

BUSINESS & INSURANCE ISSUES FOR FARMERS

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DISCLAIMER

This presentation is not legal advice. We will cover a wide range of common concerns for small farm operations to provide a basic overview of the issues you should consider in addressing business and insurance issues.

Please consult with an attorney for specific questions about your operation.

CHOICE OF ENTITY

❖ Default entities:

- ❖ Sole proprietorship or general partnership

❖ Created entities:

- ❖ Limited Liability Corporations (LLCs)
- ❖ S-Corp
- ❖ C-Corp
- ❖ Cooperative
- ❖ Non-profit

LIABILITY PROTECTION

- ❖ Main reason to create one of the formal entities is for liability protection
 - ❖ But you have to do more than just form it
- ❖ Maintain corporate formalities: separate bank accounts, annual meetings, paperwork
- ❖ Factors courts look to: (1) whether corporation engaged in fraudulent behavior; (2) whether corporation was inadequately capitalized; and (3) whether corporation failed to follow corporate formalities

LIMITED LIABILITY COMPANIES, LLCs

- ❖ Can be member managed or manager managed
- ❖ May have one or more members
- ❖ LLCs can make different tax elections
 - ❖ Flow-through: treats income as if not incorporated
 - ❖ S Corp status: can reduce self-employment taxes above “reasonable amount” of wages
 - ❖ Must meet the requirements (see next slide)

S-CORPS vs. C-CORPS

- ❖ C Corps subject to double taxation; taxed at corporate level and shareholder level when profits are distributed. All S Corp income is allocated to the shareholders.
- ❖ C-Corps allow unlimited shareholders; S-Corps 100 or fewer and all must be U.S. residents or citizens.
- ❖ C-Corps can have different classes of shareholders; S-Corps cannot. This can make it easier for C-Corps to expand and sell shares, or other investment options.

COOPERATIVES

- ❖ Texas Rural Cooperative Center, University of Texas
Rio Grande Valley
- ❖ For Central Texas: Annelies Lottman,
annelies.lottmann@utrgv.edu
- ❖ Will be doing a one-day workshop at FARFA
conference, September 24

NON-PROFITS

- ❖ Cannot sell the operation for your profit – it belongs to the nonprofit
- ❖ Can apply for (c)(3) status if the operation is dedicated **exclusively** to a cause that benefits the general public, such as education or scientific advancement
- ❖ Can have a (c)(3) in connection with a for-profit farm
 - ❖ **Must** keep the finances, records, and administration separate

B CORP: BENEFIT CORPORATION

- ❖ Not a separate legal entity option
- ❖ Similar to Fair Trade Certification or USDA organic label
- ❖ Corporate purpose to create a material positive impact on society; required to consider the impact of their decisions on shareholders, workers, community and the environment
- ❖ Texas law: amend articles of incorporation to become a Social Purpose Corporation:
www.bcorporation.net/sites/default/files/documents/legalreq/SPC_Legal-Requirement_9222016.pdf
- ❖ Other states: www.bcorporation.net

INSURANCE ISSUES

- ❖ Many different types of insurance
 - ❖ Crop damage and livestock loss
 - ❖ Property damage
 - ❖ Injuries to guests and customers
 - ❖ Farmer injuries
- ❖ Basic concept: contract between you and the insurance company
 - ❖ If you lie, you invalidate the contract
 - ❖ Contract defines what is and is not covered

CROP DAMAGE & LIVESTOCK LOSS

- ❖ Whole Farm Revenue Protection (WFRP) policy now available from USDA Risk Management Agency
- ❖ Protection for diverse crop and livestock protection
- ❖ Insures the farm's established revenue from crops and livestock
- ❖ Must have at least 5 consecutive years of farm tax history
- ❖ USDA website: www.rma.usda.gov/policies/wfrp.html
- ❖ Contact NCAT, ncatsw@ncat.org or [866-319-1669](tel:866-319-1669)

PROPERTY DAMAGE

- ❖ Buildings, equipment, fences, machinery
- ❖ If you started your farm as a homestead, property damage might be covered by your homeowners policy initially
- ❖ But at some stage, the homeowners policy will not cover farm operations once the items are “business property” – need a specific farm policy to cover property damage
- ❖ May also cover damage to seeds or livestock, depending on the policy
- ❖ Need to keep your policy updated when you build or improve buildings, buy major equipment, etc.

