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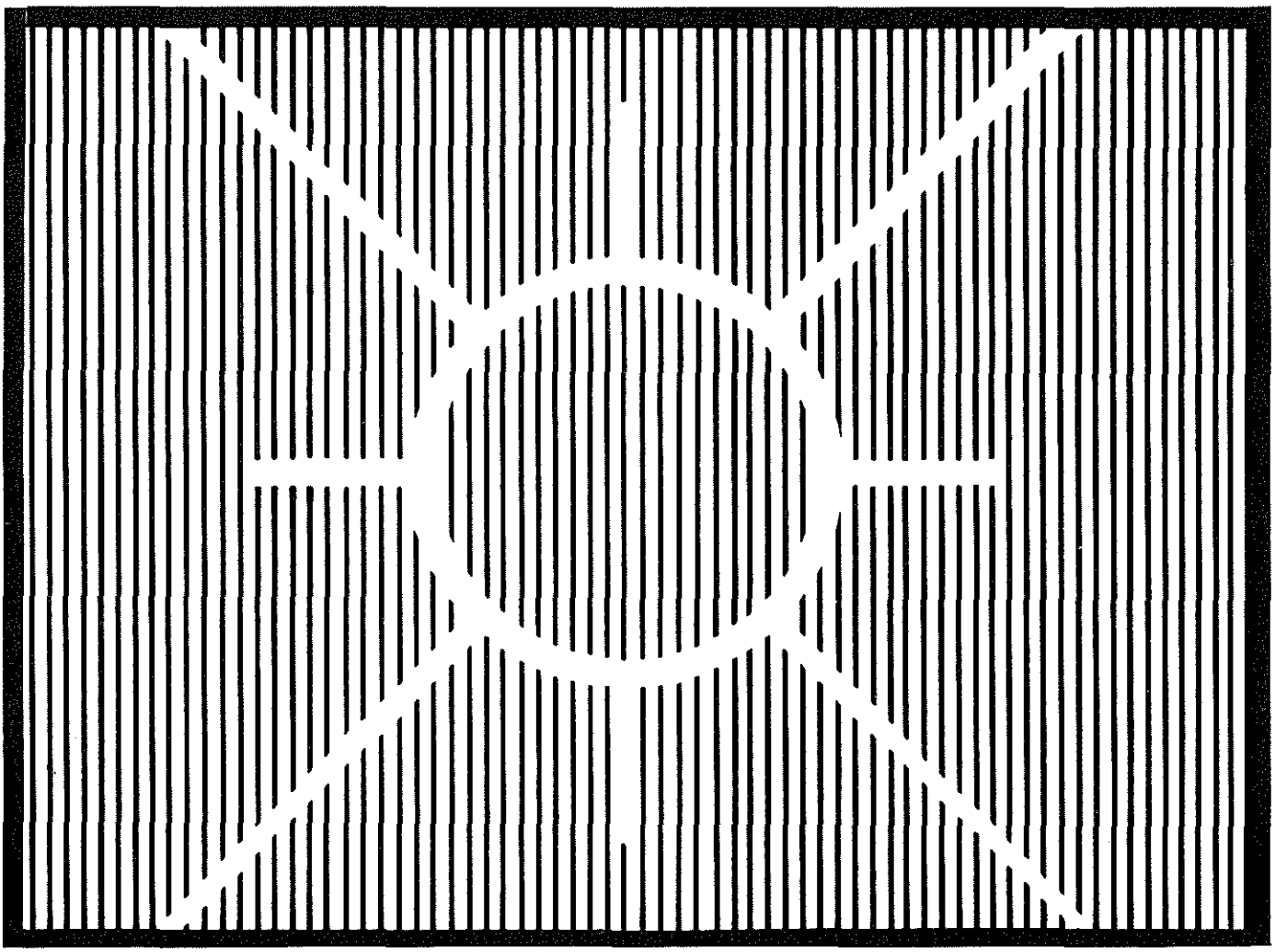
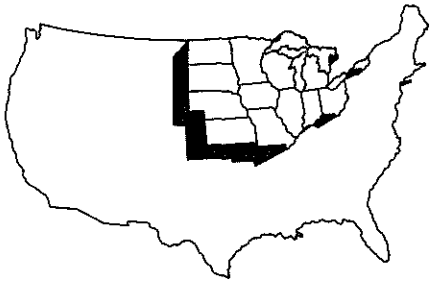
AGRICULTURAL EMPLOYMENT LAW AND POLICY





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AGRICULTURAL EMPLOYMENT LAW AND POLICY

A Study of the Impact of Modern Social and Labor Relations Legislation on Agricultural Employment

by

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FORWARD

Farm labor has long played a major role in the production of food and fiber in the United States. For every two family farmworkers, there is one hired worker engaged in farming activity. Within the past decade, farm laborers have gained significant legal protections, coming closer to those enjoyed by the nonfarm work force. This monograph outlines U.S. farm employment law, tracing its history and social rationale and concluding with suggestions for future policy in this area. It is one of a series of studies by the Minnesota Agricultural Experiment Station that contributes to NC-117, the regional research group that has dealt with the organization and control of the U.S. food system. The NC-117 organizations and participants are listed below.

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PREFACE

This monograph is the third in a series of reports based on legal-economic research conducted at the University of Minnesota Agricultural Experiment Station. The Minnesota research project has as one of its objectives the statement of current law and policy relating to various aspects of the U.S. food system. This objective is also part of a broader regional study of the organization and control of the U.S. food system. The regional effort encompasses some of the Minnesota work. Accordingly, this monograph is also designated by NC-117 and North Central Regional research publication numbers.

A historical hallmark of U.S. agriculture has been its reliance on farm operator and family labor as the dominant human resource used to produce food and nonfood commodities. Despite the importance of family labor, laborers hired by farmers constituted 1.8 million persons in 1978. Even though farm mechanization has historically made the labor input less needed, the hired farm work force represents a major segment in the U.S. economy.

It can be categorically stated that the social and labor legislation that significantly affected wages, work environment, health, and safety from the 1930s on had little application to the farm labor force until the 1970s. In recent years, there has been a virtual "rush" to extend the benefits enjoyed by nonfarm employers to farmworkers.

This monograph details the current status of farm employment law and policy, its history and social rationale, and raises questions about its future direction.

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Chapter 1

INTRODUCTION[†]

Historically, the marketplace controlled the supply, cost, and working conditions of hired labor in the on-farm production segment of American agriculture. During the first several decades of the twentieth century, governmental units at the state and federal levels made little or no effort to aid the farm labor force or to assist its individual members. As social and labor legislation was enacted—particularly during and since the 1930s—large segments of the American working force were affected, but farm labor was for the most part excluded. Thus, a conscious and articulated policy of exclusion replaced an unexpressed policy of general omission.

The policy of excluding farm labor from social and labor legislation was designed, in part, to assist farm employers by keeping them free of legislatively imposed, labor-connected costs. Such a policy necessarily involved unstated legislative decisions to perpetuate a low-income, disadvantaged farm labor force.

In more recent years, the policy of neglect has been haltingly replaced by a policy of piecemeal attention to some of the more glaring social and economic problems of the hired farm labor force.

The essence of the farm labor policy problem in the United States today reduces to this question: How can the immediate and future need for hired farm labor be supplied as required without perpetuating existing social and economic inequities? This study examines and critiques current farm labor policy and suggests alternatives. It focuses on the hired farm working force as a whole, assuming that less would be accomplished by viewing the special problems of migrant workers, local seasonal workers, hired family members, or other subgroups in isolation.

A "farm labor policy" interacts with general farm policy, national population policy, and other policy areas involving national priorities, all with their combined and interacting effects. For example, partial coverage of hired farmworkers by most social and labor legislation has been but one of several policy decisions contributing to a reduction in the number of hired man-days used on farms. However, whether expanded coverage of farmworkers under existing social and labor laws will importantly increase the cost of hired farm labor and thus accelerate mechanization and industrialization of American agriculture remains to be seen. Farm labor policy may affect the size and direction of changes in demand for hired farm labor in coming years. Similarly, the size of the hired farm working force will affect the future structure of American agricultural population distribution and job training.

Since there is continuing pressure to extend more social and economic benefits to farmworkers, it is essential that today's policymakers have some indication of the impact of further legislation on the level or use of hired farm labor. The first step in this study is to measure the importance of labor as an agricultural input in terms of its cost relative to other inputs.

Farm Labor Cost

The use of labor has declined rapidly and steadily in relation to other farm inputs. Labor inputs have declined more than 30 percent just since 1967, much more rapidly than the decrease in farm real estate (Figure 1). Farmers have substituted machinery for labor and chemicals for land. A part of this substitution for labor may be explained by the relative prices of farm inputs. Farm wages have increased faster than any other farm input cost except interest since 1967 (Figure 2).

Even though farmers have been using less labor on farms, it remains an important farm production expenditure. Labor accounted for 8.9 percent of total farm production expenditures in 1978 (Figure 3).

[†]The statistical information presented in this chapter was compiled by Winston W. Grant, research specialist and extension economist in legal affairs, University of Minnesota.

This compares with 8.1 percent in 1977.1/ In dollar terms, the 1977 farm labor cost ranged from a low of about $5 billion to a high of nearly $8 billion, depending upon the calculation method used.2/

Regardless of the exact amount, it is clear that the quantity and wage value of farm labor in U.S. farm production is large. It significantly affects total farm production expenditures, and to a lesser extent, the ultimate cost of food and fiber to the U.S. consumer.

The Farm Labor Force

This study concentrates on the status of those workers employed in on-farm production of food and fiber products, including all activities attendant to planting, harvesting, and preparatory to first processing. While some attention is given to the whole farm labor picture, including family farm labor, the major policy problems reviewed in later sections relate to hired farm labor, including field workers, machinery operators, dairy hands, livestock handlers, and others similarly employed. Some of those so employed will occasionally work in processing activities on the same farm and for the same employer.

Recent data indicate the continued dominance of family labor in American agriculture, seasonal and geographic fluctuations in hired farm labor levels, and a continuing long, downward trend in the on-farm hired labor force.

Downward trends. There was a long-term downward trend in numbers of farm laborers dating from at least 1910, but leveling out during part of the 1970s. The downward trends resumed in 1976 (see Figure 4). Total farm employment dropped from 13,555,000 in 1910 to less than 30 percent of that figure, or 3,774,200 in 1979.3/ Figure 5, showing movements in an index of farm employment, magnifies the trends from 1963 through 1979. This trend in farm employment has followed similar declines in farm population (Figure 6).

Dominance of family labor. The largest share of the U.S. farm labor force has been accounted for by farm family labor used on owned or leased acreage. Family labor follows the general long-term downward trend with only modest interruption (Figure 5). Average annual family labor stood at 10,174,000 in 1910. By 1978 it had decreased to 2,501,000, less than one-fourth of the 1910 number.4/

The general and significant dominance of farm family labor is clear. Family labor as a percent of total farm labor for the United States ranged from 70 percent in 1975 to 66 percent in 1979. The relationship of family to hired labor varies greatly among the 10 Standard Federal Regions, but in only one, Region IX (California, Nevada, and Arizona), does hired labor dominate.5/

Figure 7 depicts family farm labor and hired farm labor as a percent of total farm labor from 1910 through 1979. Two observations may be made. First, there is a striking stability in the dominance of family labor over the 69-year period. Second, beginning in 1972, the percentage of family labor appears to have begun a very gradual but noticeable decline from 76 percent in 1972 to 66 percent in 1979.

The continued dominance of family farm labor raises important policy questions: To what extent have farm family members been affected by various state and federal social and labor statutes? Has the historic pattern of excluding farm family workers (paid or unpaid) from labor protections continued? Is the status of family members who work for family farm partnerships or family farm corporations being dealt with adequately in current legislation?

Hired farmworkers. Hired farmworkers, though greatly outnumbered by farm family workers, provide a major amount of labor in the on-farm production of food and fiber. Like family labor, the long-term trend in hired farm labor has been one of decline (see Figures 4 and 5). Average annual hired farmworkers numbered 3.381 million in 1910, but by 1979 they numbered only 1.273 million—a decrease of nearly two-thirds.6/

Despite the long-range downward trend, hired farm labor increased from 1972 to 1976 (see Figure 5). Hired farmworkers increased 20 percent over this five-year period, a time span in which record high farm prices were registered, but the decline resumed after 1976 so that by 1978 the average annual number of hired farmworkers had fallen again—by 8.8 percent in just two years. The Department of Labor continued to project an overall 39-percent drop in farm employment from 1974 to 1985.7/ This is the only major occupational group for which there is a negative projection.

The most comprehensive data concerning the hired farm labor force are collected in the annual hired farm working force survey conducted for the Economics, Statistics, and Cooperatives Service by the Bureau of the Census as a supplement to its Current Population Survey (CPS). These data with commentary

are published each year as The Hired Farm Working Froce of (year). The following hired farm labor profile is from the latest (1977) issue.8/

> About 2.7 million persons 14 years old and over did hired farmwork sometime during 1977, according to the 1977 Hired Farm Work Force Survey conducted for ESCS by the Bureau of the Census. The number of hired farmworkers has changed little since 1972 (Table 1).
>
> The majority of the days worked (70 percent) were accounted for by workers who worked 150 days or more during the year. Persons working 150 days or more comprised only 23 percent of all workers (see Table 2). The workers were predominately young (58 percent under 25 years), male (77 percent), and White (84 percent). The majority did not live on a farm.
>
> Annual earnings in 1977 of all hired farmworkers averaged $3,265. Of this, $1,913 were earned for an average 93 days of hired farmwork. The remainder came from nonfarm employment (Table 3).
>
> Hispanics and Blacks and Others accounted for 28 percent of the 1977 hired farm working force (756,000 workers, Table 4). About 61 percent of these workers were Blacks and Others and 39 percent were Hispanics. Minority workers were older than White workers and had been employed in hired farmwork longer.
>
> Approximately 191,000 of the workers (7 percent of the hired farm working force) were migrants in 1977 (Table 4). About 58 percent of these migrants traveled 200 miles or more and 20 percent traveled 1,500 miles or more away from home. The long-distance migrants tended to be Hispanic and Black and Other workers. Annual earnings from farm employment of migrant workers averaged $2,263, for an average 97 days of farmwork.
>
> About one-fourth of the Nation's hired farmworkers were located in the Southeast Standard Federal Region (SFR IV) at the time of the survey in December 1977 (Table 4). Only 14 percent of the migrant workers were located in the Southeast. Another 51 percent of the migrants were located in the Southwest and Lower Pacific Coast regions (SFR VI and IX).

Given these socioeconomic characteristics of the farm labor force, special problems have been perceived in the past, resulting in the exclusion of the bulk of the hired labor force from coverage under social and labor legislation. Other sections of this monograph discuss whether there is any current justification for retention of remaining exclusions because of the seasonal and irregular nature of employment

Geographic and seasonal distribution of the farm labor force. The size and composition of the labor force varies greatly by season and geographic area. In 1980, the U.S. farm employment level was as high as 4,543,000 in July and as low as 3,022,000 in January (see Table 5). As might be expected, farm labor use follows an annual cycle (Figure 8). The cycle begins each year with low labor use in January, increases in use to a peak in July, then decreases to January. This same general pattern holds at the national level for total workers on farms, family labor, and hired labor.

In 1979, the areas of greatest farm labor use were Regions IV and V (the Southeast and North Central Lake states) (Figure 9). These regions also showed the greatest absolute seasonal variation, 296,000 and 370,000 more workers on farms in July than in January, respectively. The relative seasonality 9/ varied greatly as well. In Regions I, II, III, VI, and VII, the variation ranged from 49 to 59 percent in 1978, and from 32 to 84 percent in 1980. In Regions IV, V and IX, the variations ranged from 65 to 79 percent in 1978, and from 43 to 70 percent in 1980; and in Regions VIII and X (Mountain and Northwest Pacific Coast states), the relative variation was 98 percent to 127 percent in 1978, and 58 percent to 136 percent in 1980, respectively.

A note on the adequacy of farm labor data. The available data when used together tell us some important things about the farm labor situation. We have noted the importance of family labor in American agriculture; have examined the socioeconomic characteristics of hired workers; have observed the relatively small size of the migrant force; have noted that while casual and seasonal hired workers are numerous, they are not the major source of hired man-hours; and have plotted the downward trend in employment opportunity in on-farm agricultural production work.

In later sections, other data on wage rates, numbers of hired farmworkers covered by various pieces of social legislation, and other scattered data of significance are discussed.

In searching for the data necessary for the kind of policy assessments made in this paper, we encountered two problems with the adequacy of the data. First, we encountered some substantial differences in the estimates of various organizations or between different estimates made by the same organization. For example, average annual hired farm labor for 1977 was reported as 1.296 million workers in the February 1979 issue of Farm Labor, U.S. Department of Agriculture, Economics, Statistics, and Cooperatives Service (ESCS), Crop Reporting Board. On the other hand, the hired farm working force survey conducted for ESCS by the Bureau of the Census and reported in The Hired Farm Working Force of 1977, U.S. Department of Agriculture, ESCS, Agricultural Economic Report No. 437, October 1979, indicated 2.73 million hired farmworkers. The latter number is more than double the former.

It should be noted that these differences do not reflect upon the competence of the reporting organizations. Rather, the differences can be explained by the sampling methods used and the times of year when samples were taken.10/ However, one must be aware of such differences when farm labor statistics are reported and relied upon for various purposes. It is reasonable to assume that the relationships indicated within the various groups of available data are substantially accurate. Thus, the observations which we make on the basis of such data are of considerable importance in assessing current farm labor policy and setting forth policy alternatives.

The second problem of data adequacy was simply one of availability. Regrettably, some important information is unavailable or available only in less-than-satisfactory form. Little information is available on the number of hired farmworkers covered by specific pieces of social legislation, the number of persons as opposed to hired workers in the migrant stream, the number of paid family members in farm work, the number of persons attempting to support a family as farmworkers, the number of sharecroppers whose legal status may not be that of employee but who are in need of protections that accompany that status, and such things as employment levels by farm size, type, and location.

Scope and Purpose of This Study

This study proceeds on the assumption that a hired labor force will continue to be required on American farms. While there are strong indications that the number of workers will continue to decline, there is no assurance that the historic rate of decline will continue. A basic premise of this study is that it should be possible to supply the required hired labor force for on-farm production work without perpetuating existing social and economic inequities. Thus, how such a farm labor policy can be made a reality is the ultimate problem under consideration.

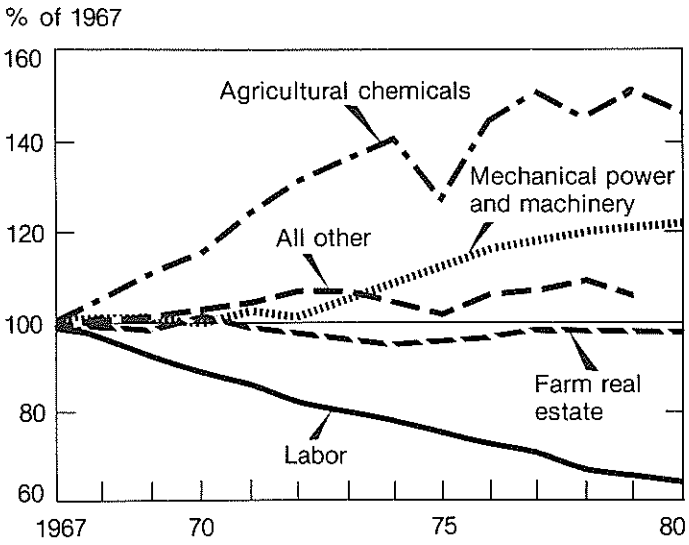
The first step in this study was to create a statistical picture of the farm labor force. The next step, which involves the next several sections of this monograph, will be to examine specific social and labor policies as they relate to the farm labor force. There follows a separate commentary on wage and hour policy, child labor policy, farm labor contractor regulations, occupational safety and health policy, compensation and disability schemes, health care policy, retirement income policy including social security, unemployment insurance policy, employment services policy, the special problems of the alien labor force, and farm labor relations policy. There is an examination of the historic policy of exclusion and the suggested justification for that policy. It will become obvious that the "justifications" for exclusions in various legislative schemes are similar or, in some instances, identical. Most of the arguments supporting exclusionary provisions are variations on the theme that inclusion of farmworkers would be too costly for farm employers and that the programs would be impossible to administer. As each policy area is discussed, an assessment of the effectiveness of current law, given the stated objectives, is undertaken to the extent that available data permit. Recommendations in the specific areas are set forth. Of course, certain problems with current farm employment policy can be perceived only by looking at all of the legislative, social, and labor programs together. Thus, after individual consideration has been given, an overall commentary follows.

Among the general questions to be considered are the following: Can the existence of an adequate and increasingly productive hired farmworker force be assured? Is it possible to provide that work force at a cost that is fair to farm operators, while at the same time moving steadily toward bringing hired farmworkers into the mainstream in terms of wages, benefits, and working and living conditions? How can existing regulation of farm employment be made more effective, less confusing, and more equitable? It is possible to deal more adequately with the special problems of certain important subgroups in the farm labor force, in particular migrant workers, family members, sharecroppers, farm labor contractors, youthful workers, and illegal aliens?

In the final section of this study, general recommendations are made to supplement the specific proposals in the various "topical" sections. The following matters receive attention: suggestions for immediate improvement of current statutes and regulations, without moving to major revisions; assessment of the need for a thorough and ongoing comprehensive economic study of the hired farm labor situation as an aid to future policymaking; the need for general guidelines applicable when major changes in farm employment statutes and regulations are considered in any of the specific areas of concern explored in this monograph; suggestions for the improvement of dissemination of this information to farm employers, hired farmworkers, and their respective representatives; the need for priority consideration of the problems of certain subgroups in the farm labor force as existing policy is studied and revisions developed; the special need for attention to the union movement and its importance in the achievement of many of the goals delineated in this study.

No section of this study stands alone. It is essential that those engaged in legislative or regulatory reform have a comprehensive picture of the farm employment scene before them. Planning for this policy will be most successful when lawmakers, regulators, and those who advise them see specific efforts in totality.

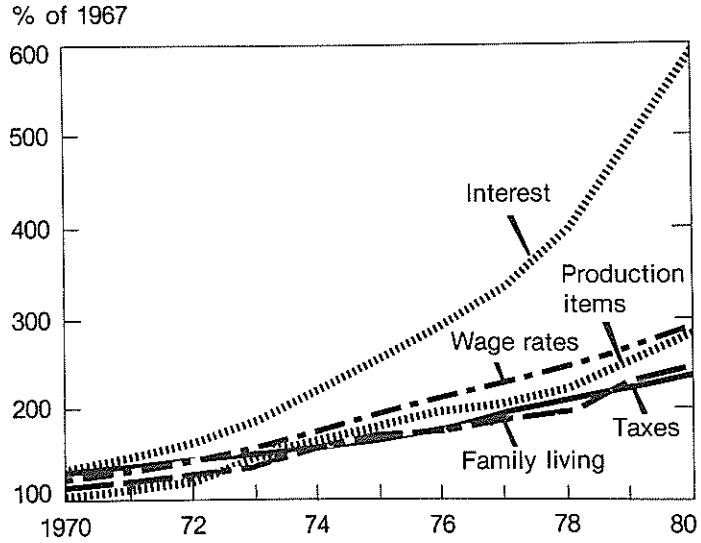
Figure 1. Use of selected farm inputs.



Data for All Other inputs not available for 1980.
1979 preliminary; 1980 estimated.

Source: U.S. Department of Agriculture, *1980 Handbook of Agricultural Charts,* Agricultural Handbook No. 574, October 1980, p. 16.

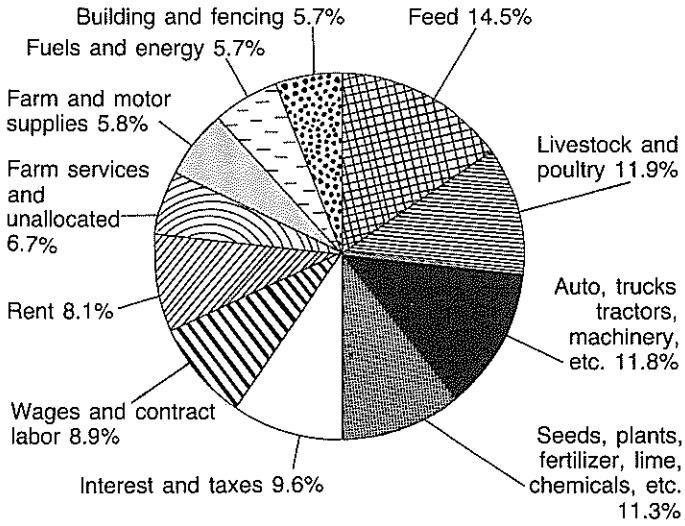
Figure 2. Indices of farm expenses.



1980 January to June average. Taxes include State and local property taxes per acre on farm real estate. Interest is that payable per acre on farm real estate debt. Components of the Index of Prices Paid by Farmers for commodities, services, interest, taxes, and wage rates.

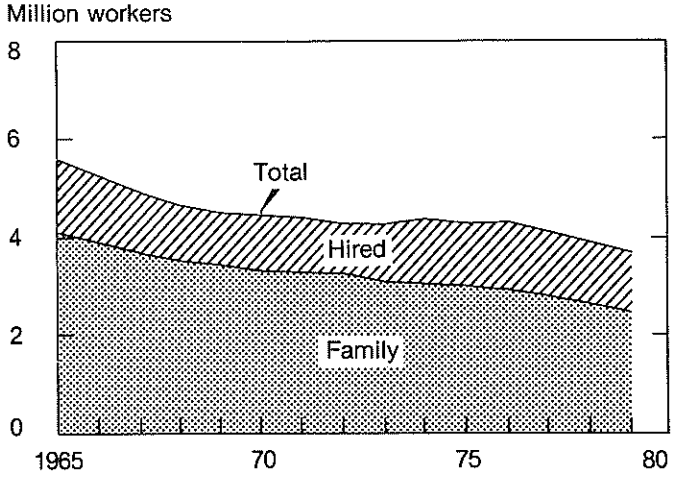
Source: U.S. Department of Agriculture, *1980 Handbook of Agricultural Charts,* Agricultural Handbook No. 574, October 1980, p. 15.

Figure 3. Farm production expenditures.



Source: U.S. Department of Agriculture, *1979 Handbook of Agricultural Charts,* Agricultural Handbook 561, October 1979, p. 18.

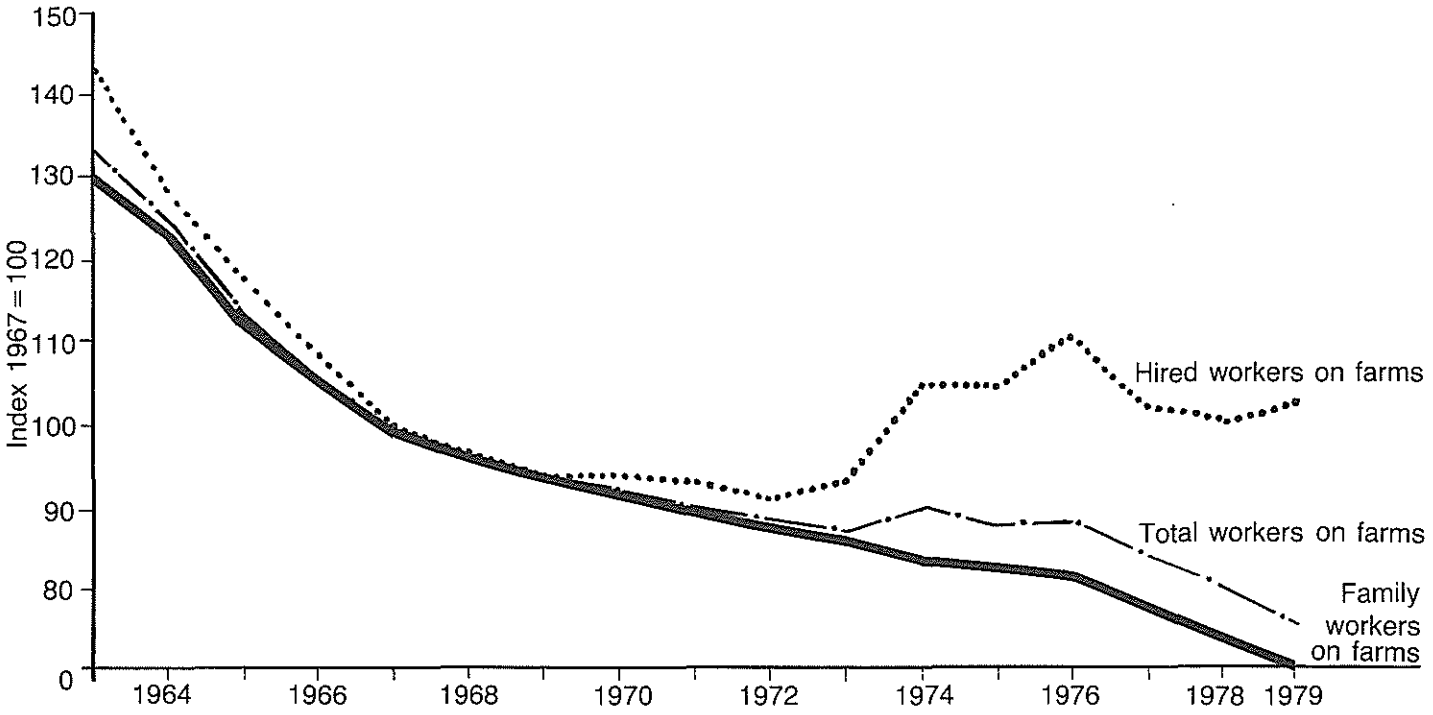
Figure 4. People employed on farms.



