



## Maryland Farm Internships and Labor Laws



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**M**any farms across Maryland use interns to lighten the overall farm workload and help young people gain practical farming knowledge. Although interns can be a welcome addition to a farm’s workforce, farm employers need to be aware of how to properly compensate interns and the legal consequences of adding them to the payroll. Can interns work for free or be provided a small stipend? Must they be paid minimum wage? What about an unpaid internship if meals and housing are provided? Farmers who hire and/or house interns may need to make changes in order to comply with Federal and State laws that protect workers. Farmers should carefully consider applicable laws before hiring interns and consult an insurance agent and attorney to reduce exposure to liability. There have been

recent nationwide legal crackdowns on the compensation of interns, and this is an area of the law which can be costly to ignore or misunderstand.

### **Intern and Apprenticeship Programs Must Comply With Federal and State Law**

The U.S. Department of Labor (DOL) has specific definitions of both internships and apprenticeships which are not interchangeable. An apprenticeship program must be created and managed in compliance with State and Federal law. The Maryland Department of Labor and Licensing (DLLR) administers the State apprenticeship program and requires registration of apprenticeship programs. Although rarely implemented, certain agricultural occupations such as farm



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equipment mechanics, farm advisors, farm workers, and horse trainers qualify as occupations that may have apprenticeship programs. Apprenticeships combine paid, on-the-job training and related technical instruction. Farm employers interested in having apprentices should contact the DLLR.

As for the classification of interns, the factors of the “primary beneficiary test” below are used to determine if the intern is exempt from minimum wage.<sup>1</sup>

1. The employer and the intern understand that the intern is not entitled to wages for the work performed.
2. The training provided is similar to that which is given in an educational environment, including clinical and hands-on training.
3. The intern does not displace paid employees.
4. The duration of the internship is limited to the time the intern receives beneficial learning.
5. The work is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
6. The work accommodates the intern's academic commitments and academic calendar.
7. The intern is not necessarily entitled to a job at the conclusion of the internship.

The “primary beneficiary test” is inherently flexible. Whether an intern is an employee under the FLSA necessarily depends on the unique circumstances of each case. The factors are weighed all together to examine the “economic reality” of the intern-employer relationship and no single factor can be used to conclude that the intern is not an employee entitled to the minimum wage. In cases where a worker may not qualify as an intern, Maryland law allows students in DLLR approved work-study programs to be paid less than the minimum wage.<sup>2</sup> A farm employer should consult legal counsel or the DLLR before deciding to pay an intern anything less than the minimum wage.

### **The Federal Fair Labor Standards Act (FLSA) and the Maryland Wage and Hour Law Dictate the Amount Farm Employers Must Pay Maryland Farm Workers**

Although the Fair Labor Standards Act (FLSA) establishes the Federal minimum wage, some states, including Maryland, require a higher minimum wage. Unless an exemption applies, the higher State minimum wage is the wage that must be paid to all employees. State minimum wage rates typically increase over time and employers should check annually to ensure they are paying the correct wage.<sup>3</sup> Workers cannot waive their right to be paid minimum wage. It is not a viable defense for an agricultural employer to claim an intern knew and accepted an unpaid or under-paid internship. In addition, farm employers at for-profit farms should use caution in allowing any person to work on a volunteer basis. The DOL, following judicial guidance, has found employees may not serve as unpaid or underpaid volunteers in for-profit private sector businesses.

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There is an important Federal and State exemption for paying minimum wage to farm workers called the “500 Man-Day Exemption.”<sup>4</sup> This exemption allows small farms to pay interns and other employees less than minimum wage if the agricultural employer did not use more than 500 man-days of labor in any calendar quarter of the previous year.<sup>5</sup> A “man-day” is defined as any day

an employee performs agricultural work for at least one hour.<sup>6</sup> To qualify for the exemption, the work done by the farm employees must meet the definition of agricultural work outlined in the law.