INJURIES TO GUESTS OR CUSTOMERS: LIABILITY INSURANCE

- ❖ Physical injuries (trips and falls, dog bites, etc)
- ❖ Foodborne illness
- ❖ Even if you are confident your product will never hurt someone, liability insurance is important
 - ❖ Provides a legal defense if sued (justly or unjustly)
 - ❖ Required in many venues
 - ❖ Even if your customer wouldn't sue, their insurance company might
- ❖ Shop around
 - ❖ One option in Central Texas region: American National, Eileen Coleman, Coleman Agency, Eileen.Coleman@american-national.com

AGRITOURISM PROTECTION

- ❖ Texas-specific – check your state’s law
- ❖ SB 610 in 2015 provided significant liability protection for “agritourism entities” - a person engaged in the business of providing an agritourism activity, without regard to compensation. *Chapter 75A of the Texas Civil Practices and Remedies Code.*
- ❖ "Agritourism activity" means an activity on agricultural land for recreational or educational purposes of participants, without regard to compensation.
- ❖ Must post a sign with specific language or get a signed waiver with specific language

AGRITOURISM, cont'd

- ❖ Not absolute – insurance is still a good idea
 - ❖ Does not limit liability if the injury is caused by: (1) negligence that evidences a disregard for the safety of the participants; (2) a dangerous condition on the land, facility or equipment that the entity or knew or reasonably should have known about; (3) a dangerous propensity, that is not disclosed to the agritourism participant, of a particular animal used in the activity; (4) failure to train or improper training of an employee actively involved in an agritourism activity; (5) intentionally caused injuries
 - ❖ ***May help in getting insurance or reducing premiums***
- ❖ Similarly, HB 262 from the 2015 session provides liability protection for landowners who let their land be used for community gardens

INJURIES TO EMPLOYEES

❖ Workers' Compensation

- ❖ Not required for private employers in Texas in general – check your state's law

❖ May be included in farm liability policy

- ❖ Check with your agent

❖ May need to find a commercial line of insurance coverage

FARMER INJURIES

- ❖ Issue: if you or your partner are injured, sick, or disabled, what happens?
- ❖ Health insurance
 - ❖ Check if your policy covers injuries that occurred while working in your own business
- ❖ Disability insurance for lost income

YOUR WORKFORCE

- ❖ Independent contractors
- ❖ Employees
- ❖ Interns & volunteers

INDEPENDENT CONTRACTORS

- ❖ Do not have to pay payroll taxes, workers comp, etc.
 - ❖ Need to collect a W-9 and provide a Form 1099
- ❖ But you can't simply agree with your hire that he/she is an "independent contractor" – must meet the legal test
- ❖ If you improperly classify workers as independent contractors, when they are really employees, you could owe fines and back taxes
- ❖ Can be tricky – Uber is being sued right now

CONDITIONS FOR IND. CONTRACTORS

- ❖ May not have to meet all these factors – depends on state law. Often look to the overall facts and circumstances.
- ❖ An IC is expected to meet broad objectives only and is able to choose the specific means or tasks to accomplish them
 - ❖ If you give instructions on HOW to do something, they're more likely an employee
- ❖ An IC controls his/her schedule & has his/her own tools
- ❖ An IC offers the same services to others
- ❖ An IC is not doing a core function of the business

INTERNS & VOLUNTEERS

- ❖ Federal Fair Labor Standards Act
- ❖ 1947 Supreme Court case involving railroad brakemen-trainees.
 - ❖ Rule: unpaid interns couldn't displace full-time employees and their work couldn't benefit the employer
- ❖ 2004 AOL litigation – **can a for-profit business even have volunteers when it isn't an apprenticeship situation?**
- ❖ 2010 DOL six-part test

FOR-PROFIT EMPLOYERS & INTERNS/ VOLUNTEERS

- ❖ Internship similar to training given in an educational environment
- ❖ Internship experience is for the benefit of the intern
- ❖ Intern does not displace regular employees
- ❖ Employer derives no immediate advantage from activities of intern (b/c of need for supervision or re-doing the work)
- ❖ Intern is not entitled to a job at the conclusion of the internship
- ❖ Intern understands s/he not entitled to wages

RECOMMENDATIONS

- ❖ Written agreement with interns tracking the requirements
- ❖ Keep time records; record time and type of work
- ❖ Keep records of deductions for room and board (deductions FMV or actual cost); need written consent from intern to deduct
- ❖ Structure internship to avoid performance of routine tasks
- ❖ Consider formal educational component
- ❖ If it doesn't meet the factors, you can call it an internship, but still need to pay minimum wage & follow other employment laws.

NONPROFIT EMPLOYERS

- ❖ Exception for individuals who volunteer for the government
- ❖ Also for "individuals who volunteer their time freely and without anticipation of compensation for religious, charitable, civic or humanitarian purposes to nonprofit organizations."

