



A Legal Guide to Direct Farm Marketing for Maryland Produce Growers

Funding for The Legal Guide to Direct Farm Marketing for Maryland Produce Growers was made possible by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service through grant AM190100XXXXG020. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the USDA.



UNIVERSITY OF MARYLAND
**AGRICULTURE LAW
EDUCATION INITIATIVE**
MPOWERING THE STATE

Table of Contents

Introduction	1
I. Preparing for Direct Marketing	1
Review Potential Land Use Restrictions	1
Determine Your Food Safety Obligations.....	2
Assess the Need for Licenses, Permits, and Certifications	3
Label Your Specialty Crops and Value-Added Products.....	3
Familiarize Yourself with Agricultural Labor and Liability Laws	5
Understand Your Premises Liability Risk.....	5
Review Your Insurance Coverage	5
The COVID-19 Pandemic May Require Growers to Adjust Their Operations.....	7
Take Stock of Your Intellectual Property	7
II. Direct Marketing Contracts.....	8
Basic Contract Principles	9
Evaluating Contract Terms	9
III. Online Sales & Marketing	13
Online Sales	13
Shipping & Delivery of Farm Products.....	13
Sales and Use Tax Collection Depends on Location and Products	14
Businesses Need to Protect Consumers' Personal Information	15
Email Marketing.....	15
Using Social Media	15
Quick Reference: Common Legal Issues by Direct Marketing Method	17
Appendix A - Questions to Ask Yourself Before You Sign a Contract.....	18

Introduction

In recent years, and most recently due to constraints caused by the COVID-19 pandemic, agricultural direct marketing has seen a resurgence in popularity as customers seek out more locally-produced fresh foods.¹ Direct marketing of farm products allows farmers to remove one or more of the “middle-men” (wholesale, distributors and/or retailers) from the supply chain to directly sell their products to consumers. There are several methods for direct marketing, such as selling at farmers’ markets, participating in a community-supported agriculture (CSA) arrangement, online sales, or making direct sales to restaurants or retail.

Direct marketing can provide advantages to farm operators but will likely also present legal challenges. This guide is not a comprehensive resource for all your potential legal needs. It will, however, outline pertinent legal issues to consider when pursuing direct marketing of farm products, inform you about existing resources on the various legal topics (noted in the References section), and prepare you to understand and critically evaluate direct marketing agreements before signing a contract.

Part One includes legal considerations when you are preparing to direct market your produce. Part Two reviews basic contracting principles and provides a framework for evaluating direct marketing contracts. Finally, Part Three discusses legal issues commonly encountered when advertising and making sales online.

If you require more detailed information or educational assistance about any of the topics discussed in this guide, feel free to contact the legal specialists at the Agriculture Law Education Initiative (ALEI) at www.umaglaw.org/contact.

I. Preparing for Direct Marketing

Many of the preliminary efforts producers take to ensure their business is operating legally are also necessary steps for legally marketing foods to consumers and restaurants. Paying attention to legal compliance requirements is a form of risk management. All business owners are well-served by regularly taking stock of their legal obligations, which can change as the business grows and evolves. The topics discussed in this section are particularly relevant to producers who are currently or prospectively direct marketing in some way.

Review Potential Land Use Restrictions

Often the first step to producing goods for sale is verifying that there are no existing land use restrictions that would prohibit agricultural types of use. Land use restrictions can pop up in a few different forms and require a review of local laws as well as any property lease or purchase agreements.

Lease Restrictions

If you lease the land from which you want to direct market farm products, make sure your lease allows this use and there aren’t any prohibitions in the lease which would curtail your venture. If a lease is silent on this issue, to avoid legal conflict a tenant may consider having a conversation with the landlord and/or amending a lease to reflect this permitted use.

Zoning

Local zoning laws are particularly relevant for producers who plan to sell products directly from a farm or to set up processing facilities on the farm. Before expanding an existing farm operation,

adding additional farm buildings, or starting a new farm operation, farmers should make sure the local zoning laws do not preclude such actions. Farmers who set up roadside stands should also check local zoning laws to ensure that use is permitted within the particular zone.²

Covenants & Easements

Covenants are land-use restrictions that are recorded in the local land records office and “run with the land.” In other words, the restrictions continue to apply to the land from owner to owner unless and until extinguished. Restrictions from covenants and easements are applied to land in addition to restrictions from local zoning. Homeowner association restrictions are a common form of covenants. If you are unsure if the farm is subject to any restrictive covenants, you can have a fairly inexpensive title search done.

Easements, like covenants, “run with the land” and can restrict the permissible uses of owners and tenants. Common examples of easements on farmland include utility easements which would allow a utility to use and maintain certain areas, typically near roadways. It is not uncommon for some easements, such as conservation easements, to prevent certain activities related to direct marketing such as retail uses.³ Prior to initiating or expanding a direct marketing use, you can obtain a title search to ensure that the farm’s uses are not restricted by covenants.

Determine Your Food Safety Obligations

The Food Safety Modernization Act (FSMA) is a mandatory federal food safety law, enacted under the Federal Food Drug and Cosmetic Act (FDCA),⁴ and made up of many subparts or rules, one of which is the Produce Safety Rule (PSR).⁵ The PSR mandates policies and procedures to prevent the transmission of foodborne illnesses.⁶

In Maryland, the PSR is administered by the Maryland Department of Agriculture (MDA).⁷ All Maryland produce growers need to register with the MDA⁸, however, how the PSR impacts growers will depend on the type of products grown and the size of the farming operation.

If you are subject to the PSR, you will be required to attend a PSR grower training course.⁹ Training topics include worker health, hygiene, and training, agricultural water and soil amendment quality standards, and equipment sanitation steps.¹⁰

Many growers fall into the qualified exempt category of the FSMA¹¹ and, if so, growers have certain labeling obligations.¹² Specifically, qualified exempt growers must include their name and complete farm address on either:

- a food packaging label on the produce; on
- a sign that is displayed at the point of sale with the produce; on
- documents delivered with the produce in the normal course of business; or
- an electronic notice in an internet sale.

Another aspect of FSMA you should be aware of is the Preventive Controls Rule (PCR) for Human Foods, which applies to the facilities that manufacture, process, pack or hold foods. Most farms that pack, hold, or minimally process (e.g. dehydrating or packing and labeling raw agricultural commodities) the crops grown and harvested on-site as part of their primary farming operations are exempt and do not need to register as a facility with the FDA. Cottage food producers who operate out of their private residence are not considered facilities and therefore not subject to PCR requirements (see next page for more details).

However, farms that engage in more intensive processing, for example, a farm that grows apples and processes them into apple cider or juice for sale to a distributor is considered a “mixed-type facility”

that is required to register under the PCR.¹³ These types of farm and processing operations have more requirements than the PSR.

Retailers may require food safety standards from the growers from which they purchase. Although not legally required, many producers also seek a GAP (good agricultural practices) certification to satisfy buyer standards and requests.¹⁴ In addition to food safety certifications, a recall or traceability plan for responding to an outbreak of foodborne illness is another common request from retailers.¹⁵

Assess the Need for Licenses, Permits, and Certifications

Although no license is required to sell fresh, whole, raw fruits and vegetables, farmers who want to sell certain products and provide samples of products at a farmers market and/or process and sell value-added products will need permits. Special claims about the quality or production methods used generally require certification from an accredited source.

Farmers Market Sales

In Maryland, the applicable county Health Department is the permitting authority for growers who want to offer samples of product at a farmers market.¹⁶ Certain products, however, can be offered for retail sales at markets without a health department license: unflavored honey, whole or uncut produce, whole or uncut fruits, fresh unprocessed herbs, non-potentially hazardous baked goods, naturally acidic fruit jams and jellies, and eggs (producer must be registered with the MDA).¹⁷

Processing Permits

Whether processed food requires a permit depends upon whether it is classified as either a potentially hazardous or non-hazardous food. Hazardous or non-hazardous is determined by how perishable a food is, and how dangerous it may become once spoiled.¹⁸

A farmer who wants to sell certain non-potentially hazardous foods made and packaged in a private home kitchen may qualify as a cottage food business, for which no permit is required. The prepackaged cottage food can be sold directly to a consumer from a residence, at a farmers market, at a public event, by personal delivery, by mail delivery (within the state), or to a retail food store, including a grocery store or a food cooperative. Sales must not exceed \$25,000 annually and can only be offered within Maryland.¹⁹

Farmers who want to process certain types of food²⁰ in a home or domestic kitchen located on the farm, but exceed the cottage food law limits, can apply for an *on-farm processing license* from the Maryland Department of Health (MDH), as long as they do not have annual revenues from the sale of on-farm products exceeding \$40,000.²¹

For all other types of processing, including on-farm products exceeding \$40,000, a farmer will need a *Processing License* from the Maryland Department of Health (MDH) to meet commercial processing standards.²² If you are producing an acidified or low acid canned food, you must also register your facility and your scheduled process with the FDA, and register your facility as part of the Bioterrorism Act.²³

Label Your Specialty Crops and Value-Added Products

A grower who is direct marketing products rather than selling to a wholesaler will need to consider what products need to be labeled and the required content of the labels. “...Food labeling is generally regulated by the United States Department of Agriculture (USDA), the United States Food & Drug Administration (FDA), and the United States Federal Trade Commission (FTC).”²⁴ Food produced and sold in Maryland also needs to be labeled in accordance with state-specific laws.