Average number of persons employed in 1 survey week each month—through 1974, the last full calendar week ending at least 1 day before the end of the month; beginning in 1975, estimates are quarterly and include the week of the 12th of January, April, July, and October.

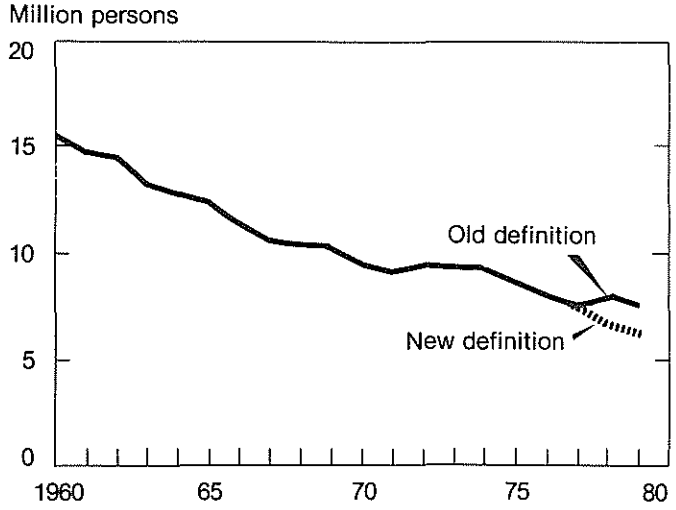
Source: U.S. Department of Agriculture, *1980 Handbook of Agricultural Charts,* Agricultural Handbook No. 574, October 1980, p. 25.

Figure 5. **Indices of numbers of persons employed on farms, 1963-1979, 1967 = 100.**



Sources: USDA, *Agricultural Statistics,* 1978, Table 621, p. 431 and *Farm Labor,* USDA, ESCS, Crop Reporting Board, August 1980, p. 3.

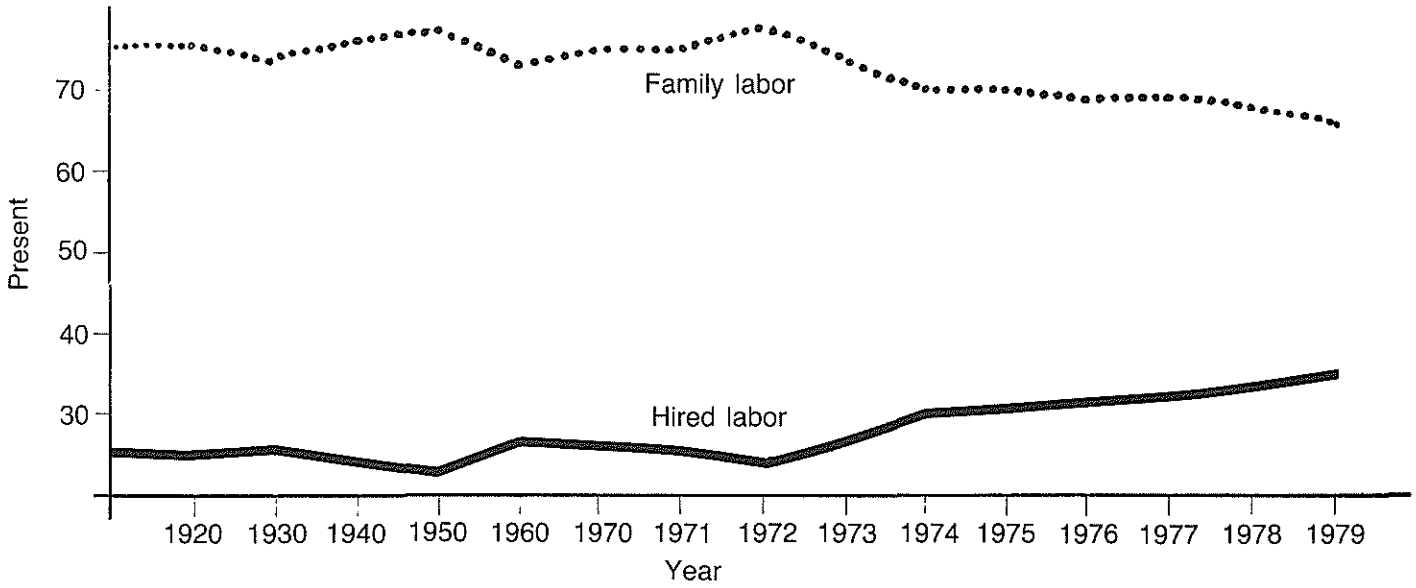
Figure 6. **Farm population.**



Present definition includes those living on places with $1,000 or more in agricultural product sales. Previous definition was those on places of 10 or more acres with $50 in sales and under 10 acres with $250 in sales.

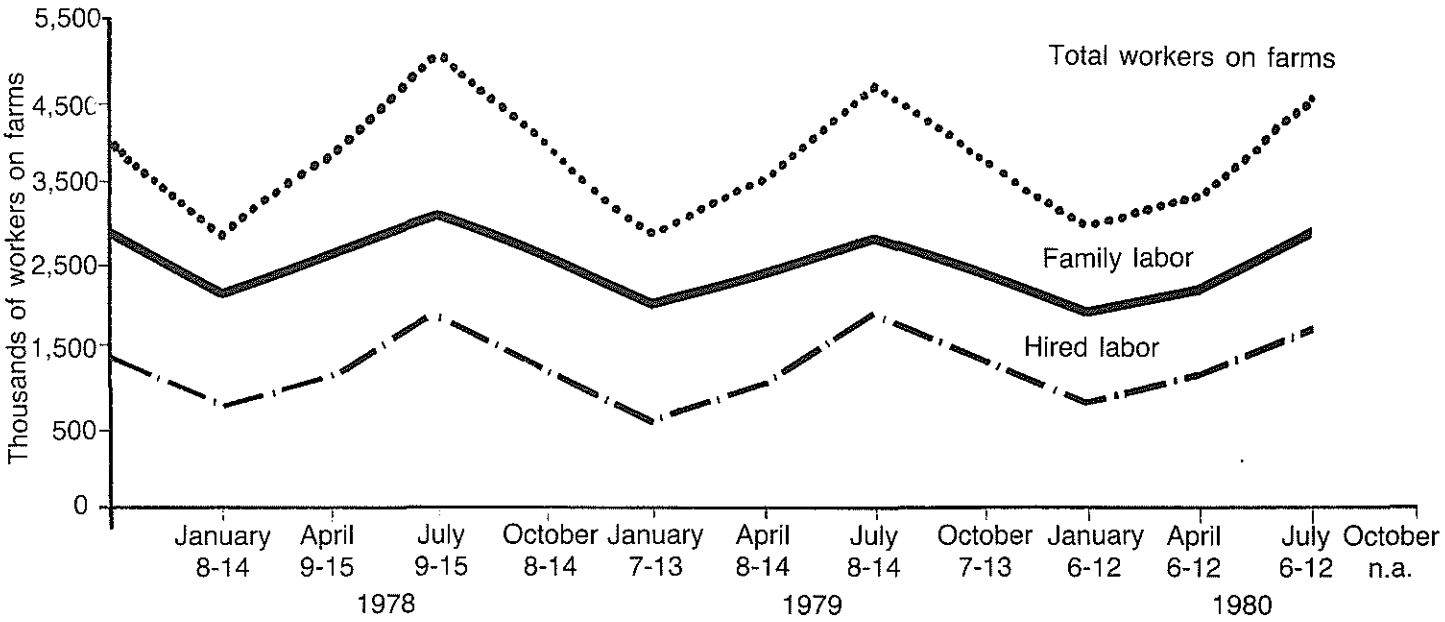
Source: U.S. Department of Agriculture, *1980 Handbook of Agricultural Charts,* Agricultural Handbook No. 574, October 1980, p. 25.

Figure 7. **Family farm labor and hired farm labor as percent of total farm labor, 1910- 1979.**



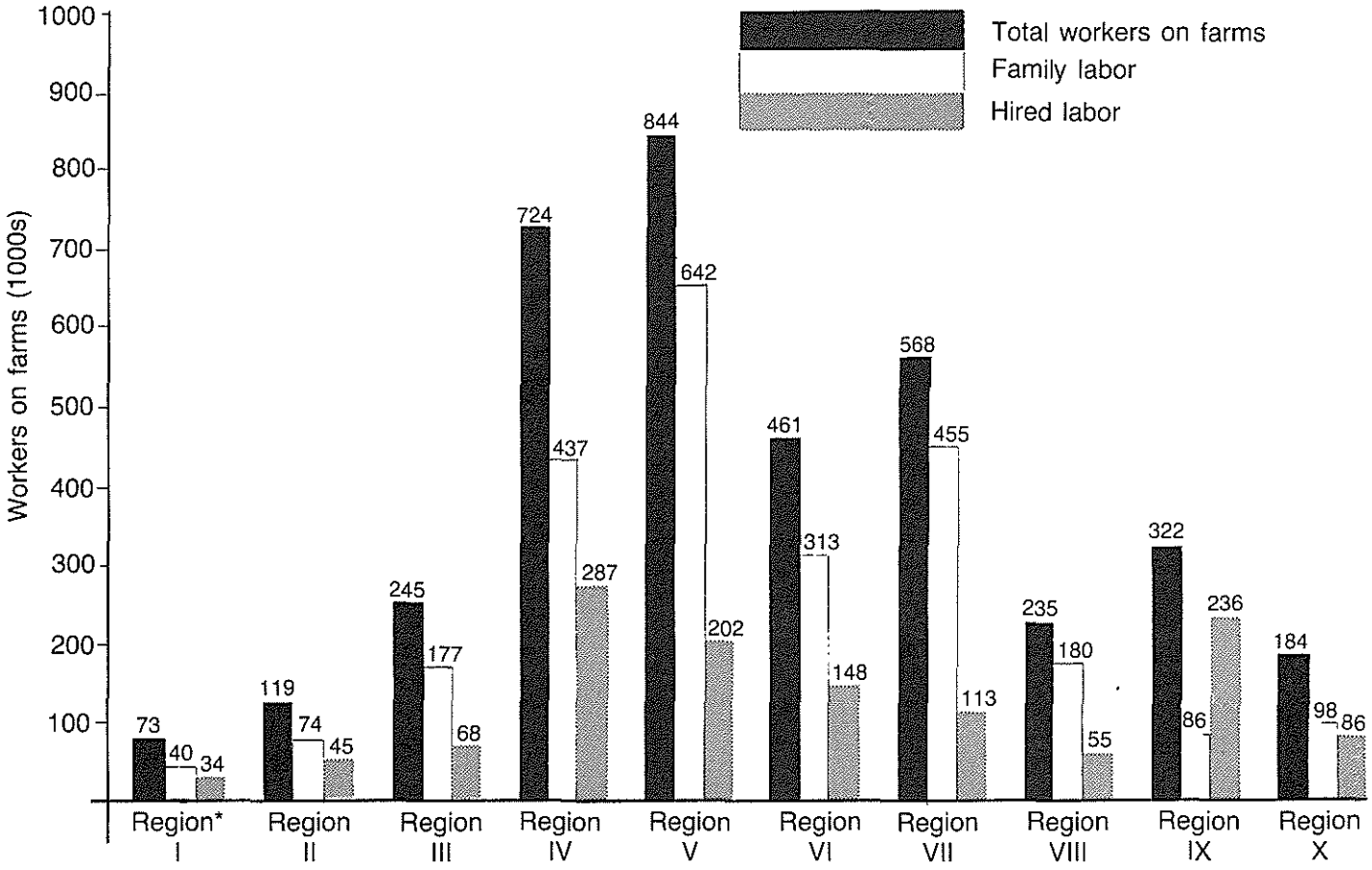
Source: *Handbook of Labor Statistics 1974,* U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 1825, 1974, Table 46, p. 116 and Farm Labor, USDA, ESCS, Crop Reporting Board, August 1975-1980.

Figure 8. **Seasonality of U.S. farm labor, 1978-1980.**



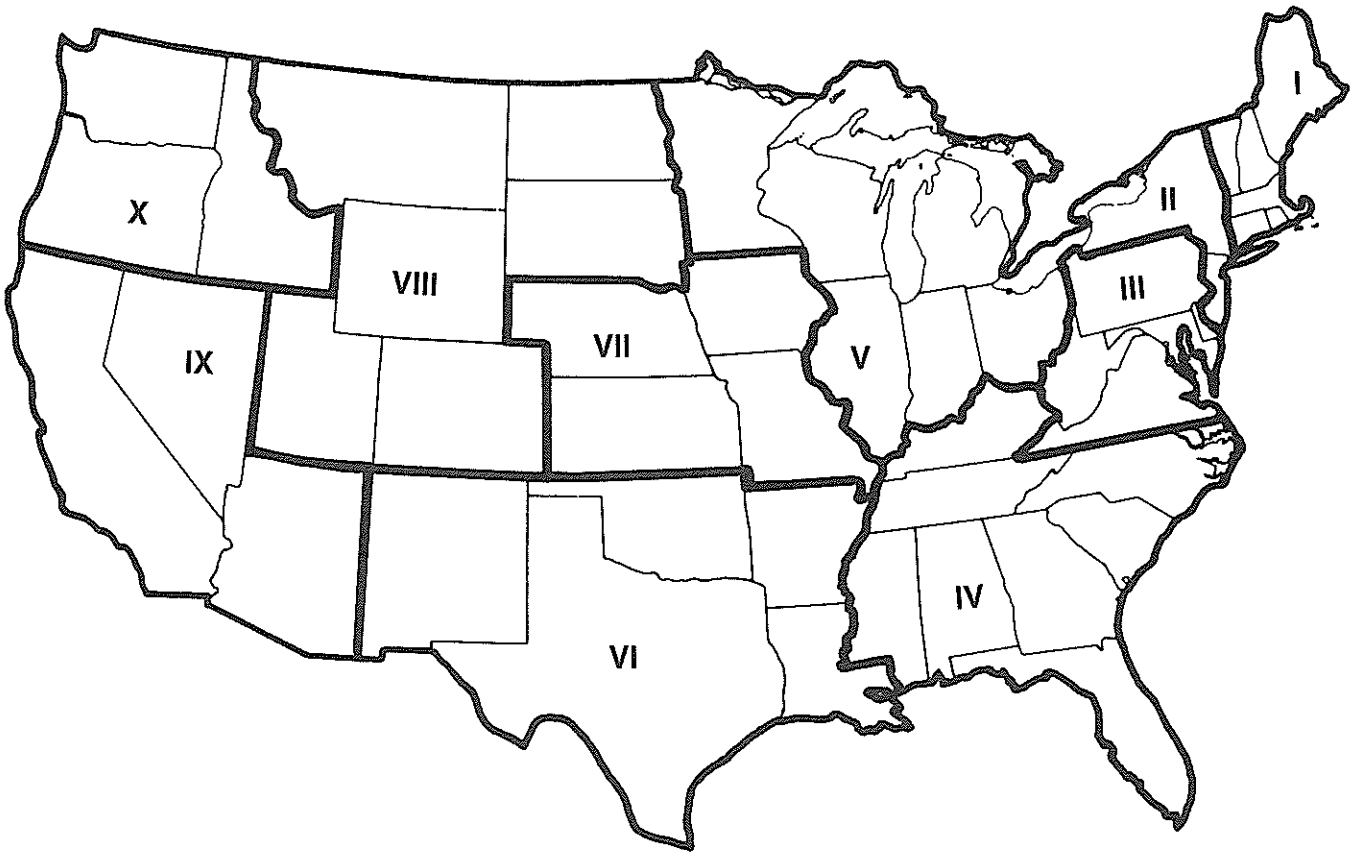
Source: See *Table 6.*

Figure 9. **Average annual number of workers on farms by Standard Federal Region, 1979.**



Source: See *Table 6.*
*See *Figure 10* for composition of Standard Federal Regions.

Figure 10. **Standard Federal Regions.**



Source: *Farm Labor,* USDA, ESCS, Crop Reporting Board, May 1980.

Table 1. **Number of hired farmworkers, by duration of farmwork, 1945-77.**

Year	Total	Duration of hired farmwork during the year				
		Less than 25 days	25-74 days	75-149 days	150-249 days	250 days or more
			Thousands			
1945	3,212	1,247	825	339	262	539
1946	2,770	817	749	340	312	552
1947	3,394	1,179	771	411	418	615
1948	3,752	1,250	904	597	381	620
1949	4,140	1,630	1,017	526	396	571
1950	4,342	[1]—	[1]—	[1]—	[1]—	[1]—
1951	3,274	1,118	925	379	301	551
1952	2,980	1,008	928	324	296	424
[2]						
1954	3,009	1,101	756	318	364	470
[2]						
1956	3,575	1,497	920	410	305	443
1957	3,962	1,762	1,044	501	256	399
1958	4,212	1,893	[1]—	[1]—	[1]—	[1]—
1959	3,577	1,412	863	502	348	452
1960	3,693	1,531	868	465	390	438
1961	3,488	1,600	849	354	281	404
1962	3,622	1,555	933	408	284	442
1963	3,597	1,735	771	392	309	390
1964	3,370	1,369	924	413	326	338
1965	3,128	1,264	807	397	282	379
1966	2,763	1,130	717	339	211	367
1967	3,078	1,338	738	327	277	397
1968	2,919	1,299	731	308	256	324
1969	2,571	1,106	718	258	189	301
1970	2,488	1,093	623	293	172	306
1971	2,550	1,191	648	213	213	285
1972	2,809	1,130	663	361	288	367
1973	2,671	1,085	567	351	247	421
1974	2,737	1,169	619	308	274	367
1975	2,638	1,180	556	319	228	355
1976	2,767	1,145	652	347	290	333
1977	2,730	1,056	667	322	295	391

Number of workers for 1959 and succeeding years are rounded to the nearest thousand without being adjusted to group totals.

[1]Not available.

[2]No survey conducted in 1953 and 1955.

Source: Gene Rowe, *The Hired Farm Working Force of 1977,* Agricultural Economics Report No. 437, USDA, ESCS, October 1979, p. 3.

Table 2. **Number of hired farmworkers and trends by race, age, and duration of farmwork, averages 1965-67 and 1975-77.**

Item	3-year averages			Percent of total	
	1965-67	1975-77	Percentage change	1965-67	1975-77
	Thousands		*Percent*		
Total	2,990	2,712	–9.3	100	100
Race:[1]					
Whites	2,168	2,272	+4.8	72	84
Blacks and Others	822	440	–46.5*	27	16
Age:					
14-17 years	940	810	–13.8*	31	30
18-24 years	619	767	+23.9*	21	28
25-44 years	695	659	–7.2	23	24
45-64 years	594	360	–39.4*	20	13
65 years and over	142	116	–8.3	5	4
Region:					
Northeast	237	221	–6.8	8	8
North Central	564	717	+27.1*	19	26
South	1,440	1,125	–21.9*	48	41
West	748	648	–13.4*	25	24
Duration of farmwork:					
Less than 25 days	1,244	1,127	–9.4	42	42
25-74 days	754	625	–17.1*	25	23
75-149 days	354	329	–7.1	12	12
150-249 days	257	271	+5.4	9	10
250 days and over	381	360	–5.5	13	13

[1]Data were not available for Hispanic hired farmworkers for these periods.

*Changes in number or distribution between 1965-67 and 1975-77 are significantly different at the 95-percent confidence level.

Source: Gene Rowe, *The Hired Farm Working Force of 1977,* Agricultural Economics Report No. 437, USDA, ESCS, October 1979, p. 16.

***Table 3.* Hired farmworkers: Average annual earnings by primary employment status, 1977.**

Primary employment status[1]	Total				With farm work only		With both farm and nonfarm work		
	Workers		Total annual earnings	Annual farm earnings	Workers	Annual farm earnings	Workers	Total annual earnings	Annual farm earnings
	Number	Percentage Distribution							
	Thou.	*Percent*	*Dollars*		*Thou.*	*Dollars*	*Thou.*	*Dollars*	
In Labor Force	1,367	50	5,465	3,173	743	4,708	623	6,371	1,344
Hired farmwork	734	27	5,427	5,173	616	5,355	118	5,796	4,221
Other farmwork[2]	137	5	2,172	1,572	104	1,704	32	[3]	[3]
Nonfarm work	444	16	6,977	641	—	—	444	6,977	641
Unemployed	52	2	1,777	782	23	[3]	29	[3]	[3]
Not in Labor Force	1,364	50	1,058	649	846	740	518	1,575	498
Keeping house	238	9	770	590	178	600	60	1,270	561
Attending school	981	36	1,063	642	570	744	410	1,506	501
Other	145	5	1,495	719	98	977	47	[3]	[3]
All hired farmworkers	2,730	100	3,265	1,913	1,599	2,588	1,131	4,222	957

Number of workers may not add to totals due to rounding.
— = Not available.
[1]Refers to respondent's major or chief activity during the year. See appendix C.
[2]Includes operating a farm and unpaid family labor.
[3]Averages not shown where base is less than 50,000.
Source: See *Table 1,* p. 12.

***Table 4.* Number and distribution of hired farmworkers, by racial/ethnic group and Standard Federal Regions, 1977.**

Standard Federal Regions	All hired farmworkers					Migrant[1] farmworkers	
	Total		Distribution within region by racial/ethnic groups				
	Number	Percent	Whites	Hispanics	Blacks and others	Number	Percent
	Thou.	*Percent*				*Thou.*	*Pct.*
I—New England	75	3	97	3	—	1	—
II—New York and New Jersey	81	3	95	2	—	—	—
III—Mid-Atlantic	153	6	83	—	16	4	2
IV—Southeast	706	26	54	2	44	26	14
V—North Central Lake States	400	15	98	1	—	18	9
VI—Southwest	364	13	57	25	17	70	37
VII—Mid U.S.	277	10	96	2	1	14	7
VIII—Mountain	172	6	92	6	1	24	13
IX—Lower Pacific Coast	301	11	36	48	16	27	14
X—Northwest Pacific Coast	202	7	90	7	4	6	3
U.S.	2,730	100	72	11	17	191	100

Numbers and percentages may not add to totals due to rounding.
— = Not available.
[1]The regional distribution of migrant workers primarily reflects home-base location rather than place of work, since the survey was taken in December.
Source: Gene Rowe, *The Hired Farm Working Force of 1977,* Agricultural Economics Report No. 437, USDA, ESCS, October 1979, p. 13. See *Figure 10* for composition of Standard Federal Regions.

Table 5. **Geographic seasonality of farm labor: Workers on farms, selected weeks, by Standard Federal Regions and United States, in thousands, 1979-1980.**

Regions*	1978 8-14 January	1978 8-15 April	1978 9-15 July	1978 8-14 October	1979 7-13 January	1979 8-14 April	1979 8-14 July	1979 7-13 October	1980 6-12 January	1980 6-12 April	1980 6-12 July	Relative[9] Seasonality (1980)
I												
Total	61	68	97	90	59	69	86	77	61	71	95	
Family	37	36	54	45	37	39	45	35	34	36	48	56%
Hired	24	32	43	45	22	30	41	42	27	35	47	
II												
Total	94	120	140	129	88	113	149	124	85	114	156	
Family	65	79	82	80	61	81	85	68	51	70	89	84%
Hired	29	41	58	49	27	32	64	56	34	44	67	
III												
Total	222	241	345	257	219	240	294	228	227	241	303	
Family	173	171	247	184	173	176	206	151	169	162	206	34%
Hired	49	70	98	73	46	64	88	77	58	79	97	
IV												
Total	577	749	1,030	745	605	680	901	700	553	683	939	
Family	391	486	593	482	410	424	474	436	359	391	502	70%
Hired	186	263	437	263	195	256	427	264	194	292	437	
V												
Total	697	777	1,149	955	684	729	1,054	897	682	759	976	
Family	594	637	801	736	562	593	733	676	533	573	700	43%
Hired	103	140	348	219	122	136	321	221	149	186	276	
VI												
Total	378	507	572	526	351	445	533	514	373	432	531	
Family	284	359	372	357	269	316	345	320	263	291	337	42%
Hired	94	148	200	169	82	129	188	194	110	141	194	
VII												
Total	451	648	683	612	451	522	715	581	497	472	622	
Family	392	461	522	495	380	437	516	485	418	383	460	32%
Hired	59	87	161	117	71	85	199	96	79	89	162	
VIII												
Total	198	231	391	250	193	229	287	224	178	225	282	
Family	162	187	231	194	152	180	220	163	137	175	205	58%
Hired	36	46	88	56	41	49	67	61	41	50	77	
IX												
Total	216	272	357	288	222	283	366	386	257	281	382	
Family	64	73	92	78	73	79	93	89	75	83	93	49%
Hired	152	199	265	210	149	204	273	297	182	198	289	
X												
Total	116	164	253	211	109	157	254	213	109	164	257	
Family	84	94	121	106	78	95	115	102	73	92	112	136%
Hired	32	70	142	105	31	62	139	111	36	72	145	
U.S.												
Total	3,010	3,689	4,955	4,063	2,980	3,466	4,639	3,944	3,022	3,441	4,543	
Family	2,246	2,593	3,115	2,757	2,195	2,420	2,832	2,525	2,112	2,255	2,751	50%
Hired	764	1,096	1,840	1,306	785	1,046	1,807	1,418	910	1,186	1,792	

*See Figure 10 for Standard Federal Regions.
Source: *Farm Labor,* USDA, ESCS, Crop Reporting Board, February, May, August, November; 1978, 1979, 1980.

Table 6. **Workers on farms, annual averages, with U.S. indices, 1975 to 1979.**

Region*	1975	1976	1977	1978	1979
	Thousands (percent)				
I					
Total	74	80	80	78	73
	(100)	(100)	(100)	(100)	(100)
Family	44	46	44	43	39
	(59)	(58)	(55)	(55)	(53)
Hired	31	34	36	35	34
	(41)	(42)	(45)	(45)	(47)
II					
Total	130	136	128	122	119
	(100)	(100)	(100)	(100)	(100)
Family	85	92	82	77	74
	(65)	(68)	(64)	(63)	(62)
Hired	45	44	46	45	45
	(35)	(32)	(36)	(37)	(38)
III					
Total	310	300	287	268	245
	(100)	(100)	(100)	(100)	(100)
Family	234	210	213	195	177
	(75)	(70)	(74)	(73)	(72)
Hired	76	90	74	73	68
	(25)	(30)	(26)	(27)	(28)
IV					
Total	893	912	835	775	724
	(100)	(100)	(100)	(100)	(100)
Family	605	603	539	488	437
	(68)	(66)	(65)	(63)	(60)
Hired	288	309	296	287	287
	(32)	(34)	(35)	(37)	(40)
V					
Total	964	981	955	897	844
	(100)	(100)	(100)	(100)	(100)
Family	756	765	756	693	642
	(78)	(78)	(79)	(77)	(76)
Hired	208	216	199	204	202
	(22)	(22)	(21)	(23)	(24)
VI					
Total	548	543	519	498	461
	(100)	(100)	(100)	(100)	(100)
Family	390	381	358	344	313
	(71)	(70)	(69)	(69)	(68)
Hired	158	162	161	154	148
	(29)	(30)	(31)	(31)	(32)
VII					
Total	636	637	592	575	568
	(100)	(100)	(100)	(100)	(100)
Family	531	525	487	469	455
	(83)	(82)	(82)	(82)	(80)
Hired	105	112	105	106	113
	(17)	(18)	(18)	(18)	(20)

Table 6, continued.

Region*	1975	1976	1977	1978	1979
VIII					
Total	260	252	257	251	235
	(100)	(100)	(100)	(100)	(100)
Family	197	193	202	194	180
	(76)	(77)	(79)	(77)	(77)
Hired	63	59	56	57	55
	(24)	(23)	(21)	(23)	(23)
IX					
Total	338	335	332	303	322
	(100)	(100)	(100)	(100)	(100)
Family	81	82	85	84	86
	(24)	(24)	(26)	(28)	(27)
Hired	257	253	247	219	236
	(76)	(76)	(74)	(72)	(73)
X					
Total	188	200	185	190	184
	(100)	(100)	(100)	(100)	(100)
Family	102	102	98	102	98
	(54)	(51)	(53)	(53)	(53)
Hired	86	98	87	88	86
	(46)	(49)	(47)	(47)	(47)
United States					
Total	4,342	4,376	4,170	3,957	3,774
	(100)	(100)	(100)	(100)	(100)
Family	3,026	2,999	2,863	2,689	2,501
	(70)	(69)	(69)	(68)	(66)
Hired	1,317	1,377	1,307	1,268	1,273
	(30)	(31)	(31)	(32)	(34)
United States†					
Total	89	89	85	81	77
Family	83	82	78	74	69
Hired	92†	110†	103†	101†	102

*See *Figure 10* for composition of Standard Federal Regions.
†Seasonally adjusted indexes based on 1967 = 100.
Source: *Farm Labor,* USDA, ESCS, Crop Reporting Board, various issues, quarterly, 1975 to 1980.

