apply to permanent dairy employees.
 - H-2A employee housing is under federal regulation and must all be inspected before it can be occupied.
- Goes into effect on January 1, 2021.



Cornell Overtime Resources

- The Extension Bulletin: “[Adapting Your Labor Strategies to New York’s Revised Farm Employment Laws](#)” will help you consider and evaluate possible strategies for your farm.
- Download the [Overtime Cost Calculator](#) to model your current workforce and to project the effects that the new laws will have on your business.
- <https://agworkforce.cals.cornell.edu/overtime/>



Becker Forum 2020

- Monday, January 13, 2020
- Marriott Syracuse Downtown 100 East Onondaga Street, Syracuse, NY 13202
- Register: <https://nysvga.org/register-for-meeting-online/>
- Topics:
 - Immigration Policy and Washington Update
 - Complying with New York Labor Laws
 - Managing in a Union Environment
 - H-2A Application Process Changes
 - And more...



Your Action Steps

1. Print this presentation and use as a checklist for your farm.
2. Read the NYSDOL FAQ document and other materials (<https://www.labor.ny.gov/immigrants/farm-laborer-fair-labor-practices-act.shtm>).
3. Get your insurances in place right away. Agents are already getting backed up with all the new demand.
4. Make a plan for how you will pay overtime and provide a day of rest each week. Be sure you have systems in place to track employee time, pay accurately, and keep good records for 6 years.
 - Don't forget minimum wage went up again: Upstate is \$11.80; Nassau, Suffolk, and Westchester are \$13.00.
5. Update your workplace posters, NYSDOL has a new set available now.
6. Make plans to learn more about union organization and collective bargaining. Train your supervisors to avoid unfair labor practices.
7. Plug in to your information sources to learn more detail in the coming months. Subscribe at Cornell Agricultural Workforce Development: <https://agworkforce.cals.cornell.edu/>

Thanks. Questions?

