ADMINISTRATIVE REPORT **DATE: December 21, 1998**

PUBLIC HEALTH SERVICE/CDC/NIOSH/DSR
FACE-98-15

TO: **Director, National Institute for Occupational Safety and Health**

FROM: **Division of Safety Research, NIOSH**

SUBJECT: **9-Year-Old Child Helping With Blueberry Harvest Dies After Being Run Over by Cargo Truck on Field Road --** Michigan

SUMMARY

On July 28, 1998, a 9-year-old boy (the victim) died after he jumped or fell off the back of a cargo truck and was run over. The victim had been picking blueberries with his father and an 11-year-old boy the morning of the incident. After lunch the boys helped the victim's father pick up plastic containers filled with blueberries and load them onto a cargo truck. The boys were riding in the truck's cargo area as it slowly moved in reverse, when the victim either jumped or fell off and then slipped while trying to jump back onto the truck bumper. He fell face down on the field road, and the truck ran over him. The father felt the truck bump into something, and getting out of the truck to check, he found that he had run over the victim. The father called for help to workers in the field, and a worker used a cell phone to call emergency medical services (EMS). The EMS arrived within minutes of the call, provided emergency care, and transported the victim to an area hospital where he was pronounced dead. NIOSH investigators concluded that, to prevent similar occurrences, employers should:

- *comply with child labor laws which establish minimum ages for employment and restrict the type of work which youth, less than 16 years of age, are allowed to perform in agricultural settings*

- *ensure that children, who are brought to the fields where work is being performed, are restricted to areas where there is no vehicular travel or machine use, and which is free of any recognized hazards*

- *ensure that passengers are not allowed to ride on vehicles unless safe seating is provided*

- *consider equipping vehicles used in agriculture with a back-up alarm and/or a signal person when trucks must be backed through areas where other workers are present*

- *evaluate field roads to determine a safe route for vehicular and equipment travel*

- *develop, implement, and enforce a comprehensive safety program for all workers which includes, but is not limited to, training in hazard identification, avoidance, and abatement*

INTRODUCTION

On July 28, 1998, a 9-year-old boy (the victim) died after he jumped or fell off the back of a cargo truck and was run over. On July 31, 1998, officials from the United States Department of Labor Wage and Hour Division contacted the National Institute for Occupational Safety and Health (NIOSH), Division of Safety Research (DSR), and requested technical assistance in evaluating the circumstances surrounding the incident. On August 6, 1998, a DSR Safety and Health Specialist and a DSR Mathematical Statistician with expertise in agricultural safety issues, accompanied by a Wage and Hour Specialist from the Department of Labor, traveled to the incident site to conduct an investigation. Photographs of the incident site taken by the sheriff's department immediately following the incident were reviewed. The incident was discussed with the investigating officer, the deputy medical examiner, the property owner, and the growers who leased the land from the property owner. The sheriff's report and a medical examiner's report were obtained. DSR investigators were unable to locate the victim's father, the 11-year-old boy who had witnessed the incident, or the farm labor contractor (FLC) for an interview. Incident-specific information described in this report was derived from official reports and from interviews with officials from the sheriff's department and the medical examiner's office. Personnel from those agencies had spoken through an interpreter with the victim's father, the 11-year-old boy and the FLC (each spoke fluent Spanish but little English) to gain detailed information regarding the incident.

The growers had leased approximately 80 to 90 acres where the incident occurred and hired 60 seasonal workers for a 12-week period each year to harvest blueberries. These workers were shown videos on warehouse and pesticide safety and were given a set of basic safety rules by the growers. Because the berry crop was ripening too rapidly for the growers' seasonal workers to harvest, the growers had contracted with an FLC to locate and hire approximately 10 additional workers. The contract between the growers and the FLC was verbal.

The FLC had a license from the Department of Labor to hire seasonal workers. The FLC's pay records indicated that he had hired the victim's father (his brother-in-law) approximately 3 weeks prior to the incident. According to officials who investigated the incident, the victim was helping his father harvest and transport blueberries.

The growers stated they understood their responsibility was to provide sanitary facilities to the workers hired by the FLC but that supervision and safety of workers hired by the FLC were the FLC's responsibility. The growers had been in business for 16 years, and this was the first time they had contracted with an FLC. It was the first fatality to occur on the blueberry farm.

INVESTIGATION

The victim and his father arrived at the blueberry field at approximately 7:30 a.m. and picked blueberries with the 11-year-old son of the FLC. This was their first day working in this field, and the weather was hot and sunny. By early afternoon, pickers had placed plastic containers filled with blueberries along the field road. The father's job was to load blueberries onto the growers, cargo truck and drive them to the growers' packing shed located about 150 yards from the field. He asked his son and nephew to help load the containers onto the cargo truck.