MINIMUM WAGE LAW

- ❖ Some exceptions for farms for agricultural labor only (production of crops and livestock)
 - ❖ “500 man day exemption” – a farm that used fewer than 500 man day in each calendar quarter of the previous year is not required to pay the federal minimum wage this year
 - ❖ One man day = one worker performs at least one hour of labor
 - ❖ Need to track the # of people who worked each day and for long they worked

UNEMPLOYMENT TAX

- ❖ Most small farms are exempt from **federal** unemployment tax. Must pay unemployment tax if, in a calendar quarter of the previous or current year, you:
 - ❖ Paid wages of \$20,000 or more, OR
 - ❖ Employed 10 or more individuals for some portion of the day during 20 different calendar weeks
- ❖ State law may be different. In Texas, you must pay unemployment tax if you employ three or more employees for twenty weeks or more in a calendar year, or pays at least \$6,250 in total gross wages in a calendar quarter.
- ❖ www.twc.state.tx.us/businesses/unemployment-tax-basics

IN-KIND COMPENSATION

- ❖ If some or all of your employees' compensation is provided in-kind (housing, food, etc), then you must address a wide range of issues, from compliance with the minimum wage laws to OSHA requirements
- ❖ Farm Commons, www.FarmCommons, has good guidance documents
- ❖ They also have very good state-specific materials for the New England states and a few Midwest states, on other topics.

FUNDING THROUGH INNOVATIVE BUSINESS MODELS

- ❖ Associations, LLCs, Leases; "ownership" concept
- ❖ First hurdle: is your business ready for investors?
- ❖ Second hurdle: compliance with securities laws
- ❖ One avenue discussed on next slide
 - ❖ Specialized area of law
 - ❖ Farm-to-Consumer Legal Defense Fund offers assistance, www.FarmtoConsumer.org
 - ❖ Austin FoodShed Investors, www.austinfoodshedinvestors.org

JOB ACT: SUMMARY OF SEC RULES

- ❖ Can raise up to \$1 million in any 12 month period
- ❖ Investment caps: 10% of annual income or net worth if income over \$100,000; or greater of \$2000 or 5% of annual income or net worth if income \$100,000 or less
- ❖ Must file a disclosure document & annual reports with SEC
- ❖ No advertising allowed
- ❖ Crowdfunding must be done through a “registered portal”

ZONING/RIGHT TO FARM

- ❖ Almost every state has a Right to Farm law
- ❖ Designed to protect CAFOs; provide protection from nuisance lawsuits and local ordinance limitations
- ❖ In some states, can be used by small farmers threatened by local authorities
- ❖ New statutes and bills being promoted to block GMO-free zones, pesticide-free zones, etc
 - ❖ SB 1172 in the 2017 Texas Legislative Session

TEXAS RIGHT TO FARM

- ❖ Primarily protects against neighbors' complaints
 - ❖ Prevents neighbors from bringing suit if the agricultural operation has been there for at least one year and using that practice for that long
 - ❖ Covers even extreme situations (overflowing manure tanks)
- ❖ Protects from local ordinances **if** the farm as currently operated pre-dates the ordinance
 - ❖ But only covers farming practices (growing crops, raising livestock) – not value added, retailing, agritourism, etc.

LOCAL ORDINANCES

- ❖ Zoning and other regulations are not static
 - ❖ Austin, San Antonio, Dallas – are all considering, or have recently considered, issues surrounding urban farming
 - ❖ Get involved in changing the laws!
- ❖ Different types of activities:
 - ❖ Growing crops/vegetables
 - ❖ Livestock, from poultry to small ruminants
 - ❖ Selling/retail
 - ❖ Agritourism and events

HOSTING ON-FARM EVENTS

❖ Zoning issues

- ❖ Whether residential or agricultural zoned, question is whether you can host events of certain sizes
- ❖ If not allowed under zoning ordinance:
 - ❖ Talk with the neighbors
 - ❖ Seek a “conditional use permit” or variance

❖ Disability access

- ❖ especially if ongoing/recurring events
- ❖ Americans with Disabilities Act

ON-FARM EVENTS & FOOD SAFETY

- ❖ Sanitation issues
 - ❖ Keep animals separate from eating areas
 - ❖ Handwashing/sanitation facilities
 - ❖ Guidance for attendees (signs, directions)
- ❖ Check your insurance policy for coverage
- ❖ Regulatory issues:
 - ❖ Public/private distinction
 - ❖ Permits

ON FARM REGULATORY ISSUES

- ❖ Private or non-commercial events
 - ❖ Feeding friends and family
 - ❖ Potlucks (but are you charging?)
 - ❖ CSA members or other clubs (again, charging?)
 - ❖ Restrictive membership criteria and common group activities
- ❖ Products vs. food service/ eating on-site
- ❖ Commercial kitchens & temporary licenses

FDA FSMA REGULATIONS

- ❖ Exemptions for produce growers:
 - ❖ \$25,000 or less of produce
 - ❖ \$500,000 or less + more than half direct sales to consumers
- ❖ Exemptions for storing or processing food
 - ❖ \$1 million gross sales for food manufacturing
 - ❖ “Retail food establishments”
- ❖ Need to keep records to prove exemption & maybe more
- ❖ Food hubs and cooperative businesses face extensive new requirements
 - ❖ May be able to structure to avoid, but need to figure that out up-front
- ❖ Flow charts on FARFA website,
www.FarmAndRanchFreedom.org/FSMA

MORE INFORMATION

- Farm and Ranch Freedom Alliance,
www.FarmAndRanchFreedom.org