Selling by Weight

If you use a scale in your operation to weigh and measure food products for sale, you need to make sure you understand and comply with Maryland's Weights and Measures Law which requires scales to be registered with the MDA²⁵ and verified annually. In Maryland, if a grower is selling a product by weight, the product's label must display the net weight; in other words, the weight of the product excluding the weight of the packaging.²⁶ Labeling a product with an approximate weight is a violation of the law. Labeling products with weight, however, does not apply to vegetables when sold by the head or bunch²⁷ or to berries and small fruits when sold in open containers with capacities of ½ pint, 1 pint, or 1 quart, dry measure.²⁸

Local

In order to label an agricultural product as local or locally grown in Maryland, the grower must include the name of the state from which the product was originally grown or raised immediately adjacent to the words "local" or "locally grown" or "regional".²⁹ This labeling regulation applies to wholesalers, retail stores, farmers markets, and restaurants. Maryland producers can also use the Maryland's Best logo, a program managed by the MDA's Marketing and Agribusiness Development section that links Maryland farmers with consumers through their online portal, promotions and advertising.³⁰

Organic

Agricultural products, including raw, fresh and processed products that are sold, labeled, or represented as organic must be produced and processed in accordance with the National Organic Program standards.³¹ If you want to grow products organically, you must follow the strict production requirements.³² To label your products organic, they will need to be certified by a USDA-accredited certifier such as the MDA.³³

Value Added or Packaged Foods

As outlined in *Processing and Selling Value-Added Food Products in Maryland* all value-added foods sold in Maryland must, at a minimum be labeled with:

1. the business name and address of the producer, packer, or distributor;
2. a quantity statement (count, fluid measurement or net weight depending on the product);
3. the common name or descriptive identity of the product;
4. the ingredients listed in descending order of prominence by weight;
5. a declaration of artificial color or flavor and chemical preservation; and
6. the food source of each major food allergen contained in the product.³⁴

Additionally, cottage foods must be labeled with a printed statement in 10-point type or larger, in a color that provides a clear contrast to the background of the label: "Made by a cottage food business that is not subject to Maryland food safety regulations" and those sold at a retail store must also have the date the product was made and the business phone number and email address.³⁵ Nutritional labeling may also be required, as described in the next section.

Nutrition Information

The federal Nutrition Labeling and Education Act (NLEA), which amended the Food Drug & Cosmetic Act (FDCA), requires packaged foods to bear nutrition labeling.³⁶ Packaged foods sold at retail must contain a nutrition label that lists the ingredients, nutrition content (e.g. calorie content, % Daily Value, etc.), and the name of the food producer.³⁷ The NLEA contains exemptions for small producers, however, if a nutrient content claim or health claim is made, then small businesses are required to include nutritional information on labels.³⁸

Allergens

Producers of foods that contain or that are derived from, a “major food allergen” are required to disclose the allergen on the label.³⁹ “Major food allergens” include (1) milk; (2) eggs; (3) fish; (4) Crustacean shellfish; (5) tree nuts; (6) wheat; (7) peanuts; or (8) soybeans. The allergen-labeling requirement applies to all packaged foods except meat, poultry, and egg products. Raw agricultural commodities (e.g., fruits and vegetables) also are not required to bear allergy labels.

Both Federal Law⁴⁰ and Maryland Law⁴¹ Prohibit Selling Misbranded Food

The Consumer Protection Act is a state law which prohibits the false and misleading advertising of products, including misbranded food.⁴² The Consumer Protection Act is enforced by the Maryland Attorney General’s Office, Division of Consumer Protection.⁴³

“Misbranded food is defined as anything with a false or misleading label, the wrong name of the food, a misleading container, or an imitation product that is not labeled as such.”⁴⁴ Outright lies are of course included as misbranding (claiming “Organic” when non-organic methods are used, for example), but sometimes omitting required information is also considered misbranding. Failing to include the name and place of business of the farmer or distributor on the label can mean it is misbranded.⁴⁵ Food will also be considered misbranded if it is processed and frozen, and it then is offered for sale in an unfrozen state, and the label does not indicate “food was previously frozen and should not be refrozen”.⁴⁶ When creating your labels, take care to verify what information you must include and what claims you can legally make before placing them on your products.

Familiarize Yourself with Agricultural Labor and Liability Laws

Farmers who direct market their products may find that they need help to keep up with market demands. They might decide to hire more employees to assist with customer service, billing, labeling, packaging, and delivery, among other duties. Before hiring workers, producers should become familiar with the various labor laws that apply to agricultural operations and consider how they apply to their own specific circumstances; several resources detailing various labor laws are available online through ALEI and UMD Extension.⁴⁷ Violations for failure to pay minimum wage and overtime pay, and mistakes when hiring noncitizen workers, are the most common mistakes employers make.

Understand Your Premises Liability Risks

Implementing direct marketing might involve inviting customers on to your property, which means liability risks associated with members of the public coming on to your land. Customers on the farm are considered invitees, who are legally owed the highest duty of care from the business to protect them from foreseeable harm by keeping the property reasonably safe.⁴⁸ Farmer operators should walk the areas customers will access to identify safety hazards or dangerous conditions, and then make plans to lessen or remedy the condition or place clear signage warning of the hazard. Fixing potential risks is necessary to limit liability, but purchasing insurance is also important to limit the impact on the business in the event of an accident.

Review Your Insurance Coverage

A farmer should never assume their current insurance coverage will cover direct farm marketing activities. There are many types of insurance and because insurance is not a “one size fits all” subject, details about the planned activities will help an agent tailor a policy that suits the business needs. Farmers should annually review their policy and discuss their policy coverage with an insurance agent.

Farm General Liability Insurance

A typical farm liability policy is designed to provide coverage for accidents that happen on the farm (e.g. injuries to the farmer, customers, visitors, and guests).⁴⁹ Many farmers also have a commercial business policy which is written specifically for the business involved and is designed to provide heightened liability protection for the specific types of activities conducted in connection with the business. To decide how much and what type of insurance is needed a grower needs to understand whether the forms of direct marketing are included in the insurance coverage. For example, if a grower has a farm liability policy that protects and covers farming activities and farming is a defined term, does farming as defined in the insurance policy include selling at the local farmers market?

Another important consideration is whether the coverage is impacted by selling another farmer's products or by the amount of direct sales made by the farmer.⁵⁰ In some cases, selling another farmer's products or selling a certain amount of products will result in the venture being considered a separate business for which the farmer will need a commercial property policy.

Commercial Policy

Commercial property insurance plans are appropriate for businesses with property and physical assets, such as equipment, and is important to consider even for farmers living on their farm. General home liability coverage will typically not cover farm business losses. The value of the business property will affect the total cost of the policy and coverage limits.

Personal assets located on business property are usually not be covered under commercial property plans. Losses from certain types of natural disasters, floods and other major weather events may not be covered by standard commercial property policies; neither are intentional and fraudulent acts by employees or injuries to workers that occur in the workplace.

Commercial auto coverage is needed to cover damages resulting from an accident of a commercial vehicle, including damage to a third party's property. Cargo coverage is required for the contents or load the vehicle is carrying. Unless specifically listed on the policy, a vehicle policy will not cover animals transported in a truck or trailer.

Product Liability Insurance

Product liability insurance applies when a consumer is injured by a product. In the direct farm marketing context, farmers purchase product liability insurance to protect themselves if their farm products cause injury or illness. In most cases, a farm liability policy would not provide coverage to someone injured or made ill because of ingesting a farm product because farm liability policies are limited to injuries on the farm premises, not injuries that occur in a consumer's home.

In Maryland, a strict liability state, if a consumer can prove that a farm's product was unsafe when it left the farm and that the unsafe product caused an injury or illness, the farmer will most likely be held liable. Given the liability exposure farmers face when they put food into the commerce stream, product liability insurance is worth strong consideration.