The work included within the definition is broken down into primary and secondary agriculture. Primary agricultural work is related to planting, maintaining, and harvesting crops, as well as raising animals.<sup>7</sup> Secondary agricultural work includes practices, whether or not they are farming practices, performed either by a farmer (including farm employees) or on a farm as an incident to or in conjunction with such farming operations. This includes preparation for market, delivery to storage, delivery to market, or delivery to carriers for transportation to market.<sup>8</sup> If an employee in the same workweek performs work that is exempt (fits the definition of agricultural work described above) and work that is non-exempt, the employee is not exempt for the entire week and the minimum wage requirements of the law apply.<sup>9</sup>

Both Federal and State law also exclude the following types of agricultural employees from the minimum wage requirement:

- Agricultural employees who are an immediate family member of their employer,<sup>10</sup>
- Those principally engaged on the range in the production of livestock,<sup>11</sup>
- Hand harvest laborers who commute daily from their permanent residence, are paid on a piece rate basis in traditionally piece-rated occupations, and were engaged in agriculture fewer than 13 weeks during the preceding calendar year,<sup>12</sup>
- Minors, under the age of 17, who are hand harvesters commuting daily from their permanent residence, paid on a piece-rate basis in traditionally piece-rated occupations, employed on the same farm as their parent, and paid the same rate as those at least 17.<sup>13</sup>
- Maryland excludes employees engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables or horticultural commodities, poultry, or seafood from the State minimum wage requirements.<sup>14</sup>

If the employee is under 18 years of age, the State of Maryland permits an employer to pay the employee a wage equal to 85% of the State minimum wage.<sup>15</sup>

As for overtime compensation, Maryland exempts farm employers from paying overtime wages to interns and other farm employees if any of the exemptions from the minimum wage requirements described above apply and all other farm workers shall receive overtime pay for all hours over 60 hours a week.<sup>16</sup>

### **When Can an Employer Deduct Room and Board Expenses From Pay?**

The reasonable cost of room and board may be included as part of an employee's wage if the facilities are regularly available to all similarly situated employees, the acceptance of the facilities is voluntary on the part of the employee, and the employee actually receives the benefits.<sup>17</sup> An employer may not deduct an amount from an employee's compensation for room and board which exceeds the actual cost to the employer.<sup>18</sup> This means that an employer cannot make a profit from offering room and board.<sup>19</sup> Nor may an employer include the cost of room or board primarily for their own benefit or convenience.<sup>20</sup>

Employers are advised to get a signed agreement from employees acknowledging that the employee has voluntarily accepted room and board benefits and the cost of the benefits will be deducted from the employee's compensation. Agricultural employers should keep very careful records of the cost of providing room and board to employees and consult with legal counsel or the DLLR before making any income deductions for these benefits. Providing detailed pay stubs to employees that reflect the cost of these benefits is also recommended to protect employers. Before an agricultural employer decides to build or convert an existing building into employee housing, he or she should consult the local zoning ordinance to make sure the housing is legally permitted in the desired location. Employee housing must meet all local and State housing and/or health code standards prior to occupation.

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### Interns Performing Seasonal Agricultural Work Are Covered by the Migrant and Seasonal Agricultural Worker Protection Act

Many farmers may be surprised to learn that interns performing seasonal agricultural work fall under the protections of the Migrant and Seasonal Worker Agricultural Protection Act (MSPA), which protects migrant and seasonal agricultural workers. If seasonal interns are required to be away from their permanent residence while performing the seasonal agricultural work, they will be considered migrant workers; if not, they will be considered seasonal workers. The MSPA has two main exemptions: the 500 Man-Day Exemption described above and the family business exemption. The family business exemption exempts farm labor contractors working for a farm owned and operated by themselves or an immediate family member. Further, migrant and seasonal workers who are immediate family members of the farm employer are not covered under the MSPA.