The truck used in the incident was owned by the growers and is shown in Figure 1. It was a 1984 Ford single-axle truck equipped with a large, fully enclosed cargo compartment approximately 13 feet long, 8 feet wide and 8 feet high. The truck had side mirrors on both the driver's and the passenger's side. There was no back-up alarm/signal, nor is one required on vehicles used in agricultural settings. Between the cab and the cargo compartment was a 3 ½-foot-high by 2-foot-wide door with a window. The rear bumper extended out 10 inches from

the back of the truck and measured 17 inches from bumper to ground. A 2-foot-long vertical grab bar, designed to assist individuals entering the cargo compartment at the back of the truck, was located on the end of the truck on the passenger side. At the time of the incident, the rear door of the cargo compartment was open. The rear door operates like a garage door and slides up inside the roof of the compartment when opened. It is closed by pulling a strap located on the door. According to the victim's father, the door was normally pulled shut when he drove with the children in the cargo compartment.

Reports indicate that the father had driven trucks similar to the one used in the incident for about 1 year, and that he was a licensed driver. According to the grower, this was the first time the father had driven this particular truck and the first time he had driven on this field. The cargo truck normally used for blueberry transport was like the one used the day of the incident. It was not in service that day.

The victim's father drove the truck forward along the flat single lane hard dirt road that extended around 3 sides of the 5-acre blueberry field and stopped periodically to work with the boys loading the plastic blueberry containers on the truck. Once he had completed picking up berries he put the truck in reverse and traveled the same route in reverse because there was no room to turn the truck around. According to the growers, at one time they could drive all the way around the field, but some time ago the road going around the fourth side was closed to all vehicular traffic. Blueberry bushes were located on one side of the dirt road and a ditch was within 2 feet of the other side so there was little room to maneuver.

According to official reports, the father thought that both boys were inside the cargo van, but he could not see them through the door opening and window between the cargo compartment and the cab because the stacked blueberry containers obscured his vision.

Reports indicate that the boys were riding in the back of the cargo compartment or on the rear bumper. The victim jumped or fell off. When he tried to jump back on the bumper, he may have tried to reach for the grab bar located on the rear passenger side of the truck, and while doing so slipped and fell face forward (prone) onto the road. The truck's left rear tire rolled over the victim's torso. Though other workers were in the surrounding fields picking blueberries, only the victim,

the 11-year-old boy and the victim's father were in the immediate vicinity. When he saw the victim slip, the 11-year-old boy screamed for the driver to stop. The driver heard nothing, but reports indicate that he felt a bump. He stopped the truck, drove the vehicle forward, and ran over the victim a second time. He got out of the truck, and walking to the back to check what had happened, found the victim lying in the road. He immediately called to field workers nearby who used a cell phone to call 911 for assistance. He returned to assist his son and to await emergency medical services.

Sheriff's department personnel arrived at 2:49 p.m. (within 7 minutes of receiving the 911 call), assessed the victim and finding no vital signs present, began cardiopulmonary resuscitation (CPR). An ambulance arrived at 2:55 p.m., and personnel examined the victim, determining that he was asystolic (in cardiac standstill), unresponsive, and had fixed and dilated pupils. EMS personnel performed emergency care and transported the victim to a local hospital where he arrived at 3:10 p.m. Hospital emergency personnel continued resuscitation attempts until 3:29 p.m., when the patient was pronounced dead.

CAUSE OF DEATH

The medical examiner listed the cause of death as lacerated liver (severe).

RECOMMENDATIONS

Recommendation #1: Employers should comply with child labor laws which establish minimum ages for employment and restrict the type of work which youth, less than 16 years of age, are allowed to perform in agricultural settings.

Discussion: The Fair Labor Standards Act (FLSA), also known as the Wage-Hour Law, enacted in 1938, includes child labor provisions that prohibit the employment of youth in jobs and under conditions detrimental to their health or well being. Unless a specific exemption applies, 14 is the minimum age for employment in agricultural activities that are not deemed hazardous by the Secretary of Labor. Youth as young as 10 or 11 years old may be employed under prescribed conditions to hand-harvest short-season crops, only if an employer's application for a waiver has been approved by the Secretary of Labor. Employers should take steps to

ensure that hired employees are not utilizing children to inappropriately conduct work tasks.

Children may lack the judgment necessary to protect their own safety and health. In this incident the 9-year-old victim may not have been aware or fully capable of understanding the safety risks associated with jumping off and then attempting to get back on the back of a slowly moving vehicle. A copy of a Department of Labor Bulletin summarizing federal child labor provisions of the FLSA in agriculture is appended.

Recommendation #2: Employers should ensure that children, who are brought to the fields where work is being performed, are restricted to areas where there is no vehicular travel or machine use, and which is free of any recognized hazards.

Discussion: Children are frequently brought to the fields by their parents or by other adults caring for them. While federal child labor laws have legal authority over specific working conditions and ages at which children can work, they do not have legal authority to determine the conditions under which non-working children can be present in the worksite. Growers should establish a policy that restricts non-working children to specific areas of the farm. These areas would be areas which the grower has established as off limits for vehicular travel and machine use and is free of any recognized hazards.

Recommendation #3: Employers should ensure that passengers are not allowed to ride on vehicles unless safe seating is provided.