Notes to Chapter 1

1. U.S. Department of Agriculture, 1978 Handbook of Agricultural Charts, Agricultural Handbook No. 551, November 1978, p. 11.

2. Total farm production expenditures in 1977 were $97.9 billion. Eight and one-tenth percent of that is $7.93 billion (U.S. Department of Agriculture, 1978 Handbook of Agricultural Charts, op. cit.). In 1977, annual average earnings of all hired farmworkers with 25 or more days of farm work was $3,018. Those workers numbered 1,675 million that year, resulting in an estimated labor cost of $5.055 billion (U.S. Department of Agriculture, 1979 Agricultural Statistics, Table 62, p. 431).

3. U.S. Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, 1974, Bulletin 1825, 1974, Table 46, p. 116; U.S. Department of Agriculture, ESCS, Farm Labor, Crop Reporting Board, August 1980. p. 3.

4. Id.

5. For more detail see Table 6. Figure 10 outlines the Standard Federal Regions.

6. U.S. Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, 1974, Bulletin 1825, 1974, Table 46, p. 116; and U.S. Department of Agriculture, ESCS, Farm Labor, Crop Reporting Board, August 1980, p. 3.

7. U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 1978-79 Edition, Bulletin 1955, 1978, p. 606.

8. Gene Rowe, The Hired Farm Working Force of 1977, Agricultural Economics Report No. 437, U.S. Department of Agriculture, Economics, Statistics, and Cooperatives Service, October 1979, p. 1. The report is usually published two years behind the survey. The 1977 survey was conducted in December 1977. See Figure 10 for Standard Federal Regions.

9. "Relative seasonality" as used here is defined as the number of workers used in the month of greatest labor use minus the number used in the month of least labor use, divided by the number of workers used in the month of least labor use. See Table 5.

10. Farm Labor estimates are quarterly and based on a multiple frame enumerative probability survey. See "Source and Reliability of Estimates," Farm Labor, La. 1(2-80), February 1980, p. 2. Hired Farm Working Force of 1977 estimates are based on data obtained in December 1977 from questions in the Current Population Survey of the Bureau of the Census. December is a month when labor is near its annual lowpoint. See Agricultural Economics Report No. 437, October 1979, p. 46.

Chapter 2

WAGE AND HOUR LAWS: AGRICULTURAL EMPLOYMENT

Wage laws establish minimum hourly rates which must be paid by certain employers to some or all employees. The rationale underlying such laws involves social as well as economic considerations.1/ Wage laws are designed to foster the well-being of workers and their families, particularly in industries where the pay is low and there are no labor organizations.2/ There is also an assumption that wage floors will help to prevent periodic downward trends in wages and prices,3/ thinking that reflects pressing concerns of depression economics. It has also been suggested that wage laws will tend to eliminate and prevent the recurrence of unfair competition resulting from the use of "sweatshop" labor.4/ While federal and state statutes have never been universal in their scope, it is theorized that the control of wages in some areas of employment will have a "spill-over" effect forcing up wages in unregulated employment as an "industry-wide custom of payment of at least the minimum wage" is established.5/

Hour laws, or more descriptively overtime laws, require that certain employers pay some or all of their employees time and one-half or even double time for work over a set number of hours per week. The traditional purpose of hour laws is not to improve the lot of workers by fattening their pay checks, but to fight unemployment by discouraging overtime work and encouraging the creation of additional jobs.6/ If minimum wage laws do not apply to a certain industry, it is virtually certain that no applicable hour laws will be found. However, the existence of an applicable minimum wage law is no assurance that hour laws exist for a particular industry. This is the case with agriculture where minimum wage laws currently have fairly widespread application, but where hour laws have almost no application.

This section will trace the evolution of wage laws as they apply to agricultural employment, and will look at limited developments in the area of hour laws. An assessment of the current state of the law will be made and recommendations set forth.

Historical Development

Wage Law Development in General

The first minimum wage law in the United States was enacted in Massachusetts in 1912. It did not set a minimum wage, but authorized a wage board to set standards and to publish the names of employers who did not meet them.7/ By 1923, 17 states had enacted minimum wage laws.8/ These early laws were designed to protect women and children and did not provide coverage for men.

In 1923 the United States Supreme Court in Adkins v. Children's Hospital 9/ upheld a lower court ruling that the minimum wage law of the District of Columbia was unconstitutional. The court spoke of freedom of contract and the right of the employer to pay a fair equivalent of the service rendered whether or not a living wage resulted. Minimum wage laws in several other jurisdictions were either declared unconstitutional or repealed.10/ It was not until the Great Depression of the 1930s that the effort to revive the minimum wage movement made headway. A number of states reenacted wage laws and in 1937 the U.S. Supreme Court in West Coast Hotel Co. v. Parrish 11/ upheld Washington's minimum wage law and in the process specifically overruled Adkins. The Court concluded that freedom of contract could be restricted in many situations including the area of contracts between employers and employees when the public interest demanded this. Much legislative activity followed and at the federal level the Sugar Act of 1937 12/ and the Fair Labor Standards Act of 1938 13/ (hereinafter FLSA) became law. The Sugar Act of 1937 was the first federal law to affect wages in agricultural employment, but its scope was limited to a single aspect of the agricultural sector. The Sugar Act of 1937, as amended, is discussed later. FLSA, while not applicable to agriculture when enacted, was of immense importance not only because of the leadership role which it provided for the federal government, but because it introduced significant innovations in general minimum wage legislation. These included application of the law to men, a statutory hourly minimum wage rate in contrast to the system of industry by industry

wage orders, and the requirement of overtime pay in some situations.14/ The constitutionality of FLSA was sustained in United States v. F.W. Darby Lumber Co.,15/ a 1941 decision of the U.S. Supreme Court. Further innovations came as a result of amendments in 1963 and 1967 which prohibited discrimination in pay on the basis of sex and age, respectively.16/

Because of various exclusions in FLSA, it remained desirable for the states to have minimum wage legislation and most, but not all, jurisdictions responded. However, in those states that enacted minimum wage laws, extensive exemptions applicable to agricultural employment were commonplace. While FLSA was amended several times to raise the hourly minimum from 25 cents per hour to successively higher levels and to expand the scope of coverage, it was not until 1966 that there was a major breakthrough in the agricultural labor area.

Wage Law Development in Agriculture

The Sugar Act of 1937. The Sugar Act of 1937,17/ later replaced by the Sugar Act of 1948,18/ was the first law to affect wages in agricultural employment. The Sugar Act of 1948, which expired on December 31, 1974,19/ conditioned the payment of federal sugar subsidies upon the payment by the farmer of a special minimum wage to persons employed in the production, cultivation, or harvesting of sugar beets or sugarcane.20/ "Special" is used to denote a wage rate under the generally applicable minimum wage. If a farmer failed to pay the special minimum wage, his subsidy payments, to the extent of unpaid wages, were payable directly to the workers.21/ Wage rates were set annually by the Secretary of Agriculture after regional hearings.22/ The regulations set per-hour minimums for those paid on an hourly basis and per-acre minimums for those hired to do such work as hoeing for a specific dollar amount for a designated area. Inasmuch as the Congress did not extend the Sugar Act of 1948, its expiration in 1974 left formerly protected employees to look to applicable provisions of the Fair Labor Standards Act of 1938 as amended and to state minimum wage laws if any.

The Fair Labor Standards Act of 1938. When President Roosevelt proposed federal minimum wage legislation in the 1930s, it is reported that he envisioned laws that would "help those who toil in factory and on farm."23/ However, since farm wages were traditionally lower than those paid in most other industries, Congress was not inclined to cover agriculture at the same wage floor designed for industry generally. "Agriculture" was broadly defined in FLSA to include farming in all its branches including the cultivation and tillage of the soil; dairying; the production, cultivation, growing, and harvesting of commodities; the raising of livestock, bees, fur-bearing animals, and poultry; plus incidental activities by a farmer or on a farm such as preparation for market, delivery to storage, or to market.24/

Through the years minimum wage laws have come in at between 40 and 57 percent of straight time average hourly earnings in manufacturing.25/ In 1937 the average hourly rate in manufacturing was 62 cents per hour while in farming it was only 17 cents per hour.26/ Even the 25-cents-per-hour minimum wage originally set in the FLSA would have brought farmworkers in at a level substantially over the existing agricultural mean. Thus, farmworker coverage under FLSA was destined to wait until the special minimum wage for agricultural employees emerged in the 1966 Amendments to FLSA.27/ Special in this context connoted a required wage level distinct from and lower than the general minimum wage. However, even after the 1966 changes only those employers using "500 man-days" of agricultural labor in a calendar quarter in the previous calendar year were required to comply, and then only as to nonexempt categories of employees.28/

While the coverage criteria established in the 1966 Amendments will be discussed in the following section, it should be noted that when Congress was considering these amendments the motion that carried the day was that "the exclusion of farmworkers from minimum wage protection was inequitable and inconsistent with the statement of policy of the Act."29/ According to one statistical analysis, using September 1975 employment levels, the effect of the 1966 partial inclusion of farmworkers under special minimum wage provisions brought coverage to about 572,000 of 1,375,000 farmworkers, roughly 42 percent.30/ Further amendments in 1974 31/ slightly increased the scope of coverage and, again using September 1975 employment levels, resulted in 597,000 of 1,375,000 workers being covered, roughly 45 percent.32/ The 1974 Amendments extended special minimum wage coverage to workers on farms that are part of conglomerates having a gross volume of business more than $10 million annually.33/ This change involved approximately 1,200 farms employing 39,200 workers, but since 96 percent were already covered by virtue of the test established in 1966,34/ the effect of conglomerate coverage was minimal.35/

The special minimum wage for covered agricultural workers lagged well behind the general minimum wage for a number of years. For example, note the following differences at several times since the 1966 Amendments went into effect: $1.00 vs. $1.40 in February 1967, $1.15 vs. $1.60 in February 1968, $1.30 vs. $1.60 in February 1969, $1.60 vs. $2.00 in May 1974, $1.80 vs. $2.10 in January 1975, and

$2.00 vs. $2.30 in January 1976.36/ Effective January 1, 1977, the special minimum wage rose to $2.20 and thus drew very close to the $2.30 general minimum wage for the first time.37/ The special minimum wage policy was scheduled to be phased out as of January 1, 1978, pursuant to legislation bringing agriculture to the $2.30 figure.38/ While the special minimum wage for agriculture did, as a practical matter, pass into history as of that date, the figures turned out to be somewhat different than just suggested. Under the Fair Labor Standards Amendment of 1977 39/ the general minimum wage was set at $2.65 beginning January 1, 1978, $2.90 beginning January 1, 1979, $3.10 beginning January 1, 1980, and $3.35 beginning January 1, 1981, and thereafter. In the process, the idea of eliminating the special minimum wage for covered agricultural workers was not abandoned. Effective January 1, 1978, the minimum wage for covered agricultural employment jumped from $2.20 to the general industrial level of $2.65 per hour. Note that the "agricultural" rate is still stated separately.40/ In 1979 covered agricultural employment, along with the industrial sector generally, was at $2.90 with the increases already indicated slated for 1980 and 1981.

It is important to note that a farm employer can comply with the minimum wage requirement without paying a cash wage at the full statutory rate. This is because the value of perquisites may within limits, be considered to be part of the wage. Perquisites can include board, lodging, and other facilities if customarily furnished by the employer to his employees.41/ Note also that where covered employees are paid on a piece rate, the rate must be reasonably calculated to generate sufficient compensation so as to satisfy the minimum hourly wage requirement.42/

Farmworkers have never been included under federal overtime or hour laws. Voluntary payment of overtime is an unusual phenomenon among farm employers.43/ Requirements under state law are rare, but not totally nonexistent.44/ According to a July 1974 survey,45/ universal overtime would affect the pay of almost one-third of 2.1 million farmworkers. Arguments for and against such an extension will be presented at the end of this chapter.

Current Status of the Law

Federal Law

Before applying the agricultural exemption scheme under FLSA, it is essential to determine that the employment in question is in "agriculture" as that term is defined in the statute. The definition is two part and contains what is known as the "primary" definition and the "secondary" definition.46/

The "primary" definition reads:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities) defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry,47/

The "secondary" definition follows immediately in the same subsection:

> and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to carriers for transportation to market.48/

Determining the parameters of each definition has lead to a great deal of litigation and to the promulgation of extensive interpretive regulations.49/ Problems with the definitions can be expected to persist and to contribute to the complexity of the law in this area. Any exploration of these cases and regulations is beyond the scope of this study, but excellent sources exist where analyses are provided.50/

Prior to the 1966 Amendments to FLSA, agricultural employment was not covered under its provisions. As a result of the 1966 Amendments, special minimum wage provisions were applied to certain categories of agricultural employment.51/ The concept of the special minimum wage prevailed until January 1, 1978, when covered farmworkers were brought to the level of the general minimum wage. However, it is estimated that less than one-half of the hired farmworker force is currently covered, given the threshold provisions and specific exemptions built into the 1966 Amendments which remain substantially intact, though slightly altered by subsequent amendments.52/

The threshold provision under FLSA is the 500 "man-days" test.53/ "Man-days" are defined to be days during which an employee performs agricultural labor for not less than one hour.54/ A farm employer who uses more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year must pay all but certain specifically excluded hired farmworkers the federal minimum wage in the current year. The man-days of employees, other than family members, count toward the 500 man-days even though some of those days are generated by employees who fall into one of the specifically exempted categories, the members of which are not entitled to minimum wage protection after their employer meets the 500 man-days test. Employees who are members of a nonincorporated farmer's immediate family are neither protected by FLSA nor do their work days count in the 500 man-days test.55/

The three categories of specifically exempted employees whose man-days may push a farmer over 500 man-days in a given quarter of a calendar year and bring minimum wage protection to workers on the farm other than themselves and family members 56/ are: hand harvest laborers paid on a piece rate in what is generally a piece rate operation, who came daily from their permanent residences and were employed less than 13 weeks in agriculture in the preceding year;57/ hand harvest laborers under the age of 17 years when employed on the same farm as their parents if paid on the same piece rate as older persons employed on the same farm;58/ cowboys and shepherds employed on the range in production of livestock.59/

The 500 man-days threshold is designed to effect a legislative policy of insulating small farmers from the cost and complications of the wage requirements of FLSA. Proof that the 500 man-days have not been used in an appropriate quarter by the employer is an absolute bar to employee recovery in a suit for the difference between the minimum wage and a lower contract wage rate.60/

The specific exemption of coverage to local commuting piece workers is part of a scheme to extend minimum wage benefits to migrant workers without elevating the cost of local labor.61/ Migrant piece workers who work for an employer who has met the 500 man-days test must be employed at a piece rate that is reasonably designed to net the minimum wage under normal working conditions. Prior to 1974, a grower could hire a careful mixture of local and migrant piece workers producing a situation where the 500 man-days test was not met, thus freeing the grower from all obligation to meet the federal special minimum wage as to any employees. This highly criticized maneuvering led to language in the 1974 Amendments which required the man-days of local hand harvest laborers to be included when running the 500 man-days test.62/

Wage laws have wider application to migrant workers than might be suspected by a cursory glance at FLSA. It is easy to presume that migrants are likely to miss out on the protection of FLSA because of their being employed for short periods on many different farms. If a 20-person crew works for four weeks, six days a week, only 480 man-days are generated; and if the employer has no other employees during the particular calendar quarter, it follows that the threshold which triggers the application of the law has not been reached. If this work pattern is repeated on farm after farm, it is possible to have a crew go through an entire farming season working on farms that do not meet the 500 man-days test. However, under current law a crew leader, also referred to as a farm labor contractor, is considered an employer in most instances. Continuing with the example of the 20-person crew, such an employer will have used far more than 500 man-days during the various calendar quarters year after year.63/ The crew leader will, therefore, be required to pay his crew at least the minimum wage and in contracting with farmers will have to be certain that the agreement generates enough to pay accordingly. Even where the labor contractor is not a bona fide independent contractor as where the farmer using the labor has the power to direct, control, and supervise the work as well as determine pay rates and method of payment, the regulations indicate that there will still be a joint-employment situation and that each employer is considered equally responsible for compliance with FLSA.64/

The FLSA is not the only federal legislation that currently affects wages paid in agriculture. Farmers who use employment services established under the provisions of the Wagner-Peyser Act must agree, when making application for workers, to pay at prevailing rates in their area, rates that may be substantially above the existing minimum wage.65/ These requirements will be discussed in the chapter on employment services. Further, farmers who order foreign agricultural workers through the "H-2" program are required by regulation to pay at rates at or above "adverse effect rates" set to protect domestic workers.66/ Again, these rates may be substantially higher than prevailing minimum wage rates. The "H-2" program will be discussed in the section on alien farmworkers and immigration and naturalization laws.

It is possible that the exemption of piece workers under the age of 17 encourages child labor, since a grower may hire young people to do piece work without being concerned as to whether they will generate the equivalent of the minimum wage. The pros and cons of this will be explored in the section on child labor in agriculture, but essentially it is a question of whether current wage laws and other social legislation should be designed to encourage or discourage employment for young people on farms.

Workers employed on a farm that has met the 500 man-days test must be paid the "agricultural" minimum wage regardless of age, unless they fall into one of the specifically exempted categories. Thus, a young person age 15 who is not a family member and who is paid an hourly wage for work other than range production of livestock must be paid $3.10 per hour in 1980. There is an exception, however, which applies a reduced minimum wage to the employment of certain students and learners who are working pursuant to a special certificate issued to the agricultural employer by the regional Wage-Hour Administrator or his designate.67/ The reduced minimum wage is currently 85 percent of the federal minimum wage.68/ Unless special permission is granted on the basis of a finding that full-time employment opportunities will not be reduced, an employer may hire no more than six workers under the special certificate program.69/

State Legislation

A completely current report on the wage and hour law of each state is outside the scope of this study and, in any event, would be of limited value because of frequent changes. However, it is possible to point out certain patterns. A few states, including Alabama, Florida, Iowa, Louisiana, Mississippi, Missouri, South Carolina, and Tennessee have no minimum wage laws nor are there any provisions for administrative wage orders. Many of the jurisdictions that do have minimum wage laws or administrative wage orders provide a blanket exclusion of agriculture.70/ However, almost half of the states that regulate in this area do provide some type of coverage for at least part of the agricultural labor force. In some instances, the state legislation incorporates the exclusionary scheme of the FLSA verbatim.71/ In other states, protection is extended to some workers excluded under the federal scheme. New York provides a simple and Minnesota a more complex example of law in this latter category.

In New York, the approach involves a special statutory provision affording minimum wage coverage when the agricultural employer has a payroll that exceeds a dollar threshold. Since 1970, all agricultural employers who paid $1,200 or more in wages in the preceding calendar year must pay a special minimum wage in the current year.72/

The present Minnesota Fair Labor Standards Act became effective January 1, 1974.73/ It set a $1.80-per-hour minimum wage, the same rate as the special federal rate for farmworkers through 1975. Until October 1, 1976, the act covered persons 18 year of age or older. It applied to agriculture only if employment was on a farm which used at least the equivalent of two full-time workers and which, on any given day, employed more than four farmworkers.74/ Under the statute, the equivalent of one full-time worker is 40 weeks of employment in a calendar year.75/ Employees not yet 18 years of age probably did not have to be counted in computing full-time worker equivalents or actual numbers of workers. Effective October 1, 1976, the act was amended to raise the minimum wage to $2.10 for those 18 years and older and to institute a reduced minimum wage of $1.89 for those under age 18.76/ Effective September 15, 1977, the minimum wage for those over age 18 was raised to $2.30 and for those under age 18 to $2.07.77/ Effective January 1, 1980, the minimum wage for those over age 18 was fixed at $2.90 and for those under age 18 at $2.61.78/ Increases are set by statute for 1981, $3.10 and $2.79, respectively; and for 1982, $3.35 and $3.02, respectively. Since October 1, 1976, it would seem reasonable to assume that those under age 18 would be included in determining full-time worker equivalents and numbers of employees.

The potential complexity of the interrelationship of federal and state law can be illustrated using the Minnesota example. During the period January 1, 1974, to October 1, 1976, it was theoretically possible for a Minnesota farmer who met both the 500 man-days test and the test for application of the Minnesota law to have workers in the following categories: an adult not exempted under federal law at special federal minimum wage; an adult exempted under federal law at the Minnesota minimum wage; a worker under 18 covered under federal law (for example, a 17-year-old migrant worker paid by the hour); and a worker under 18 covered by neither law. Since October 1, 1976, the same situation could exist except that the last worker, a person under 18 not covered by federal law because exempted, would be entitled to the Minnesota reduced minimum wage at the under-age-18 rate. In 1980, therefore, the federal reduced rate aside, three wage rates could be in effect simultaneously on a Minnesota farm: the $3.10 federal, the $2.90 Minnesota, and the $2.61 reduced Minnesota.

Extra compensation for work over 40 or 48 hours per week is not required under federal law and is virtually unknown under provisions of state law. However, an exception is found in the law in Minnesota where provision is made requiring payment of time and one-half for work over 48 hours to farm employees, as well as others, if they qualify for the minimum wage under Minnesota law.79/

Enforcement Efforts

Recent data are inconclusive as to the extent of compliance with existing farmworker wage laws. Wages of farmworkers for all methods of pay were reported for the week of April 8-14, 1979, to average $3.39 per hour.80/ That was an encouraging figure since it did not include the value of perquisites provided to some workers but did include the wages of those who were not under federal minimum wage coverage.81/ Those receiving only cash wage and no perquisites averaged $3.64 for the same period.82/ Again the wages of noncovered workers were included. Both figures are substantially above the then current federal minimum of $2.90. Even livestock workers during the stated period averaged $2.90 without considering perquisites.83/ However, when state-by-state figures are examined, the picture changes somewhat.84/ Ten states had an average rate for all hired farmworkers under $2.90. They were West Virginia, Georgia, South Carolina, Tennessee, Wisconsin, New Mexico, Montana, South Dakota, Wyoming, and Nevada. New Mexico and South Dakota were the lowest with $2.45 and $2.44, respectively.85/ The value of perquisites was not counted and wages paid to excluded workers were included. When the figures for workers paid by cash wages alone are examined, no state was under $2.90, and only one—South Carolina—was under $3.00.86/ Figures for workers paid cash wages by the hour and receiving no perquisites show three states under $2.90 on the average: Goergia at $2.89, South Carolina at $2.89, and New Mexico at $2.70.87/ Again, these averages include workers who were not covered. In 14 states the average wage for the period for field workers was below $2.90, but again perquisites are not counted and the wages of noncovered workers are figured in.88/ Given that as many as 50 percent, and possibly more, worked in employment that was not covered and that the value of perquisites was not included in figuring the averages, the figures are encouraging and at least suggest the possibility that compliance is extensive and that the "spill-over" effect of the nonuniversal minimum wage in agriculture may be very real.

The following minimum wage compliance data for agriculture was reported by the Employment Standards Administration of the U.S. Department of Labor:89/

	Fiscal Years					
	1973	1974	1975	1976	1977	1978
Compliance actions	1008	927	847	1056	921	1045
Wage violations	3510	1986	2108	2368	2827	4265

Department of Labor compliance actions are aimed at employers who are suspect of violations.

The fact is that existing data are not satisfactory for purposes of evaluating the effectiveness of minimum wage legislation as it applies to agriculture. If a tentative conclusion is to be attempted on the basis of the type of data presented above, it would be that noncompliance is not widespread. However, more study is clearly needed.

There are other factors that cause concern with respect ot the degree of compliance. Fear of retaliation may inhibit workers from reporting violations, government compliance efforts are minimal at best, and the awkward nature of the statutory schemes hardly encourages voluntary compliance. Persons who have worked in migrant legal action programs have frequently suggested that migrant and seasonal farmworkers are unlikely to exercise their FLSA rights because of fear of potential employer retaliation.90/ It is true that FLSA specifically prohibits employers from retaliating and provides that an employer may not "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the chapter, or has served or is about to serve on an industry committee."91/ What the seasonal or migrant farmworker might fear most is not outright retaliation manifested by firing, but future discrimination when the employer fails to rehire him during the next farming season. Since the aggrieved employee must make a *prima facie* showing of retaliation and since an astute employer can usually generate a business pretext for the refusal to rehire, the worker who asserts FLSA rights does take a great risk even though the antiretaliation provision is in the law. Even a protective order *in camera* allowing the farmworker to commence the suit without revealing his identity provides useful protection only for one working season.92/ Uninhibited complaints are essential to root out cases of noncompliance and until much stronger antiretaliation legislation is forthcoming such reports will probably not be made in great numbers. Placing the burden to show freedom from retaliatory motive on the employer would be an obvious and substantial change in the present law.

Comparatively little energy is being expended by the Department of Labor in compliance efforts in the agriculture production sector:93/

Compliance actions	Fiscal Years 1973	1974	1975	1976	1977	1978
All industries	78,162	66,395	61,263	62,770	58,690	65,342
Agricultural production	1,008	930	845	1,055	921	1,045
Percent of all actions	1.29	1.40	1.38	1.68	1.57	1.60

This is not a particularly impressive record, and if the problem is lack of funding, the responsibility falls directly on the Congress to make a more aggressive enforcement program possible.

Congress could also move to make current minimum wage provisions for agriculture more effective. This would involve simplification of the law, in particular an elimination of the 500 man-days threshold. Compliance with the existing law by a farmer who hires a moderate number of workers requires constant attention to the formula. In some instances, application of the federal minimum wage will be an off-and-on-again requirement. Even the farmer who is not currently required to comply should comply with federal record keeping requirements if there is a chance that he will use 500 man-days in a single calendar quarter of the current year. For example, the farmer who uses 10 hired workers, all generating man-days, for six days a week for eight weeks in a quarter has used 480 man-days and will reach the 500 mark with just two additional work days.

The situation is, in many instances, no better under state law. For example, the two full-time worker equivalency test and the more than four employees on any given day test in Minnesota law requires careful and informed recordkeeping. Also, the peculiar interplay of federal and state law can lead to some unusual and frustrating results. For example, in Minnesota it is theoretically possible for one farm employer to fall under the federal minimum wage law for some workers and the state for others, for the next farm employer down the road to fall under only the state requirements, and for a third farm employer to come under neither federal or state law. If wage and hour laws were the only regulatory requirements affecting farm employment, it would be rather easy to argue that the formulas and exclusionary provisions could be managed, but when these requirements are viewed in the overall context of the regulation of farm employment, they become part of an incredibly involved scheme.

Emerging Developments

There were no bills pending in the 96th Congress as of October 1980 94/ which would in any way alter the present threshold requirement and system of exclusions as they apply to agricultural employment. This study did not extend to analyzing pending legislation at the state level, if any.

Evaluation

Much has been written to the effect that existing wage and hour laws tend to perpetuate social injustice and some deeply rooted notions about the propriety of cheap agricultural labor in this society.95/ To some extent these views must be given credence, particularly when one considers that the current federal law reaches less than one-half the farmworkers in the United States and that a substantial number of states have no minimum wage law affecting agricultural employment. When one considers that recent figures show the mean rate for field workers to be $2.55 in Nevada, $2.53 in Wyoming, $2.38 in South Dakota, $2.49 in South Carolina, $2.67 in North Carolina, and $2.65 in Georgia, perquisites aside, one can imagine the range or rates necessary to produce such averages.96/

Of course, the current federal minimum rate of $3.10 is a significant improvement over past special minimum rates and the scheduled move to $3.35 in 1981 is to be applauded. The move from $2.20 in 1977 to the 1979 rate of $2.90 represented a 70-cent increase in just two years and the increase to $3.10 in 1980 effected a 90-cent increase in just three years. If these improvements could be coupled with an elimination of the 500 man-days threshold, the situation would be vastly improved, even if the specific exemptions for certain classes of workers remained in the law. Recent studies indicate that just the elimination of the specific exemptions would have an insignificant impact nationally with a total of approximately 80,000 workers being affected.97/ However, if in addition the 500 man-days test were to be eliminated, the effect would be dramatic—with coverage being extended to an additional 1.4 million workers.98/

Setting aside consideration of the specific exemptions the elimination of the 500 man-days threshold would no doubt have its greatest impact in the southern and border states together with a few states in the Upper Midwest and West. Thus, a critical question may be one of timing so as to allow the farm economy in those parts of the country to adjust to the jolt of further increased labor costs. Coordination with extensions of other programs, such as unemployment insurance, should be assured so simultaneous introduction of potential cost increasing legislation does not occur. Reasonable periods

between such extensions should be maintained. However, it must be assumed that an appropriately timed extension of wage laws can be absorbed by agricultural employers. This conclusion is based on the historical ability of agriculture to absorb the costs of Social Security, the wage requirements of the 1966 and 1974 amendments, and other increased production costs.99/ Studies indicate that, even given the differences of agriculture in terms of price and market structure, over a period of time added costs of production will be absorbed and passed on to consumers. While it may be true that some marginal operators will be unable to cope with the increased costs, unless there is substantial evidence that this group is significant in size, it is hard to justify inaction on behalf of hundreds of thousands of hired farmworkers to salvage a relatively few farm operators.

