


THE MIGRANT AND SEASONAL
AGRICULTURAL WORKER PROTECTION ACT:

What You Need to Know Before You Plant Seedlings

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The Phone Call

Your phone rings. You answer it. On the line you find an investigator with the United States Department of Labor (DOL) who wants to ask you a few questions about the Mexican or other agricultural labor force that recently planted the seedlings on your tree farm. It seems the DOL is enforcing the revised (March 12, 1997) Migrant and Seasonal Agricultural Worker Protection Act regulations in its investigation of migrant labor in Mississippi.¹ It all sounds Greek to you but, who knows, this question and answer thing may be as much fun as a game show.

When you finish the call you realize it would have been helpful to know the rules of the game before you played. Civil and criminal fines and sanctions don't sound like the prize you hoped would be behind door number three. You wish you would have found out some information about agricultural labor laws before you hired someone to plant your seedlings.

What is MSPA?

The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801, *et. seq.* MSPA) was adopted in 1983 exclusively to regulate the employee/employer relationship in agriculture.² The purpose of the act was to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers, to require registration of farm labor

¹ The Secretary of the DOL has the authority to investigate complaints, enter onto property, inspect and copy records, and question persons as may be appropriate. This includes subpoenaing documents. Any person who unlawfully resists, opposes, impedes, intimidates, or interferes with any DOL official in an investigation commits a violation of MSPA and is subject to civil and criminal penalties. *29 U.S.C. § 1862.*

² MSPA followed the United States Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. § 2041 (repealed 1983), which was designed to regulate independent middlemen who supplied laborers to agricultural concerns across the nation. FLCRA was adopted as a response to the problems of exploitation of migrant agricultural workers by certain irresponsible contractors with that act being intended to regulate the middlemen who were in a position to exploit both operators and workers. Years after its adoption, Congress concluded that the act had failed to achieve its goals and that it was subject to overzealous enforcement by the Department of Labor. Congress set about resolving this problem by adopting a new act.

contractors, and to assure necessary protections for the migrant³ and seasonal⁴ agricultural workers, agricultural associations, and agricultural employers. Although there was once significant debate as to whether MSPA applied to forestry activities, there is no longer any dispute as to its applicability to forestry.⁵

To Whom Does the Act Apply?

There are three (3) principal classes of regulated persons under MSPA: agricultural associations, agricultural employers, and farm labor contractors. The statutory definitions set forth in 29 U.S.C. §1802 are as follows:

Agricultural Association means any non-profit or cooperative association of farmers, growers or ranchers incorporated or qualified under applicable state law which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

Agricultural Employer means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

Farm Labor Contractor means any person other than the agricultural employer, an agricultural association, or an employee of an agricultural employer, or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

³ Generally, a migrant agricultural worker is an individual in agricultural employment of a seasonal or temporary nature who is required to be absent overnight from his permanent place of residence. 29 U.S.C. § 1802 (8) (A).

⁴ Generally, a seasonal agricultural worker is an individual in agricultural employment of a seasonal or other temporary nature who is not required to be absent overnight from his permanent place of residence. 29 U.S.C. § 1802 (10) (A).

⁵ Those in the forest industry who believed they had escaped liability under the act were subject to a rude awakening when the Ninth Circuit Court of Appeals held that those who raised trees as a crop for harvest are engaged in agricultural employment for the purposes of MSPA and are subject to the terms and provisions of that act. *Bresgal v. Brock*, 833 F.2d 763 (9th Cir. 1987), modified 843 F.2d 1163 (9th Cir. 1988). Shortly thereafter, the Fifth Circuit Court of Appeals (which has jurisdiction over Mississippi) found that Congress intended that agricultural employment includes forestry operations even when not performed on a traditional farm, and that such operations be subject to the act. *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir. 1988).

Even though most owners of small tracts of forest land will not directly hire or employ migrant or seasonal workers, DOL takes the position that the engagement of a "farm labor contractor" makes the forest landowners an "agricultural employer" under MSPA. Agricultural employers have limited obligations under MSPA. In order to avoid significant obligations and primary liability under the act, owners of tree farms and forest lands will need to establish two (2) points:

1. that the owner is not an employer or a farm labor contractor (as defined by the act); and,
2. that the owner is not a joint employer of migrant and seasonal workers.