Discussion: Passengers in motor vehicles should ride inside of vehicles and be restrained with seat belts whenever vehicles are moved. The practice of riding on vehicles where safe seating has not been provided has led to injury and death for adults as well as for children and should be strictly prohibited. OSHA standards 29 CFR 1910.266 (f) (2) (viii) and 29 CFR 1926. 601 (8) , detail safe seating requirements for logging machines and construction vehicles respectively, and though not written for machines and vehicles used in agricultural settings, provide useful information regarding safe seating.

Recommendation #4: Employers should consider equipping motor vehicles used in agriculture with a back-up alarm

and/or a signal person when trucks must be backed through areas where workers are present.

Discussion: When vehicles must be backed over field roads, alarms can provide a useful warning to alert workers in the area that a vehicle is present. Back-up alarms have been useful in warning workers of potentially dangerous vehicular movement and have prevented run-over incidents. Though required in selected manufacturing and construction worksites, back-up alarms are not currently required for vehicles used in agriculture.

Additionally, a trained signal person could have been used to direct the truck movement and improve the safety of co-workers. Alarms and signal persons can warn field workers to stay off the field roads whenever vehicles are present.

Recommendation #5: Employers should evaluate field roads to determine a safe travel route for vehicular and equipment travel.

Discussion: An evaluation of the field road layout (three-sided arrangement) may have identified that the absence of a turnaround for vehicles and equipment presented a hazard for workers (including the 9-year-old victim) when drivers are required to operate vehicles in reverse. Establishing a turnaround would eliminate the hazards unique to backing vehicles.

Note: After the incident, the growers stated that they planned to eliminate the use of the cargo truck completely and use a forklift to pick up produce placed on skids along the field road. If forklifts are used, safety hazards unique to their use should be identified and controlled. The OSHA standard 29 CFR 1910.178, Powered Industrial Trucks (which includes forklifts), though not written for agricultural settings, provides useful information regarding safe use of forklifts.

Recommendation #6: Employers should develop, implement, and enforce a comprehensive safety program for all workers which includes, but is not limited to, training in hazard identification, avoidance, and abatement.

Discussion: The evaluation of tasks to be performed at the worksite forms the basis for development, implementation, and enforcement of a safety program. They key elements of such a program should include at a

minimum, training in hazard recognition, avoidance, and abatement. This safety program should include the safety and health of all workers on the worksite. In this incident, the victim was run over by a truck. There was no comprehensive safety program for the worksite. The truck driver had not received training in hazard recognition and therefore did not recognize the hazard created for other workers when he backed the truck over the narrow dirt road with unrestrained passengers and an open cargo door. Had these hazards been recognized and abated, the fatality may have been prevented.

Whenever there is any uncertainty regarding employer status, those involved should seek clarification from the Department of Labor, Employment Standards Administration, Wage and Hour Division. Both the Migrant and Seasonal Agricultural Protection Act (MSPA) and the Fair Labor Standards Act provide valuable information regarding employer status and are referenced below. A summary of each document is appended.

Once employer status is clarified, the employer(s) should establish a comprehensive safety program which provides a plan for providing a safe workplace for all workers at the worksite.

REFERENCES

Child Labor Requirements in Agriculture Under the Fair Labor Standards Act, U.S. Department of Labor Employment Standards Administration, Wage and Hour Division, WH 1295, July, 1990.

Employment Relationship Under the Fair Labor Standards Act, U.S. Department of Labor Employment Standards Administration, Wage and Hour Division, WH 1297, May, 1980.

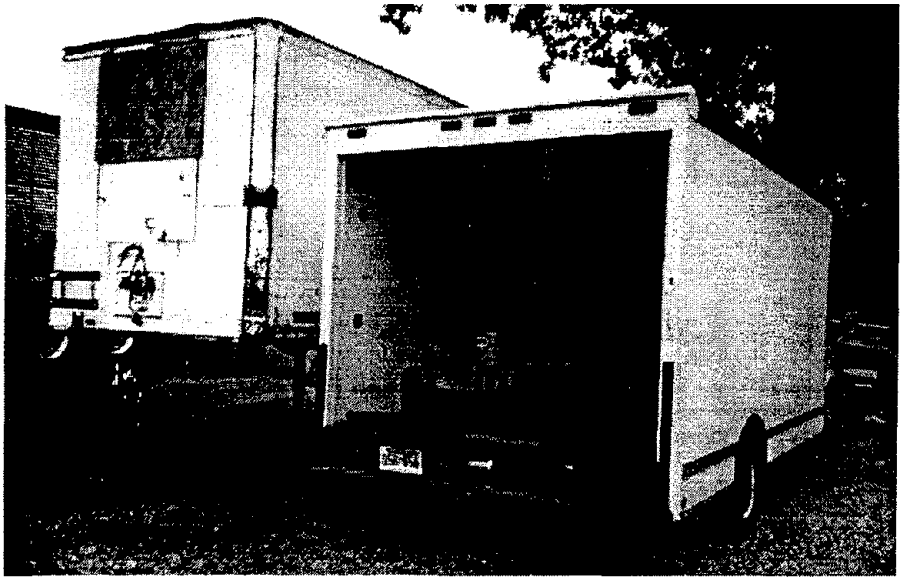
Office of the Federal Register: Federal Register, Vol. 61, No. 96, p 24857-24866, May 16, 1996. Migrant and Seasonal Agricultural Worker Protection Act; Final Rule.