Workers' Compensation Insurance

Insurance to protect workers who are injured on the job may also be required. Workers' compensation insurance funds are used to pay eligible injured employees' medical and/or funeral expenses. Employees who are covered by workers' compensation benefits for on-the-job injuries waive any right to sue their employers for the resulting medical and/or funeral expenses. In Maryland, if a farmer has at least three full-time employees or an annual payroll of at least \$15,000 for full-time employees, then the farmer is subject to Maryland's Workers' Compensation Insurance law.⁵¹

The COVID-19 Pandemic May Require Growers to Adjust Their Operations

Although policies change rapidly to address the current risk levels,⁵² businesses should take care to comply with guidance from the Center for Disease Control (CDC) and the MDA and check with their local county health department regarding the current guidelines.⁵³ Generally, operators that allow customers onto farm grounds are advised to:

- Put up signage and provide information on websites and social media to explain any changes to the operation or extra precautions taken to limit exposure to COVID-19.
- Keep customers and workers from grouping too close to one another; in no case closer than 6 feet.
- Allow for customers to be spaced 6 feet or more apart when they are picking and paying for the produce. Use flags, cones, and tape, or otherwise demark areas available for picking in the fields. Allow for sufficient space when customers are waiting to pay for the produce.
- Do not let anyone work or pick who is sick or is experiencing fever, body aches, nausea, cough, sore throat, or shortness of breath or may have been exposed to individuals with these symptoms. You can use signage like, “Do not pick if you are sick!”⁵⁴
- The MDA has released best practice guidance related to training your workforce to comply with social distancing rules and enhanced disinfecting practices, keeping them healthy, handling on-farm deliveries and pick-ups, pick-your-own operation, farmers markets, and safe agricultural business practices.⁵⁵

Take Stock of Your Intellectual Property

Direct marketers who want customers to connect their products with a brand or specific name will want to protect the hard work and time it took to build up their image and reputation. Custom logos and catchphrases, etc. are protected as intellectual property under trademark laws and online content and photos generated by the farmer can be protected under copyright laws.

Register Trade Names and Trademarks for Exclusive Use

A trade name is an official name used to identify a business and distinguish it from the business of another. A trade name is a ‘Trading As’ name, which may be different from the legal name of the business as registered with the State of Maryland.⁵⁶ Using a trade name may be of particular importance to farms run as sole proprietorships. These farms cannot conduct business in any name other than the name of the owner unless a trade name is registered.

By contrast, a trademark is words and/or symbols used to identify goods and distinguish the goods from those sold by another. For example, Brandt’s Fruit Trees trademarked their Pink Lady Apple as the only truly pink apple in the industry. It is also possible to register a service mark by registering words and/or symbols to identify services that a person performs and to distinguish them from services that another person performs.

Registering a trademark guarantees exclusive use, establishes legally that your mark is not already being used, and provides government protection from any liability or infringement issues that may arise. Registering trademarks can be done on the state level⁵⁷ and the federal level.⁵⁸ While registering your trademark or trade names protects against others’ use, it is up to you to bring an action against anyone who infringes on your exclusive use. Therefore, conducting periodic searches of your name and marks is a good way to stay on notice of potential infringement.

After you've obtained your trademark, you'll have to renew it periodically (usually every 10 years) with the state and/or U.S. Patent and Trademark Office to show that you are still using it. If you fail to renew it, it will be considered abandoned, leaving it open for others to claim unless you can reapply for it.

Copyright Laws Protect Use of Original Works

Most farmers in the business of growing produce and marketing their goods would not normally need to worry about copyright protections.⁵⁹ Online marketing, however, which typically requires the use of content containing photographs and videos, requires an understanding of these protections. "A copyright protects original works of authorship fixed in any tangible medium of expression."⁶⁰ A copyright is actually a bundle rights that allow the owner of the copyright to do or authorize things related to the work such as display it, reproduce it, prepare derivative works and/or distribute copies of the work for sale or rent.⁶¹ "A work, may be but does not need to be, registered with the Copyright Office to gain protection."⁶²

If a farmer uses work (e.g. photos, images, or videos) created and owned by someone else, the farmer may unknowingly infringe on the creator's copyrights. The easiest way to use work created by another and not infringe on copyrights is to ask permission to use the materials. By asking for permission or a license to use the materials, and ensuring the author, if desired, is credited, a grower can avoid copyright infringement. A person claiming trademark and/or copyright infringement for a social media post, may file a takedown request with the social media platform (e.g., Twitter, Facebook) to have an infringing post removed.

To avoid legal issues related to posting or using content from others, some growers may want to limit the content they use to pictures from their own operation; however, posting photos of persons at your operation without their permission may also present legal risk. An easy way to reduce risk and inform customers that you may take and use photos of them (for example, a picture of a family at a u-pick operation), is to include a clear explanation of that fact in a waiver that customers are asked to sign. This information may be combined with other liability-related concerns in a standard liability waiver. Alternatively, seeking permission from the subjects of the photo at the time it is taken is another tactic. It is not safe to assume that people will want their image shared, especially children, so it is best practice to seek permission prior to posting.

II. Direct Marketing Contracts

Direct marketing is traditionally based on personal relationships between the farmer and the customer. Modern market opportunities give farmers access to more customers and businesses, which often requires a contractual agreement from the producer. Many producers operate on informal sales and verbal agreements which, though quick and simple, can create problems down the road for both parties.

Understanding the basics of contract law can help farmers better negotiate agreements that accurately describe the intended transaction and adequately protect their business. Sales with restaurants or retailers particularly can benefit from simple written contracts. Signing a written contract instead of relying on an oral agreement does not mean the buyer and seller do not trust each other. Instead, written contracts are the best way to record and recall the vital terms of agreements and avoid potential losses.⁶³ Becoming familiar with contract structures and terms will also help farmers better recognize a breach and handle enforcement measures.

Basic Contract Principles

To be enforceable, contracts must have three basic elements:

✓ **Offer:** Offering goods or services for sale subject to acceptance or rejection by the other party. An enforceable contract must identify the people (legal names of individuals over the age of 18) or entities (corporation, LLC, etc.) who are making the agreement. If a person is signing on behalf of a company, he/she must have the legal authority to do so. An offer to do something, e.g. sell produce in exchange for money, should be clearly described.

✓ **Acceptance:** Other party accepts the first offer. Simply making an offer to sell or an offer to buy (e.g. placing an order) does not form a contract. These actions only invite the other party to accept the offer. The parties involved must also show mutual assent; in other words, that they intend to make a contract and accept the outlined terms. Mutual assent can be demonstrated by signing a document or by conduct which recognizes the existence of the contract.⁶⁴ The need for acceptance of an agreement is why an invoice alone is not a contract. With invoicing, there is no clear expression of acceptance, instead there is a record of selling produce and an expectation of getting paid.

✓ **Valid Consideration:** Legal term that means an exchange of something of value. Consideration is the thing of value (typically money) that is being offered and accepted in the contract. There must be something of value exchanged to make a contract enforceable.

While oral agreements can contain the basic elements of an enforceable contract, a legal rule called the Statute of Frauds requires that all agreements for the sale of goods in the amount of \$500 or more must be in writing to be enforceable in Maryland.⁶⁵ Additionally, oral agreements are very difficult to enforce because if the parties disagree on the terms of the deal, there is no proof of what was actually agreed upon.

Evaluating Contract Terms

The terms of a contract should outline the expectations and responsibilities of the parties. The specific terms to include in your contract will depend upon what is being sold, to whom, and how. Contracts can take various forms. Two main types of contracts for the direct marketing of specialty crops are marketing and production contracts.⁶⁶

Marketing contracts “...set a price (or pricing mechanism) and an outlet for the commodity before harvest or before the commodity is ready to be marketed.”⁶⁷ “Farmers who enter into marketing contracts generally: (1) own the commodity until it is delivered to the buyer; (2) retain the right to make most management and production decisions; and (3) bear the risk of loss.”⁶⁸

Marketing contracts can take many forms. Common examples include:

- Forward sales of a growing crop, where the contract provides for later delivery and establishes a price or contains provisions for setting a price later.
- Price setting after delivery based on a formula that considers grade and yield; or
- Pre-harvest pooling arrangements, where the amount received is determined by the net pool receipts for the quantity sold.⁶⁹

Production contracts, commonly used when growing vegetables for processing, farmers do not own the crop they agree to produce. Instead, the processor owns the crop and agrees to pay the farmer for the services required to produce it. “Production contracts typically allow the owner of the product (the buyer) to make significant management and production decisions.”⁷⁰

Community Supported Agriculture (CSAs) shares are similar to production contracts made directly with the consumer. CSAs are usually pre-sales of the upcoming season's harvest. The buyers of CSA shares may pay in advance for a full season or only a week in advance (per federal food assistance guidelines), but with the understanding the investment carries the risk of bad weather or other crop hindrances. Growers who mainly market their produce through CSAs should consider creating CSA agreements explaining the risks and outlining realistic expectations for their customers.⁷¹

Farmers who instead grow their own produce for sale at farmers markets will have to abide by the rules and procedures established by the specific market organizer. The rules are typically found in a market's vendor agreement, which is a legally binding contract between the farmer and the market.⁷²

One way that growers can evaluate a direct marketing contract is to ask themselves a series of questions related to the agreement at issue. By considering the "what-ifs" of the transaction, growers can make sure the contract provides adequate protection for both parties to the agreement.