Who is a Joint Employer?

One concept of MSPA that has been the frequent subject of litigation is the joint Employer Doctrine. If a tree farmer or forest owner is found to be a joint employer of the migrant or seasonal worker, the joint employer is responsible for full compliance with the act. Current enforcement focuses upon the pay requirements of the act referred to by the acronym WHAT (wages, housing, and transportation). The courts will look to the economic realities of the relationship between the owner and the worker. The relationship between the owner and the contractor may also be judicially reviewed in determining whether the owner is a joint employer of the worker. Under new DOL regulations you can have an independent contractor relationship with your farm labor contractor but still be held to be a joint employer of the workers.

These regulations were recently revised March 12, 1997 over the protest of The American Pulpwood Association (APA) and the American Forest & Paper Association (AF&PA).⁶ 62 Fed. Reg. No. 48, Page 11734 (March 12, 1997). Under the new regulations, the Department of Labor utilizes various factors and guidelines in determining whether an independent contractor or joint employer relationship exists. These factors are not used by the DOL as a "checklist."

Included among the factors to be considered in determining whether or not an employment relationship exists are:

1. Whether you have the power, either alone, directly, or indirectly through others to direct, control, or supervise the worker(s) or the

⁶ The APA and AF&PA criticized the proposed regulations during their comment period. At least one suggestion was incorporated by DOL in the final rule. Some criticisms included that the new regulations fail to afford primacy to the common law test of "right to control" in determining joint employment and improperly included the provision of field sanitation facilities. The DOL rejected the APA and AF&PA positions on these two issues.

- work performed (taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);
2. whether you have the power either alone or with others, directly or indirectly, to hire, fire, or modify the employment conditions, or determine pay rates or methods of wage payment for worker(s);
 3. The degree of permanency and duration of the relationship of the parties in the context of the agricultural activity at issue;
 4. The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;
 5. Whether the activities performed by the worker(s) are an integral part of your overall business operation;
 6. Whether the work is performed on your premises, rather than on premises owned or controlled by another business entity; and,
 7. Whether you undertake responsibilities commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or material required for the job.

Obligations Upon Tree Farmers

Even if the owner of a tree farm establishes he is not a farm labor contractor, an employer, or a joint employer, he still has obligations under MSPA. The most important obligation should be to verify that the independent contractor performing services for the owner is registered with the Department of Labor for each farm labor contracting activity performed by the contractor and to maintain employment and payment records for three years. For example, a sample registration card is attached that reflects the specific activities for which that contractor is authorized. For current enforcement purposes, the DOL refers to these activities by the acronym "FRESH T" (furnishing, recruiting, employing, and soliciting, housing and transportation).

How to Verify Registration

29 U.S.C. §1811 requires all persons engaged in farm labor contracting activities to have a certificate of registration from the Secretary of the Department of Labor specifying the farm labor contracting activities for which the person is authorized to perform. A farm labor contractor is required to carry the certificate of registration at all times and exhibit it upon request.⁷

⁷ The certificate of registration cannot be transferred or assigned. It expires twelve (12) months from the date of issuance unless temporarily extended or renewed for an additional twelve (12) months or two (2) year period [29 U.S.C §1814].

A prudent operator of a tree farm or other forest owner should not rely solely upon the existence of a purported certificate of registration. Although reliance on the certificate may be sufficient under the act, it would be wise to confirm the registration with the Department of Labor due to the act placing an affirmative duty on persons engaging farm labor contractors to ascertain that the contractor possesses a current, valid, and unrevoked certificate covering each activity for which the contractor is engaged. You can verify certificates of farm labor contractors in the Southeast Region (including Mississippi and seven other states) by calling the Farm Labor Contractor Registration Office in Tallahassee, Florida at (904) 488-3131.⁸ In addition, you can find a complete list of ineligible farm labor contractors on line at <http://www.dol.gov>.