Code of Federal Regulations 29 CFR 1910.178, (Powered Industrial Trucks) 1997 Edition. U.S. Government Printing Office, Office of the Federal Register, Washington D.C.

Code of Federal Regulation 29 CFR 1910.266, (Logging Operations) 1997 Edition. U.S. Government Printing Office, Office of the Federal Register, Washington D.C.

Code of Federal Regulation 29 CFR 1926.601, (Motor Vehicles) 1997 Edition. U.S. Government Printing Office, Office of the Federal Register, Washington D.C.

Figure 1. Cargo Truck Used in Incident



At the time of the incident, the victim jumped or fell off the rear of the cargo truck (pictured above), which was moving in reverse.

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Fatality Assessment and Control Evaluation (FACE) Project

The National Institute for Occupational Safety and Health (NIOSH), Division of Safety Research (DSR), performs Fatality Assessment and Control Evaluation (FACE) investigations when a participating State reports an occupational fatality and requests technical assistance. The goal of these evaluations is to prevent fatal work injuries in the future by studying the working environment, the worker, the task the worker was performing, the tools the worker was using, the energy exchange resulting in fatal injury, and the role of management in controlling how these factors interact.

States participating in this study: North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia.

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Child Labor Requirements In Agriculture Under The Fair Labor Standards Act (Child Labor Bulletin No. 102)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH 1295
(Revised July 1990)

CHILD LABOR BULLETIN NO. 102

(Child Labor Bulletin No. 101 deals with the employment of minors in non-agricultural occupations.)

This booklet is a guide to the provisions of the Fair Labor Standards Act (also known as the Wage-Hour Law) which apply to minors employed in agriculture. In addition to child labor provisions, the Act also contains provisions on minimum wage, overtime, equal pay, and record keeping.

It is important to note that the child labor provisions of the Act apply to the agricultural employment of all children, migrant as well as local resident children.

OTHER CHILD LABOR LAWS

Other Federal and State laws may have higher standards. When these apply, the more stringent standard must be observed. All states have child labor laws and compulsory school attendance laws.

CONTENTS

COVERAGE OF THE CHILD LABOR PROVISIONS

The Fair Labor Standards Act of 1938 (FLSA) establishes minimum ages for covered employment in agriculture unless a specific exemption applies. Covered employment in agriculture includes employees whose occupations involve growing crops or raising livestock which will leave the State directly or indirectly through a buyer who will either ship them across State lines or process them as ingredients of other goods which will leave the State.

Employees covered include workers who:

- raise livestock, bees, fur-bearing animals, or poultry;
- cultivate the soil, grow, or harvest crops;
- grow or harvest crops as employees of a contractor;
- as employees of either the farmer or an independent contractor, do work on the farm which is incidental to the farming operations of that farm (such as threshing grain grown on that farm);
- as employees of the farmer, do work off the farm which is incidental to the farming operations of the farm.

The child labor provisions may apply to employment in any of the above regardless of farm size or the number of man-days of farm labor used on that farm.

MINIMUM AGE STANDARDS FOR EMPLOYMENT IN AGRICULTURE

16 - Minimum age for employment

- in any agricultural occupation declared hazardous by the Secretary of Labor;
- during school hours;

14 - Minimum age for employment outside school hours in any agricultural occupation not declared hazardous by the Secretary of Labor;

except:

* 12 and 13-year-olds may be employed with written parental consent or on a farm where the minor's parent or person standing in place of the parent is also employed;

* minors under 12 may be employed with written parental consent on farms where employees are exempt from the Federal minimum wage provisions.

Local minors (permanent residents) 10 and 11 years old may be employed outside school hours under prescribed conditions to hand harvest short season crops for no more than 8 weeks between June 1 and October 15 in any calendar year, upon approval by the Secretary of Labor of an employer's application for a waiver from the child labor provisions for such employment. A "permanent residence" means the place where the minor normally resides with his or her parent(s) year-round.

Note: Minors of any age may be employed by their parent or person standing in place of their parent at any time in any occupation on a farm owned or operated by their parent or person standing in place of their parent.

SCHOOL HOURS AND EMPLOYMENT IN AGRICULTURE

Minors under 16 years of age may not be employed during school hours unless employed by their parent or person standing in place of their parent. School hours are those set for the school district in which a minor is living while employed in agriculture.

For example:

- If the school is in session from 9 a.m. to 3 p.m. in the school district where the minor is living while working, the minor may work only before 9 a.m. or after 3 p.m. on school days.

- Work before or after school hours, during weekends, or on other days on which the school for the school district does not assemble is considered work outside school hours.

- School hours provisions apply to private as well as public schools.

- A crew leader who takes workers to an area where schools are open may not allow minors under 16 to work during the hours school is in session in the school district where the farm work is being done.

- Work during school hours refers to those hours determined on the basis of the official school calendar for the school district where the minors are living while so employed. No provision is made for the release of individual children or any class or grade to work in agriculture.