The eight questions below are meant to help growers evaluate the basics of a contract.⁷³

1. Do you understand what you are promising to do?

It is crucial to both read and understand all the terms in a contract before signing. There is no reason for contracts to contain confusing legal terms that are not easily understandable. Ask questions and talk about any terms that are unclear to you. The best way to ensure you understand what you are agreeing to is to seek legal advice before signing the contract. A knowledgeable attorney can help you negotiate and craft an equitable agreement.

a. Is there a clear description of the type and quantity of the crops to be sold and the payment terms?

The contract should contain a clear description of the specialty crops to be sold, which may include the volume, weight or count of each item. The contract should also include the price of the items, how the payment will be made, including the time period in which the buyer has to make the payment and how late payments will be handled (i.e. a late fee).

b. What is the term of the contract?

Term refers to the lifespan of the agreement. All contracts should include a start date and an end date. A renewal clause to extend the term of the contract may be included if the parties desire the contract to extend beyond the original term.

c. When and how does the contract terminate?

A contract should also contain a way for the parties to terminate it before the end of the term and how a termination can be initiated. Generally, written notice is required via email or regular mail. Decide which forms of communication work best for you and the other party and how much advance notice you require.

d. How is the product to be delivered?

The contract should indicate the anticipated delivery date, a notification period if the anticipated delivery date is no longer accurate, who will be making the delivery and who bears the risk of loss during transit.

e. What are the quality standards?

It is not uncommon for buyers of specialty crops to want to inspect crops for good quality before being obligated to make payment. To avoid conflict, parties to a direct marketing contract should choose precise parameters for quality or condition of produce that are objectively measurable, like a scoring system based on physical attributes. If a buyer is able to inspect for quality, the contract should have a clear timeframe for the buyer to both make the

inspection and reject the product and inform the grower if the quality standards are not met. The contract should also describe how the parties will handle a dispute about the quality of products.

2. What if the farmer or the buyer fail to perform?

The contract should reflect one of the fundamental “what ifs” in a sound contract-- “what if one of the parties fails to fulfill their end of the bargain?” When writing the terms, include a clear explanation for what constitutes a breach of the contract and what the parties can or should do in the event of breach.

For example, if the buyer is late paying for a product, does the buyer have a grace period in which to make a late payment? If the farmer wants to terminate the contract because of a breach, does he/she have to give written notice of the intention to terminate or are there certain breaches that allow immediate termination of the contract? The contract should also include penalties associated with early termination of an agreement, like forfeiture of payments.

Sometimes failure to perform is due to a situation that is out of the parties’ control. For example, the COVID-19 pandemic is an example of an unforeseeable circumstance that affected businesses but was beyond their control. A Force Majeure clause (a.k.a. Act of God clause) will outline the extreme circumstances that excuse performance of a contract and what the parties should do in extreme circumstances.

3. Does the contract require insurance or indemnification?

The contract may require one or both of the parties to have a set amount of insurance coverage. Direct marketing of farm products may increase liability and, contractual obligations aside, farm operations will want to make sure they have adequate insurance coverage to manage the increased risks associated with their marketing and sales methods (for more information see the “Review Your Insurance Coverage” section). When a contract requires specific insurance coverage, or the other party to be listed as beneficiary, check how proof of insurance should be provided and when.

“Indemnification, hold harmless, and defend” clauses are becoming common place in all sorts of contracts, but they should not be underestimated or considered boilerplate. Using this type of provisions shifts the burden of liability and associated financial repercussions onto the indemnifying party. For example, if a farmer selling at a farmers market agrees in a vendor agreement “to indemnify and hold the market harmless for all claims related to the vendor’s participation in the market, including pay all associated legal fees for defending claims,” the farmer will obligate himself to pay the attorneys’ fees to defend any claims (relating to his participation in the market) brought against the market as well as pay for the damages awarded to injured parties. These clauses can become impractical if the parties do not have sufficient insurance or other financial means to pay the amounts promised. For this reason, contracts seeking indemnification also often require proof of insurance that will cover the costs of any legal claims. When faced with an indemnification clause, it is best to seek legal advice about the potential impacts prior to signing the contract.

4. What if a dispute arises?

Parties to a contract can agree how they want to handle contract disputes and whether they want to require the parties to attend mediation before going to court. Mediation encourages parties to voluntarily resolve their issues without the need to go to court. The parties can also agree which state’s laws apply (where a lawsuit should be filed) if going to court is necessary, and who pays attorney’s fees. Typically, the losing party will pay for the winning party’s attorney’s fees.

The Maryland Agricultural Conflict Resolution Services is the official US Department of Agriculture (USDA)-certified agricultural mediation program for Maryland, offering confidential assistance to help

resolve agriculture related issues in a productive environment. This service is a no-cost to low-cost means of resolving disputes, especially when compared with traditional legal processes, and can assist with finding a qualified mediator familiar with agricultural practices.

5. Can the contract be assigned to another, or is it personal to you?

If the intention of the parties to the contract is that the agreement is personal to the parties and cannot be assigned to others (in other words, no subcontractors or getting someone else to fulfill the terms), that should be specified in the contract.

6. How can the contract be amended?

If, during the course of the contract, relationship circumstances change and require a change in terms, like delivery specifications or payment schedules, then signed contracts can be amended and changed by agreement. Typically, contracts will indicate how amendments can be made with language such “changes to this agreement must be made in writing and signed by both parties.”

7. Do the terms comport with Perishable Agricultural Commodities Act (PACA)⁷⁴ ?

Interstate sellers of fresh and frozen produce should consider the PACA trust when negotiating the terms of produce sales. PACA is a federal law, enforced by the U. S. Department of Agriculture (USDA) that creates a trust for sellers of produce which puts them in a priority debtor status to protect them against not being paid by a buyer.⁷⁵ In other words, if a produce buyer has received produce but not yet paid for it and has a business failure or bankruptcy, properly preserved PACA trust claims will be paid before other creditors.⁷⁶

When produce is sold directly to a buyer, according to PACA payment is generally required within 10 days after the date the buyer accepts the produce.⁷⁷ According to the PACA regulations, buyers and sellers may agree, in writing, prior to the sale to extend the time of payment, however, to preserve PACA trust rights the time for payment should not be extended more than 30 days from the date the produce was accepted.⁷⁸

Buyers and sellers of large quantities of produce are required to have a PACA license but farmer sellers are exempt from this requirement.⁷⁹ Unlicensed farmer sellers who do not receive payment must provide the buyer with a written notice of their intent to preserve trust benefits under the PACA within 30 days from the date that payment was past due or notification was received that a payment instrument was dishonored.⁸⁰ Farmer sellers can initially enforce their PACA trust rights by filing a complaint with USDA, PACA Division and further enforcement can be sought through a civil action U.S. District Court.⁸¹

8. Does the contract contain all the terms of the deal?

There is often an entirety term in contracts providing that the parties agree the contract contains the entire agreement of the parties and supersedes any previous agreements. This term also enforces the parole evidence rule which holds that oral arguments not included in the written contract cannot be enforced or used during conflict disputes.

Taking time to review the contract to ensure you completely understand what you are required to do and how disputes can be resolved not only lays the groundwork for a solid contracting relationship with the buyer, but also helps protect you from unintended costs or liability. Appendix A of this Guide features these questions in an easy-to-use checklist.

III. Online Sales & Marketing

The internet is an invaluable tool for direct marketing. Due to the COVID-19 pandemic, more specialty crop farmers than ever are using the internet for direct sales and/or support other marketing channels they use, such as a CSA. There are inherent advantages to farmers using the internet for direct marketing to reach new clients from diverse demographics. Whether through their own website or through a third-party direct sales platform, there are also associated legal considerations that farmers need to understand.

Before undertaking online sales and marketing, farmers should consider what they hope to gain and the amount of time they will be able to devote to maintaining online sales and marketing channels. Keep in mind that, although not addressed in this section, all of the rules and principles that are discussed in the labeling section also apply to online sales and marketing.