Exemptions

Certain exemptions do exist under the act, but they must be carefully reviewed before an employer should rely upon them. For example, there is a family exemption to the act, but the family exemption requires that all farm labor activity be performed exclusively by an immediate family member. Additionally, common carriers, unions, nonprofit charitable organizations, local short-term contracting activities and other exemptions do exist, but they should be carefully evaluated as to the facts and circumstances of any particular case [See, 29 U.S.C §1803; 29 C.F.R. §41.15.]⁹

Regulatory Requirements for Employers

What's the big deal about being found to be an employer under MSPA? If the tree farmer or forest owner is held to be a farm labor contractor or a joint employer under the act, there is a requirement of compliance with detailed technical record-keeping provisions. For example, when any migrant or seasonal agricultural worker is recruited, there must be written disclosure of information ranging from the place and period of employment to transportation, housing and other benefits and the costs to be charged for each.¹⁰ (29 U.S.C §1821 - migrant workers, 29 U.S.C §1831 - seasonal

⁸ The other states in the Southeast Region are Alabama, Georgia, Florida, North Carolina, South Carolina, Tennessee and Kentucky. Farm Labor Contractors located outside of the Southeast Region can be verified by calling the National Registration. 1-800-800-0235.

⁹ Because MSPA is a remedial statute, it is broadly construed. For the same reason, exemptions are narrowly construed to apply only when found to be plainly and unmistakably within the terms and spirit of the Act. Charles v. Burton 857 F.Supp. 1574, 1582-83 (M.D. Ga. 1994).

¹⁰ The specific requirements are:
1. the place of employment;
2. the wage rates;

workers). There are other disclosure provisions concerning workers' rights and protections and the terms and conditions of occupancy.

In addition to those disclosure requirements, there are specific record-keeping requirements under the act. Each farm labor contractor, agricultural employer, and agricultural association which employs migrant agricultural workers must keep information for three (3) years on each employee. These records are typically kept in a sealed envelope that the landowner never opens. They include a range of information from hours worked and total pay to sums withheld and not paid.¹¹ (29 U.S.C §1821 -migrant workers; 29 U.S.C §1831 - seasonal workers)

A farm labor contractor is required to provide these employment and financial records to any agricultural employer and agricultural association employing the contractor [29 U.S.C §1821(e)]. Each worker for each pay period must be provided an itemized written statement concerning the above information.¹²

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3. the crops and kinds of activities on which the worker may be employed;
 4. the period of employment;
 5. the transportation, housing, and any other employee benefit to be provided, if any, and the cost to be charged for each;
 6. the existence of any strike or other concerted work stoppage, slow down or interruption of operations by employees at the place of employment; and
 7. the existence of any arrangements with any owner or agent of any establishment in the area of the employment concerning commissions or benefits resulting from sales by such establishments to the workers.
 8. Whether state worker's compensation or unemployment insurance is provided, and if so, the name of the insurance carrier, the names of policy holders, the name and telephone number of each person who must be notified in case of injury or death, and the time period within which such notice should be given.

¹¹ The specific requirements are:

1. the basis on which wages are paid;
2. the number of piecework units earned if paid on a piecework basis;
3. the number of hours worked;
4. the total pay period earnings;
5. the specific sums withheld and the purpose for each sum withheld; and
6. the net pay.

¹² All information provided to the workers must be provided in English, or as necessary and reasonable, in Spanish or other language common to the migrant agricultural workers who are not fluent or literate in English.

There are special provisions within the act concerning housing, safety and health requirements¹³ [29 U.S.C §1823) and motor vehicle safety¹⁴ [29 U.S.C §1841). The complete regulations concerning MSPA are codified at 29 CFR 500.

REGULATORY ENFORCEMENT INITIATIVE

In 1999, the United States Department of Labor announced a forestry MSPA initiative. Citing perceived problems within the forest products industry, DOL planned a program of conducting in excess of one hundred audits across the United States. These audits were allocated by state and region according to the intensity of forest products operations.¹⁵

Mr. Alfred H. Perry, National Agricultural Coordinator of the United States Department of Labor, in speaking to the Mississippi Forestry Association 1999 Annual Meeting indicated that there would be approximately eight audits in Alabama and ten audits in Mississippi in 2000. Mr. Perry further stated that the Department of Labor would review the results of the audits in determining whether to keep the aggressive audit program in place or to revise the program. He speculated that if 90%¹⁶ or greater compliance was achieved

¹³ Housing requirements under the act include making the persons controlling housing facilities responsible for insuring the facilities comply with substantive federal and state safety and health standards. The standards include those promulgated by the Employment and Training Administration, at 20 CFR 654.404 et seq. and those promulgated by the Occupational Safety and Health Administration, at 29 CFR 1910.142. See, 29 CFR 500 (Migrant and Seasonal Agricultural Worker Protection Regulations).