HAZARDOUS OCCUPATIONS IN AGRICULTURE

The Secretary of Labor has found and declared that the following occupations in agriculture are hazardous for minors under 16 years of age. No minor under 16 may be employed at any time in these occupations except as exempt (See page 5).

(1) Operating a tractor of over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor.

(2) Operating or assisting to operate (including starting, stopping, adjusting, feeding or any other activity involving physical contact associated with the operation) any of the following machines:

(i) Corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea viner;

(ii) Feed grinder, crop dryer, forage blower, auger conveyor, or the unloading mechanism of a nongravity-type self-unloading wagon or trailer; or

(iii) Power post-hole digger, power post driver, or nonwalking-type rotary tiller.

(3) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines:

(i) Trencher or earthmoving equipment;

(ii) Fork lift;

(iii) Potato combine; or

(iv) Power-driven circular, band, or chain saw.

(4) Working on a farm in a yard, pen, or stall occupied by a:

(i) Bull, boar, or stud horse maintained for breeding purposes; or

(ii) Sow with suckling pigs, or cow with newborn calf (with umbilical cord present).

(5) Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than 6 inches.

(6) Working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height of over 20 feet.

(7) Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper.

(8) Working inside:

(i) A fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere;

(ii) An upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position;

(iii) A manure pit; or

(iv) A horizontal silo while operating a tractor for packing purposes.

(9) Handling or applying (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying) agricultural chemicals classified under the Federal Insecticide, Fungicide, and Rodenticide Act (as amended by Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. 136 et seq.) as Toxicity Category I, identified by the word "Danger" and/or "Poison" with skull and crossbones; or Toxicity Category II, identified by the word "Warning" on the label;

(10) Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; or

(11) Transporting, transferring, or applying anhydrous ammonia.

EXEMPTIONS FROM HAZARDOUS OCCUPATIONS ORDER IN AGRICULTURE

These prohibitions do not apply to the employment of minors under 16 years of age by their parents or by persons standing in the place of their parents on farms owned or operated by such parents or persons.

Under carefully regulated conditions, employment of 14 and 15-year-old minors in certain of the agricultural occupations found and declared to be hazardous is exempt. They are:

STUDENT-LEARNERS

Student-learners in a bona fide vocational agriculture program may work in the occupations listed in items 1 through 6 of the hazardous occupations order under a written agreement which provides that the student-learner's work is incidental to training, intermittent, for short periods of time, and under close supervision of a qualified person; that safety instructions are given by the school and correlated with on-the job training; and that a schedule of organized and progressive work processes has been prepared. The written agreement must contain the name of the student-learner, and be signed by the employer and a school authority, each of whom must keep copies of the agreement.

4-H FEDERAL EXTENSION SERVICE TRAINING PROGRAM

Minors 14 and 15 years old who hold certificates of completion of either the tractor operation or machine operation program may work in the occupations for which they have been trained. occupations for which these certificates are valid are covered by items 1 and 2 of the hazardous occupations order. Farmers employing minors who have completed this program must keep a copy of the certificates of completion on file with the minor's records.

Enrollment in this program is open to minors who are not members of 4-H as well as 4-H members. Information on this program is available from an Extension Agent of the Cooperative Service of a land grant university.

VOCATIONAL AGRICULTURE TRAINING PROGRAM

Minors 14 and 15 years old who hold certificates of completion of either the tractor operation or machine operation program of the U. S. Office of Education Vocational Agriculture Training Program may work in the occupations for which they have been trained. Occupations for which these certificates are valid are covered by items 1 and 2 of the hazardous occupations order. Farmers employing minors who have completed this program must keep a copy of the certificate of completion on file with the minor's records.

Information on the Vocational Agriculture Training Program is available from vocational agriculture teachers.

PENALTIES FOR VIOLATIONS

For each violation of the child labor provisions or any regulation issued thereunder, employers may be subject to a civil money penalty of up to $1,000.

The Act was amended, effective May 1, 1974, authorizing (in section 16(e)) the Secretary of Labor to assess a civil money penalty not to exceed $1,000 for each violation of the child labor provisions of the Act or any regulation issued thereunder. When a child labor civil money penalty is assessed against an employer, the employer has the right, within 15 days after receipt of the notice of such penalty, to file an exception to the determination that the violation or violations of the child labor provisions occurred. When such an exception is filed with the Administrator of the Wage and Hour Division, the matter is referred to the Chief Administrative Law Judge, and a formal hearing is scheduled. At such hearing the employer may, or

an attorney retained by the employer may, present such witnesses, introduce such evidence and establish such facts as the employer believes will support the exception. The determination of the amount of any civil money penalty becomes final if no exception is taken to the administrative assessment thereof, or if an exception is filed, pursuant to the decision and order of the administrative law judge.

The Act also provides, in the case of willful violation, for a fine up to $10,000; or, for a second offense committed after the conviction of such person for a similar offense, for a fine of not more than $10,000, or imprisonment for not more than 6 months, or both. The Secretary of Labor may also ask a Federal district court to restrain future violations of the child labor provisions of the Act by injunction.