Online Sales

At a minimum, many farmers create a website to let customers know about the farm's products and how customers can get in touch with the operators (email address and phone number). Depending on the operation, farmers may include more details such as the farm's history and/or the farming methods used to grow the products. If a farm operator doesn't have the time or inclination to create and maintain a website, there are many third-party options that allow farmers to use the internet as a channel without the hassle of maintaining a website.⁸²

E-Commerce Functionality

Farm operators may be interested in adding e-commerce functionality to their website to allow for direct sales or to allow customers to pay for products online that are later picked up at a local farmers market or through a CSA or delivered to the customer. Implementing e-commerce is a time-intensive endeavor requiring research to assess e-commerce options that fit with your business model and products, and more time to set-up, transition, and perform routine maintenance.⁸³ Farmers will also want to consider how an e-commerce system will work with the farm's other existing systems (inventory management, accounting, etc.).⁸⁴

Online Sales Platforms

The National Young Farmers Coalition has put together a guide for farmers with information on direct sales software platforms, direct sales models, and software platform details.⁸⁵ When considering various direct sales online platforms, there are questions that growers may want to consider to help them decide if the particular platform is appropriate for their operation.⁸⁶

Shipping & Delivery of Farm Products

Selling farm goods online means having to consider the various methods available to deliver products to the consumer, and how to avoid any liability or local compliance issues.

Home Shipping

Not all types of specialty crops, such as fresh produce, are easily shipped. If a farm is able to ship products by mail, the farmer should consider the associated costs and safety measures. USDA's Food Safety and Inspection Service provides tips for safely sending food to customers through the mail including the best ways to package products that require cold storage.⁸⁷ With the onset of COVID-19, the delivery of farm products has become a more complicated but still vital part of direct marketing farm products.

On-farm Pick Up

Many growers have found the best way to get farm products to customers is to have customers pick up the items from the farm. This type of delivery can accompany the sale of farm products purchased previously through an online sale system, through a CSA model or purchased at the time of sale. Before undertaking this delivery system, growers will want to make sure that this type of retail use is permitted by the underlying zoning of the farm (See the Zoning Section above for more detail).⁸⁸ The grower must operate the pick-up location in keeping with the current disease prevention standards of the county health department and the MDA.⁸⁹ To minimize contact between customers while they are picking up products from the farm, the farm operator may have to make adjustments such as limiting the amount of customers permitted in the pick-up area at a given time, scheduling and staggering pick-up times, and installing a handwashing station and related signage.

Alternative Pick-up Locations

If allowing on-farm pick-up of farm products is not desirable or feasible, a grower should consider alternative pick-up locations. Some farms that utilize a CSA model can designate shared pick-up locations, such as a community meeting space. Additionally, growers that attend farmers markets may be able to process sales prior to the market day and use the farmers market as a pick-up location for customers. Farmers market vendors need to understand how having customers pick-up products at the farmers market will impact the percentage of sales due to the market.

Seeking or forming a food hub is another alternative. A food hub gathers the farm products from multiple farmers and allows customers to buy a diverse array of locally grown products in a single transaction with a centralized pick-up or delivery.⁹⁰ Growers who commingle products from various farms will no longer be eligible for agricultural exemptions from the Fair Labor Standards Act.⁹¹

Home Delivery

Home delivery is a significant undertaking for growers unaccustomed to transporting their products. Before offering home deliveries, growers should consider whether they have a delivery vehicle that can safely (ex. cold storage) transport the product, acceptable delivery range, the labor required to make the deliveries and whether the products are priced to account for the costs associated with delivery.⁹²

Delivery terms should also clearly indicate whether produce deliveries will be left unattended (e.g. on a porch or other agreed upon location) or if someone must accept delivery. Ice packs in delivery boxes to preserve cold storage is a common solution when dropping off boxes. Coolers are another solution, whether provided by the farmer (and charged to customer as part of delivery fees) or by the customer, however customers can be advised that delivery can be refused if the cooler is deemed inadequate to maintain necessary temperatures.

Sales and Use Tax Collection Depends on Location and Products

Whether you must collect sales and use taxes and the amount will depend on where you are located and what you sell. In Maryland, the sales and use tax generally does not apply to agricultural products (or items used for an agricultural purpose, which is discussed more in the next section).⁹³ Additionally, food is exempt from the state sales tax, with a few exceptions.

Operations that only sell food items that are meant for consumption off of the sales premises (e.g. farm stand, farmers market, etc.) should not collect sales tax on exempt food items. However, foods that are prepared and packaged, or meant for immediate consumption are subject to the state sales tax.⁹⁴

The sales and use tax does not apply to a sale of food stamp eligible food, as defined in 7 U.S.C. § 2012, bought with a food coupon issued in accordance with 7 U.S.C. § 2016. Food stamp eligible food items can include staple items, bakery foods, snack foods, and cold prepared foods.

Producers who travel regionally to different farmers' markets, have CSA customers in neighboring states, or sell to customers online, should make a point of looking up and applying the appropriate food tax based on where the sales take place or the product is being shipped. Generally, businesses that meet established sales or transaction thresholds must register with the target state to collect sales tax as an out-of-state dealer.⁹⁵

Businesses Need to Protect Consumers' Personal Information

If consumers enter personal information into a farm's website, such as a credit card number and security code, the U.S. Federal Trade Commission (FTC) requires that the business has a plan to safeguard that information.⁹⁶ The FTC provides business owners with guidance on how to protect consumer's personal information and comply with consumer protection requirements.⁹⁷

In Maryland, if a business collects personal information, or contracts with a company that does, pursuant to state law, it must maintain reasonable security procedures and practices.⁹⁸ A business that fails to do so and is part of a security breach, must notify affected customers of any such breach and may be subject to substantial fines.⁹⁹

If a farm is gathering personal information, it is advisable to establish a privacy policy, require consumers to agree to it when the information is collected (include an "I agree" box customers can check), and store personal information with a reputable cloud storage provider.¹⁰⁰ Tips from the FTC also include educating yourself and your staff about common hacker tricks, such as ransomware, phishing, and how to avoid them, encrypting devices and requiring passwords, and looking for Transport Layer Security (TLS) from webhosts that include software updates and email authentication.

Email Marketing

Growers who decide to use email for direct marketing need to be aware of federal and state restrictions. The CAN-SPAM Act is a federal law administered by the Federal Trade Commission (FTC), which establishes requirements for commercial messages, gives recipients the right to stop receiving your emails, and contains strict penalties for violations.¹⁰¹ In general, email senders must not use false or misleading information in the header (from, to, reply to) or the subject line, must include a physical address, and allow recipients the opportunity to unsubscribe or opt out of receiving future emails.

For more detail, employers can check out the FTC's compliance guide to help business owners ensure the emails they send are in compliance with federal law.¹⁰² In Maryland, state law also prohibits businesses from sending emails containing false or misleading information in the subject line.¹⁰³

Using Social Media

Social media platforms are easily accessible, widely used, and invaluable marketing tools for producers.¹⁰⁴ These platforms are particularly vital for communicating special events and promotions or changes in operations and hours. Despite the fast pace and relative ease of using social media to communicate with existing and potential customers, businesses must still take steps to comply with a platform's policies governing the use of services and user data.¹⁰⁵ Additionally, FTC guidelines for truth in advertising still apply to social media marketing.

Terms of Service

The Terms of Service (TOS) will outline who can use the social media platform, the platform's data and privacy policy, guidelines for posting content, and any disclaimers. Usually the TOS will be presented when you create an account, but you are responsible for staying up to date on the policies. Be sure to read the TOS or similar guidelines posted by the platform(s) you are using (Facebook, Instagram, Twitter, etc.).

The principles for avoiding trademark and copyright infringement (discussed under Branding & Intellectual Property) are just as important when managing photos, video, and music used on social media posts. The best way to avoid an accusation of illegal use is to use your own original pictures and videos. If using or re-posting another user's content, be sure to request permission (or a license) to use the content on your own page and then give credit to the author and link back to the original source.

Social media platforms are private companies that are not subject to First Amendment censorship complaints, meaning your post or page can be removed if a platform administrator determines that you violated their rules of conduct by infringing on another's trademark or copyright.¹⁰⁶ The legal ramifications for violations vary on each social platform, but primarily rely on the user indemnifying the company for violations of federal or state law and in case of a lawsuit.

Endorsements

If farm operators get others to endorse the farm or farm's products they must disclose if the endorsers have any financial (including free items in exchange for the review), employment, personal, or family relationship with a brand.¹⁰⁷ These types of endorsements are basically advertisements and thus must comply with federal and state truth in advertising laws federal and state levels by only promoting honest opinions. According to the FTC, the social media post must reflect any paid relationships by using the hashtags "ad" or "sponsored."