¹⁴ Motor vehicle safety provisions of the act include requirements that persons providing transportation to migrant and seasonal workers must insure the vehicle conforms to standards prescribed by the Secretary of the Department of Labor, all applicable federal and state safety standards, insure the driver has a valid license under state law to operate the vehicle, and insure that there is an insurance policy or liability bond protecting from liability for damages to persons or property arising out of the operation of the vehicle. The complete regulations concerning motor vehicle safety are codified at 29 CFR 500.100.

¹⁵ The DOL has prepared a publication entitled "Frequently Asked Questions: Forestry Workers and Federal Labor Standards." The publication is broader than MSPA issues but should be obtained by every person or company in their MSPA compliance efforts. DOL has additional publications addressing MSPA compliance and compliance with other wage and labor laws.

¹⁶ For example, Mr. Perry indicated that the Department of Labor had recently concluded an investigation of what they called the "salad bowl" – farmers producing cucumbers, tomatoes, onions, etc. They have also investigated the poultry industry. As a result of their 1997 and 1998 investigations, the DOL filed a lawsuit against 20% of the people and corporations that were the subject of investigation. DOL is continuing to audit those areas that have been in substantial noncompliance in order to determine whether their previous audits and litigation have had any impact on compliance with MSPA. Alfred H. "Hap" Perry, National Agricultural Coordinator, United States Department of Labor, to the Mississippi Forestry Association, October 27, 1999, in Tunica, Mississippi.

by the audit program, then the Department of Labor may conclude that the forest products industry was in substantial compliance with the Act thereby diminishing the need for intensive future DOL audits. However, he further speculated that if less than 90% compliance was revealed by the audits, DOL may continue an audit program until it achieves 90% compliance at site targeted investigations.¹⁷

Civil and Criminal Penalties

Criminal sanctions exist for violation of MSPA. Any person who willfully or knowingly violates the act may be fined not more than \$1,000,¹⁸ sentenced to a prison term not to exceed one (1) year, or both. Upon subsequent convictions, the defendant can be fined up to \$10,000, sentenced to a prison term of three (3) years, or both. A \$10,000 fine and prison term of up to three (3) years are also potential criminal sanctions for a farm labor contractor who violates the prohibition against employing illegal aliens, or who fails to obtain or maintain a certificate of registration.¹⁹

In addition to the criminal and administrative penalties, a private right of action exists in any person aggrieved by a violation of the act. Groups of lawyers specializing in MSPA and other labor relations acts frequently bring class action suits under the provisions of the act. Those suits seek actual damages, statutory damages of up to \$500 per plaintiff per violation, and equitable relief. If the lawsuit is certified as a class action, the court can award the lesser of \$500 per plaintiff per violation or up to \$500,000.²⁰ However, if a state worker's compensation law is applicable and coverage is provided for an employee, those benefits are the exclusive remedy for the worker's loss, in accordance with the laws of the state.

¹⁷ Address by Alfred H. "Hap" Perry, National Agricultural Coordinator, United States Department of Labor, to the Mississippi Forestry Association, October 27, 1999, in Tunica, Mississippi.

¹⁸ The initial \$1,000 fine should be viewed in light of administrative sanctions under 29 U.S.C. § 1853 that allow the Secretary of the Department of Labor to assess a person violating the act a civil monetary penalty of up to \$1,000 for each violation. Administrative and judicial review of such civil assessments must be afforded under the act.

¹⁹ Section 501(a) of the Act applies to willful and knowing violations of MSPA. Section 501(b) applies to farm labor contractors who violate portions of § 274 of the Immigration and Nationality Act.

²⁰ In making the award the court is directed to consider what attempts were made to resolve the issues in dispute before the resort to litigation by the parties. If a claim is made against a tree farmer or forest owner and the threat of litigation is raised, that person would be well-advised to immediately consult counsel in order to determine the existence of any potential liability.