CERTIFICATE OF AGE

Employers may protect themselves from unintentional violation of the child labor provisions by keeping on file an employment or age certificate for each minor employed to show that the minor is the minimum age for the job. Certificates issued under most State laws are acceptable for purposes of the Act.

RECORD KEEPING FOR EMPLOYMENT OF MINORS

Every employer (except a parent or person standing in the place of a parent employing one's own child on a farm owned or operated by such parent or person) who employs any minor under 16 years of age in agriculture must maintain and preserve records containing the following data about each minor employed:

1. Name in full.

2. Place where the minor lives while employed. If the minor's permanent address is elsewhere, both addresses should be given.

3. Date of birth.

4. Evidence in writing of any consent of the parent or person standing in place of the parent of the minor, if consent is required. (See Pages 1 & 2 for information on the ages to which this rule applies.)

MINIMUM WAGE FOR AGRICULTURAL EMPLOYMENT

The Fair Labor Standards Act extends minimum wage provisions to farm employees, including minors, whose employer used more than 500 man-days of farm labor during any calendar quarter of the previous calendar year. Unless otherwise exempt, employees covered by the minimum wage provisions must be paid at least $3.80 an hour (4.25 an hour effective April 1, 1991).

Farm workers are not subject to the overtime pay provisions of the Act.

No minimum wage and overtime pay is required for the following:

1. Members of the employer's immediate family.

2. Hand harvest laborers paid piece rates in an operation generally recognized as piecework in the region, under both of the following conditions: (1) they go each day to the farm from their permanent residence; and (2) they have been employed in agriculture less than 13 weeks in the previous calendar year.

3. Migrant hand harvest laborers 16 years of age or under who are employed on the same farm as their parents and under both of the following conditions: (1) they are paid piece rate in an operation generally recognized as piecework in the region; and (2) the piece rate is the same as that paid workers over the age of 16.

4. Employees principally engaged in the range production of livestock.

ADDITIONAL INFORMATION

Inquiries about the Fair Labor Standards Act will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under U.S. Department of Labor in the U.S. Government listing. These offices also supply publications free of charge.

***U.S. Government Printing Office: 1990-262-288/26240**

Employment Relationship Under the Fair Labor Standards Act

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH Publication 1297

(Revised May 1980)
(Reprinted August 1985)

This publication is for general information and is not to be considered in the same light as statements of position contained in Interpretative Bulletins published in the Federal Register and the Code of Federal Regulations, or in the official opinion letters of the Wage and Hour Administrator.

This material will be made available to sensory impaired individuals upon request. Voice phone: 202-219-4907
TDD' phone: 1-800-326-2577

'Telecommunications Device for the Deaf.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act contains provisions and standards concerning recordkeeping, minimum wages, overtime pay and child labor. These basic requirements apply to employees engaged in interstate commerce or in the production of goods for interstate commerce and also to employees in certain enterprises which are so engaged. Federal employees are also subject to the recordkeeping, minimum wage, overtime, and child labor provisions of the Act. Employees of State and local government are subject to the same provisions, unless they are engaged in traditional governmental activities, in which case they are subject to the recordkeeping and child labor requirements. The law provides some specific exemptions from its requirements as to employees employed by certain establishments and in certain occupations.

The Act is administered by the U.S. Department of Labor's Wage and Hour Division with respect to private employment, State and local government employment, and Federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission and the Tennessee Valley Authority. The Office of Personnel Management is responsible for administering the Act with regard to all other Federal employees.

For the Fair Labor Standards Act to apply to a person engaged in work which is covered by the Act, an employer-employee relationship must exist. The purpose of this publication is to discuss in general terms the latter requirement.

If you have specific questions about the statutory requirements, contact the W-H Division's nearest office. Give detailed information bearing on your problem since coverage and exemptions depend upon the facts in each case.

STATUTORY DEFINITIONS

Employment relationship requires an "employer" and an "employee" and the act or condition of employment. The Act defines the terms "employer", "employee", and employ" as follows:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. Section 3(d).

(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
(2) In the case of an individual employed by a public agency such term means–
(A) any individual employed by the Government of the United States--
(i) as a civilian in the miliary departments (as defined in section 102 of title 5, United States Code),
(ii) in any executive agency (as defined in section 105 of such title),
(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,
(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or
(v) in the Library of Congress;
(B) any individual employed by the United States Postal Service or the Postal Rate Commission: and
(C) any individual employed by a State, political subdivision of a State, or an interstate Governmental agency, other than such an individual--
(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
(ii) who–
(I) holds a public elective office of that State, political subdivision, or agency,
(II) is selected by the holder of such an office to be a member of his personal staff,
(III) is appointed by such an officeholder to serve on a policymaking level, or
(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.*
(3) For purposes of subsection (u), such term, does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

See note on top on next page

*On June 24, 1976, the Supreme Court, in the case of National League of Cities v. Usery, ruled that it was unconstitutional to apply the minimum wage and overtime provisions of the Fair Labor Standards Act to State and local government employees engaged in activities which are an integral part of traditional government services. The Court expressly found that school, hospital, fire prevention, police protection, sanitation, public health, and parks and recreation activities are among those to which the minimum wage and overtime provisions do not apply. However, it is the Department's position that the decision effects no change in the application of the child labor or recordkeeping provisions.