Contests

Contests and raffles/sweepstakes on social media platforms can help a business build brand awareness. In Maryland, most contests, sweepstakes, or other sales promotion efforts are prohibited from requiring entrants to make a purchase or pay to enter a promotion, whether the winner is chosen by chance or skill, and businesses must make certain disclosures.¹⁰⁸ Sales promotions may require a purchase or buy-in if the retail value of the prize offered is less than \$40, or 20% of the minimum purchase or \$400 (whichever is lesser).¹⁰⁹

Handling Negative Reviews

Be prepared for some negative feedback occasionally on pages that allow members of the public to post and comment on their posts. How you respond on the public forum can impact other customer's perception of the level of customer service and quality of products. Always try to be professional and never harass negative reviewers.

Quick Reference: Common Legal Issues by Direct Marketing Method¹¹⁰



Farm & Roadside Stands or Stores - The most basic and traditional way to direct market farm products to customers is by setting up a roadside stall or dedicating a space on the farm for members of the public to visit.
Common legal issues: Land use restrictions; food safety; collection of state and local sales taxes..



Farmers Markets - Signing up to sell from a stall at a farmers market is another way to gain direct access to customers who are interested in purchasing local produce. Markets are usually held once a week at the same location and require the producer to haul and set-up their own products.
Common legal issues: Reviewing vendor agreements; food safety, permits, labeling requirements; payment methods; collection of state and local sales taxes.



Pick Your Own (PYO) Operations - Most commonly used for fruits and berries, PYO operations allow customers to come onto the farm property to pick their own produce, generally by purchasing a ¼, ½, or 1 quart container to fill.
Common legal issues: Premises liability and removal of hazardous conditions; food safety; land use restrictions; payment methods; collection of state and local sales taxes..



Community Supported Agriculture (CSA) - CSAs are usually pre-sales of upcoming season's harvest. The buyers of CSA shares may pay in advance for a full season or only a week in advance (per federal food assistance guidelines), but with the understanding the investment carries the risk of bad weather or other crop hindrances.
Common legal issues: Membership agreements contracts and payment; licensing requirements; insurance and worker's compensation issues; delivery methods; online sales; consumer protections.



Direct delivery - Producers who contract with restaurants, grocery stores, other retail outlets often handle the delivery of fresh produce or value-added products to those establishments.
Common legal issues: Contracts; payment issues; food processor licensing/permitting; buyer food safety requirements (e.g. GAP); shipping & handling.

Appendix A: Questions to Ask Yourself Before You Sign a Contract

Basic Elements	Yes	No	N/A
Offer, Acceptance, and Consideration			
Value over \$500 - in writing			
Parties are over 18 years old and have authority to sign			
Mutual Assent (signed by both parties)			
Terms	Yes	No	N/A
Do you understand what you are promising to do?			
<ul style="list-style-type: none"> • Is there a clear description of the type and quantity of the crops to be sold and the payment terms? • How long will the agreement last? • When and how does the contract terminate? • How is the product to be delivered? • What are the quality standards? 			
What if the farmer or the buyer fail to perform?			
Does the contract require insurance or indemnification?			
What if a dispute arises?			
Can the contract be assigned to another, or is it personal to you?			
How can the contract be amended?			
Do the terms comport with PACA?			
Does the contract contain all the terms of the deal?			
Attorney	Yes	No	N/A
Have you called an attorney about drafting or reviewing a written contract?			

References

- ¹ The value of food sold directly from Maryland farms to consumers, retailers, institutions, and a variety of local food intermediaries (distributors and wholesalers that market and sell locally branded products), doubled from \$28 million in 2012 to \$54 million in 2017. 2017 USDA Census of Agriculture, https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Maryland/st24_1_0002_0002.pdf
- ² For an overview of how to investigate local zoning, check out the following: Sarah Everhart, *Understanding Zoning for New Farm Enterprises*, in BEGINNING FARMER SUCCESS GUIDEBOOK (2019), <https://extension.umd.edu/newfarmer/farming/beginning-farmer-success-guide-book>.
- ³ For an overview of easements on farmland, check out the following: Margaret Todd, *Overview of Farmland Preservation in Maryland*, in BEGINNING FARMER SUCCESS GUIDEBOOK (2019), <https://extension.umd.edu/newfarmer/farming/beginning-farmer-success-guide-book>.
- ⁴ 21 U.S.C. §§ 301-399.
- ⁵ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption; Extension of Compliance Dates for Subpart E, 82 Fed. Reg. 42,963 (Sept. 13, 2017) (codified at 21 C.F.R. 112), <https://www.federalregister.gov/documents/2017/09/13/2017-19434/standards-for-the-growing-harvesting-packing-and-holding-of-produce-for-human-consumption-extension>
- ⁶ See ALEI, Food Safety page, <http://umaglaw.org/about/food-safety/>; See also University of Maryland Extension, Produce Safety resources, <https://extension.umd.edu/foodsafety/food-safety-modernization-act-fsma-good-agricultural-practices-good-handling-practices>.
- ⁷ For more information, see MDA, Food Safety Modernization Act, <https://mda.maryland.gov/foodfeedquality/Pages/Food-Safety-Modernization-Act.aspx>
- ⁸ See MDA website for registration forms, <https://mda.maryland.gov/foodfeedquality/Pages/Food-Safety-Modernization-Act.aspx> and this helpful for explanation of the registration forms <https://www.youtube.com/watch?v=4Ve0d5doCgw&t=279s>.
- ⁹ University of Maryland Extension, *Produce Safety Rule (PSR)*, <https://extension.umd.edu/foodsafety/farm-fmsa-gaps/produce-safety-rule-psr>.
- ¹⁰ The Produce Safety Alliance maintains a national list of upcoming trainings, see the Grower Training Course page to find online and in-person courses, <https://producesafetyalliance.cornell.edu/training/grower-training-courses/>.
- ¹¹ To determine if you are qualified exempt and learn more, see this video *I am Qualified Exempt from the Produce Safety Rule, Now What?* <https://vimeo.com/309548944>.
- ¹² 21 C.F.R. § 112.6 (b).
- ¹³ For more information on the applicability and the PCR and its requirements, see UMD Extension, *Preventive Controls Rule Overview*, <https://extension.umd.edu/foodsafety/farm-fsma-gaps/preventive-controls-rules-pcr-overview>.
- ¹⁴ For more information on GAP certification requirements and produce safety, see <https://psla.umd.edu/extension/produce-safety>; see also, UMD Extension, *Comparison of GAP and PSR Certification Requirements*, <https://extension.umd.edu/foodsafety/farm-fsma-gaps/comparison-gap-and-psr-certification-requirements>.
- ¹⁵ When an outbreak occurs and can be traced to the source, it is usually followed by a recall of the product. A recall can result in substantial financial damage to the grower and have ripple effects throughout the industry. Having a recall plan in place lessens the confusion, delay, and financial repercussions which can stem from a recall. For more information, see Sarah Everhart and Ashley Ellixson, *A Guide to Drafting A Model Recall Plan for Maryland Produce Growers and a Model Recall Plan* (Sept. 2017).
- ¹⁶ A list of county health department offices and their contact information, as well as local extension offices, is available online at <http://extension.umd.edu/mredc> by clicking your county of interest on the MRDEC Resource Map
- ¹⁷ Ginger S. Myers, *Licenses and Regulation Updates for Farmers Marketing Value-Added Products Directly to Consumers*, Ag Marketing News Update, (University of Maryland Extension March 2013), <https://extension.umd.edu/learn/licenses-and-regulation-updates-farmers-marketing-value-added-products-directly-consumers>.
- ¹⁸ Potentially hazardous foods are those that require temperature control because the food is capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms, *Clostridium botulinum*, or *Salmonella Enteritidis*. See Maryland Dep't of Health and Human Services (DHHS), *On-Farm Home Processing Food and Definitions*, https://extension.umd.edu/sites/extension.umd.edu/files/_docs/programs/MREDC/Docs/On-Farm%20Allowable%20Foods.pdf.
- ¹⁹ Md. Code, Gen. Health, § 21-330.1; COMAR 10.15.03.27.
- ²⁰ Herb and specialty vinegars, dried products, flavored honey, non-hazardous baked goods, fruit pies with equilibrated pH of 4.6 or less, and canned acid food with an equilibrated pH of 4.6 or less. Products that require a processing license and training: acidified canned goods, potentially hazardous baked goods, fermented products, fruit butters (banana, pear, pumpkin), cut fruits and vegetables, and cured meats. See Maryland Dep't of Health and Human Services (DHHS), *On-Farm Home Processing Food and Definitions*, https://extension.umd.edu/sites/extension.umd.edu/files/_docs/programs/MREDC/Docs/On-Farm%20Allowable%20Foods.pdf.
- ²¹ Md. Code, Gen. Health, § 21-308(c) ; COMAR 10.15.04.18; see also MDH, ON-FARM HOME PROCESSING LICENSING PROCEDURE STEP-BY-STEP, https://phpa.health.maryland.gov/OEHFP/OFPCHS/Shared%20Documents/plan-review/guidelines/on-farm_Licensing_StepByStep_ltrhead.pdf
- ²² Md. Code, Gen. Health, § 21-211; COMAR 10.15.04.21.
- ²³ For more information on registering with the FDA, see, <https://www.fda.gov/food/guidance-documents-regulatory-information-topic-food-and-dietary-supplements/acidified-low-acid-canned-foods-guidance-documents-regulatory-information>
- ²⁴ *Food Labeling – An Overview*, The National Agricultural Law Center, <https://nationalaglawcenter.org/overview/food-labeling/>.