It would seem inadvisable to go to a 100 or 250 man-days test as some have suggested.100/ That would simply put a different group of farm employers through the process of having to become familiar with the law and would only serve to perpetuate the complexity of statutes and regulations rather than reversing that trend.

One argument raised against the elimination of the 500 man-days test is that unusual difficulties will be encountered in enforcing the law in instances where there are only one or two employees and where the work is seasonal or transient in nature. Experience with the Social Security Act, certain workers compensation statutes, and other social legislation, while not problem free, indicates that administration and enforcement of social legislation of universal or nearly universal scope is possible in modern agriculture. Modern computer technology coupled with a requirement that an employee's hourly rate, plus the hourly value of perquisites, if any, be stated on FICA returns would deter most potential violators.

The issues are more complex with respect to the efficacy of repealing the specific exemptions in the FLSA. For example, it is possible that the extension of the minimum wage to those engaged in the range production of livestock would have a devastating effect on ranchers. The hours worked by employees on the range are often extremely long and hard to measure, given the fact that hired workers may be in remote country for days. Most of these workers are on salary, receive some perquisites, and may well not need minimum wage protection.

The exemption affecting certain workers under age 17 may also be justifiable, if it is determined that there is a need to preserve jobs for young people by allowing payment of a wage under the national minimum. However, rather than leave this area totally unregulated, it may be that a reduced minimum wage should be set as in Minnesota and as is the case with certain student workers under the federal law.

The exemption of local seasonal piece workers is perhaps the most difficult of the specific exclusions to justify. Other than to provide cheap labor for cultivating and harvesting certain crops, there seems to be little reason for the exemption, and such a purpose is not a very palatable justification for failing to protect this class of workers. It may be suggested that forcing payment of higher piece rates that would assure the minimum wage under normal working conditions would result in the elimination of many such jobs given the tendency of operators to respond when they can with crop changes and mechanization. Since many of the local workers are simply supplementing other income or are not the principal wage-earners in their families, it may be argued that it is better to leave the situation alone so as to preserve these extra sources of income for those who are interested. Such arguments may be persuasive to some for the moment, but they should not be the basis for long-term policy making which ought to be geared to the gradual elimination of the exemption. Farmers and consumers ought not to be permanently subsidized by these workers.

The exemption for family members is one that is likely to survive. Such an exemption appears in other types of social legislation. There seems to be a long-established policy of "hands-off" family operations and in most cases since all that is happening is a distribution of the income from one farmer among several in the same household, it seems inappropriate for the government to regulate that distribution. Where two or more family units are on one farm, as where a son or daughter runs a separate household, it also seems doubtful that federal protection is needed to adjust wages. The pressing issue that arises in connection with this exclusion has to do with its scope and the fact that it does not operate when the family farm incorporates. As will be pointed out repeatedly, most legislative bodies have failed to look carefully at the fact that the family farms are becoming incorporated at an increasing rate across the country. Why wage and hour laws should apply when the family operates in corporate form rather than as a sole proprietorship or partnership is difficult for many farm operators to understand. It is still a family operation and the reasons for the exclusion as it applied to a noncorporate operation are as valid when applied to the family farm corporation. Whatever the long-range decision might be, legislative bodies need to look much more carefully at this problem than they

have in the past. It is possible to define "family farm corporation" and extend the exemption accordingly. A specific decision to do or not to do this would seem desirable.

However, even the most extensive application of wage laws to agricultural employment will not solve the general problem of low incomes for such workers and their families. Until the minimum wage is in the area of 50 percent of the mean cash wage or the mean wage plus the value of perquisites, farmworkers will continue to be behind the national workforce generally and will suffer not only low incomes but related low benefit levels for Social Security, unemployment compensation, workers' compensation, and other programs. A long-range solution is suggested by the experience to date in California where the impact of unionization is beginning to be noticeable. Recent figures demonstrate that the minimum wage of $2.90 was between 70 and 85 percent of actual farmworker wages nationally, depending on which categories of farm employment are used.101/ However, for the same period in California, the minimum wage of $2.90 was between 54 and 71 percent of the average wage, again depending on which categories are used.102/ For example, in California the effective average rate for piece workers was $5.30 per hour, the highest in the nation.103/ The minimum wage was 54 percent of that. The average rate for all workers, perquisites not included, for California for one week in April 1979, was $4.11.104/ The minimum wage was 71 percent of that. It would hardly seem a coincidence that these figures emerge in the state where unionization in agriculture is the most pronounced. Recent United Farm Worker breakthroughs suggest that even more impressive figures may soon be reported in California. In September 1979, strike settlements brought agreements calling for an initial $5.00 an hour wage, increasing to $5.70 by the end of three year contracts, and also for automatic cost-of-living raises.105/

Prior to the enactment of the FLSA Amendments of 1977, there had been considerable discussion of moving the minimum wage to $3.00 per hour and legislation to that effect was introduced in the first session of the 94th Congress.106/ Thereafter, the rate was to be governed by changes in the Consumer Price Index. Serious questions were raised about this provision, since adjustments could be required as often as twice a year. Many firms, particularly farm firms, might find it difficult to absorb unexpected wage costs. Therefore, it was probably fortunate that Congress retained control over the minimum wage level in the 1977 legislation.107/

One final matter remains for evaluation. Would it be feasible to extend hour laws at the federal level to cover on-farm production workers? There is little evidence that requiring employers to pay overtime would result in the reduction of unemployment in any segment of the farm economy. Some may argue that mandatory overtime pay would help raise the general income level of those who work in on-farm production. While this has not been the traditional rationale for hour laws, it may be, given the seasonal nature of much agricultural employment, that this would be one way to help those involuntarily employed less than a full year to earn on a basis comparable to those with year-round employment. To the extent that certain farm employers would be forced to use workers on an overtime basis because of the unavailability of additional workers and to the extent that some farmers cannot escape by mechanization, the extension of overtime benefits might have the indicated result. How many jobs would be lost and how many workers would have their present long work weeks cut back is difficult to predict.

Recommendations

It is recommended that the 500 man-days threshold in the federal law be reexamined, with current data being accumulated to determine the probable impact of its elimination. If the conclusions stated in this study are verified, it is recommended that the exclusion be eliminated entirely. A reduction in the scope of the exclusion by the enactment of a 100 or 250 man-days test is not desirable unless economic realities demand that the present threshold be phased out rather than eliminated in a single legislative move.

The specific exemptions in federal law deserve careful review. While it is not likely that all can be eliminated, it seems likely that the exemption for local piece workers would be the prime candidate for early action. There is also a pressing need to reevaluate the application of the current law to family farm corporations with a view to expanding the scope of the existing exclusion to bring consistent treatment to family operations regardless of the business form adopted.

It is recommended that the special minimum wage be left as an historical phenomenon and not be reinstituted. Further, considering the impact of inflation, a review of the presently fixed minimum wage levels for 1981 and thereafter is recommended. Consistent with action in recent years, it would seem appropriate to at least keep pace with inflation and, if economically feasible, have minimum wage levels running a little ahead of the inflation rate. Of course, such a decision would have to be made with

careful consideration to whether it would have a significant adverse effect on the problem of inflation and the attempts to control an unacceptable present annual rate.

The impact of the union movement in California suggests that legislation encouraging farmworker unions be seriously considered again at the federal level and in those states that have not yet moved in the area. A more detailed discussion of labor laws as they relate to agriculture is included in a later section.

The extension of hour laws to agricultural employment at the federal level should be reviewed. A requirement of time and one-half for work over 48 hours a week would be an appropriate measure to study. It seems unlikely that economic conditions would permit serious consideration of overtime pay for hours over 40 and under 49 hours per week.

The creation of a reduced minimum wage for youthful workers in federal legislation should also be given consideration. This would be of particular importance if the 500 man-days threshold was eliminated and extension of the general minimum wage became far more extensive in agriculture.

Finally, a general study of minimum wage legislation as it affects agriculture is in order, with the impact of proposed changes being given careful consideration. Would the elimination of the 500 man-days test cause more than a relatively few marginal operators to go out of business? Would the change have a particularly devastating effect on certain types of farming operations? Just how much "fill-in" work for housewives and students would be eliminated if the exclusion for local piece workers was eliminated? Given the extensive labor input already included in the price of most items in the supermarket, would expansion of the scope of coverage of minimum wage laws really have more than a negligible impact on prices generally, or on the prices of certain commodities? Given the many forces that appear to promote mechanization and the loss of jobs in the agricultural sector, would increased wage costs really cause a noticeable acceleration in mechanization except in isolated cases? Would the extension of hour laws cause a loss of jobs and would such a move really improve annual earnings for a significant number of farmworkers?108/

It is indisputable that economic realities and social concerns need to be balanced in this as well as other areas, but unless the economic arguments against change are overwhelming, the social considerations including improving the lot of hired farmworkers, producing a more workable set of laws and moving agricultural employment closer to the mainstream of the national production economy ought to carry the day.

Notes to Chapter 2

1. One school of thought suggests that minimum wage laws hurt the poor by eliminating jobs and forcing people into welfare programs. See Leffler, "Minimum Wages, Welfare, and Wealth Transfers to the Poor," 21 Journal of Law and Economics 345 (1978), which discusses this view and references to a number of relevant studies.

2. See Weiss, "A Look at the Minimum Wage and H.R. 10130," 27 Labor Law Journal 131 (1976), reprinted 2 Lab. L. Rep., Wages-hours (CCH) ¶30,478.

3. Ib.; See also Growth of Labor Law in the U.S. 125 (1962).

4. Ib.

5. See Sherman, "Farmworkers Amendments to the Fair Labor Standards Act," 5 Clearinghouse Rev. 207, 208 (1971); Growth of Labor Law in the U.S., 129 (1962).

6. See Weiss, supra note 2.

7. Growth of Labor Law in the U.S., 72 (1962).

8. Id. at 69.

9. 261 U.S. 525, 67 L. Ed. 785, 43 S.Ct. 394, 24 ALR 1238 (1923).

10. Growth, supra note 6 at 79.

11. 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 ALR 1330 (1937).

12. See notes 17 through 22, infra and accompanying text.

13. 29 U.S.C. §§201-19 (1976), as amended, (Supp. I, 1977).

14. Growth, supra note 6 at 84.

15. 312 U.S. 100, 85 L. Ed. 604, 61 S.Ct. 451, 132 ALR 1430 (1941).

16. See Equal Pay Act of 1963, Pub. L. No. 88-38, §3, 77 Stat. 56-57 (codified at 29 U.S.C. §206 (d) (1) (1970)). The act took effect on June 10, 1964, one year after its enactment.

17. Sugar Act of 1937, ch. 898, 50 Stat. 903 (expired Dec. 31, 1947).

18. Sugar Act of 1948, ch. 519, 61 Stat. 922 (expired Dec. 1, 1974) (formerly U.S.C. §§1100-61 (1970), as amended, (Supp. IV, 1974).

19. Sugar Act Amendments of 1971, Pub. L. No. 92-138, §18(a), 85 Stat. 390 (codified at 7 U.S.C. §§1101, 1111, 1112, 1114-17, 1119, 1121, 1122, 1132, 1133, 1137, 1153, 1154, 1158 (Supp. IV, 1975)) provided the existing act would expire no later than Dec. 31, 1974.

20. Sugar Act of 1948, ch. 519, tit. III, §301(c), 61 Stat. 930 (expired Dec. 31, 1974) (formerly 7 U.S.C.).

21. Sugar Act of 1948, ch. 519, tit. III, §301(c)(4), 61 Stat. 930 (expired Dec. 31, 1974) (formerly 7 U.S.C.).

22. 7 C.F.R. §862.10 (1975).

23. See Koziara, "The Agricultural Minimum Wage: A Preliminary Look," 9 Monthly Labor Review 26 (1967).

24. 29 U.S.C. §203(f) (1976), as amended, (Supp. I, 1977).

25. Weiss, supra note 1.

26. Kantor, "A Minimum Wage for Farm Workers," 83 Monthly Labor Review 677 (1960).

27. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, §103, 80 Stat. 832-33, amending 29 U.S.C. 203(e) (1964) (codified at 29 U.S.C. §203(e)(3) (1976) as amended (Supp. I, 1977)).

28. See notes 54 through 60, infra and accompanying text.

29. S. Rep. No. 1487, 895th Cong., 2d Sess., 22648 (1966).

30. Letter from Assistant Regional Administrator, Dept. of Labor, to Donald Pedersen, July 15, 1976, statistical data enclosed.

31. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6, 88 Stat. 55, amending 29 U.S.C. §203(e) as amended (1976) (Supp. I, 1977).

32. Letter, supra note 20.

33. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 18, 88 Stat. 61-69, 72 adding 29 U.S.C. §213(g) codified at 29 U.S.C. §213(g) (1976) (Supp. I, 1977).

34. "Man-day" is defined in the act as "any day during which an employee performs any agricultural labor for not less than one hour. 29 U.S.C. §203(u) (1976). See also 29 U.S.C. §203(e)(3) (1976); 29 U.S.C. §203(a) (1976).

35. U.S. Dept. of Labor, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act 47 (1976) (hereinafter cited as Minimum Wage and Maximum Hours); "conglomerate" coverage should not be confused with "enterprise" coverage which has to do with work in intrastate commerce being covered, if no specific exemption applies, if the employer "enterprise" is engaged in interstate commerce.

36. Minimum Wage and Maximum Hours, supra note 25 at 15.

37. 29 U.S.C. §206(a)(5)(D) (1976 & Supp. I, 1977).

38. 29 U.S.C. §206(a)(5)(E) (1976 & Supp. I, 1977).

39. Pub. L. No. 95-191, 91 Stat. 2145 (95th Cong., Nov. 1, 1977).

40. 29 U.S.C. §206(a)(5) (1976 & Supp. I, 1977), as amended Pub. L. No. 95-191, 91 Stat. 1245.

41. 29 U.S.C. §203(m) (1976 & Supp. I, 1977), as amended Pub. L. No. 95-191, 91 Stat. 1245.

42. U.S. v. Rossenwasser, 323 U.S. 360, 65 S.Ct. 295, 89 L.Ed. 301 (1945).

43. Minimum Wage and Maximum Hours, supra note 25 at 49.

44. See O.R.C. §4111.03 (Page 1975), as a typical example, excludes agricultural employees from overtime provisions, but see Minnesota FLSA, Minn. Stat. §177.25, Subd. 1 (Supp. 1979), provides that work in excess of 48 hours per week must be compensated at time and one half.

45. Minimum Wage and Maximum Hours, supra note 25 at 49.

46. See Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 69 S.Ct. 1274, 93 L.Ed. 1672 (1949).

47. 29 U.S.C. §203(f) (1976).

48. Id.

49. 29 C.F.R. §780.100 et seq.

50. Eg., 4 FRES, Wage and Hour Laws §25:9 et seq.

51. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, §103, 80 Stat. 832-33, amending 29 U.S.C. §203(e) (1964) (codified at 29 U.S.C. §203(e) (1976).

52. Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, §6(a)(2), 88 Stat. 58, 64, amending 29 U.S.C. §203(e)(3) (codified at 29 U.S.C. §203(e)(3) (1979) (Supp. I, 1977)); see Minimum Wage and Maximum Hours, supra note 25 at 47-49.

53. 29 U.S.C. §213(a)(6) (1976) (Supp. I, 1977).

54. 29 U.S.C. §203(u) (1976) (Supp. I, 1977).

55. 29 U.S.C. §203(e)(3) (1976) (Supp. I, 1977).

56. 29 U.S.C. §203(e) (1976) (Supp. I, 1977).

57. 29 U.S.C. §213(a)(6)(C) (1976) (Supp. I, 1977).

58. 29 U.S.C. §213(a)(6)(D) (1976) (Supp. I, 1977).

59. 29 U.S.C. §213(a)(6)(E) (1976) (Supp. I, 1977).

60. Sherman, "Farmworkers Amendments to the Fair Labor Standards Act," 5 Clearinghouse Rev. 207, 222 (1971).

61. Does this exclusion have the effect of discouraging the use of migrants in favor of "cheaper" local labor?

62. See Supra note 41.

63. 29 C.F.R. 780.331(d) (1978).

64. Id.

65. 20 C.F.R. §653.108(c)(4) (1978).

66. 20 C.F.R. §655.207 (1978), revised and corrected 44 Fed. Reg. 32211, 32212, 47042, 49664 (1979) and 45 Fed. Reg. 29854 (1980).

67. 29 U.S.C. §214 (1976) (Supp. I, 1977) and regulations promulgated thereunder. Other than during school vacations, such work is limited to 20 hours in any work week.

68. 29 U.S.C. §214(b)(1)(A) (1976) (Supp. I, 1977).

69. 29 U.S.C. §214(b)(4)(B) (1976) (Supp. I, 1977).

70. See Staff of Subcomm. on Agricultural Labor, House Comm. on Education and Labor, "Federal and State Statutes Relating to Farmworkers" 1-70 (Comm. Print 1976).

71. 29 U.S.C. §213(a)(6) (1976).

72. N.Y. Consolidated Laws, Labor 672 (McKinney's 1977).

73. Minn. Stat. §§177.21-.35 (1974), as amended, (Supp. 1975); amended by, Laws 1976, 165, and Laws 1980, c. 415 §1.

74. Minn. Stat. §177.23, subd. 7 (1)-(2) (Supp. 1975), as amended.

75. Minn. Stat. §177.23, subd. 7 (1) (Supp. 1975), as amended.

76. Minnesota Session Laws 1976, c. 165, §1, eff. Oct. 1, 1976.

77. Minnesota Session Laws 1977, c. 183, §1, eff. Sept. 15, 1977.

78. Minn. Stat. §177.23, subd. (1) (Supp. 1980).

79. Minn. Stat. §177.25 (1974); Minn. Stat. §177.23(7)(1) & (2) (1974).

80. Farm Labor, May 24, 1979, p. 3.

81. Id.

82. Id.

83. Id.

84. Separate data not available for Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont. Alaska and Hawaii not included at all.

85. Farm Labor, May 24, 1979, at 12.

86. Id.

87. Id.

88. Id. at 13.

89. Minimum Wage and Maximum Hours, supra note 25 at 49.

90. Catz and Scher, Farm Workers and the Fair Labor Standards Act: Minimizing Employer Retaliation, 10 Clearinghouse Review 111 (1976).

91. 29 U.S.C. §215(a)(3) (1976) (Supp. I, 1977).

92. Catz and Scher, supra note 78 at 116-117.

93. Data accompanying letter, supra note 20.

94. C.C.H. Cong. Index, 96th Cong.

95. See, e.g., Shotwell, The Harvesters: The Story of the Migrant People (1961).

96. Farm Labor, May 24, 1979, at 13.

97. Minimum Wage and Maximum Hours, supra note 25 at 48.

98. Id.

99. Griffing, Walker, Weitzman, Youtie, A Social and Economic Analysis of the Exclusion of Farm Workers from Coverage Under the Indiana Workmen's Compensation Act of 1929, pp. 23-33; Hearings on S. 1861, S. 1725, HR 7935 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93rd Cong., 1st Sess. 427 (1973).

100. Growth, supra note 6 at 129.

101. Farm Labor, May 24, 1979.

102. Id.

103. Id. at 12.

104. Id. at 12.

105. San Francisco Chronical, Sept. 26, 1979 at 3; Los Angeles Times, Sept. 14, 1979 at 3; Los Angeles Times, Sept. 13, 1979 at 3; Los Angeles Times, Sept. 11, 1979 at 3; New York Times, Sept. 2, 1979 at 24; Los Angeles Times, Sept. 1, 1979 at 1.

106. H.R. 10, 130, 94th Cong., 1st Sess. (1975).

107. See generally, Weiss, supra note 1 at 131.

108. See, supra note 1, where reference is made to studies which suggest that minimum wage laws may have an adverse impact on the working poor by driving them to the welfare roles.

Chapter 3

CHILD LABOR IN AGRICULTURE

The oppression of children in the factories and "sweatshops" of an earlier day is a well-documented part of American history.1/ Eventually it was determined that the state had a legitimate interest in putting an end to children being worked beyond the limits of their physical capacity and having their schooling interfered with. An argument also emerged that it was necessary to limit the employment of children to aid the fight against unemployment and to eliminate a factor which was believed to depress wages and delay improvements in working conditions for adults.2/

State legislatures and the Congress responded gradually with laws regulating certain aspects of the employment of children. In general, the resulting child labor laws, which continue to evolve, consist of provisions limiting working hours, forbidding employment during school hours, and prohibiting employment of children in certain types of hazardous occupations.

As in virtually every other area of social legislation, agriculture has received special treatment in child labor laws. While child labor in agriculture is currently regulated at the federal level and in most states, the ages at which children may begin to work and at which they may be assigned "hazardous" tasks are lower than in industry generally. As a result, the labor of children remains an important part of the labor input in American agriculture.3/ Whether this results from a real need for this type of labor input or because of the convenient availability of relatively inexpensive child labor is an open question. However, there are situations, such as the strawberry industry in Oregon,4/ where it is argued that the child labor input is an absolute necessity.

The current state of the law has been strongly criticized by those who feel that it still tolerates widespread exploitation of children by farmers and growers.5/ On the other hand, there are those who argue that the present standards are too harsh and that they eliminate legitimate after-school and vacation-time work opportunities for young people.6/

Historical Development

The original efforts to regulate child labor were aimed at factory operations. Eventually coverage was extended to other types of employment, but with a few exceptions agriculture was left unregulated. One study indicates:

> Even when an exclusion was not written into the law, in practice the States did not usually apply the law to children employed on farms. In the days of individual farm ownership, agriculture was looked upon as a way of life rather than an industry. The participation of children was expected and socially approved.7/

As the industrialization of agriculture gradually began to take place, more attention was focused on the problems of child labor but little legislation resulted.

> It was not until the 1920's that a few State provisions began to appear which applied specifically to child labor in agriculture. For example, Ohio, in 1921, tried to regulate child labor on farms by a provision applicable to irregular employment; Nebraska fixed an 8-hour day for children working in sugarbeets, but it was virtually ignored; Wisconsin, in 1925, gave its industrial commission power to regulate the employment of children in special types of agriculture. These and a few other provisions did not begin to scratch the surface, and by 1940 the regulation of farm child labor was at about the same state of development as the regulation of factory child labor a century earlier.8/

Federal involvement in the regulation of child labor in agriculture came with the enactment of the Sugar Act of 1937 9/ and the Fair Labor Standards Act of 1938.10/

Under the provisions of the Sugar Act of 1937, as replaced by the Sugar Act of 1948,11/ farmers who wished to qualify for full subsidy payments were required to refrain from employing children under age 14, unless members of the farmer's immediate family. Children in the 14-and-15-year-old category

could be employed, but (except for members of the farmer's immediate family) for no more than eight hours a day. Subsidy payments could be reduced by $10 per child for each day or part of a day during which the child was employed in violation of the act. The Sugar Act of 1948 expired December 1, 1974 and was not reenacted.

Current federal child labor law for agriculture originated in the provisions of the Fair Labor Standards Act of 1938.12/ Initially FLSA sought to bar "oppressive child labor" which in the case of agriculture amounted to prohibiting the employment of children under age 16 while legally required to attend school.13/ Since the legal requirement to attend school did not exist for all children under age 16 in a number of states, the impact of FLSA was weakened.14/ Thus, the Fair Labor Standards Act was amended to prohibit the employment of children under age 16 in agriculture during school hours whether attendance was compulsory under local law or not.15/ This amendment became effective in 1950. A later amendment in 1966 prohibited employment of children under age 16 in certain hazardous types of agricultural employment.16/

Since 1937, when the federal law began to develop, the states have moved at varying paces, some developing school attendance laws, some imposing hour limits, a few enacting minimum age requirements, and a few setting limits on job assignments based on hazards perceived. Where state law and federal law govern the same aspect of child labor, the stricter of the two must be observed.17/

Current Status of Federal Law

The basic federal child labor provisions are found in the Fair Labor Standards Act of 1938, as amended.18/ Originally, the law provided only for the imposition of criminal penalties 19/ on producers and shippers of "hot goods."20/ "Hot goods" are items produced and shipped in interstate commerce in the United States by any employer of an establishment, including a farm, where oppressive child labor has been "employed"21/ within 30 days preceeding removal of the goods from the premises. The employer and the shipper are almost always two entirely different parties. It is arguable that FLSA places an affirmative duty upon shippers to insure that none of the goods were produced by an enterprise employing oppressive child labor in any capacity. However, the probability of enforcing FLSA against shippers is remote for two reasons. First, the goods remain "hot" for only 30 days after production. Second, good faith shippers are not in violation and good faith may be established by the shipper obtaining a written assurance from the producer that no oppressive child labor practices have been engaged in.22/ It follows that the producer or farmer is the more likely candidate for enforcement activities.

Later amendments added a direct prohibition on the use of oppressive child labor.23/ The provision currently reads: "No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in an enterprise engaged in commerce or in the production of goods for commerce."24/ This makes it unnecessary to prove shipment of "hot goods" and arguably makes it easier for enforcement authorities to proceed against employers, including farmers, who use oppressive child labor.

The key to comprehending the federal provisions is to understand what constitutes "oppressive child labor" in agriculture. This is not a simple task and requires threading through numerous provisions and piecing them together. Several considerations are dealt with by statute including age, identity of the employer, school hours, parental consent, nature of the task assigned, and administrative waiver. Once the federal scheme is sorted out, it must be remembered that the farm employer must remain aware that more severe state regulations, if they exist, must also be considered and observed. The possibility exists that in some jurisdictions the farm employer will be required to observe federal standards on some points and state standards on others.

To summarize the federal scheme certain definitions and concepts must be understood and it is most convenient to consider the statutes and regulations as they apply to: (1) ages 16 and 17, (2) ages 14 and 15, (3) ages 12 and 13, (4) ages 10 and 11, and (5) under age 10.

When the parent is discussed in federal laws as the employer or as the person who must give consent to employment of a minor, it must be understood that this includes persons standing in the place of the parent. This does not necessarily mean a legally appointed guardian, but can be one who takes a child into his home to be treated as a member of the family.25/

When school hours are referred to, the reference is generally to school hours for the school district in which the child lives. Complications that arise when children move from one district to another are beyond the scope of this study.26/

Whether work assigned a minor is "particularly hazardous" requires attention to two basic schemes.

The first is found in volume 29, Code of Federal Regulations, Part 570 Subpart E (hereinafter referred to as Subpart E) and relates to certain types of work deemed "particularly hazardous" to youthful workers between 16 and 18 years of age, including: manufacturing explosives or articles containing explosives; operating certain motor vehicles; mining; logging; sawmill work; work in certain mills; operating certain power machines; work with radioactive substances; operating power-driven hoists; use of power metal-forming, punching, and shearing machines; slaughterhouse employment; work in meat packing plants; use of bakery machines; operating paper products machines; making of brick and tile; operating circular saws, bandsaws, and guillotine shears; wrecking; demolition; shipbuilding; roofing; and excavating.27/ These regulations have no application to agricultural employees of the 16-and-17-year old age group when engaged in farming. Whether they have application to youthful workers in agriculture under age 16 is unclear, though doubtful.28/

The second scheme that relates to tasks assigned youthful workers relates specifically to occupations in agriculture which are deemed "particularly hazardous" for youthful workers under age 16. These regulations are found in volume 29, Code of Federal Regulations, Part 570, Subpart E-1 (hereinafter Subpart E-1) and prohibit: operation of most self-propelled and power-driven farm machinery; handling of a number of types of agricultural chemicals; tasks inside storage bins and silos; certain work around breeding animals; and other activities enumerated in the regulations.29/

"Agriculture" in the context of federal child labor laws includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil; dairying; the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities; the raising of livestock, bees, fur-bearing animals, or poultry. Also within the scope of agriculture in this context are practices including forestry and lumbering operations performed by a farmer or on a farm incidental to or in conjunction with such farming operations. This includes preparation for market, delivery to storage or to market or to carriers for transportation to market.30/

It is important to note that a youthful worker in agriculture can be employed even though he is not paid wages. The statute speaks of employment in the broad context of suffering or permitting to work.31/

With these considerations in mind, a discussion of federal child labor regulation for agriculture becomes possible within the framework of the age categories set forth above.

Ages 16 and 17. The agricultural employer who employs youthful workers in this age category does not need to be concerned about school hours or about obtaining consent from parents, school authorities, or federal administrators. The nature of the work assigned is not limited by the child labor laws so long as it is work in agriculture. The regulations found in Subpart E describe certain occupations which are deemed to be particularly hazardous for persons in this age group,32/ but these regulations clearly do not apply to the employment of 16-and-17-year-olds in agriculture.33/ Thus, at the federal level, there are no restrictions which could result in a finding of oppressive child labor by an agricultural employer.

The agricultural employer, however, must be alert to the possibility that at some point his operation may no longer be considered agricultural and instead constitutes a logging, manufacturing, mining, slaughterhouse, or other regulated business. Under such circumstances, the regulations at Subpart E will apply and the assigning of prohibited tasks to persons in this age group will give rise to oppressive child labor, exposing the employer to civil and possibly criminal sanctions. Where the regulations of Subpart E apply, there are apprentice and student-learner exemptions which may operate if prescribed conditions are met.34/

Ages 14 and 15. Employment of persons in this age group in agriculture is by definition oppressive child labor.35/ However, there are numerous exceptions. First, consider the case where the parent is the employer and, then, the case where a third party is the agricultural employer.