"Employ" includes to suffer or permit to work. - Section 3(g).

EMPLOYMENT RELATION DISTINGUISHED FROM COMMON LAW CONCEPT

The courts have made it clear that the employment relationship under the Act is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the Act and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work". The courts have indicated that, while "to permit" requires a more positive action than "to suffer", both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for him by another is sufficient to create the employment relationship under the Act.

TEST OF THE EMPLOYMENT RELATION

The Supreme Court has said that there is "no definition that solves all problems as to the limitations of the employer-employee relationship" under the Act; it has also said that determination of the relation cannot be based on "isolated factors" or upon a single characteristic or "technical concepts", but depends " upon the circumstances of the whole activity" including the underlying "economic reality". In general an employee, as distinguished from an independent contractor who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the business which he serves. The factors which the Supreme Court has considered significant,

although no single one is regarded as controlling, are:

(1) the extent to which the services in question are an integral part of the employer's business;

(2) the permanency of the relationship;

(3) the amount of the alleged contractor's investment in facilities and equipment;

(4) the nature and degree of control by the principal;

(3) the alleged contractor's opportunities for profit and loss; and

(6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.

TRAINEES

The Supreme Court has held that the words "to suffer or permit to work" , as used in the Act to define "employ", do not make all persons employees who, without any express or implied compensation agreement. may work for their own advantage on the premises of another. Whether trainees or students are employees of an employer under the Act will depend upon all of the circumstances surrounding their activities on the Premises of the employer. If all of the following criteria apply. the trainees or students are not employees within the meaning of the Act:

(1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainees or students;

(3) the trainees or students do not displace regular employees, but work under their close observation:

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations my actually be impeded;

(5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

(6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

EFFECT OF "SALE" ON THE RELATIONSHIP

An employment relationship may exist between the parties to a transaction which is nominally a "sale." An employee is not converted into an independent contractor by virtue of a fictitious "sale" of the goods produced by him to an employer, so long as the other indications of the employment relationship exist. Homeworkers who "sell" their products to a manufacture are his employees where the control exercised by him over the homeworkers through his ability to reject or refuse to "buy" the product is not essentially different from the control ordinarily exercised by a manufacturer over his employees performing work for him at home on a piece rate basis.

FRANCHISE AGREEMENTS

The Act generally provides that a retail or service establishment which is under independent ownership would not lose its independent status solely because it operates under a franchise agreement. On the other hand, the franchised establishment and its employees may, in certain situations, be considered to be part of the franchisor's business. This would be particularly relevant in a situation where a franchisee is in control of the details of the day to day operations of the establishment, but the franchisor retains control over the basic aspects of the business. Where such a situation exists, they would be considered to be parts of a single business, and the employees of the franchised outlet would be considered to be employees of the franchisor.

FACTORS WHICH ARE NOT MATERIAL

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where the work is performed, the absence of a formal employment agreement and whether the alleged independent contractor is licensed by the State or local government are not considered to have a bearing on determinations as to whether or not there is an employment relationship. Similarly, whether a worker is paid by the piece, by the job, partly or entirely by tips, on a percentage basis, by commissions or by any other method is immaterial. The Supreme Court has held that the time or mode of compensation does not control the determination of employee status.

EFFECT OF EMPLOY RELATIONSHIP

Once it is determined that one who is reputedly an independent contractor is in fact an employee, then all the employees of the so-called independent contractor engaged in the work for the principal employer likewise become the employees of the principal employer, who is responsible for compliance with the Act. However, in order to protect himself against the "hot goods" prohibition of the Act, a manufacturer or producer should undertake to see that even a true independent contractor complies with the law.

VOLUNTEER SERVICES

The Act defines the term "employ" as including "to suffer or permit to work". However, the Supreme Court has made it clear that the Act was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another". In administering the Act, the Department follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered as employees of the religious, charitable and similar nonprofit corporations which receive their services.

For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a school

library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employee-employer relationship.

Religious, Charitable or Nonprofit Organizations: There is no special provision in the Act which precludes an employee-employer relationship between a religious, charitable, or nonprofit organization and persons who perform work for such an organization. For example, a church or religious organization may operate an institution of higher education and employ a regular staff who do this work as a means of livelihood. In such cases there is an employee-employer relationship for purposes of the Act.

There are certain circumstances where an individual who is a regular employee of a religious, charitable or nonprofit organization may donate services as a volunteer and the time so spent is not considered to be compensable "work". For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. The Department will not consider that an employee-employer relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. However, this does not mean that a regular office employee of a charitable organization, for example, can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.

Members of Religious Orders: Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals and other institutions operated by the church or religious order are not considered to be "employees" within the meaning of the law. However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution.