References

- ²⁵ Producers can only use “legal for trade” scales designed to meet the specifications and tolerances in state law. Device registration applications are available through the MDA Weights and Measures Department, https://mda.maryland.gov/weights_measures/Pages/weights_measures.aspx.
- ²⁶ Md. Code, Agric., § 11-308.
- ²⁷ Md. Code, Agric., § 11-304(b)(2).
- ²⁸ Md. Code, Agric., § 11-314.
- ²⁹ COMAR 15.01.09
- ³⁰ For more information on Maryland’s Best program contact: Mark S. Powell, Chief of Marketing and Agribusiness Development, mark.powell@maryland.gov, (410) 841-5775.
- ³¹ Except for operations whose gross income from organic sales totals \$5,000 or less, farm and processing operations that grow and process organic agricultural products must be certified by USDA-accredited certifying agents.
- ³² 7 C.F.R. Part 205; see also USDA AMS, *Labeling Organic Products* (Dec. 2016), <https://www.ams.usda.gov/sites/default/files/media/Labeling%20Organic%20Products.pdf>.
- ³³ The MDA is accredited by the USDA for compliance with the National Organic Program and there is funding available to assist with the costs of organic certification. For information on organic certification in Maryland, see MDA, *Certified Maryland Organic*, https://mda.maryland.gov/foodfeedquality/Pages/certified_md_organic_farms.aspx.
- ³⁴ COMAR 10.15.03.12 (A); MDA, *Processing and Selling Value-Added Food Products in Maryland* (Nov. 2019), https://mda.maryland.gov/foodfeedquality/Documents/MDA%20MDH%20-%20Processing%20and%20Selling%20Value%20Added%20Food%20Products%20in%20Maryland_11-2019.pdf.
- ³⁵ COMAR 10.15.03.27(C)(1)(c).
- ³⁶ See FDA, *Guidance for Industry: Food Labeling Guide* (Jan. 2013), <https://www.fda.gov/media/81606/download>.
- ³⁷ 21 U.S.C. § 343q.
- ³⁸ Retailers with annual gross sales of not more than \$500,000 or annual gross food sales to consumers of not more than \$50,000 (21 C.F.R. § 101.9(j)(1)). A food producer who employs an average of less than 100 full-time equivalent employees and sells fewer than 100,000 units of the particular product in a one-year period (21 C.F.R. § 101.9(j)(18)(ii)); see also, 21 C.F.R. § 101 and 9 C.F.R. § 317.
- ³⁹ Federal Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 343(w)(1).
- ⁴⁰ 21 U.S.C. Ch. 9 et seq.
- ⁴¹ Md. Code, Gen. Health, § 21-210.
- ⁴² Md. Code, Com. Law, § 13-301, et. seq.
- ⁴³ Md. Code, Com. Law, § 13-201.
- ⁴⁴ A. Bryan Endres and Rachel Armstrong, *Ohio Direct Farm Business: A Legal Guide to Farm Marketing*, 57 (Univ. of IL 2013), <http://nationalaglawcenter.org/wp-content/uploads/assets/articles/OHdirectfarm.pdf>.
- ⁴⁵ Md. Code, Gen. Health, § 21-210 (b)(3).
- ⁴⁶ Md. Code, Gen. Health, § 21-210 (b)(11).
- ⁴⁷ Analyzing labor laws in Maryland and in many other states is challenging because federal, state, and county laws need to be considered. The Agriculture Law Education Initiative has several publications detailing various federal and state labor laws that apply to farmers, <http://umaglaw.org/publications-library/farm-labor/>; see also Margaret Todd, *Managing Farm Human Resources and Hiring Process Basics*, in BEGINNING FARMER SUCCESS GUIDEBOOK (2019), <https://extension.umd.edu/newfarmer/farming/beginning-farmer-success-guide-book>.
- ⁴⁸ For more detailed information on premises liability and a property owner’s duty of care, see Paul Goeringer, *Understanding Agricultural Liability: Premise’s Liability*, UME FS-1001 (December 2015), <http://umaglaw.org/publications-library/>.
- ⁴⁹ Neil D. Hamilton, *The Legal Guide for Direct Farm Marketing*, 141, Drake University Agricultural Law Center (June 1999).
- ⁵⁰ *Id.* at 144.
- ⁵¹ Md. Code Ann., Lab. & Empl. §9-101; For a more detailed discussion of the law see Sarah Everhart, *When is Workers’ Compensation Coverage Required for Agricultural Workers?*, at <http://agrisk.umd.edu/blog/when-is-workers-compensation-coverage-required-for-agricultural-workers?rq=workers%20compensation>.
- ⁵² Maryland Department of Health (MDH), *Coronavirus 2019 (COVID-19) Outbreak*, <https://coronavirus.maryland.gov/>.
- ⁵³ MDH, *Local Health Departments*, <https://health.maryland.gov/Pages/departments.ASPX>.
- ⁵⁴ MDA, *Maryland Pick-Your-Own Operations During COVID-19 State of Emergency*,
- ⁵⁵ ALEI has created a resource page containing articles explaining changing federal and state policies to address the pandemic, as well as links to MDA guidance, <http://umaglaw.org/legal-resources/covid-19-resources/>.
- ⁵⁶ To register a trade name with the Maryland State Department of Assessments and Taxation a business owner can go online to the Maryland Business Express portal (egov.maryland.gov/businessexpress).
- ⁵⁷ To register a trademark with the State of Maryland, a business owner can file with the Secretary of State, see <https://sos.maryland.gov/Pages/Trademarks/Trademarks.aspx>.
- ⁵⁸ If goods or services are used in interstate commerce, which takes place across state lines, a trademark can be registered with the U.S. Patent & Trademark Office (USPTO), <https://www.uspto.gov/trademarks-application-process/filing-online>.
- ⁵⁹ Farmers who create and publish print content, like newsletters, also benefit from the copyright protections discussed.
- ⁶⁰ Endres and Armstrong, *supra* note 44, at 66.
- ⁶¹ 17 U.S. Code § 106.
- ⁶² Endres and Armstrong, *supra* note 44, at 67.