When the parent is the employer, the only restrictions that apply are the general prohibitions against employment in manufacturing and mining.36/ Under federal law, the parent employer does not have to observe the limitations of Subpart E-1 or the ban on employment during school hours.37/

When a third party is the agricultural employer, employment can be during school hours only if the youthful worker has an employment certificate.38/ Parental consent is required for the issuance of such a certificate.39/ This is, however, the only instance where parental consent is required for this age group. The work assigned by the third-party agricultural employer cannot be "particularly hazardous" work as defined in Subpart E-1 unless the youthful worker has qualified for an exempt cate-

gory.40/ One exemption allows limited and supervised employment in certain otherwise forbidden tasks if the youthful worker is a "student learner" who is enrolled in an accredited vocational agricultural school program.41/ Also permitted by way of exemption is the employment of children age 14 or 15 in the operation of certain tractors and self-propelled machinery if the child has completed an approved vocational agricultural training program in tractor and machinery operation or has finished the 4-H certification program.42/ Such training programs are offered annually, usually in late winter or early spring. Upon completion of the course work, written examination, and skill test, the extension or vocational agriculture official will issue a certificate to the student indicating the level and type of farm employment permissible. The employee must present this certificate to his agricultural employer prior to actual employment. Young people under age 14 can take the required training, but cannot be certified for work until their fourteenth birthday.43/

It should be noted that parents may not on their own initiative waive school hour restrictions or "particularly hazardous" restrictions when the employer is a third-party. If the third-party agricultural employer runs afoul of any of the above restrictions, the labor that is extracted from the youthful worker is forbidden "oppressive child labor" and the employer is open to civil and possibly criminal sanctions.

Ages 12 and 13. The analysis for this age level begins with the basic proposition that employment in agriculture is by definition oppressive child labor.44/ Again, there are exceptions but they vary from those in effect for the 14-and-15-year-old age group as to third-party agricultural employers. When the employer is the parent, the same regulations prevail as for 14- and 15-year-olds.

The third-party agricultural employer cannot employ these youthful workers during school hours under any circumstances. The work assigned by the third-party agricultural employer cannot be "particularly hazardous" work as defined in Subpart E-1.45/ For this age category, there are no exemptions. The youthful workers cannot by special training or certification attain an exempted category and be assigned specified tasks forbidden under Subpart E-1. At the 12-and-13-year-old level, the youthful worker can be employed by the third-party agricultural employer only if there is parental consent or if the youthful worker is employed on the same farm as the parent.46/ If the third-party agricultural employer runs afoul of any of the above restrictions, the labor performed by the youthful worker is forbidden oppressive child labor and the employer is open to civil and possibly to criminal sanctions.

Ages 10 and 11. The federal regulations begin with the basic proposition that employment in agriculture of youthful workers in this age bracket is oppressive child labor.47/ Again, there are exceptions, but they vary from those in effect for previous age groups when the agricultural employer is a third party. When the employer is the parent, the same situation prevails as for 12- and 13-year-olds and 14- and 15-year-olds.

When the agricultural employer is a third party, the same rules as to school hours and "particularly hazardous" work prevail as for the 12-and-13-year-old category. Also, at the 10-and-11-year age level, the youthful worker can be employed by the third-party agricultural employer in permitted employment only if there is parental consent. Even where there is parental consent, such employment must be on a farm where the operator is not required to meet federal farmworker minimum wage standards as to other workers.48/ This last requirement gave rise to great controversy and has been the source of recent litigation and legislation.49/ The result was a 1977 amendment creating a procedure for administrative waiver allowing, under certain prescribed circumstances including parental consent, the employment of youthful workers in this age category on farms where the operator is required to pay the federal farmworker minimum wage 50/ (see Recent Developments). If the third-party agricultural employer runs afoul of any of the above restrictions, the resulting use of oppressive child labor will open the possibility of civil sanctions and, in some cases, criminal prosecution.

Under age 10. Here the principles that apply are identical to those in effect for ages 11 and 12 except that there is no provision for administrative waiver to permit employment of children age 9 and under on farms that are required to pay the federal farmworker minimum wage. Thus, while federal law does not absolutely prohibit a child, no matter how young, from being employed by a third-party agricultural employer, the effect of the statute and regulations is to severely limit those opportunities.

Any farmer who employs persons under age 18 must be fully informed with respect to the various restrictions inasmuch as violations may result in criminal penalties,51/ civil penalties,52/ and possible private actions by the employee against the employer.53/ The consequences of illegal use of child labor under federal law are significant. A farmer who willfully violates the child labor laws may be subject to criminal prosecution and, upon conviction, to a fine of up to $10,000.54/ A second conviction of willful violation of the act may lead to imprisonment for up to six months in addition to the fine.55/ Civil penalties may now be assessed up to $1,000 for each violation whether willful or not.56/

Regulations set forth considerations that the Secretary of Labor must take into account in assessing a civil penalty.57/ In addition to these penalties, the Secretary of Labor is authorized to bring actions to enjoin future violations if there is good reason to believe that the employer will continue to violate the law.58/ A violation of such an injunction triggers contempt proceedings and exposes the farm employer to further sanctions.

In addition, where there is an injury associated with disregard of child labor laws, there is an argument that an implied private cause of action arises against the farmer under federal law. While this theory was rejected in Breitwiesser v. KMS Industries, Inc.,59/ the dissenting justice and other critics have been hard pressed to see the justification for denying the implied federal cause of action for damages.60/ Their argument is that existing remedies under state law are inadequate and that there is implicit in the federal child labor legislation a manifestation of the intent of Congress that private damages should be awarded in cases where injuries grow out of accidents occurring during illegal employment. Such a cause of action would not be founded in principles of the common law and arguably should be available even where state workers compensation statutes provide minimal relief.

Current Status of State Law: an Example

Compliance with federal law does not excuse a farm employer from compliance with more stringent state child labor regulations.61/ Minnesota provides a good example of a jurisdiction that regulates child labor in agriculture through a combination of child labor and school attendance laws.62/ What results is the application, in theory at least, of a mixture of state and federal regulation. A review of the interplay of federal and Minnesota law follows for each established age category.

Ages 16 and 17. The only applicable child labor restrictions grow out of statutes and regulations prohibiting employment in administratively established "particularly hazardous" categories.63/ There is considerable similarity to Subpart E of the federal regulations. The Minnesota regulations, however, unlike the federal, clearly apply even if the task is assigned incidental to agricultural employment.64/ The prohibitions do not apply if the youthful worker is in an approved training program, is employed by a parent or be certain statutory "family farm corporations," or is age 17 and has graduated from high school.65/

Age 14 and 15. At this level, the interplay of federal and state law becomes more complex. It is necessary to look first at the situation where the parent or an appropriate family farm corporation is the employer, and then at the situation where a third-party agricultural employer is involved.

Where the parent or an appropriate family farm corporation is the employer, the child labor provisions of Minnesota law do not apply.66/ This includes provisions that set forth types of employment that are deemed particularly hazardous for both the 16-and-17-year-old category and the under-16 category.67/ At this point, the federal restriction against employment in mining and manufacturing comes into play.68/ The stricture of the child labor law against employment during school hours does not apply if the employer is the parent.69/ It must be pointed out, however, that nothing in the child labor law relieves the parent or guardian from compliance with compulsory state school attendance laws.70/ In the past, as in other agricultural states, Minnesota had laws which permitted children 14 years of age or older to work in a permitted occupation about the home between April 1 and November 1. The survival of many farm families depended on the availability of children to help with field labor from spring plowing and planting through harvest. The legislature recognized the economic realities of those times. Changed farming techniques and an increased emphasis on education eventually led to a repeal of these provisions. For a number of years students enrolled and in regular attendance at the Northwest School of Agriculture at Crookston or the Southern School of Agriculture at Waseca were excused from attendance between April 1 and October 1. However, recent legislation repealed that program.71/

When a third-party agricultural employer is involved, a number of restrictions apply. So long as the employment is not in a category deemed particularly hazardous under state law for the 16-and-17-year-old age category and the under-16 category,72/ and so long as the hours of employment do not coincide with school hours on a school day,73/ youthful workers in this age category can be employed by third-party agricultural employers. Parental consent is not required unless the employer wishes to have the youthful worker work more than 40 hours a week or more than eight hours in any 24-hour period.74/ A youthful worker in this age category cannot work before 7:00 a.m. or after 9:30 p.m. on any day.75/ Parents cannot waive this requirement by consent given to the third-party agricultural employer.

Youthful workers 14 and 15 years of age may be employed during school hours if they are working pursuant to an "employment certificate."76/ The required "employment certificate" may be issued by

the school district superintendent or other authorized person.77/ Employment during school hours pursuant to such a certificate is consistent with federal law. Parental consent is required.78/

Note that the limitation on tasks assignable to youthful workers in this age category is subject to exceptions where the minor is in an approved training program.79/ At this point, resort to federal standards setting exemptions from Subpart E-1 would seem the safest way to avoid problems.

For a time in 1973 it appeared that all employment of children under age 16 in agriculture would cease in Minnesota. The Minnesota Supreme Court in its decision in State Farm Insurance Co. v. Hilk 80/ indicated that the statutory proscription of employment of children under age 16, where the employment was deemed dangerous to life, limb, health, or morals, ruled out the hiring of children for virtually all farm work. Given this holding, the legislature amended the statute to state that "nothing in section, 181A.01 to 181A.12 shall prohibit a person from employing a child in any agricultural pursuit permitted under the United States Code, Title 29, Section 213(c)(2)."81/ Thus, Minnesota and federal law are identical on the subject of "particularly hazardous" work by children employed on farms, with the exception of the application of the Minnesota regulations for 16- and 17-year-olds and not the federal.82/

Ages 12 and 13. Children under age 14 may not be employed in Minnesota unless certain exceptions apply.83/ Certain of the exceptions do apply to agricultural employment.

Where the parent is the employer, the current law is identical to that for the age 14 and 15 group.

Where a third party is the agricultural employer, the employment is permitted "in corn detasseling operations and other agricultural operations" with parental permission.84/ So long as the employment is not in a category prohibited by Minnesota Regulations C.L.S. 11 or C.L.S. 15 and so long as the hours of employment do not coincide with school hours on a school day, employment is possible with parental permission. It is unclear whether the parent of a child in this age category can by permission allow the employer to work the child more than 40 hours a week or more than 8 hours in a 24-hour period.85/ It is clear that parental permission does not free the employer to start the workday for the child prior to 7:00 a.m. or extend it beyond 9:30 p.m. Employment certificates permitting work during school hours are not available to this age category.86/

Children under age 12. State law is much more stringent than the federal for employment of children under age 12. Employment is permitted only if the employer is the parent. The restrictions on the parent are identical to those stated for the 12-and-13- and the 14-and-15-year-old age groups.

Employment by a third-party agricultural employer is not permitted unless there is an exemption granted for the particular minor by the Commissioner.87/

Summaries — The Minnesota example provides some useful lessons. First, it provides a practical illustration of how a state can set about imposing stricter standards than those imposed by the federal child labor laws. Second, it illustrates that the employer cannot assume that the state law is stricter in all respects than the federal or that it is as all encompassing as the federal. Third, it illustrates that a state with extensive agricultural operations and a substantial influx of migrant families can function with child labor laws substantially stricter than those at the federal level, particularly as they apply to children under age 12. Fourth, the example demonstrates the complexity of regulatory schemes for child labor in agriculture.

Enforcement

While there are no totally reliable statistics available,88/ very many studies indicate that large numbers of children have been illegally employed in American agriculture in the past and that this persists.89/ Illegal employment of children on farms has been reported by various sources for the last several decades.90/ Problems have appeared to be most acute in connection with the children of migrant farmworkers.91/ Whether state and federal legislation has worked to materially curb abusive practices is an open question. Since there are no systematic employment statistics with respect to numbers of persons illegally employed, there is obviously no way to measure any change in the level of such employment. Investigations by federal wage and hour compliance officers during fiscal year 1974 turned up 497 child labor violations in agriculture, forestry, and fisheries and similar investigations in fiscal year 1975 disclosed 851 violations.92/ These figures may appear insignificant when compared with the 6,462 violations uncovered by federal inspectors in fiscal year 1974 and 10,452 violations uncovered in fiscal year 1975 in retail trade.93/ However, investigation of child labor violations in agriculture is a much more difficult process than in most other industries thus few conclusions can be drawn from

these statistics.

Rather than speculate about the level of compliance with child labor laws it seems more profitable to concentrate on compliance theory with a view toward evaluation. If existing law seems designed to give effectiveness to child labor restrictions, one might be inclined to assume that abusive practices are being eliminated unless there is concrete evidence to the contrary.

Regrettably, an examination of the current law leaves uneasy feelings about its effectiveness. How, for example, can maximum hour legislation be enforced? Currently, token inspections are about all that go on. It is infrequent that these investigations grow out of complaints, for even though there are provisions protecting employees against retaliation if they report,94/ there is very little to motivate the farmworkers to report child labor violations. For example, the children may be part of a migrant family and the income they produce may be critical. Reporting violations might require the migrant family to remain behind for hearings and other appearances, thus destroying the opportunity to continue to make a living that season. Further, the question of whether there will be work the following summer looms large. Therefore, investigators are left, for the most part, to make random inspections. Even these are not easily conducted. Many growers feel that an inspector may not come on the premises unless the grower consents or the inspector has a warrant authorizing entry. Mr. Justice White in See v. The City of Seattle 95/ said: "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." A grower may be confronted with an inspector at the farmhouse, indicate that he would be glad to have him check the fields, but would prefer to have him come back in an hour or two when it would be more convenient. The word can spread in that time to clear the fields of children, if indeed there are any who are working illegally. Thus, the chances of picking up violations are radically reduced.

In Marshall v. Barlow,96/ the U.S. Supreme Court said that probable cause need not be demonstrated to obtain a warrant if it is being sought pursuant to a general administrative plan of enforcement of the legislative scheme. However, even if an inspector thus gains immediate access to the fields, it remains extremely difficult to determine whether maximum hour laws are being violated since most children do piece-rate work. The records may accurately indicate how much they earned, but at the same time will not blatantly indicate violation of maximum hour laws. Thus, unless an inspector is able to remain around for a 24- or 48-hour period, incognito, it may be virtually impossible to detect maximum hour violations.

Employment in extra hazardous tasks 97/ is another thing entirely. An inspector may be able to catch a violation in a brief period of observation, but the same problems of access exist as were discussed with regard to hour laws. However, some progress is being made in this area with the advent of civil money penalties. There are indications that employers know of the potential penalties and are anxious to avoid them.98/ A potential civil penalty of $1,000 for each violation is not a token matter. Further, since criminal penalties can grow out of willful violations of FLSA, and since employment in extra hazardous activities will periodically result in accidental death, there is the possibility of criminal and civil penalties being imposed with a maximum amount of publicity. This may have more of a deterrent effect than any compliance program that can be conceived.

Violation of laws prohibiting employment during school hours is apparently no great problem with respect to local children. There are suggestions that it continues to be a serious problem with the children of migrant workers. It is obviously difficult for those charged with enforcement of school attendance laws to be aware of a child's absence when the child is in the community only temporarily and has never been registered with the system. Therefore, some method of transfer procedure is desirable in an effort to keep track of the whereabouts of migrant children so that an accurate record of their school attendance becomes possible. There are indications that procedures have developed which have improved the situation. The Migrant Student Record Transfer System (MSRTS), a national automated telecommunication system centered in Little Rock, Arkansas, provides academic and other information on migrant children to participating schools.99/ In fiscal year 1975, some 8,800 schools in 48 states had access to this national data bank which had records in its files of more than 500,000 migrant students.100/ By 1977, approximately 14,000 schools were receiving data.101/ When children transfer from one school to another, it is possible to have their current records available almost instantly. Records can be supplied within 4 to 24 hours after a request is made.102/ The only difficulty is that a child who moves on from one school may not show up at another within a reasonable period of time and thus interruption of education is still possible. However, for those children registered with the data system there will be a record of the schools at which they were registered. When they have returned to home base in Florida, Texas, or wherever, school officials will be able to counsel with the parents to improve the child's attendance in future years. This program offers far more potential than any inspec-

tion system or truancy system that has been devised or attempted.

Detection of violations of age laws presents significant problems. There is a limit to the number of inspectors who can be engaged in ferreting out such violations. Further, those inspectors who do function in the field face the problem of access to the place of work.103/ Recognizing the almost impossible barriers to a successful on-site inspection program, regulations were proposed 104/ to implement a 1974 amendment to FLSA.105/ These federal regulations require an agricultural employer to secure from every employee under age 17 a proof-of-age certificate and to have it on file.106/ Farmers who fail to comply are subject to civil penalties and, in the event of willful violations, criminal penalties.107/ A few well-publicized criminal prosecutions for failure to obtain and have on file a proof-of-age certificate may well accomplish more in securing compliance with age laws than all the field inspections that have been conducted in past years. Hopefully, farmer-employers will reject children who fail to present proper certificates showing the child to be of appropriate age for the particular job.

While there will never be complete compliance with federal and state child labor and school attendance laws, given innovative compliance techniques, significant improvements will become reality.

Recent Developments

There was no legislation pending in the 96th Congress in October 1980 that would alter the existing federal child labor laws. The status of pending legislation, if any, in the several states was not explored.

The most recent development, litigation and legislation at the federal level regarding the employment of children ages 10 and 11 in agriculture, produced considerable controversy and goes to the heart of certain issues under consideration.

In Kelly v. Brennan,108/ an Oregon strawberry farmer sought in June 1974 to enjoin the Secretary of Labor from enforcing the provisions of the recently amended FLSA which prohibited the use by certain farmers of non-family child labor under age 12.109/ Under the pre-1974 version of the law, children under age 12 had been permitted to engage in the seasonal picking of strawberries and certain other farm work during non-school hours with parental permission. The 1974 amendments permitted children under age 12 to work on farms with parental permission only where the agricultural employer did not have to meet the minimum wage requirements of FLSA. In other words, only farmers who used less than 500 man-days of agricultural labor in all calendar quarters of the preceding calendar year could hire non-family children under age 12.

The plaintiff had used more than 550 man-days in a calendar quarter of the preceding year. He annually engaged a work force of 500 to 600 children during the peak of harvest. It was estimated that one-third of the children were under age 12 and plaintiff testified that their services could not readily be replaced. Thus, he estimated a one-third crop loss which he translated into a monetary loss of $66,000. A temporary injunction was granted restraining the secretary from enforcing the act against plaintiff and others similarly situated.110/ The injunction was then vacated by the same three-judge panel on September 13, 1974.111/ While Congress did not act in 1974, 1975, or 1976, the strawberry growers of Oregon at least gained an additional season of labor from youthful workers under age 12.

The Kelly case is of considerable interest because it highlights problems with the law in this area and possible congressional rationale for the 1974 child labor restrictions. It was argued that the classification in the 1974 amendment which made children under 12 available to some farmers and not to others had no "rational basis" and was thus constitutionally infirm under the Fifth Amendment. The court, in refusing to make the injunction permanent, noted that there is a presumption in favor of the constitutionality of the statute and that the issue was whether there is "a rational basis" for the chosen regulatory scheme. The court said: "The Congress had great latitude in making classifications under economic and social legislation. They (such laws) are valid if any state of facts can reasonably be conceived that justifies them. The existence of a rational basis need only be 'fairly debatable.'"

The burden of proof to demonstrate that the legislation was without rational basis was on the plaintiff, and the court held that he had not sustained that burden by "clear and convincing" evidence. The court noted that classification under the FLSA based on the size of an enterprise was not "constitutionally suspect." Further, the court took notice of the legislative history of the 1974 amendments and in particular the following passage: "Basically there emerged three reasons—each one sufficient by and of itself, as to why child labor in agriculture in its present form must be ended: 1. It is physically and mentally detrimental to the health and well-being of the children; 2. It is a social depressant, stunting the intellectual growth and opportunity of those subject to this vicious cycle;

3. It is, as was industrial child labor years before, economic exploitation of human resources."112/

The Kelly court went on to indicate that there were any number of reasons which would support the classification in the act. It might be argued that large farms are the greatest exploiters of child workers. On the other hand, it might be argued that Congress was in the process of expanding the act gradually and will reach the smaller farms later. Further, it may be that Congress had in mind that small farms had less ability to pay minimum wages and needed special exemptions to survive. The size formula may have been deemed essential to practical administrative regulation, since regulation of small farms may impose too great an administrative task. Finally, the Congress may have contemplated that the state should regulate the smaller farms. In short, the court saw ample "rational basis" for the classification and the Kelly case was no doubt correctly decided.

Congress responded to these problems of the Oregon strawberry farmers and those similarly situated by enacting the Fair Labor Standards Amendment of 1977.113/ FLSA now provides that an employer or group of employers who are under the statutory proscription barring hiring of children less than 12 years of age may apply to the secretary for a waiver. The waiver, if it is granted, will allow the employer to hire children less than 12 years of age but not less than 10 years of age for not more than eight weeks in the calendar year. The employment must be as hand harvest laborers in an agricultural operation which has been and is customarily generally recognized as being paid on a piece-rate basis in the region. The secretary may not grant such a waiver unless it is found: (1) That the crop to be harvested is one with a particularly short harvesting season and that the application of the law would cause severe economic disruption of the industry of the employer or group of employers;114/ (2) That the employment of the children would not be deleterious to their health or well-being;115/ (3) That the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the children;116/ (4) That individuals age 12 or older are not available for such employment;117/ and (5) That the industry of such employer or group of employers has traditionally and substantially employed individuals under 12 years of age without displacing substantial job opportunities for individuals over 16 years of age.118/ The waiver procedure has, however, been suspended as a result of a March 20, 1980, decision in National Association of Farmworkers Organizations et al. v. Marshall.119/ That situation is likely to persist until objective data can be produced permitting pesticide and other chemical tolerances for children to be scientifically ascertained.

The 1977 amendment was a defeat for those who would prefer to tighten child labor restrictions in agriculture on the theory that there is a need for greater protection of children. It seems that the Congress is not actually engaged in a gradual expansion of the prohibition of the act as the court in Kelly suggested. Under certain circumstances, employment of children 10 and 11 years old is apparently deemed to be a healthy and character-building experience. As a result of the 1977 legislation, assuming resolution of the pesticide and other chemicals tolerance problem, farmers such as Kelly will no longer be forced to switch crops, mechanize, or engage in schemes to skirt the law.120/

Recommendations

The evolution of the current state of child labor law as it affects agricultural employment is not difficult to explain. The developments of the past several decades reflect in part a concern for the welfare of youthful workers and at the same time the purported needs of the industry for a sufficient labor supply. The developments also reflect the tension that persists between those who feel that there is something wholesome in the tradition of children having useful work on the farms of this country. The Kelly litigation and the legislation that resulted illustrates in a dramatic way that this tension exists undiminished and that the Congress is still willing to loosen child labor restrictions to respond to perceived needs of agricultural producers.

What has evolved is what must be the most complex and convoluted set of child labor statutes and regulations ever to exist in this society. If there are those who remain unconvinced as to the complexities of the law after reading what is intended to be a simplified summary in this chapter, a day of studying the text of statutes and regulations at the federal and state level should be persuasive. The present state of the law, of course, reflects many competing interests and concerns.

It must be assumed that the development of child labor law as it impacts agriculture has not reached a final stage. The controversy that exists promises that further changes will be debated at the state and federal level. The fact that agriculture is almost certain to become more industrialized and to continue to evolve in the direction of fewer and larger operations also promises that the child labor laws of today may not serve indefinitely.

A number of pressing questions need to be answered if policy is to develop in this area in a mean-

ingful way. For example, just how critical is the need for youthful workers in agriculture generally, and in specific agricultural operations in particular? This question is aimed primarily at cases where the employer is a third party and not a parent or family farm corporation. Is the need that is alleged real, or is this a situation where a need is made to appear to exist because it saves the industry higher costs that would be incurred by hiring adult workers or by moving to greater mechanization or use of chemicals? Is there solid data indicating the need to treat agriculture differently than most other industries in this society? Are most youthful workers who are being employed by third parties being employed by large agricultural operators? If so, is society simply perpetuating a form of subsidy as has been done in so many indirect ways in the past? Can this be justified, if it is true? What price are the youthful workers paying in terms of health, education, and desirable childhood experiences? To what extent is the employment that is offered healthful, character building, fair in terms of the financial return to the children, nonhazardous, supervised, and in some measure educational? These are difficult questions, but the answers are important if policy questions are to be approached intelligently.

Any evaluation of current child labor law as it affects employment in agriculture must address the question of the effectiveness of current protective measures. One of the conclusions of this study is that the convoluted nature of the present regulatory scheme yields a system which makes compliance difficult even with a good-faith effort. Without massive efforts, far beyond what most optomistic advocates could hope to promote with lawmakers, there is little prospect of making such a multi-tiered and complex system of regulation fully effective. A myth of regulation emerges, with the reality being that license has in effect been granted to use youth indiscriminately and too often in a detrimental way.

If investigation indicates a need for greater restrictions on the use of child labor in agriculture or more effective enforcement of current regulations, how are such goals to be achieved?

There is no simple solution, but a substantially different approach to the regulation of child labor in agriculture should be explored. One possible model is suggested by the recent provisions at the federal level for employment of children ages 10 and 11. The essentials would be as follows:

(1) The new scheme, which would have to be put into effect at the federal level, would continue to allow employment of children under age 16 by parents and guardians, but only during hours when school is not in session in the district where the child lives. Children age 14 and 15 could be permitted to work on the parent's farm pursuant to a student-learner permit as a part of an approved educational program.

(2) Children in the age 14 and 15 category could be permitted to work for third-party agricultural employers during school hours under similar permits and under the conditions similar to those currently in effect.

(3) As to all other children, that is, those not working for a parent, or pursuant to a student-learner permit, limited employment would be possible in agriculture only during non-school hours and only where the farmer employer has obtained an administrative waiver. Such a waiver would be issued only after a demonstration of need for the youthful workers, and unavailability of older workers. It would be good only for the type of employment described and approved and would be issued only if there was assurance of safe working conditions, adequate supervision, and compliance with other reasonable standards. Whether employment pursuant to such a permit could include children under age 12 should be determined legislatively. Perhaps a higher age floor would be appropriate, but a bottom level should be set in any event.

Many questions arise with respect to such a proposal. Would the expense of administering the program be prohibitive? Would it really bring greater protection to youthful workers? Would it be workable with respect to the children of migrant workers?

These are obvious concerns. An expanded administrative apparatus would be required, but after a few years of experience with the current 10-and-11-year-old program, it should be possible to estimate the cost of an expanded program. As far as the protection offered by the program, substantial benefits could be anticipated. Third-party agricultural employers who really do not need youthful workers would be likely to want to avoid the administrative process by using older employees, more machines, or more chemicals to get the job done. Those who used youthful workers pursuant to permits would do so knowing that penalties would result from misrepresentations regarding working conditions and from deviating from the conditions of the permit. Such violations should be more readily discoverable than violations under current law because the employer in order to obtain the needed permit should be required to waive rights with respect to the conduct of inspections, thus increasing the efficiency and effectiveness of

existing inspectors. Further, those who hire without securing the needed permit should be quite visible and would risk almost certain eventual exposure. Heavy penalties could attach including disqualification from obtaining a proper permit for some time into the future. This scheme, which promises more efficient enforcement and more stringent and certain penalties for violation, could mean significant advances rendering the whole effort to protect youthful workers in agriculture far more meaningful than at present. To promote the greatest efficiency and cost effectiveness, federal legislation should provide for the delegation of the permit-issuing procedure to those states which enact legislation at least as stringent as that at the federal level.

While the application of the suggested program to the children of migrant workers presents special difficulties, it would be essential that no exceptions be written into the law with regard to their employment. Continued funding for appropriate educational and recreational programs would be essential for the purpose of providing supervised activities designed to attack health and educational problems. Such programs would have to operate during all hours that the parents are in the fields or are engaged in other farm work.

In all probability, there will be no immediate move to the type of alternative suggested above. However, it seems reasonable to anticipate that the emphasis on education will increase in this society, and that agriculture will continue to become more and more industrialized with increased use of machines and chemicals. It seems that the time will come, no doubt within this century, when a majority of legislators will find it impossible to justify treating agriculture differently than other major industries in the child labor laws. While a majority of lawmakers do not perceive this to be the case currently, it seems probably that such a majority will eventually exist. A sudden cutoff of all youthful labor would be difficult for the industry to handle and would also leave too many youthful workers with time on their hands and without direction. Rather than moving to an immediate cutoff of youthful labor, the program suggested above would provide an intermediate stage during which the status of youthful workers could be improved while the use of such labor is gradually phased out. Agriculture as an industry would have time to adjust and there would be an opportunity to expand helpful programs of activity for the youthful workers who will become unemployed.