MSPA is intended to supplement state law to the extent the state law might be more restrictive than the federal act. Mississippi does not have any more restrictive state law than MSPA. However, tree farmers or forest owners may find that in addition to claims being made against them under MSPA, similar claims are made under state unemployment compensation and federal withholding acts. See, e.g. *Miss. Code Ann. §71-5-11 l. 6 (1972)*.

Important Contract Language

Although the DOL does not believe that the proper legal analysis should turn exclusively on contractual arrangements among a contractor and the property owner, the contractual language is still very important in any DOL decision. MSPA prohibits contractors from violating, without justification, the terms of written contracts with agricultural employers. The act does not allow parties to contract away any responsibilities a party would otherwise have under the law (*29 U.S.C. §1844*).

Most migrant and seasonal agricultural workers have been used in the timber industry for planting and site preparation work. Regardless of the type of work for which such labor will be utilized, a contract should be reached with the farm labor contractor concerning the agreement between the contractor and the owner. Specific provisions that should be considered for such an agreement may include identification of certificate issued by DOL, explanation of the independent contractor relationship, indemnification provisions and language requiring the contractor to comply with MSPA, including furnishing the owner accurate payroll information required by MSPA in a sealed envelope.²¹

²¹ Some provisions applicable to MSPA contracts between forest landowners and farm labor contractors may include:

1. specific reference to the certificate of registration issued by the Secretary of the Department of Labor authorizing the specific activity that is the subject of the agreement;
2. an agreement that the contractor will immediately notify the owner of any challenge to that certificate or proceedings to dissolve or cancel it; and,
3. requirement that accurate employment and payroll information of the contractor required by MSPA be furnished to the owner in a sealed envelope.
4. a specific description of the activity to be performed by the contractor and any restrictions upon the activity;
5. a provision concerning the liability of the contractor for complying with federal and state laws and regulations, including:
 - a. Migrant and Seasonal Agricultural Worker Protection Act;
 - b. Mississippi Workers' Compensation Law;
 - c. Occupational Safety and Health Act; and
 - d. general labor laws;
6. general indemnification provisions;
7. information requiring general liability insurance policies and workman's

Conclusion

The Migrant and Seasonal Agricultural Worker Protection Act is a law to be reckoned with by any tree farmer or forest owner. Every attempt should be made to avoid the classification of farm labor contractor or joint employer under the act. Similarly, the temptation to exert control or have the right to control forest operations subject to the act must be avoided or the joint employer doctrine will subject the owner to the strictures of the act.

It is critical that every tree farmer and forest owner ascertain whether or not any independent contractors employed by them are properly registered with the Secretary of the Department of Labor. The owner should review the registration certificate and independently verify the registration with the Department of Labor for each farm labor contracting activity performed by the contractor. The owner should obtain sealed employment records and maintain them for three (3) years.

Specific legal advice should be obtained from an attorney who practices forestry law and is familiar with MSPA and DOL regulations. Additional information can be obtained by writing or calling the United States Department of Labor, Wage and Hour Division, One Jackson Place, Suite 1020, 188 East Capitol Street, Jackson, Mississippi 39201-2126, (601) 965-4348, the Southeast Regional Office (850) 488-3131, offices outside the Southeast Region (800) 800-0235, or the United States Department of Labor, Wage and Hour Division, Atlanta Federal Center, 61 Forsyth Street SW, Room 7M10, Atlanta, GA 30303, (404) 562-2202. The web site is <http://www.dol.gov>.

compensation coverage;

8. provisions establishing that the farm labor contractor is an independent contractor and not an employee of the owner, such as:

a. the owner will issue a 1099 to the contractor and will not withhold social security, income, or other taxes and that the contractor has sole responsibility for preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes;

b. the contractor has sole responsibility to conduct the operations consistent with the terms of the agreement in any manner the contractor, in its sole discretion, deems expedient;

c. the contractor may set hours of performance and the beginning and ending of the work in its sole discretion;

d. the contractor shall furnish experienced personnel trained by contractor to perform the duties set forth in the agreement and provide field sanitation facilities, housing or transportation;

e. the contractor shall hire, fire, supervise and pay its own employees, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s); and,

f. the contractor shall furnish all tools, materials, and equipment necessary to perform the work.