References

- ⁶³ Jill Krueger, *Before you Sign on the Dotted Line...Questions for Farmers to Ask Before Entering into a Direct Marketing Agreement* (Farmer's Legal Action Group, Inc. 2005), <http://www.flaginc.org/wp-content/uploads/2013/03/DirectMarketingAgreement2005.pdf>.
- ⁶⁴ Md. Code, Com. Law § 2-204.
- ⁶⁵ Md. Code, Com. Law §2-20(1).
- ⁶⁶ A Model Basic Sales Agreement is provided in Rachel Armstrong, *Writing a Basic Sales Agreement for the Direct Market Farm* (Farm Commons 2013), www.FarmCommons.org.
- ⁶⁷ USDA Economic Research Service, *Farmers' Use of Marketing and Production Contracts* /AER-747, p. 3, https://www.ers.usda.gov/webdocs/publications/40764/18614_aer747a_1_.pdf?v=41063.
- ⁶⁸ Amanda N. Heyman, *Farmers' Guide to Organic Contracts*, 1-6, (Farmer's Legal Action Group, Inc. Aug. 2012), <http://www.flaginc.org/wp-content/uploads/2013/03/FGOC2012.pdf>.
- ⁶⁹ USDA, *supra* note 67.
- ⁷⁰ Heyman, *supra* note 68.
- ⁷¹ Community Supported Agriculture Agreement examples and resources are available online at the Agriculture Law Education Initiative website (www.umaglaw.org).
- ⁷² For an example of a Vendor Agreement and more details on specific terms, see Sarah Everhart, *Farmer's Market Vendor Agreement Legal Guide* (2019), <http://umaglaw.org/farmers-market-vendor-agreement/>.
- ⁷³ The contents of the checklist and the information provided below is adapted from various resources that give more in-depth discussion on forming contract terms. See Neil D. Hamilton, *The Legal Guide for Direct Farm Marketing*, Drake University Agricultural Law Center (June 1999); see also, Rachel Armstrong, *Writing a Basic Sales Agreement for the Direct Market Farm* (Farm Commons 2013), www.FarmCommons.org.
- ⁷⁴ Perishable Agricultural Commodities Act, 7 U.S.C. § 449a-t.
- ⁷⁵ USDA, *Preserving PACA Trust Rights*, <https://www.ams.usda.gov/rules-regulations/paca/paca-trust>.
- ⁷⁶ *Id.*
- ⁷⁷ 7 C.F.R. § 46.2(aa).
- ⁷⁸ 7 C.F.R. § 46.46(e)(2). See also, Farmers Legal Action Group, Inc., *Understanding Farmers' Rights to be Paid for Fruit and Vegetable Crops*, September 29, 2007, <http://www.flaginc.org/wp-content/uploads/2013/03/PACAart12007.pdf>.
- ⁷⁹ Although farmers are exempt from the license requirement they may want to consider being licensed. See the following for more information, <https://www.wga.com/toliveri/blog/why-should-growers-consider-investing-in-a-paca-license>.
- ⁸⁰ USDA, *PACA Common Questions & Answers*, <https://www.ams.usda.gov/rules-regulations/paca/common-questions>. See also, the specific information that must be included in the written notice <https://www.ams.usda.gov/rules-regulations/paca/paca-trust>.
- ⁸¹ *Id.*
- ⁸² For information on direct sales platforms and web-based options, see National Young Farmers Coalition (NYFC), *Farmer's Guide to Direct Sales Software Platforms*, <https://www.youngfarmers.org/wp-content/uploads/2020/04/Farmers-Guide-to-Direct-Sales-Software-Platforms.pdf>.
- ⁸³ Sarah Cornelisse, E-Commerce for Ag Business: Advantages and Challenges, PENNSTATE EXTENSION Blog (May 18, 2020), <https://extension.psu.edu/e-commerce-for-ag-business-advantages-and-challenges>.
- ⁸⁴ *Id.*; see also Sarah Cornelisse and Brian Moyer, *Management Considerations for Implementing E-Commerce in a Food or Farm Business*, PENNSTATE EXTENSION Blog (April 10, 2020), <https://extension.psu.edu/management-considerations-for-implementing-e-commerce-in-a-food-or-farm-business>.
- ⁸⁵ NYFC, *supra* note 82.
- ⁸⁶ Oregon Tilth, *Questions for Considering Online Sales Platforms for Farms Direct Marketing* (Mar. 24, 2020), <https://tilth.org/education/resources/questions-for-considering-online-sales-platforms-for-farms-direct-marketing/>.
- ⁸⁷ USDA Food Safety and Inspection Service (FSIS), *Mail Order Food Safety* (last modified Mar. 30, 2015), https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/mail-order-food-safety/CT_Index.
- ⁸⁸ Everhart, *supra* note 2.
- ⁸⁹ The University of Maryland Extension Food Safety page has links to help you find the contact information for local health departments and MDA's COVID-19 standards, <https://extension.umd.edu/foodsafety>.
- ⁹⁰ James Matson, et al., *Running a Food Hub: Lessons Learned from the Field*, SR 77 Vol. 1 (USDA April 2015), https://www.rd.usda.gov/files/SR_77_Running_A_Food_Hub_Vol_1.pdf; other volumes in the Service Report 77 - Running a Food Hub series are <https://www.rd.usda.gov/taxonomy/term/319>.
- ⁹¹ Margaret Todd, *Agricultural Labor Laws*, in BEGINNING FARMER SUCCESS GUIDEBOOK (2019), <https://extension.umd.edu/newfarmer/farming/beginning-farmer-success-guide-book>.
- ⁹² NYFC, *supra* note 82.
- ⁹³ Md. Code, Tax-General, § 11-201. Note that items typically sold by nurseries or horticulturists, like flowers, sod, decorative trees and shrubs are not exempt from sales and use tax.
- ⁹⁴ At time of publication, Maryland state sales and use tax was 6%. Sales of alcoholic beverages are taxed at 9%. This applies to sales of packaged alcoholic beverages as well as beverages served for immediate use. Examples of food items subject to food sales tax include heated food, sandwiches, salads, soups, dessert, ice cream and frozen yogurt sold in containers less than one pint. Examples of food items exempt from Maryland sales tax include fruits, vegetables, and grains, eggs, beverages, fish, crab, meat, and poultry, and ice cream and frozen desserts in containers of more than one pint. For more information, see, Maryland State Comptroller, Sales and Use Tax, <https://www.marylandtaxes.gov/business/sales-use/index.php>.

References

⁹⁵ South Dakota v. *Wayfair*, 138 S. Ct. 2080 (2018), the United States Supreme Court ruled that out-of-state sellers, including online retailers, are required to collect sales taxes for the states into which they deliver if their business meets certain economic thresholds within the state, regardless of whether the retailer has an office or store or any sort of physical presence in the state.

⁹⁶ Endres and Armstrong, *supra* note 47, at 62; see also Section 5(a) of the Federal Trade Commission Act, 15 U.S.C § 45(a).

⁹⁷ For more information on developing a privacy policy and protecting consumers' data, see Federal Trade Commission (FTC), *Consumer Privacy*, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security/consumer-privacy>; see also FTC, *Cybersecurity for Small Businesses*, <https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity>

⁹⁸ Md. Code, Com. Law § 14-3501 *et seq.*

⁹⁹ *Id.*

¹⁰⁰ For more information, see Sarah Cornelisse and Nicole Cook, *Keeping Your Social Media Marketing Legal*, PENN STATE EXTENSION Blog (Aug. 30, 2019), <https://extension.psu.edu/keep-your-social-media-marketing-legal>.

¹⁰¹ 15 USC 7701, *et. seq.*

¹⁰² Federal Trade Commission (FTC), *CAN-SPAM Act: A Compliance Guide for Business*, <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business>.

¹⁰³ Md. Code, Com. Law § 14-3002.

¹⁰⁴ For information on how to develop a social media for marketing strategy, see Sarah Cornelisse, *A Guide to Developing a Social Media Strategy for Ag Entrepreneurs*, The Pennsylvania State University (2020), <https://extension.psu.edu/a-guide-to-developing-a-social-media-strategy-for-ag-entrepreneurs>; see also Sarah Cornelisse, *Social Media Best Practices in Times of Crisis*, Penn State Extension (March 24, 2020), <https://extension.psu.edu/social-media-best-practices-in-times-of-crisis>.

¹⁰⁵ Cornelisse and Cook, *supra* note 100.

¹⁰⁶ Cornelisse and Cook, *supra* note 100.

¹⁰⁷ FTC, *Disclosures 101 for Social Media Influencers*, <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers>.

¹⁰⁸ Md. Code, Com. Law § 13-305(g).

¹⁰⁹ Md. Code, Com. Law § 13-305(c).

¹¹⁰ List adapted from Legal Aid of Nebraska, Farm Law Project, *Legal Considerations in Direct Farm Marketing: A Summary*, 2018, <https://www.legalaidofnebraska.org/wp-content/uploads/2018/12/Direct-Farm-Marketing-Legal-Issues-Brochure.pdf>.

Authored By:



Sarah Everhart
*Senior Legal Specialist, ALEI,
Francis King Carey School of Law
University of Maryland*
severhart@law.umaryland.edu



Margaret Todd
*Research Assistant, ALEI,
Francis King Carey School of Law
University of Maryland*
motodd@law.umaryland.edu

Research and writing support provided by the 2019 Russell Brinsfield Interns, Michael Marinelli and Victoria Long.

The Agriculture Law Education Initiative (ALEI) is a collaboration of the University of Maryland Francis King Carey School of Law at the University of Maryland, Baltimore (UMB); the College of Agriculture & Natural Resources at the University of Maryland, College Park (UMCP); and the School of Agricultural and Natural Sciences at the University of Maryland Eastern Shore (UMES). ALEI is an initiative of the University of Maryland: MPowering the State, a strategic alliance between UMB and UMCP created in 2012 to significantly expand research, business development, and student opportunities at both universities.

University of Maryland Francis King Carey School of Law

500 West Baltimore St.
Baltimore, MD 2120
(410) 706- 7377

www.umaglaw.org
Twitter: @MDAgLaw
Facebook: facebook.com/MdAgLaw

This publication, Nov. 2020 (EM-9), is a series of publications of the University of Maryland Extension. The information presented has met UME peer review standards, including internal and external technical review. For help accessing this or any UME publication contact: itaccessibility@umd.edu

For more information on this and other topics, visit the University of Maryland Extension website at extension.umd.edu University programs, activities, and facilities are available to all without regard to race, color, sex, gender identity or expression, sexual orientation, marital status, age, national origin, political affiliation, physical or mental disability, religion, protected veteran status, genetic information, personal appearance, or any other legally protected class.