It is important to note that what is being proposed here is not as far reaching as the legislation proposed in 1959 by Senator Patrick V. McNamara and 15 cosponsors who wanted to eliminate the child labor exemptions for agriculture from the Fair Labor Standards Act.121/ The proposal, had it been enacted, would have prohibited the employment of children under age 14 by third-party agricultural employers. Those in the 14-and-15-year age category would have still been employable when the Secretary of Labor "determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health or well-being."122/ In all other circumstances, children would have had to be 16 to be employed by a third-party agricultural employer. Such a proposal puts the employment of children in agriculture on the same basis as employment in most nonagricultural pursuits. The proposal may eventually have political viability but should probably be enacted after the proposed intermediate stage has been used as a phase-in device.

Notes to Chapter 3

1. Growth of Labor Law in the United States 7-15 (1976) [Hereinafter cited as Growth of Labor Law].

2. See Oversight Hearing on the Fair Labor Standards Act, Hearings, Before the General Subcommittee on Labor of the House Committee on Education and Labor, 93rd Cong., 2nd Sess. 11 (1974) [hereinafter cited as 1974 Oversight Hearings].

3. See U.S. Dept of Agriculture, The Hired Farm Working Force of 1961 at 36.

4. See generally 1974 Oversight Hearings, supra note 2; R. Taylor, "Child Labor on the Farm" Sweatshops in the Sun. 94 (1973) [hereinafter cited as Sweatshops in the Sun].

5. See Sweatshops in the Sun, supra note 4 at 179.

6. See generally 1974 Oversight Hearings, supra note 2.

7. Growth of Labor Law, supra note 1 at 27.

8. Id.

9. Sugar Act of 1937, ch. 898, 50 Stat. 903 (expired Dec. 31, 1947); replaced by Sugar Act of 1948, ch. 519, 61 Stat. 922 (expired Dec. 1, 1974), formerly 7 U.S.C. §§1100-61 (1970), as amended (Supp. IV, 1974).

10. 29 U.S.C. §§201-19 (1976), as amended; held constitutional, United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1940).

11. See note 9, supra.

12. See note 10, supra.

13. The federal law, however, did not and does not now make school attendance mandatory or set school hours. The states have regulated in this regard.

14. Growth of Labor Law, supra note 1 at 39.

15. Fair Labor Standards Amendments of 1949, ch. 736, 63 Stat. 910, Sec. 11.

16. Pub. L. 89-601, §203(d).

17. 29 U.S.C. §218a (1976).

18. Fair Labor Standards Act, 29 U.S.C. §201-19 (1970), as amended (Supp. IV, 1975).

19. 29 U.S.C. §212 (1970).

20. See 1 CCH Lab. L. Rep., Wages - Hours ¶25,620 (1975).

21. The term "employed" is statutorily defined as "to suffer or permit to work." 29 U.S.C. §203(g) (1970). A child may be "employed" under child labor law without being paid wages.

22. 29 U.S.C. §212(a).

23. Pub. L. 87-30 (1961); Act Oct. 26, 1949 §10(b); see, interpretation at 29 C.F.R. §570.112 (1979).

24. 29 U.S.C. §212(c) (1976).

25. 29 C.F.R. §570.126 (1979).

26. 29 C.F.R. §570.123(c) (1979).

27. 29 C.F.R. §§570.50-570.68 (1979).

28. See Note, preceeding 29 C.F.R. §570.50 (1979); 29 C.F.R. §570.123(d) (1979); 29 C.F.R. §570.126 (1979); 29 C.F.R. §570.122 (1979); 29 U.S.C. §203(l) (1976). 29 U.S.C. §203(l) prohibits assignment of tasks by an agricultural employer to a child under age 16 if the tasks have been determined hazardous by the secretary. The cited materials from C.F.R. appear to make Subpart-E restrictions unapplicable to agricultural employment. Yet, such a reading does not square with the statute if one concedes there is no reasonable basis for the secretary to find the Subpart-E activities hazardous generally, but not in agriculture. Thus, while the C.F.R. materials seem clear enough, it might be less than prudent from both a safety and legal standpoint for an agricultural employer, parent, or third party, to assign Subpart-E tasks such as operating circular bandsaws, etc., to a child under age 16.

29. 29 C.F.R. §§570.70-570.72 (1979).

30. 29 U.S.C. §203(f) (1976); this is the Fair Labor Standards Act definition and is discussed in more detail in the portion of this monograph on "Wage and Hour Laws: Agricultural Employment."

31. 29 U.S.C. §203(g) (1976).

32. 29 C.F.R. pt. 570, subpart E (1979).

33. See note 28, supra.

34. 29 C.F.R. §570.50(b) & (c) (1979).

35. 29 U.S.C. §203(l) (1976).

36. 29 U.S.C. §203(l) (1976); this assumes inapplicability of Subpart-E regulations as explained at note 28, supra.

37. 29 C.F.R. §570.70(b) (1979); 29 U.S.C. §203(l) (1976); 29 U.S.C. 212(c) (1976); 29 C.F.R. §570.123 (c) (1979).

38. 29 C.F.R. §570.35a (1979).

39. 29 C.F.R. §570.35a(b)(3)(vi) (1979).

40. 29 U.S.C. §203(l) (1976); 29 U.S.C. §213(c)(2) (1976); 29 C.F.R., pt. 570, subpt. E-1 (1979).

41. 29 C.F.R. §570.72(a) (1979). However, this section provides that 5 of the 11 categories of "particularly hazardous" employment are still out of bounds for "student learners."

42. 29 C.F.R. §570.72(b) (1979).

43. See Ohio Farm Labor Handbook, Ohio Cooperative Extension Service, November 1976 at 26-7.

44. 29 U.S.C. §203(l) (1976); 29 U.S.C. §212(c) (1976).

45. 29 C.F.R. §570.70 - §570.72 (1979).

46. 29 U.S.C. §213(c)(l)(B) (1976) as amended.

47. 29 U.S.C. §203(l) (1976); 29 U.S.C. 212(c) (1976).

48. 29 U.S.C. §213(c)(1)(A) (1976), as amended.

49. Kelly v. Brennan, 74 LC ¶33,101 (U.S.D.C. Ore. 1974); Kelly v. Brennan, 74 LC ¶33,222 (U.S.D.C. Ore., 1974); P.L. 95-151, 91 Stat. 1245 (95th Cong., Nov. 1, 1977) codified as 29 U.S.C. §213(c)(4).

50. 29 C.F.R. §575.1-575.9 (1979).

51. 29 U.S.C. §212 (1970); 29 U.S.C. §215(a)(4), 216(a) (1970).

52. 29 U.S.C. §216(e) (Supp. IV, 1975); 29 C.F.R., pt. 579 (1979).

53. See Breitwieser v. KMS Industries, Inc., 467 F.2d 1391 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973). See also Rickett v. Jones, 495 F.2d 185 (5th Cir. 1974).

54. 29 U.S.C. §216(a) (1976).

55. Id.

56. 29 U.S.C. §216(e) (1976); 29 C.F.R., pt. 579 (1978).

57. 4 FRES §30:96.

58. See 29 U.S.C. §212(b) (1976).

59. 467 F.2d 1391 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973).

60. See Note, "Remedies - Fair Labor Standards Act - Private Damage Suit to Redress Violations of Child Labor Provisions of the Fair Labor Standards Act," 26 Vand. L. Rev. 867 (1973).

61. See 29 U.S.C. §218(a) (1976).

62. Child Labor Standards Act, Minn. Stat. §§181A.01-.12 (1974), as amended (Supp. 1975); The Child Labor Standards Act and Related Rules and Regulations 1-22 (1974) (hereinafter cited as CLS). CLS is currently contained in volume 11, MCAR (Minnesota Code of Agency Regulations).

63. Minn. Stat. §181A.04, subd. 5 (1974), as amended.

64. MCAR, C.L.S. 8.

65. Id.

66. Minn. Stat. §181A.07, subd. 4 (1974), as amended.

67. MCAR, C.L.S. 11; MCAR, C.L.S. 15; MCAR, C.L.S. 8.

68. Discussion in text assumes inapplicability of Subpart-E regulations as explained at Note 28, supra.

69. Minn. Stat. §181A.04, subd. 2 (1974) as amended; Minn. Stat. §181A.07, subd. 4 (1974) as amended.

70. See Minn. Stat. §120.10 (1974), as amended.

71. Minnesota Session Laws 1978, c.706, repealing Minn. Stat. §120.10, subd. 3 (1974), amending Minn. Stat. §120.10, subd. 3 (1965).

72. MCAR, C.L.S. 11; MCAR, C.L.S. 15.

73. Minn. Stat. §181A.04, subd. 2 (1974), as amended.

74. Minn. Stat. §181A.04, subd. 4 (1974) as amended; Minn. Stat. §181A.07 subd. 1 (1974) as amended.

75. Minn. Stat. §181A.04 subd. 3 (1974), as amended.

76. Minn. Stat. §181A.05 (1974) as amended.

77. Id.

78. The provisions of 29 C.F.R., 570.31 et. seq. (Child Labor Reg. 3) would not appear to have application in agriculture by virtue of 29 U.S.C. 213(c)(1)(c), the implication of Op. Atty. Gen., 270-d July 15, 1969 notwithstanding.

79. MCAR, C.L.S. 5.

80. 296 Minn. 8, 206 N.W.2d 360 (1973).

81. Minn. Stat. §181A.11 (1974), as amended.

82. See notes and accompanying text, supra.

83. Minn. Stat. §181A.04 subd. 1 (1974) as amended.

84. Minn. Stat. §181A.07, subd. 1 (1974) as amended.

85. Id.

86. Minn. Stat. §181A.05 (1974), as amended.

87. Minn. Stat. §181A.07 subd. 5 and subd. 6 (1974), as amended.

88. See 297 U.S. Dept. of Agriculture, The Hired Farmworking Force of 1974.

89. See 1974 Oversight Hearings: Hearings on Agricultural Child Labor Act of 1971 on H.R. 10499 and H.R. 1597 Before the Subcommittee of the House Committee on Education and Labor, 92d Cong., 1st Sess. (1971) (hereinafter cited as 1974 Child Labor Hearings); See also Sweatshops in the Sun, supra note 4.

90. See Ib.; School and Society, July 8, 1939, p. 43; School Life, July 1948, p. 13; Christian Century June 13, 1956, p. 723.

91. See 1974 Child Labor Hearings, supra note 89; Sweatshops in the Sun, supra note 4.

92. U.S. Dept. of Labor, Minimum Wage and Maximum Hours, Standards Under the Fair Labor Standards Act (1976) at 40.

93. Id.

94. See 29 U.S.C. §215(a)(3) (1976); Catz and Scher, "Farmworkers and the Fair Labor Standards Act: Minimizing Employer Retaliation," Clearinghouse Rev. 111 (June, 1976).

95. 387 U.S. 541 at 545, 87 S.Ct. 1737, 1740, 18 L.Ed.2d 943, 947 (1967).

96. 436 U.S. 307, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978).

97. 29 U.S.C. §203(1) (1970): 29 C.F.R., pt. 570, subpt E-1 (1979).

98. Minimum Wage and Maximum Hours, supra note 92 at 41.

99. Elementary and Secondary Education Act of 1965, as amended 20 U.S.C. §241(b).

100. U.S. Comptroller General Report on Evaluation of the Migrant Student Record Transfer System (Sept. 1975) at 1.

101. An Educational and Health Record Service for the Mobile American, MSRTS Staff, August 1977.

102. Education Briefing Paper: Title I Migrant Education Program, U.S. Office of Education, August 1978, at 3.

103. See notes 95 and 96 supra and accompanying text.

104. 29 U.S.C. §203(1) (1970); prohibits employment in occupations found by the Secretary of Labor to be particularly hazardous, 29 C.F.R., pt. 570, subpt E-1 (1979) was promulgated pursuant to this section.

105. 29 U.S.C. §212(d) (1976).

106. 39 Fed. Reg. 36940 (1974); 39 Fed. Reg. 40590 (1974); 41 Fed. Reg. 26834 (1976); see 29 C.F.R., pt. 570.

107. See 39 Fed. Reg. 36940, 36943 (1974).

108. 74 LC ¶33,101 (U.S.D.C. Ore., 1974).

109. 29 U.S.C. §213(c)(1)(A) (Supp. IV., 1975), later amended by 91 Stat. 1245 (Nov. 1, 1977).

110. Kelly v. Brennan, note 108, supra.

111. Kelly v. Brennan, 74 LC ¶33,222 (U.S.D.C. Ore., 1974).

112. Senate Report 93-690, at 30.

113. P.L. 95-151, 91 Stat. 1245 (Nov. 1, 1977).

114. 29 C.F.R. §575.5(a) and (b) (1979).

115. 29 C.F.R. §565.5(c) (1979).

116. 44 Fed. Reg. 24058 (1979), amending 29 C.F.R. §575.5(d); 45 Fed. Reg. 55177 (1980); see note 119 infra and accompanying text.

117. 29 C.F.R. §575.5(e) (1979).

118. 29 C.F.R. §575.5(f) (1979).

119. No. 79-1587 (C.A.D.C. March 20, 1980).

120. One method that had been suggested was for the farmer in Kelly's position to lease his land from year to year so that the lessee, who had not used 500 "man-days" in the previous calendar year in any quarter, would become the "employer of the year."

121. S.2141 introduced June 1, 1959.

122. Id.

Chapter 4

OCCUPATIONAL SAFETY AND HEALTH IN AGRICULTURE

The national workforce suffers more than 14,000 on-the-job deaths and approximately 2,000,000 work-related injuries annually.1/ The National Safety Council estimates that agriculture is the third most hazardous industry in the United States.2/ It is estimated that in 1972 there were 2,200 fatalities and 200,000 disabling injuries related to agricultural work.3/ In 1975, approximately 5,500 farm people lost their lives and more than 500,000 suffered disabling injuries. Figures for 1977 indicate approximately 5,400 accidental deaths and 480,000 disabling injuries involving farm people.4/ The figures include farm family members as well as hired farmworkers. The figures on disabling injuries include both temporary and permanent disabilities. One recent study of farm accidents in 16 selected states revealed that 75.6 percent of the accidents reported during the survey were work-related.5/ Employees, both full- and part-time, accounted for about 15.9 percent of the injuries.6/ The 15.9 percent appears to be a percentage of all accidents, work-related and non-work related. The full- and part-time farmworkers accounted for about 20.8 percent of the work-related accidents.7/ It has been suggested that this sort of statistical data for agriculture, as dramatic as it may seem, minimizes safety and health problems since many incidents of illness and injury go unreported.8/ Data on work-related illness have not been located during this study and the statistics presented above in no way reflect the extent of that problem. The valuable efforts of some state regulatory bodies, extension programs, farm organizations, farm-related industries, and even international bodies, while not to be discounted, have failed to curb the constant increase in safety and health problems in American agriculture.9/

History

Perceiving the seriousness of the problem and given the absence of systematic state efforts to regulate, Congress after decades of tentative discussion 10/ decided to include agriculture when it moved to enact the Williams-Steiger Occupational Safety and Health Act of 1970.11/ While a variety of state and federal agencies are now active in the field, no single agency has been more important or more controversial than the Occupational Safety and Health Administration (OSHA), a creature of the Williams-Steiger Act. Since April 28, 1971, OSHA has administered the statutory mandate that requires almost every employer in the nation, including agricultural employers, to maintain a safe and healthful workplace for each employee.12/ Public regulation of employee safety and health conditions has become a reality in American agriculture with a goal of reducing employment-related personal injuries, illnesses, and deaths.

What did the framers of the legislation have in mind as a method of fighting the climbing job-related death and accident rate? Given the many vastly different industries and countless specialized safety and health problems, it was apparent that the Congress should not attempt detailed legislation. Thus, the act imposed a "general duty" on an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees."13/ Elaboration was left to the secretary who was given the power to promulgate specific regulations having the force and effect of law.14/ The act directs employers to "comply with occupational health and safety standards promulgated under this Act" as well as the "general duty" clause.15/

While the act does include features utilizing educational, research, and incentive approaches, the primary theory of the legislation is that safer and more healthful work surroundings will lead to an improvement in statistics on employment-related accidents, illnesses, and deaths.16/ The regulations, therefore, are primarily designed to outlaw certain physical hazards and to require certain safety and health equipment. Employers who fail to eliminate hazards, to update existing equipment, or modify or replace old facilities as required by regulation are subject to civil and, under certain circumstances, criminal penalties.17/ Arguably, the major thrust of the program is to punish "bad" behavior, rather than to reward "good" behavior. Some have alleged this to be a serious defect in the entire scheme.18/

While OSHA is the focal point for much of the current discussion of safety and health regulation, it is essential to understand that it is not the only agency active in the area. The William-Steiger Act is designed to encourage states to become active in safety and health matters and contemplates states stepping into the primary position in the administration and enforcement of regulations. A state may file a plan with OSHA which, if approved, allows the state to establish and enforce its own safety and health standards, if at least equivalent to the federal.19/ The states which have adopted plans and have undertaken the enforcement of state standards have frequently proceeded by incorporating OSHA regulations into state regulations by reference. This, of course, fulfills the requirement that the state have standards equivalent to the federal. However, unless the state continually readopts the federal regulations or has a system of regularly incorporating federal changes, inconsistencies creep in. Recognizing this problem, the Secretary of Labor established requirements on October 6, 1975, requiring states with approved plans to update within 30 days of promulgation of a federal emergency temporary standard and within six months of the date of promulgation of a new permanent federal standard.20/ It is obvious that recent OSHA regulations may well become effective in the various states that have elected to have their own plans at different times over a period of several months.

In addition, other federal agencies are active in the area of agricultural employment including the Environmental Protection Agency (EPA), the Employment and Training Administration (ETA),21/ the Department of Labor (DOL) under the child labor provisions of the Fair Labor Standards Act, the Federal Highway Administration, and the DOL when administering the Farm Labor Contractor Registration Act.

OSHA has had particular problems in developing regulations for agriculture because, unlike some industries where public regulation of safety and health matters predated OSHA by many years, there had been little previous regulation of most matters of special concern to agriculture.22/ Thus, it was determined that most regulations would have to be created from scratch, there being no real hope of adopting existing private standards or scattered state regulations as interim regulations.23/ Accordingly, in agriculture OSHA has engaged in the promulgation of regulations on a piece-meal basis. So far OSHA has moved in the areas of employment-related housing, storage and handling of anhydrous ammonia, pulpwood logging,24/ slow-moving vehicles, farm tractors, shielding of farm machines, and cotton dust. Other areas, such as field sanitation, are under consideration. OSHA did make an abortive effort to regulate field reentry by employees following application of pesticides and herbicides, but that area is now under the control of the EPA. Regulation of standards for vehicles used in transportation of farmworkers falls in part under the province of the Federal Highway Administration. Certain safety and health concerns about child labor in agriculture are dealt with under the child labor provisions of the Fair Labor Standards Act. Many safety and health aspects of agricultural employment remain largely unregulated.

Current Status of the Law

As a prelude to considering specific OSHA regulations, it is important to establish the scheme of the regulations as they apply to agriculture. Of the hundreds of pages of substantive regulations promulgated under the Williams-Steiger Act, the only regulations that are applicable to agricultural employment are those included in Volume 29, Code of Federal Regulations, Part 1928. Under this scheme the regulations fall into two categories, those that are actually included full text in Part 1928, and those that are pulled into Part 1928 by reference. The latter category is explained by a reading of 29 C.F.R. §1928.21 which provides:

> Applicable standards in 29 C.F.R. Part 1910
>
> (a) The following standards in Part 1910 of this Chapter shall apply to agricultural operations:
>
> (1) Temporary labor camps - §1910.142;
> (2) Storage and handling of anhydrous ammonia - §1910.111(a) and (b);
> (3) Pulpwood logging - §1910.266;
> (4) Slow-moving vehicles - §1910.145.
>
> (b) Except to the extent specified in paragraph (a) of this section, the standards contained in Subparts B through T and Subpart Z of Part 1910 of this title do not apply to agricultural operations.

Most OSHA regulations are contained in the specified nonapplicable subparts of Part 1910.25/

It would be misleading to assume, however, that an agricultural employer will never be cited as long as the regulations set forth at or incorporated into 29 C.F.R., Part 1928 are complied with. The general duty clause of the Williams-Steiger Act has application to agriculture and it has been used on at least one occasion in an agricultural employment case. The case involved the electrocution of an agricultural employee when a piece of irrigation equipment, a 20-foot-long galvanized pipe, came into

contact with a power line. It was found that the employer was aware of the hazard and had taken no steps to free the workplace of it. The general duty clause was resorted to in the proceedings against the employer when it was determined that because of 29 C.F.R., Part 1928 existing regulations dealing with this type of hazard had no application.26/

Employment-related Housing

OSHA regulations dealing with "temporary labor camps" apply to facilities supplied by agricultural employers.27/ "Temporary labor camps" can be construed to refer to most facilities supplied as living or cooking quarters to local as well as seasonal out-of-state farmworkers. OSHA regulations and those adopted by corresponding state agencies 28/ cover a variety of matters including site, shelter, water supply, toilet facilities, sewage facilities, laundry and bathing set-ups, lighting, and cooking and dining facilities. Many of these may also be covered by different standards in local building and housing codes or landlord tenant laws.29/ In addition to the regulations just described, farmers using the Bureau of Employment Services of a particular state have been required to comply with the ETA regulations governing housing.30/ The fate of these regulations will be discussed later.

While there may be narrow, but justificable, criticism of specific standards in the regulations of a particular agency, a far more pressing problem in the employment-related housing area is the existence of inconsistent regulation of the same site by several agencies. For example, in Minnesota a particular housing site for farmworkers may be regulated by OSHA,31/ the Minnesota Occupational Safety and Health Commission 32/ (hereinafter MOSHC), the Minnesota Health Department,33/ ETA,34/ the Minnesota Landlord-Tenant Law,35/ and local building and housing regulations.36/ With the exception of the OSHA and MOSHC regulations, which are identical, the remaining standards may be in conflict with each other. Such a proliferation of conflicting standards creates serious compliance problems since meeting the standards of one agency may necessarily mean violating those of the next.

It is incredible that two sets of conflicting standards that were for a time applicable to agricultural housing originated from the same agency, the DOL. These are the regulations promulgated by OSHA and ETA. ETA's regulations, which applied only to employers using state employment services, were adopted in 1968 before the passage of the Williams-Steiger Act.37/ The OSHA regulations, which applied to all labor camps, were promulgated later.38/ Substantial differences and inconsistencies existed in the two sets of regulations with confusion and enforcement problems resulting.39/ For a time, in an effort to alleviate the situation, the Department of Labor adopted the policy that an agricultural employer whose housing met either standard would be deemed in compliance under both the Wagner-Peyser Act and the Occupational Safety and Health Act.40/

One effort to permanently deal with the problem failed. The DOL proposed changes in the OSHA regulations,41/ hoping that a set of regulations would emerge that would also be acceptable to the ETA. The OSHA proposal was strongly opposed by employer and employee groups and on December 29, 1975, additional hearings were ordered.42/ Those hearings concluded and the record was closed in March of 1976.43/ On April 29, 1976, OSHA announced that it had concluded that the record did not provide an adequate basis for the publication of a new final standard, so the proposal was withdrawn.44/

ETA announced on December 9, 1977, that it was revoking its standards on temporary housing leaving the OSHA standards, which by their terms apply to all temporary labor camps.45/ Employers who had met ETA standards were granted until January 1, 1979, to bring their housing into compliance with OSHA standards.46/ This provoked a suit on behalf of a number of migrant farmworkers asking that the secretary be enjoined from failing to enforce the deleted standards. It was alleged that in numerous respects the deleted ETA standards were more rigid than the OSHA standards and further that the OSHA scheme made no provision for preoccupancy inspection as was the case under the ETA regulations.47/ On May 5, 1978, OSHA announced some changes in its regulations.48/ Then, on August 15, 1978, ETA republished its regulations.49/ On September 1, 1978, ETA published a notice of proposed rulemaking which would allow for a modified application of the ETA housing standards.50/ The new controversy was initially resolved pursuant to a DOL directive issued on October 11, 1978, which provided that migrant housing built after December 31, 1978, comply with OSHA standards.51/ However, facilities constructed before January 1, 1979, could comply with either OSHA or ETA standards. The revocation of the ETA standards was postponed indefinitely.52/

Under regulations effective April 3, 1980, employers whose housing was completed or under construction before the effective date, or who entered into a contract for the construction of specific housing before March 4, 1980, may continue to follow ETA standards.53/ Employers undertaking housing construction on or after April 3, 1980, must follow the OSHA standards.54/

The agencies charged with carrying out OSHA or ETA inspections have agreed to coordinate their efforts beginning in fiscal 1980.55/ The ETA inspections will go forward as usual, with state employment services offices conducting preoccupancy inspections where the employer is using the agency's placement services. Wage and hour inspectors of the Employment Standards Administration (ESA) will continue to inspect farm labor contractor housing. The ESA, however, will work from a list which omits ETA-inspected camps. Unless complaints have been registered or accidents reported, OSHA will limit its inspection activity to those camps not inspected by state employment services personnel or wage and hour inspectors.

A remaining problem is whether a supplier of housing regulated under ETA standards can lose the option of complying with ETA standards by doing remodeling, renovation or expansion work. While "cosmetic remodeling" will not result in the structures being subject to OSHA standards, careful inquiry is advisable before any substantial work is begun.56/

An employer was able to apply for a permanent structural variance from specific ETA standards by filing by June 2, 1980, a written application with the local Job Service Office serving the area in which the housing was located.57/ After that date, housing which varies structurally from the ETA standards become subject to OSHA standards where no variance exists.58/

Viewed in isolation, this episode in the regulation of agriculture might seem tolerable given the need for the regulated to be somewhat understanding of the problems of the regulators. However, when viewed in the overall context of the complexities of OSHA and other safety and health regulations and the myriad complexities in the overall effort to regulate employment in agriculture, such manifestations of administrative infighting and inability to have a comprehensible scheme of regulation is unacceptable and contributes to the general disrespect for and perceived ineffectiveness of the regulatory process.

Storage and Handling of Anhydrous Ammonia

Certain OSHA regulations dealing with anhydrous ammonia equipment used by agricultural employees have been nullified in a curious manner. The OSHA general industrial standards set forth general standards governing anhydrous ammonia systems.59/ Two of the subdivisions of the relevant section are designed to have specific application to agricultural operations.60/ However, 29 C.F.R. 1928.21, which enumerates the OSHA general industrial standards which have application to agriculture does not mention those subdivisions, but makes only a definitional section and a general section operative.61/ The effect is to nullify the provisions which were, by their very terms, to apply in farming operations. An amendment to the regulations, proposed in 1973, was designed to correct this apparent "error," but the amendment was never acted upon.62/ On October 28, 1978, massive revisions of the OSHA regulations appeared designed to delete many sections as a part of a general governmental project to simplify regulatory schemes by eliminating unneeded provisions.63/ The deletions affected the anhydrous ammonia regulations in only a few very minor respects and the basic scheme remains in effect. Remarkably, even after what must be presumed to be a thorough review, the problem remains. It is difficult to believe that the continued nullification of the regulations designed to apply strictly to farm operations, which regulations remain "on the books," is unintentional and it must be supposed that the current OSHA policy is to refrain from regulating those aspects of this agricultural activity. No comment is intended in this study on the merits of the substance of these regulations, but the matter is discussed to point out yet another confusing aspect of this regulatory scheme.