If an employer is not exempt, the MSPA requires an agricultural employer to do a number of things, including but not limited to, providing employees with disclosures prior to the initiation of employment regarding the place of employment, wages to be paid, types of work to be performed, the period of employment, transportation, housing, and workers compensation benefits.<sup>21</sup> Agricultural employers must also provide employees with detailed pay stubs showing their hours worked, including earnings and deductions, and retain copies of payroll records for a period of 3 years. Employers must also post worksites with a poster detailing the



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rights of workers pursuant to the MSPA.<sup>22</sup> Employers should consult legal counsel to make sure they are complying with the MSPA.

### Farm Employers Should Check Applicability of Workers' Compensation and Unemployment Insurance

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.<sup>23</sup> The cost of lodging, meals and other benefits provided to employees is included in the \$15,000 cap. An employer who fails to comply with Maryland's Workers' Compensation Insurance law may be subject to a penalty of up to \$10,000.<sup>24</sup> Employers should check with their insurance agents and make sure that interns are covered either through workers' compensation or through the farm's liability policy. Depending on the nature of the work performed, interns can "fall through the cracks" of insurance and it may be worth it to purchase workers' compensation coverage even if not required by law. Further, if a farmer pays wages of at least \$20,000 during any calendar quarter of the current or preceding year to employees for agricultural work, or employs at least 10 individuals in a period of 20 weeks in the current or preceding calendar year, the employer must also participate in the Maryland Unemployment Insurance program.<sup>25</sup> ■

<sup>1</sup> U.S. DEPARTMENT OF LABOR, WAGES AND HOUR DIVISION, *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (Jan. 2018).

<sup>2</sup> Md. Code Regs. 09.12.41.21.B.

<sup>3</sup> For the current state minimum wage see Md. Code Ann., Lab. & Empl., §3-413(c); Localities may also set a higher minimum wage, such as Prince George's and Montgomery counties, which are established in the county or municipal codes.

<sup>4</sup> 29 U.S.C. § 213(a)(6)(A).

<sup>5</sup> Md. Code Ann., Lab. & Empl. §3-403(12), 29 U.S.C. § 203(u).

<sup>6</sup> 29 U.S.C. §203(u).

<sup>7</sup> 29 C.F.R. §780.105(b).

<sup>8</sup> 29 C.F.R. §780.105(c).

<sup>9</sup> 29 C.F.R. §780.11.

<sup>10</sup> Md. Code Ann., Lab. & Empl. §3-403(6); 29 U.S.C. §213(a)(6)(B).

<sup>11</sup> Md. Code Ann., Lab. & Empl. §3-403(13); 29 U.S.C. §213(a)(6)(E).

<sup>12</sup> Md. Code Ann., Lab. & Empl. §3-403(14); 29 U.S.C. §213(a)(6)(C).

<sup>13</sup> Md. Code Ann., Lab. & Empl. §3-403(14); 29 U.S.C. §213(a)(6)(D).

<sup>14</sup> Md. Code Ann., Lab. & Empl. §3-403(9).

<sup>15</sup> Md. Code Ann., Lab. & Empl. §3-413(d).

<sup>16</sup> Md. Code Ann., Lab. & Empl. §3-420(c).

<sup>17</sup> Md. Code Regs. 09.12.41.18.A.

<sup>18</sup> Md. Code Regs. 09.12.41.18.B.1.

<sup>19</sup> Md. Code Regs. 09.12.41.18.B.2.

<sup>20</sup> Md. Code Regs. 09.12.41.18.F.

<sup>21</sup> 29 U.S.C §1821 (a); 29 U.S.C. §1831(a)(1).

<sup>22</sup> 29 U.S.C §1821 (d); 29 U.S.C. §1831(c).

<sup>23</sup> Md. Code Ann., Lab. & Empl. §9-210.

<sup>24</sup> Md. Code Ann., Lab & Empl. §9-407(b)(2).

<sup>25</sup> Md. Code Ann., Lab. & Empl. §8-207(c).

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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.

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