JOINT EMPLOYMENT

A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act, since there is nothing in the Act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employments for purposes of the Act depends upon all the facts in the particular case. If the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer (s) all of the employee is work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the work week, a joint employment relationship generally will be considered to exist in situations such as:

(1) An arrangement between employers to share an employee's services. For example, two companies on the same or adjacent premises arrange to employ a janitor or watchman to perform work for both firms. Even though each entity carries the employee on its payroll for certain hours, such facts would indicate that the employee is jointly employed by both firms and both are responsible for compliance with the monetary provisions of the Act for all of the hours worked by the employee: or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee. For example, employees of a temporary help company working on assignments in various establishments are considered jointly employed by the temporary help company and the establishment in which they are employed. In such a situation each individual company where the employee is assigned is jointly responsible with the temporary help, company for compliance with the minimum wage requirement. of the Act during the time the employee is in a particular establishment. The temporary help company would be considered responsible for the payment of proper overtime compensation to the

employee since it is through its act that the employee received the assignment which caused the overtime to be worked. Of course, if the employee worked in excess of 40 hours in any workweek for any one establishment, that employer would be jointly responsible for the proper payment of overtime as well as the proper minimum wage; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reasons of the fact that one employer controls, is controlled by, or is under common control with the other employer.

However, if all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.

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Employment Standards Administration
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THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protects migrant and seasonal agricultural workers in their dealings with farm labor contractors, agricultural employees, agricultural associations, and providers of migrant housing. All persons and organizations subject to the act must observe certain rules when recruiting, soliciting, hiring, employing, transporting, or housing these workers, or when furnishing them to other employers.

Certain persons and organizations, such as small businesses, some seed and tobacco operations, labor unions, and their employees, are exempt from the act.

REGISTRATION REQUIREMENT: Before performing any farm labor contracting activities, farm labor contractors must register with the U.S. Department of Labor and obtain certificates of registration specifying the types of activities they are authorized to perform. Persons employed by farm labor contractors to perform such activities also must register with the department. Application for registration ran be made at local offices of the state employment service. Certification may be denied, suspended, or revoked for violation of any provision of MSPA.

Farm labor contractors and farm labor contractor employees must carry proof of registration and show it to workers, agricultural employers, agricultural associations, and any other persons with whom they deal as contractors.

Agricultural associations, agricultural employers, and their employees are not considered farm labor contractors and do not have to register. Before they engage the services of any farm labor contractor, however, they must take reasonable steps to insure that the contractor has a Labor Department certificate valid for the services to be performed. The department has a toll-free number (1-800-800-0235) for inquiries about the validity of certificates.

COMPLIANCE: Agricultural associations, agricultural employers, and farm labor contractors must:

-- inform migrant workers and seasonal day-haul workers about prospective employment, in writing when they are being recruited. and provide to other seasonal workers such information in writing upon request when they are offered work. Information must be written in English, Spanish, or other languages, as appropriate. Thereafter, migrant and seasonal workers have a right to receive upon request a written statement of such information:

-- pay workers their wages when due, and give them itemized, written statements of earnings for each pay period, including any amount deducted and reasons for the deductions:

-- keep complete and accurate payroll records for all workers; in addition, farm labor contractors must give any other farm labor contractor. agricultural

employer, or agricultural association to whom they supply workers, copies of payroll records for each worker supplied to that particular contractor, employer, or association;

-- assure that vehicles used or caused to be used by a farm labor contractor, agricultural employer, or agricultural association to transport workers are properly insured, are operated by licensed drivers, and meet federal and state safety standards;

-- display conspicuously at the job site a poster setting forth the rights and protections of the workers; posters are available from the Wage and Hour Division;

-- comply with terms of the working arrangements they have made with workers.

HOUSING STANDARDS: Each person or organization which owns or controls real property used for housing migrant workers must comply with federal and state safety and health standards. A written statement of the terms and conditions of occupancy must be posted conspicuously at the housing site, or be given to workers.

OTHER PROVISIONS: Farm labor contractors must comply with the terms of written agreements made with agricultural employers and agricultural associations.

ENFORCEMENT: The Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration administers MSPA. During investigations Wage and Hour investigators may enter and inspect premises (including vehicles and housing), review and transcribe payroll records, and interview workers to determine whether their employers are in compliance with MSPA.

Investigators may advise violators to make changes necessary to achieve compliance. They also may recommend assessment of civil money penalties and revocation of certificates of registration. Failure to comply with MSPA may result in civil or criminal prosecution.

Administrative actions under MSPA include penalties of up to $1,000 per violation and, in the case of farm labor contractors, revocation of existing certificates and denial of future certificates. To insure compliance with MSPA, the Secretary of Labor may seek court injunctions prohibiting further violations and may bring criminal charges. Courts may assess fines of up to $10,000 and prison terms of up to three years in criminal cases.

In addition to the above remedies, individuals whose rights under MSPA have been violated may file suit directly in federal court for damages.

For more information contact a local office of the state employment service or the nearest office of the Wage and Hour Division, listed under U.S. Government, Department of Labor,, Employment Standards Administration. The federal regulations implementing MSPA appear in 29CFR Part 500.

This is one of a series of fact sheets highlighting U.S. Department of Labor Programs. It in intended as a general description only and does not carry the force of legal opinion.