Slow-moving Vehicles

OSHA promulgated general industrial standards requiring warning signs on slow-moving vehicles and in the vicinity of biological and radiation hazards.64/ In listing the provisions which apply to agriculture 29 C.F.R. 1928.21(a)(4) refers to "slow-moving vehicles - 1910.145." Of course, 1910.145 is the entire set of rules on signs. While some confusion existed, it was presumed that the intent was to severely circumscribe the effect of 1910.145 in agriculture by making applicable only the provisions with respect to slow-moving vehicles. This, of course, could have been accomplished quite easily by a specific reference to the particular subsection rather than to the entire section. The effect of OSHA regulations and corresponding state regulations was to require that vehicles which by design travel at less than 25 miles per hour on public roads display a slow-moving vehicle emblem, a florescent yellow-orange triangle with a dark red reflecting border.65/

As a part of the general revision of OSHA regulations announced on October 24, 1978, it appears that the intent was to delete this regulation as unnecessary. However, as a result of an apparent error the amending regulation deleted only the emblem illustration and not the subsection requiring the display of the emblem. Presumably, there will be no enforcement of this regulation, except by those states

that elect to keep it active in their approved regulatory scheme, but these recent developments simply add another element of confusion, technical though it may be.66/

Farm Tractor Safety Regulations

One of the leading causes of injuries to farm employees has been the rolling or tipping of tractors.67/ OSHA regulations now require farm employers to equip most farm tractors of over 20-engine-horsepower manufactured after October 25, 1976, with roll-over protection structures (ROPS).68/ The regulation also requires installation of seat belts.69/ Exemptions allow removal of ROPS from "low profile" tractors when clearance is a substantial problem as in orchards, vineyards, hopyards, or inside buildings and greenhouses.70/ An exemption also applies when tractors must be operated with incompatible mounted equipment, such as corn pickers and vegetable pickers.71/

Because OSHA regulations govern working conditions of employees only, a farmer employer may remove the ROPS when he is operating the tractor himself. However, the ROPS must be reinstalled if an employee is to operate the tractor for a nonexempt use.72/ Similar provisions apply to the seat belt regulations. OSHA and corresponding state regulations also require that employees be given a specified set of operating instructions when initially assigned to the tractor and at least annually thereafter.73/

Farm Machinery Safety Regulations

The National Safety Council has estimated that approximately 20 percent of all injuries to farm employees are the result of accidents with farm machinery.74/ Power take-off drives, conveying augers, straw spreaders and choppers, cotton gins, rotary beaters, and rotary tillers are just a few of the machines involved. OSHA has adopted regulations requiring various safety devices on all such farm equipment manufactured on or after October 25, 1976.75/ Certain existing equipment must also be brought into compliance.76/ Affected equipment must have a variety of guards, shields, and access doors designed to protect employees from hazards associated with moving machinery parts.77/

Such machinery must also have audible warning devices which must sound if the shield or access door is not properly closed while the machine is in operation.78/

In the original version of the regulations, it was provided that a machine would be considered guarded "by location" if during operation, maintenance, or servicing, an employee could not inadvertently come into contact with the hazard.79/ Concern over the "absolute liability" imposed by this provision was expressed, the view being that the employer was in the wrong no matter how bizarre the circumstances by which the employee came into contact with and was injured by the machine.80/ An amendment was promulgated changing the provision to allow the employer to show that the machine was guarded by location if it could be demonstrated that the accident resulted from employee conduct which constituted an isolated and unforeseeable event.81/

Field Worker Exposure to Organophosphorous Products

Using the emergency rulemaking power granted in the Williams-Steiger Act,82/ OSHA, on May 1, 1973, announced temporary standards relative to field worker exposure to organophosphorous products.83/ As a result of petitions by the Florida Peach Growers Association and others, the regulations did not become effective as scheduled 84/ but revised emergency standards did go into effect on July 13, 1973, regulating field reentry for 12 pesticides.85/ Arguing that "no grave danger" existed with regard to the pesticides, the growers mounted an attack on the theory that the secretary had abused his emergency rulemaking power. The Fifth Circuit in Florida Peach Growers Association vs. United States Department of Labor 86/ agreed and struck down the emergency regulations.

Since the decision in Peach Growers, the major effort at the federal level to protect field workers from pesticides has originated in the EPA. Under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Federal Environmental Pesticide Control Act of 1972. and the Federal Pesticide Act of 1978,87/ EPA has promulgated regulations which establish limited worker protection. These regulations in current form forbid application of pesticides if unprotected workers or others are in the field, mandate certain warnings, and state rules with respect to reentry by workers with respect to 12 chemicals.88/ The act makes it unlawful to use a product in a manner inconsistent with its label or contrary to EPA regulations and farmers who ignore either may be subject to civil or criminal penalties.89/

In 1978, the DOL was advised by the EPA that the field worker reentry standards developed by EPA were based on estimated adult tolerances to pesticide exposure. Thus, concern was expressed over the

new administrative waiver procedure that was being developed to allow children age 10 and 11 to work in harvesting certain short-season crops. It was indicated that a "safe" standard for children could not be written because no data existed on which to base tolerance limits for children.90/ Studies were then undertaken to determine whether certain pesticides and chemicals, if applied at specified preharvest intervals in connection with the production of strawberries and potatoes, would adversly affect the health or well-being of 10- and 11-year-old workers.91/ Until satisfactory data are generated relative to safe tolerance levels for 10 and 11 year olds, no administrative waivers will be issued given an existing court order to that effect.92/

Regulation of Transporters of Migrant Workers

Pursuant to the provisions of the Interstate Commerce Act,93/ regulations have been promulgated governing safety in the transportation of migrant workers.94/ These regulations cover qualifications of drivers, certification of drivers, driving rules, requirements for rest and meal stops, vehicle specifications, vehicle inspections, and numerous other matters.95/ These regulations are applicable to motor carriers of migrant workers only in the case of transportation of any such worker for a distance of more than 75 miles and then only if across a state boundary.96/ Migrant worker, for purposes of these regulations, means an individual proceeding to or returning from employment in agriculture as defined in the Fair Labor Standards Act or in the Social Security Act.97/

The matter of motor transport safety is also dealt with in regulations promulgated pursuant to the Farm Labor Contractor Registration Act and in the regulations of ETA promulgated pursuant to the Wagner-Peyser Act.98/

Exposure to Cotton Dust in Cotton Gins

The most recent aspect of agricultural employment to receive attention by OSHA is ginning cotton. Cotton has historically been ginned in small gins owned by farmers and located on farms. Recently, there has been a trend toward construction of larger gins often operated by agricultural cooperatives.99/ Studies indicate a relationship between cotton dust exposure and respiratory ailments. Thus, OSHA believes standards are needed.

On June 23, 1978, OSHA announced two cotton dust standards, one to have application in nonagricultural operations of an industrial nature, and the other to cotton ginning whether in an industrial or an agricultural setting.100/ The application of the ginning standards to agriculture is accomplished by adding a subpart of 29 C.F.R. Part 1928,101/ which is identical to the general standard for cotton ginning found elsewhere in the OSHA regulations.102/ The standards which are applicable in agriculture set no permissible exposure limit for cotton dust in ginning operations. The main thrust of the regulations is to require worker training, medical surveillance, and provision of respirators at the employee's request. In some cases, the respirators may have to be provided even though there is no worker request. There are also provisions requiring cleaning operations to be conducted with vacuum devices rather than "bow-down" equipment.

The standards became effective September 4, 1978, except for those provisions requiring medical surveillance and respirators for certain employees, which were to become effective on September 4, 1979.103/

On October 20, 1978, the Circuit Court of Appeals for the District of Columbia stayed the implementation of the industrial standard pending review.104/ A decision on October 24, 1979, upheld the standard, except for its application to the cottonseed oil industry.105/ The stay was continued temporarily, giving petitioners an opportunity to show cause why it should continue pending appeal. This temporary stay was lifted January 11, 1980 and a schedule for implementation of the industrial standards was established.106/ With respect to the standards applicable to agriculture, a stay was ordered by the Fifth Circuit Court of Appeals on May 29, 1979, pending a decision on the merits in a suit brought by the Texas Independent Ginners' Association and others.107/

Enforcement Problems

Once an OSHA inspector has found a violation, he serves upon the employer a citation and a notice of proposed penalty. The employer must post the citation at or near the place where the violation allegedly occurred. A nonserious violation may carry a civil penalty of up to $1,000. Willful, repeated, or serious violations may justify a civil penalty of up to $10,000. De minimus violations carry no penalties.108/

The employer may contest the citation, the proposed penalty, or both, by giving notice of appeal to the Secretary of Labor within 15 days. If the citation calls for the abatement of a violation, an employee or representative of an employee may also contest raising the issue of the reasonableness of the period of time set for the employer to come into compliance. The case is docketed with the Occupational Safety and Health Review Commission (OSHRECOM) and assigned to an administrative law judge. A hearing is ordinarily conducted in the community where the violation occurred. After the hearing, at which the secretary has the burden of proof, the judge issues an order affirming, modifying, or vacating the citation or proposed penalty. This order becomes final 30 days thereafter unless one of the three members of the commission directs that the matter be reviewed by the commission itself. Once there has been a decision by the commission, or if 30 days expire without an order for commission review, any person adversely 109/ affected may petition the U.S. Court of Appeals for review. Effective March 1, 1980, new simplified procedures are available as an alternative in all but a few specified instances if requested by any party and no objection is raised.110/

The Senate committee on appropriations noted that there were 920 federal compliance officers in fiscal year 1974, recommended a total of 1,420 for fiscal year 1975, and advocated an increase to 2,265 for fiscal year 1976.111/ The latter increase would provide for an addition of approximately 10,000 inspections or an increase from 120,000 to 130,000.112/ These figures relate to all OSHA activities, not just those in the area of agriculture. Considering that some highly industrialized and heavily populated states such as Ohio have left the entire matter to the federal government, it is apparent that relatively few compliance officers have been available to work in agriculture. Hearings in 1974 before the Senate brought out that of 72,000 inspections, presumably in the preceding fiscal year, only 278 involved agriculture.113/ Of 292,000 violations cited, only 298 were in agriculture.114/ In California, one of the most progressive states in the agricultural job safety area, 3,788 inspections were made in the third quarter of 1975 and of those 158 were in agriculture. In the fourth quarter of the same year, 4,489 inspections were conducted and of those 197 were in agriculture. For a program which has as its premise the punishment of "bad" behavior, it is legitimate to ask whether this level of enforcement is likely to bring significant results.

How effective has the governmental effort to curb work-related injury and fatality rates? As previously noted, it has been reported that in 1975, 5,500 farm people lost their lives and more than 500,000 were disabled as a result of accidents.115/ These are rough figures and they include nonwork-related accidents for the entire farm population and work-related accidents of family members. Estimates for 1977 indicate 480,000 disabling injuries and about 5,400 fatalities.116/ Again, these figures include work-related and nonwork-related accidents for the entire farm population. Thus little can be said on the basis of these figures other than that they demonstrate a very slight decline in the overall farm accident and fatality picture.

Bureau of Labor Statistics estimates do not give as good a picture and unfortunately these figures relate to the accident rate for employment in agriculture, forestry, and fishing. There was an increase and it was the largest increase for an industry division. The injury incidence changed from 10.2 per 100 full-time workers in 1976 to 10.7 in 1978.117/ The statistics do not apply to workers who work for an employer with 10 or few employees. The national picture for occupational fatalities showed increases of approximately 20 percent among those workers employed by employers with 10 or more employees.118/ These are not encouraging figures, but they demonstrate the reversal of a five-year trend of falling rates.119/ In fairness to governmental efforts in agriculture, it must be said that it is too early to judge the real potential of OSHA and related programs given all of the difficulties discussed above and given the rather meager resources available for enforcement. Obviously, there is room for improvement and some possibilities are discussed in the recommendations section that follows the next section.

Emerging Developments

One of the ongoing battles in this area has to do with the status under OSHA of the employer with 10 or fewer workers. Several issues have emerged. Should such employers be totally exempted from the operation of the act? Should they be covered, but protected in some way from being cited for violations unless those violations are "serious," willful, or repeated? Should they be exempted from the recordkeeping requirements of the act?

Some have expressed grave concern about the burden of compliance and recordkeeping, particularly when the employer is the operator of a small farm. It has even been suggested that the continued application of OSHA regulations to small farm operations would result in many ceasing to use hired workers to the detriment of the operator and the potential employees.120/ Others have argued that it is just as dangerous to work on a small farm as on a large one and that farm employees have a right to the

protections afforded by the act and the regulations regardless of how many employees the farm operator hires.121/

Those who favor special treatment for employers who have no more than 10 employees have won some temporary battles. Regulations which became effective July 26, 1977, provide that such employers, agricultural and nonagricultural, need not comply with OSHA recordkeeping and reporting requirements except the duty to report fatalities and multiple hospitalization accidents.122/ While there is at first reading an embiguity in these regulations 123/ as to whether an employer with no more than 10 employees must maintain a log of occupational injuries and illnesses (OSHA Form 200), a reading of the history of the regulations makes it clear that under the regulations such recordkeeping is not required unless the Bureau of Labor Standards notifies the employer in writing that he has been selected to participate in an annual statistical survey whereupon the log will be kept and reports made as required by the regulations.124/

These regulations were promulgated as a reaction to the actions of the Congress which had inserted into the DOL appropriations acts for fiscal years 1975 and 1976 recordkeeping exemptions for employees with 10 or fewer employees, except in the circumstances outlined above.125/ There was concern that some of the states might treat this as a "green light" to enlarge the recordkeeping exemption. The regulations provide that while the states may have requirements stricter than those of OSHA, they may not have less demanding requirements.126/

Congress has included other restraints on the enforcement of the act in later appropriation bills. The appropriations bill for fiscal 1979 provided that none of the funds appropriated were to be used for the assessment of civil penalties in first violation situations unless the inspection results in citation for 10 or more violations or for one or more serious or willful violations.127/ That proviso applies whether the employer is agricultural or not. Of special interest to agriculture is a further proviso that states that none of the funds appropriated shall be used to "prescribe, issue, administer, or enforce any standard or regulation under the Act to farming operations where the farmer does not maintain temporary labor camp and employs 10 or fewer employees."128/ The effect of this proviso, even without the recordkeeping regulation discussed above, is to exempt most farmers with 10 or fewer employees from the operation of the act and the regulations promulgated pursuant thereto. A literal reading of the proviso suggests that farm employers are exempt even from the limited reported and conditional recordkeeping requirements of the regulations.

Farm employers must be aware, however, that restrictions in appropriation bills expire at the end of the fiscal year and may not necessarily be reimposed. Since the Congress has not been consistent in the type of provision inserted in appropriation bills, there is a need for all concerned to reexamine the law from year to year.

In order to give some degree of permanency to certain of these regulations and provisos, an effort was made in the 95th Congress to amend the Occupational Safety and Health Act to provide by statute the same limitations on issuance of civil penalties on initial inspections and the same limits on recordkeeping requirements as are currently in effect by virtue of the regulations and the provisions of the appropriation bill.129/ However, there was no provision for the blanket exemption of farm employers. While this legislation passed both houses it was vetoed by the president on October 25, 1978. The matter does not appear to be dead, however, and bills are currently pending in the 96th Congress to amend the act to totally exempt agricultural and nonagricultural employers with 10 or fewer employees, to require the issuance of warnings only in the case of certain first instance violations, and to bar the assessment of penalties in certain cases where 10 or fewer violations are cited.130/ One bill proposes an exemption for the "small farmer" and uses a seven man-years test.131/ Another suggests an exemption for the farm employer with 25 or fewer employees.132/

Whatever the merits of the exemption for most agricultural employers with 10 or fewer employees, it must be observed that such a provision introduces another threshhold requirement into the law and raises the problem of defining "farming operation" and setting the time frame in which the count of employees must be made.133/ Viewed in isolation and only in the context of safety and health laws, this probably presents no great problem. However, viewed in the larger context of all the law affecting the employer-employee relationship in agriculture with the myriad number of thresholds and exemption schemes, this type of scheme has the effect of contributing to the increased complexity of the law and all the problems that result.

On April 27, 1979, a notice of proposed rulemaking was published by OSHA proposing an amendment adding a new standard requiring sanitation facilities in the field for agricultural workers. The proposal included requirements regarding handwashing facilities, potable drinking water, toilets, and

field food consumption.134/ The proposal provides that toilet facilities shall be located within a five-minute walk from each employee's place of work in the field. Exceptions would apply if the work is to be under two hours in duration or the crew consists of fewer than five employees who have transportation to a satisfactory toilet. The required facility can be either a water-flushed toilet, chemical toilet, combustion toilet, recirculating toilet, or sanitary privy. The proposal has not been popular. Farmers say it is an expensive way to replace the toilet tissue they now carry in the cabs of their trucks.135/ The Senate Agriculture Committee approved a resolution which called the proposed standard "a hardship on small, family farm operation."136/ Others noted that the proposal seemed designed for the vegetable fields and vineyards of California and New Jersey, but were totally impractical for many farms with vast open pastures and fields of grain and cotton measuring hundreds of acres.137/

Litigation is pending involving these proposed regulations, as well as certain other matters.138/ An order, December 21, 1978, provides that OSHA's failure to complete development of the field sanitation standard while giving attention to other matters, affecting fewer workers was an "abuse of discretion" and the agency was given 30 days to file a timetable for the issuance of the final rule.139/ While an appeal was pending, a timetable was filed setting various progress dates and December 28, 1979, for publication of the final rule in the Federal Register.140/ On December 27, 1979, a decision issued allowing the secretary to temporarily delay development of field sanitation standards given other higher priority matters demanding attention.141/

The plaintiffs were also seeking to compel OSHA to promulgate agricultural standards for noise, nuisance dust, and personal protective equipment.142/ These standards are on inactive status. OSHA takes the position that they have inadequate information on these matters and that the hazards involved are of low severity. With regard to noise standards, OSHA intends to wait until there has been a review of the general industry standard before looking at the case of agriculture.143/

Several bills were introduced in the 96th Congress, 1st Session, which would require the awarding of attorney's fees to employers who successfully contest a citation or penalty.144/ This provision, if enacted, would apply to both agricultural and nonagricultural employers.

Also introduced in the 96th Congress, 1st Session, were bills that would require economic impact statements in connection with proposed standards.145/ The obvious intent of such legislation would be to force the secretary, before promulgating, to think through the balance between the cost of the regulation and the benefit to be derived. No doubt such bills were introduced in response to proposals such as the field sanitation proposal which is thought by some to have costs that would far outweigh benefits to workers.146/

Other legislation has been introduced that addresses the basic theory of the act and seeks to move things more in the direction of consultation, training and technical aid to employers.147/ For example, one bill provided:

> In order to further carry out his responsibilities under this section, the Secretary shall establish programs for the education and training of employers and employees which, to the extent practicable, shall be conducted in local communities and shall deal with hazards in particular industries.148/

Legislation has also been proposed that would compel the secretary to do on-site consultations if requested by an employer with a view to giving advice on the interpretation or applicability of standards as well as on possible ways of complying.149/

Several bills were introduced in the 96th Congress, 2d Session, designed to reward good safety records by granting employers with fewer than a set number of lost work day injuries in the preceding calendar year an exemption from all safety inspections and investigations except in certain serious instances described in the bills. Special treatment is also proposed for employers maintaining an advisory safety committee which meets statutory requirements with respect to make-up and operation.150/

Also introduced in the 96th Congress, 1st Session, were the perennial bills calling for the total repeal of the Occupational Safety and Health Act of 1970.151/

Recommendations

There is a need in this area of the law for policymakers to do some serious thinking about the wisdom of what is being attempted in agriculture. No doubt the kind of regulation that is being attempted can do much to advance the cause of safety if it is taken seriously by farm operators and

agricultural employees. There can be little argument with the proposition that attitudes are extremely important and, therefore, it is extremely distressing to hear repeatedly that two-thirds or more of surveyed farmers are opposed to the activities of OSHA and certain other safety and health schemes.152/ It is possible to understand some of this opposition. Farm employers who are faced with a vast array of technical regulations, instances of inconsistent regulations, instances of mistakes in the language of the regulations, increased costs for tractors and other machinery, and yet another set of recordkeeping requirements are going to be inclined to be cynical and bitter about state and federal activities. Some farm employers, large and small, already faced with a broad array of regulations, may have difficulty in seeing the safety and health activities as anything other than further evidence of the emergency of "The Leviathan."153/

Farm employers are not the only ones who have manifested skepticism. An attorney for the United Farm Workers has been quoted as saying, "Enforcement is a very big problem." With respect to field reentry regulations, the same individual commented, "We do not have much confidence in state or federal standards because of the enforceability problem." Apparently, UFW prefers to have safety and health protection schemes written into its contracts so it can enforce the standards through the grievance procedure.154/

Regretably, the Standards Advisory Committee on Agriculture was not perceived to include a good cross section of the nation's farmers. This compounded the public relations problem for OSHA. Unless the bureaucracy can gain the confidence of a substantial percentage of farm employers and employees, the prospect for a good test of the present legislation and regulations does not seem very likely.155/ It should be noted that the Standards Advisory Committee on Agriculture has been disbanded as part of the general move to reduce the number of advisory committees and because "the most pressing safety and health hazards in agriculture have been addressed."156/

What can be done to improve the existing situation? There are no guaranteed answers, but there are a number of possibilities to consider.

First, the criticisms of the overall scheme of the act must be given serious attention. No doubt the regulations that have been promulgated will do much to advance the cause of safety and health even if enforcement is not mounted on a large scale. It is not likely that there will be widespread removal of factory-installed ROPS or machine guards and if these safety devices are well designed their existence should help bring down accident figures for all farm personnel. However, much more attention needs to be given to the education of agricultural employers and employees and this must be accomplished in such a way so as to avoid alienating all concerned. Money spent on consultation visits by OSHA officials might be well spent. Funding for research that will give good accident statistics might yield results. The recent 18-state report begins to get at the kind of accident breakdown that can lead to sound policymaking. However, there may well be a need to go further to determine when accidents occur, not just in terms of months of the year, but days of the week, hours of the day, point during the work shift, etc. Accident patterns may well show up and recommendations can be made for employer-employee safety meetings, work breaks, and periods of intense supervision. A system of recognizing and rewarding good safety records needs to be developed. One government agency, the United States Forest Service, has many employees doing extremely hazardous work and the experience there has demonstrated that attention to this kind of detail can yield positive results. Providing safe working conditions is important, but it is but one of many factors that go to holding down accidents and job-related illnesses.

A second area of concern has to do with the legislation and regulations as such. Inconsistent regulation by different agencies must be eliminated. At both the federal and state levels, concerted efforts should be made to have safety and health programs administrered by a single agency. Unnecessary complications in the regulations should be rooted out, including those that result from mistake, unneeded threshold requirements, regulations that are designed to have broad application but which in effect are relevant only to certain regions or certain specialized farming operations, and regulations which are not readily comprehendable by the average layperson.

A third area of concern has to do with enforcement of existing regulations. Inadequate resources in the DOL and other agencies continues to be a problem. Perhaps a clear picture of the cost of employment-related accidents and illnesses is needed to convince policymakers of the need, even in the time of budget cutting for increased spending for enforcement. The use of new enforcement dollars for more than punishment schemes might make those who appropriate funds more willing to consider such additional funding.

A fourth area of concern relates to those matters now pending in Congress. Recordkeeping and broader exemptions for those with 10 or fewer employees ought not to be a permanent part of the law, at

least not for agricultural employment. There is nothing to indicate that there is something inherently safer about a place of employment in agriculture because there are 10 or fewer employees. If there is sufficient concern for lawmakers to act at all in the safety and health area, artificial thresholds ought to be shunned. There may well be legitimate concerns about the burden of recordkeeping requirements and about compliance costs for small operators. Some of these concerns could be eliminated if the reporting scheme were made simply and if it could be part of a uniform reporting system for all government programs involving agricultural employment. Some of the concern over OSHA recordkeeping requirement is simply a mainifestation of a larger concern over all the recordkeeping and reporting requirements being imposed on agriculture today. Much more attention needs to be given to the elimination of piecemeal requirements. Attitudes might well improve if a comprehensive system were introduced with adequate instruction and assistance given to farm employers and their employees. If there is a desire to regulate agricultural employment at the current level, the regulator has to communicate with the regulated on a more frequent and effective basis.

If there is a continued insistence upon exempting small operators, some attention should be given to creating a uniform system of exemption that applies not only to OSHA, but also to other schemes. Such exemption schemes ought to have some permanency and not be subject to annual expiration. The existing system leaves employers and employees with the task of constantly wondering what has happened and this promotes disdain for the whole regulatory process.

The pending field sanitation regulations are controversial because they have no practical application in many cases. The credibility of the regulator is damaged and, as in this case, long delays and costly litigation result. More input from employers and employees prior to the publication of proposed regulations might well have headed off many problems.

Some of the problems in promoting safety and health in agriculture in the 1970's are the result of evolving standards and practices where there was little past experience. Safety and health concerns have existed in the past, but large-scale systematic regulation and education has not. Thus, some of what has happened must be attributed to natural "growing pains." However, enough experience has been gained to move to a new level where cooperation, rather than conflict, will predominate. The entire repeal of OSHA, while advocated by a few, seems remote as does the enactment of a total exemption for agriculture. Promoting safety consciousness and rewarding good records could well serve as the primary thrust of occupational safety and health efforts as we move toward the second decade of experience with OSHA and many related programs.

Notes to Chapter 4

1. Letter, with Fact Sheet enclosed, from Dir. of Information, Occupational Safety and Health Review Commission, to Donald B. Pedersen, June 8, 1976.

2. 41 Fed. Reg. 10190 (1976).

3. Id.

4. Farm/Ranch Standardized Accident Survey: An 18-State Report, National Safety Council (1979) p. 2. (hereinafter 18-State Report).

5. 18-State Report, supra note 4 at 12.

6. 18-State Report, supra note 4 at 4.

7. 18-State Report, supra note 4 at Table 11, p. 12.

8. See Catz and Guido, "A Demonstrated Need for Agricultural Standards Under the Occupational Safety and Health Act of 1980," 9 Gonzaga L. Rev. 439, 440 (1976).

9. See Hearings on S. 586, S. 976, S. 1147, S. 1249, S. 2823, S. 3147, S. 3451, and S. 3651 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 93d Cong., 2nd. Sess. (1976); Implementation of the Occupational Safety and Health Act, Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2nd Sess. (1972); Fundamentals of Machine Operation, Agricultural Machinery Safety (Deere ed. 1974); International Labour Office Codes of Practice Safety and Health in Agricultural Work (Atar, Geneva, 1965).

10. See BNA Operations Manual, The Job Safety and Health Act of 1970 (1971) at 14-17.

11. Occupational Safety and Health Act of 1970, Pub. L. No. 92-596, §§2-34, 84 Stat. 1590 (codified at 29 U.S.C. §§651-78 (1976) (hereinafter cited as Williams-Steiger Act).

12. As subsequent discussion reveals, regulations and annual appropriation bills have limited the application to agricultural employment to some degree.

13. 29 U.S.C. §654(a) (1976).

14. 29 U.S.C. §655 (1976).

15. 29 U.S.C. §654(b) (1976).

16. This theory was reiterated by President Carter in his Proclamation 4645 of March 15, 1979, designating National Farm Week, 1979, 44 Fed. Reg. 16355 (March 19, 1979).

17. 29 U.S.C. §666 (1976).

18. See Hearings on S. 586, supra note 9 at 60 and 468.

19. See 29 U.S.C. §667 (1970): Comment, "The Occupational Safety and Health Act of 1970: An Overview," 4 Cumb.-Sanford L. Rev. 525, 531 (1974); Frazier, "OSHA and the Farmers: An Analysis and Critique," 1972 Ins. L. J. 439, 446 (1972); Before state laws take precedence over the federal requirements, the state plan must be submitted and approved. This approval is contingent upon the plan containing requirements at least as stringent as the federal standards. Even after the state plan is approved, however, the federal plan remains applicable for three years to enable the Secretary of Labor to ascertain whether the state act in operation meets the requirements. After the three-year temporary period, although the federal standards no longer apply, the Secretary of Labor retains jurisdiction to evaluate the state plan and its enforcement continually.

20. 40 Fed. Reg. 48679 (1975), codified at 29 C.F.R. §1953.23(a)(1) & (2) (1980).

21. Until recently the Employment and Training Administration of the Department of Labor was known as the Manpower Administration.

22. 41 Fed. Reg. 22267 (1976).

23. See 29 U.S.C. §667(h) (1976).

24. Since the pulpwood logging industry is not agriculture in the context of this study, these regulations will not be discussed.

25. It appears that the various procedural regulations found at 29 C.F.R. §§1901-06, 1910(a), 1911-13; 1950-52, 1975 & 1977 (1978) have application in agricultural cases.

26. Marion Stephen d/b/a Chapman & Stephens Company (No. 13535); See BNA Occupational Safety and Health Reporter (5/19/77), at 1559; Rev. Com. 1977, 1977-1978 OSHD ¶21,802.

27. 29 C.F.R. 1928-21(a)(1) (1978); 29 C.F.R. §1910.142 (1978).

28. An example of such state regulations are those promulgated in Minnesota. See The Minnesota Occupational Safety and Health Act of 1973. Minn. Sess. Laws 2177 (codified at Minn. Stat. §§182.655-674 (1974), as amended, (Supp. 1975), as amended Act of Apr. 3, 1976, ch. 134, §§48-49 (1976) Minn. Legis. Serv. 253 (West); Minn. Occupational Safety & Health Code Regs. 40-129 (1975) (hereinafter cited as MOSHC). MOSHC currently is contained in volume 6, MCAR.

29. See, e.g. Minn. Stat. §504.18 (1974). This has been construed to impose a "coveant of habitability" upon all lessors of residential property. See, Fritz v. Warthen 298 Minn. 54, 57-58, 213 N.W. 2d 339, 341 (1973).

30. See Housing for Agricultural Workers, 20 C.F.R., pt. 620 (1978), as amended, 41 Fed. Reg. 7092 (1976); (sentence deleted from 20 C.F.R. §620.3), as revised, 41 Fed. Reg. 13339 (1976); (20 C.F.R. §620.3, revisions corrected by 41 Fed. Reg. 15004 (1976); deleted 42 Fed. Reg. 62133 (1977);

repromulgated 43 Fed. Reg. 36058 (1978); modification proposed 43 Fed. Reg. 39124 (1978); application of present standards extended 44 Fed. Reg. 4667 (1979).

31. 29 C.F.R. §1928(a)(1) (1978); 29 C.F.R. §1910.142 (1978).

32. MOSCH 40-129 (1975).

33. See Rules and Regulations of the Minnesota State Board of Health governing Migrant Labor Camps Reg. 204 (1974) (hereinafter cited as MHD). MHD currently is contained in volume 13, MCAR. Regulations dealing with Migrant Labor Camps have also been promulgated in New York pursuant to N.Y. Public Health Law §225(m), 10 NYCRR, part 15 (1978).

34. See note 28, supra.

35. See Minn. Stat. §504.18 (1974).

36. The problem also exists in North Carolina, Hearings on H.R. 8232, H.R. 8233, H.R. 8234, H.R. 8249. H.R. 8894, H.R. 10053, H.R. 10631, H.R. 10810, H.R. 10922 Before the Subcommittee on Economic Opportunity of House Committee on Education and Labor, 95th Cong., 2nd, Sess. (1978), pp. 193-4.

37. BNA Occupational Safety and Health Reporter (12/29/77) at 1176.

38. Id.

39. BNA Occupational Safety and Health Reporter (12/29/77) at 1176; 5/4/78) at 1809.

40. See 41 Fed. Reg. 3095 (1976); 41 Fed. Reg. 18131 (1976).

41. 39 Fed. Reg. 34057 (1974).

42. 39 Fed. Reg. 44456 (1974).

43. Telephone conference between Donald B. Pedersen and Office of Standards Development, OSHA, March 11, 1975.

44. See 41 Fed. Reg. 18430 (1976).

45. 42 Fed. Reg. 62133 (1977).

46. Id.

47. Salvador Molina, et al. v. Marshall (D.C. Dist. Col. No. 78-0651 filed April 11, 1978).

48. 43 Fed. Reg. 19480 (1978).

49. 43 Fed. Reg. 36058 (1978).

50. 43 Fed. Reg. 39124 (1978).

51. DOL Program Directive 500-80 (Oct. 1, 1978).

52. 44 Fed. Reg. 4667 (1979).

53. 45 Fed. Reg. 14182 (1980); ETA standards at 20 C.F.R. §§654.404-654.417.

54. 45 Fed. Reg. 14180 (1980); OSHA standards at 29 C.F.R. §1910.142.

55. CCH OSHA Compliance Guide ¶9762; BNA Occupational Safety and Health Reporter (12-13-79) at 665-6.

56. CCH OSHA Compliance Guide ¶9599.

57. 45 Fed. Reg. 14180 (1980).

58. Id.

59. 29 C.F.R. §1910.111 (1978).

60. 29 C.F.R. §1910(g) and (h) (1978).

61. 29 C.F.R. §1910.111(a) and (b) are the sections made operative by 29 C.F.R. §1928.21 (1978).

62. See 38 Fed. Reg. 26459 (1973).

63. 43 Fed. Reg. 49748 ff. (1978), codified at 29 C.F.R. §1910.111 thru §1910.144 (1980).

64. 29 C.F.R. §1910.145 (1978).

65. 29 C.F.R. §1910.145(d)(10) (1978).

66. 29 C.F.R. §1910.145(d)(10) survives the deletions at 43 Fed. Reg. 49749 (1978), but the emblem illustration is out by virtue of item 417 at 43 Fed. Reg. 49749 (1978).

67. See 39 Fed. Reg. 4536 (1974); St. Paul Pioneer Press, July 24, 1976 at 11.

68. See 29 C.F.R. §1928.51 (1978).

69. 29 C.F.R. §1928.51(b)(2) (1978).

70. See 29 C.F.R. §1928.51(b)(5)(i)-(ii) (1978); 40 Fed. Reg. 21474 (1975).

71. 29 C.F.R. §1928.51(b)(5)(iii) (1978).

72. 29 C.F.R. §1928.51(b)(6) (1978).

73. See 29 C.F.R. §1928.51(d) (1978) (refers to Appendix A-Employee Operating Instructions of 1928 for specific operating instructions).

74. 41 Fed. Reg. 10190 (1978); a detailed report appears in 18-State Report at 31-2.

75. 29 C.F.R., pt. 1928, subpt. D (1978).

76. All new equipment manufactured on or after Oct. 25, 1976, must comply with this regulation; however, it does not apply to certain equipment manufactured before Oct. 25, 1976. See 41 Fed. Reg. 22268 (1976), changing 41 Fed. Reg. 10195 (1976) (not applicable to certain equipment manufactured before June 7, 1976).

77. 29 C.F.R. §1928.56(a)(7) (1978).

78. 29 C.F.R. §1928.57(b)(4)(ii), (c)(4)(ii) (1978).

79. 29 C.F.R. §1928.57(a)(9) (1978).

80. BNA Occupational Safety and Health Reporter (10/28/76) at 623.

81. 41 Fed. Reg. 46598 (1976).

82. 29 U.S.C. §655(c) (1976).

83. 38 Fed. Reg. 10715 (1973).

84. See 38 Fed. Reg. 15729 (1973).

85. 38 Fed. Reg. 17214 (1973). See 29 C.F.R. 1910.267(a)-Table I (1974) deleting 39 Fed. Reg. 28878 (1974) (field reentry safety intervals in days for crops treated with organophosphorus pesticides).

86. 489 F.2d 120 (5th Cir. 1974), discussed in Comment, "Farmworkers in Jeopardy: OSHA, EPA and the Pesticide Hazard," 5 Ecology L.Q. 69, 90-96 (1975).

87. 7 U.S.C. §§135-36y (1970) as amended, (Supp. III, 1979).

88. The 12 chemicals are ethyl parathion, methyl parathion, guthion, demeton, azodrin, phosalone, carbophenothion, metasystoz-R, EPN, bidrin, endrin and ethion, 40 C.F.R. §170.1-4 (1978) promulgated pursuant to 7 U.S.C. §136w (Supp. III. 1979).

89. 7 U.S.C. §136j(a)(G) (Supp. III 1979).

90. BNA Occupational Safety and Health Reporter (5/25/78) at 1930-31.

91. 43 Fed. Reg. 36623 (1978), and 45 Fed. Reg. 55175 amending 29 C.F.R. §575.5(d) (1978).

92. National Association of Farmworkers Organizations et al v. Marshall, No. 79-1587 (C.A.D.C. March 20, 1980).

93. 49 U.S.C. §§303, 304 (1976).

94. 49 C.F.R., pt. 398 (1977).

95. 49 C.F.R. §§398.3-.18 (1977).

96. 49 C.F.R. §398.2 (1977).

97. 49 C.F.R. §398.1(a) (1977).

98. These regulations are discussed in other parts of this study.

99. 43 Fed. Reg. 27419 (1978).

100. 43 Fed. Reg. 27434 (1978), amended by 43 Fed. Reg. 28474 (1978), and 43 Fed. Reg. 35036 (1978); codified as 29 C.F.R., pt. 1928, subpt. I.

101. 29 C.F.R., pt. 1928, subpt I.

102. 29 C.F.R. §1910.1046 (1978).

103. 29 C.F.R. §1928.113(i) (1978).

104. CCH OSHA Compliance Guide ¶2164.

105. AFL-CIO et al v. Marshall et al., 1979 CLH OSHD ¶23,963 (CADC 1979).

106. CCH OSHA Compliance Guide ¶9789.

107. Texas Independent Ginners Assn. v. Marshall, No. 78-2663 (5th Cir. 1979).

108. These provisions are summarized in Fact Sheet, see note 1, supra; 29 C.F.R., Subparts A-G.

109. Id.

110. 29 C.F.R., Subpart M.

111. See Dept. of Labor and Health, Education and Welfare and Related Agencies Appropriations Bill, 1975, Rept. No. 94-1146, 93d. Cong., 2d Sess. 23: Dept. of Labor and Health, Education and Welfare and Related Agencies Appropriations Bill, 1976, Rept. No. 94-366, 94th Cong., 1st. Sess. 19-20.

112. See Rept. No. 94-366, supra note 111 at 20.

113. See Hearings on S. 586, supra note 9 at 476.

114. Id.

115. St. Paul Pioneer Press, July 24, 1976 at 11.

116. 18-State Report at 2.

117. BLS statistics reported in BNA Occupational Safety and Health Reporter (11/30/78) at 1121-23.

118. Id.

119. Id.

120. BNA Occupational Safety and Health Reporter (5/19/77) at 1560.

121. BNA Occupational Safety and Health Reporter (4/28/77) at 1475.

122. 29 C.F.R. §1904.15 (1978).

123. Note the confusion that arose in BNA Occupational Safety and Health Reporter (10/19/78) at 669, corrected in BNA Occupational Safety and Health Reporter (11/16/78) at 8623.

124. 29 C.F.R. §1904.15 (1978).

125. 42 Fed. Reg. 38568 (1977).

126. 29 C.F.R. §1952.4 (1978).

127. See Dept. of Labor and Health, Education and Welfare and Related Agencies Appropriations Bill, 1978 Rept. No. 95-480, 95th Cong., 1st Sess.

128. Id.

129. H.R. 11445, 95th Cong., 1st Sess.

130. H.R. 795; H.R. 2116; H.R. 428; 96th Cong., 1st Sess., S. 1486; S. 1572; 96th Cong., 2d Sess.

131. H.R. 4397, 96th Cong., 1st Sess.

132. H.R. 4831, 96th Cong., 1st Sess.

133. An OSHA interpretation indicates that the exemption applies only if the farmer had 10 or fewer employees on the day of the inspection and no more than 10 at any time during the preceding 12 months. OSHA Instruction CPL 2.33, April 6, 1979.

134. 41 Fed. Reg. 17576 (1976).

135. St. Paul Pioneer Press, Aug. 20, 1976, 5/World and Nation.

136. BNA Occupational Safety and Health Reporter (6/24/76) at 131.

137. BNA Occupational Safety and Health Reporter (7/1/76) at 166 and 169.

138. National Congress of Hispanic American Citizens (El Congreso) v. Marshall (No. 2142-73) (U.S.D.C. Dist. of Col.).

139. 6 OSHC 2157.

140. BNA Occupational Safety and Health Reporter (2/1/79) at 1390-1.

141. National Congress of Hispanic American Citizens, 1979 CCH OSHD ¶24,115 (CADC, 1979), see comment at 13 Clearinghouse Rev. 907 (1980).

142. BNA Occupational Safety and Health Reporter (9/28/78) at 541.

143. BNA Occupational Safety and Health Reporter (9/28/78) at 542.

144. S.251; S.270; H.R. 664; 96th Cong., 1st Sess.

145. H.R. 187; H.R. 3696; 96th Cong., 1st Sess.

146. BNA Occupational Safety and Health Reporter (8/19/76) at 352.

147. H.R. 794; H.R. 187; 96th Cong., 1st Sess.

148. H.R. 794; Folio 22 at 3; 96th Cong., 1st Sess.

149. H.R. 794; H.R. 187; 96th Cong., 1st Sess.

150. H.R. 6539; H.R. 6692; H.R. 7006; 96th Congress, 2d Sess; see also S. 2153 96th Congress, 1st. Sess.; compare H.R. 6861, 96th Congress, 2d Sess.

151. H.R. 425; H.R. 738; H.R. 771; H.R. 1376; H.R. 2310; H.R. 3032; 96th Cong., 1st Sess.

152. St. Paul Pioneer Press., July 24, 1976 at 11.

153. See Hobbes, The Leviathan.

154. BNA Occupational Safety and Health Reporter (9/1/77) at 423.

155. Statement of Richard McGuire, American Farm Bureau Federation, Seante Hearings, Subcommittee on Labor of Committee on Labor and Public Welfare, Aug. 13, 1974 at 466.

156. BNA Occupational Safety and Health Reporter (9/28/78) at 542.

Chapter 5

REGULATION OF FARM LABOR CONTRACTORS

Certain farmers and growers have regularly experienced difficulty in obtaining a sufficient supply of local seasonal agricultural labor.1/ This resulted, some time ago, in the emergence of a middleman, the farm labor contractor, as an important supplier of temporary farmworkers.2/ The traditional contractor recruits at distant points, hires, and transports a crew of workers to a farm pursuant to a contract with the farmer.3/ Often the farm labor contractor, often called "crew leader," supervises the work of the crew and acts as paymaster.4/ In some instances, the contractor controls housing and other of the workers' everyday needs.5/

Through the years the migrant community and farm operators have been plagued by certain farm labor contractors who have abused the power which came with the leverage their position afforded. It has been reported that in many instances the contractor "exaggerates conditions of employment when recruiting workers in their home base or fails to inform them of their working conditions at all; transports them in unsafe, vehicles; fails to furnish promised housing, or else furnishes substandard and unsanitary housing; operates a company store while making unitemized deductions from worker's paychecks for purchases; and pays the workers in cash without records of units worked or taxes withheld."7/ For example, in one case it was alleged that a contractors recruited a family in Texas for work in Wisconsin and failed to provide that work when the people arrived. Further, the contractor, in recruiting, allegedly failed to reveal a starting date, the duration of employment, transportation arrangements, insurance benefits, wage rates, the existence of a recruiting charge, and other conditions of employment. Promised housing was not provided.8/ Other reported cases reveal similar distressing stories.9/

Farm owners have also had their difficulties. It is reported that "the contractor would agree to arrive with a crew on a designated date, simply fail to show up because better opportunities presented themselves elsewhere. This would leave the farmer with no help to harvest his ripening crop. More common is the practice of leaving after the first picking when the second and third pickings became more difficult and consequently less profitable."10/

Historical Development

The 88th Congress, recognizing a need for federal legislation to regulate the activities of farm labor contractors operating on an interstate basis, passed the Farm Labor Contractor Registration Act.11/ (Hereinafter the 1963 Act.) The purpose of the 1963 Act was to afford protection to "migrant workers" from unscrupulous contractors.12/ Farm employers were also expected to derive benefit from the legislation. While a few states, including Colorado,13/ California,14/ Oregon, 15/ Washington,16/ and New York,17/ had previously passed regulatory measures, federal intervention appeared to be an absolute necessity.

The 1963 Act included a very broad definition of "migrant workers," one that encompassed many workers who did not travel in the traditional migrant streams. This was accomplished by classifying as "migrant workers" those whose primary employment was in agriculture as defined in the Fair Labor Standards Act, and those who on a seasonal or other basis performed agricultural labor as defined in the Social Security Act.18/ The full implications of this broad definition, which has survived several amendments to the 1963 Act and which includes many local day-haul workers who return to their homes each night, will be discussed later.

The 1963 Act required that any person, who, for a "fee," recruited, solicited, or transported 10 or more "migrant workers" for interstate agricultural employment first obtain a certificate of registration from the Secretary of Labor.19/ The applicant was required to file a sworn statement as to the manner in which he operated his business,20/ provide satisfactory evidence of financial responsibility,21/ and provide a set of fingerprints.22/ Upon receipt of the registration certificate, the contractor was required to display it to those with whom he intended to deal.23/ Further, he was

required to inform each worker of the area of employment, the nature of the work, transportation, housing, and insurance arrangements, wage rates to be paid, and the charges to be assessed by the contractor for his services.24/ Then, upon arrival at the place of employment, he was required to post the terms and conditions of employment as well as those for occupancy if he controlled housing.25/ Finally, he was required to maintain payroll records showing deductions and to provide workers with itemized statements.26/

The 1963 Act indicated circumstances under which the secretary could deny, suspend, or revoke registration. These included making false statements in the application for registration; misleading potential workers with respect to terms, conditions, or existence of work; breach of contract with the users of farm labor; breach of contract with the laborers; lack of financial responsibility; conviction of certain felonies; the recruitment of aliens illegally in the United States; failure to comply with Interstate Commerce Commission laws and regulations; and noncompliance with the 1963 Act or the regulations thereunder.27/ The purpose was to render certain abusive practices unlawful. In addition to risking revocation of registration, a contractor who was convicted of a violation of the 1963 Act or a regulation promulgated pursuant thereto could be fined up to $500.28/

Unfortunately, the 1963 Act had almost no impact. Noncompliance was the rule rather than the exception.29/ The U.S. Department of Labor (DOL) reported that of an estimated 6,000 crew leaders operating across state lines, fewer than 2,000 were registered.30/ In 1974, it was reported that since the inception of the 1963 Act only four persons had been referred to the Department of Justice for criminal proceedings and only one person had been convicted and sentenced.31/ It became apparent that further legislation would be required.

Several bills were introduced into the Senate and the House in early 1974 and after extensive legislative maneuvering the Senate on October 16, 1974, passed H.R. 13342 and sent it to the president.32/ On October 29, 1974, President Gerald Ford vetoed the bill.33/ While he noted the deficiencies of the 1963 Act and supported the effort to amend it, he expressed opposition to certain ramifications of an attached rider amending the Longshoreman and Harbor Workers Act.34/

Thereafter, Congress considered redrafted legislation which excluded the Longshoreman and Harbor Workers Act rider, but which dealt even more strictly with farm labor contractors. In late Novemer 1974, a bill passed both Houses and on December 7, 1974, the president signed into law the Farm Labor Contractor Registration Act Amendments of 1974.35/ Additional amendments were added in 1976 and 1978, in each instance altering the definition of farm labor contractor.36/ (Hereinafter the 1963 Act as amended through the 95th Congress will be referred to as FLCRA.)

Current Status of the Law

The current version of FLCRA continues to define "migrant worker" very generally as in the 1963 Act. Thus, day-haul workers who return to their homes after work each day may in certain instances be "migrant workers" protected by FLCRA. A "farm labor contractor" continues to be defined as "any person, who, for a fee, whether for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment."37/ Important exemptions from the definition are discussed later. Note that the current version of FLCRA no longer requires that there be 10 or more migrant workers involved for the crew leader to be a contractor under the statute. This opens up the possibility that the recruiting of one worker, under certain circumstances, can cause the recruiter to be classed as a "farm labor contractor" under FLCRA.

A number of specific exemptions from FLCRA eliminate certain persons from the "farm labor contractor" category and thus from the statutory requirements. A brief review of the exemptions is important because of the current controversy surrounding them.

The first exemption extends to nonprofit charitable organizations and to certain educational institutions.38/ It has been urged that this exclusion should be read to extend to agricultural cooperatives, but the courts have generally refused to so interpret the statute.39/

The second exemption extends to farmers who "personally" engage in recruiting and related activities solely for the purpose of supplying workers for their own operations.40/ The term "personally" was added by the 1974 Amendments and this has been interpreted to mean that agents and employees do not qualify under this particular exclusion. Further, farm corporations arguably cannot do anything "personally" since they must act through agents and employees. This has created confusion since there is a view that at a minimum family farm corporations ought to be exempt when the "farmer" recruits solely for

its own purposes. It has been argued that Congress in the 1974 Amendments was clearly attempting to eliminate any suggestion of an exemption for large agribusiness corporations.41/

The third exemption extends to full-time or regular employees of entities referred to in the first two exclusions, with the 1974 Amendments adding "who (employee) engages in such activity solely for his employer on no more than an incidental basis."42/ As might be suspected, the phrase "on no more than an incidental basis" has been one that has created problems of interpretation resulting in litigation. Also, the courts have been called upon to determine when one is an employee as opposed to being an independent contractor. In Usery v. Golden Gem Growers, Inc.,43/ an individual drew a salary and fringe benefits from the farmer employer, but was also in charge of recruiting crews for field work. In that connection he was compensated on a percentage basis for each box picked by the crew. The individual supervised the crew and constituted the liaison between the farmer and the workers. The court held that this individual was really functioning as an independent contractor and as a farm labor contractor. Thus, he could not qualify for the exemption and should have been registered.

The fourth exemption, added by the 1974 Amendments, made intrastate (as well as interstate) recruiting and related activities subject to regulation and then exempted intrastate activity carried on solely within a 25-mile radius of the permanent residence of the recruiter and for no more than 13 weeks a year.44/ Thus, in theory, a farmer who recruits a crew or a single worker for his own use and then, for a "fee" transports the worker(s) 26 miles to a neighboring farm would be required to register and comply in all respects with FLCRA. Note that the "fee" does not have to be a profit, but can constitute nothing more than a recovery of expenses.45/

The fifth exemption has to do with activity related to obtaining certain legal aliens.46/

The sixth exemption covers any full-time or regular employee of a person who is registered under FLCRA.47/

The seventh exemption removes from the category of farm labor contractors under FLCRA, common carriers and certain of their employees.48/

The eighth exemption prevents the extension of the registration scheme to custom combine, hay harvesting and sheep shearing operations.49/

The ninth exemption applies to certain poultry operations where the employees are not away from their domicile other than during working hours.50/

The tenth and final exemption, resulting from considerable pressure from the seed industry,51/ prevents the application of FLCRA to recruitment and related activities aimed at obtaining full-time students and other persons, whose principal occupation is not farm work, to detassel and rogue hybrid seed corn and sorghum. The exemption also appears to operate when the recruiting is for "other incidental farmwork for a period not to exceed four weeks in any calendar year."52/ The employment must be of a sort that does not require the workers to be away from their permanent place of residence overnight. There is also a proviso that nullifies the exemption if the contractor uses persons under age 18 to operate his vehicles to provide transportation to workers. The exemption presents the interesting question as to whether "incidental" is intended to refer to work that is incidental to detasseling and rogueing operations only, or whether it stands separately and means incidental farmwork of any description.

If one engages in recruiting or related activities with respect to "migrant workers" and none of the exemptions apply, such person must register under FLCRA and comply with its terms. FLCRA's registration requirements, obligations, and prohibitions have been elaborated on in regulations promulgated by the Secretary of Labor pursuant to statutory authorization.53/ Revised regulations, issued on June 29, 1976, include current procedural and substantive requirements.

A registrant must designate the secretary as his agent to accept service of process,54/ must demonstrate financial responsibility or produce insurance meeting stated requirements,55/ must submit proof that vehicles meet stated safety requirements,56/ must demonstrate that housing, if it is to be furnished, meets specific standards,57/ must provide a full set of fingerprints,58/ and meet certain other requirements. A farm labor contractor who is required to register must provide the secretary with any change of address within 10 days, change in status of motor vehicles, change in housing facility arrangements and other matters.59/

In addition to the disclosures required under the 1963 version of the act, the contractor must

disclose to workers the period of employment, the existence of a strike or other labor dispute, and any commission arrangement that exists with retailers or others who may sell goods to workers.60/ These disclosures must be made to the workers in a language in which they are fluent and must be given in advance of their traveling to the job site.61/ These requirements provide the heart of the protection to workers under FLCRA.

While the causes for revocation of registration are substantially the same as in the 1963 Act, contractors who violate FLCRA may now (1) be subject to a civil penalty of not more than $1,000 for each violation,62/ (2) lose the facilities and services available under the Wagner-Peyser Act,63/ (3) suffer revocation or suspension of registration,64/ and (4) be subjected to criminal prosecution for willful violations.65/ First conviction may bring a fine of up to $500 or a prison term of not more than one year, or both.66/ Conviction for a subsequent violation may be punished by a fine not to exceed $10,000 or a prison term not to exceed three years, or both.67/

If a farmer employer or the farm labor contractor discharges a "migrant worker" in retaliation for asserting rights under FLCRA, the U.S. District Court is authorized to reinstate the worker with back pay or damages.68/ While the burden of proof of retailiatory motive is on the worker, he has the resources of the DOL behind him, as the secretary, after appropriate investigation, is required to bring the action.69/ In Flores v. Fulwood Farms of Florida, Inc.,70/ a preliminary injunction against eviction from company housing and termination of gas and electric service was granted where it appeared that these acts were being threatened in retaliation for asserting complaints under FLCRA.71/

Under the 1974 Amendments, a farmer who uses a farm labor contractor must determine if the contractor possesses a registration in full force.72/ If a farmer knowingly employs the services of an unregistered contractor, the Secretary of Labor has the power to deny the facilities and services provided under the Wagner-Peyser Act for a period of three years.73/ The farmer may also be subjected to a civil penalty of not more than $1,000 per violation, whether it occurred knowingly or not.74/

Also under the 1974 Amendments, both farm labor contractor and farm employer must keep copies of all payroll records required to be maintained under federal law.75/ Even if the contractor is handling the payroll, as is often the case, the farm employer is clearly required to obtain copies of all records and information which the contractor must accumulate together with copies of information the contractor must give to the "migrant workers." The statute requires the contractor to give a detailed account of earnings and deductions when acting as paymaster.76/

The possibility of a farmworker, damaged by a violation of FLCRA, obtaining money damages in a civil action has been a matter of some interest since Congress first moved to regulate this area in 1963. Under the 1963 Act, there was no express provision creating a right to bring such an action. Some argued that one who violated the statute, be he farmer, registered farm labor contractor, or unregistered farm labor contractor, ought to be susceptible to an action on the theory that there is sufficient congressional intent manifested to allow the courts to hold that there is an implied federal cause of action. The 10th Circuit, however, refused to recognize such a cause of action under the 1963 version of the Act. The court stated in Chavez v. Freshpict Foods, Inc.:

> This court will not fashion civil remedies from federal regulatory statutes except where a compelling federal interest of a governmental nature exists or where the intent of Congress to create private rights can be found in the statute or in its legislative history.77/

The 1974 Amendments specifically created a private right of action for any person aggrieved by an intentional violation of FLCRA.78/ Federal jurisdictional amounts and diversity of citizenship are not required nor is there any necessity for exhausting administrative remedies.79/ Given the wording of the statute, there would seem to be no reason why farmers, registered contractors, and unregistered contractors are not all potential defendants. The 1974 Amendments, however, apparently eliminated any possibility of an implied civil cause of action for negligent violation of the FLCRA.

The statute provides that the court may award "damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief."80/ Is the $500 a "cap" on the amount that can be recovered? Courts that have had occasion to address the question do not see any limit in spite of certain legislative history that suggests the contrary. In Aranda v. Pena,81/ the court indicated that the $500 is available as an alternate liquidated damages figure and in no way limits the possible recovery for actual damages. It is not reasonable to anticipate any disagreement with the analysis in Aranda.

Enforcement

The 1974 Amendments added significant civil and criminal penalties for violations.82/ On paper, at least, FLCRA was given teeth. However, its effectiveness continues to be hampered by certain vagaries in the statute itself, and by the level of enforcement efforts. Under the 1974 Amendments, which took effect on December 7, 1974, the Secretary of Labor is required to monitor and investigate farm labor contractor violations and to make an annual report to the Congress.83/ Available data, some through fiscal 1977 and some through calendar 1977, indicate increased enforcement efforts.

The DOL indicates that, as of November 1975, enforcement efforts remained at about the same level as prior to the 1974 Amendments.84/ Prior to 1974, the act had been administered by the Manpower Administration of the DOL, which placed five professional investigators in three migrant streams each year to search out violations in an undercover method.85/ This practice was discontinued in 1972,86/ when the responsibility for enforcement was given to the Bureau of Employment Standards.87/ At the close of 1975, it appeared that the professional staff vested with the duty of supervising the enforcement of the act had been reduced to two individuals located in Washington, D.C.88/ However, it was indicated that steps were being taken to train approximately 1,000 investigator-compliance officers of the Wage and Hour Division of the Bureau of Employment Standards to investigate farm labor contractor matters, along with their other duties.89/

Impatience with the administration of the amended act is manifested in the 1976 litigation in Guerrero v. Garza,90/ a classic case of workers who had been recruited in Texas by an unregistered contractor and who had come to Wisconsin expecting housing and work. Neither was available. Action was taken against the Secretary of Labor and others seeking injunctive and declaratory relief. It was asserted that the secretary had failed to carry out his duties under the amended act. In particular, that he had failed to monitor and investigate on his own initiative the activities of the Garzas and other contractors; had failed to apply sanctions to the Garzas and others; and had failed to act with sufficient speed in processing plaintiff's complaint against the Garzas. The court held that as to the first two allegations, the plaintiff had standing to pursue them. However, it was held that the plaintiffs did not have standing to challenge the federal defendants' failure to investigate the complaint more promptly. Running through the case is the suggestion that the federal practice had been to investigate only when complaints had been filed. In other words, routine monitoring and investigating had not been a part of the enforcement practice.

The 1978 hearings on various proposed amendments revealed that enforcement activity was up considerably and that for fiscal 1977 almost 87 percent of the investigations were directed investigations, rather than follow-ups on complaints.91/ For fiscal 1977, there were more than 2,320 investigations, including 1,260 farm labor contractors, 390 employees of such contractors, and more than 670 users of contractor services.92/ For calendar year 1977, the first period during which civil penalties were assessed, the penalties totaled $627,135 and involved 698 investigations.93/

The number of registrations had also climbed sharply by the end of calendar 1977. From the pre-amendment period when about 2,000 contractors were registered, the total rose to 9,707 for calendar 1976 and to 12,506 for calendar 1977. The latter figure includes 8,212 farm labor contractors and 4,294 full-time or regular employees.94/ About 500,000 agricultural workers were members of registered crews in calendar 1977.95/

Also, during 1977 the secretary issued final orders in 90 administrative actions involving revocations, refusals to issue or renew, and suspension of registration certificates.96/

While these improvements are noteworthy, one witness, representing farm labor interests, testified in 1978 that it was his view that the DOL and the Employment Standards Administration still treats the amended act like "a poor cousin."97/ The witness continued by asserting that even though the level of enforcement has risen somewhat "the Department still gives FLCRA almost no attention."98/ While the enforcement manpower is doubtless much less than desired, it is not really fair to say that the amended act is getting "almost no attention." As Donald Elisburg, assistant secretary of labor, testified in the same hearings:

> We have approximately budgeted positions in staff years for this law under the current fiscal year, approximately 37 1/2 staff years, but that is divided among our entire investigative working force and around the country. For example, we expect to have the equivalent of 30.1 full-time staff years of investigation time during this fiscal year 1978, but that is spread among many of our 1,100 compliance officers. So some might be the equivalent of fulltime for 3 months on farm labor investigation, some might only put in a few hours, it depends where

> there are growing seasons and where the need is. But at one time or another, we have available the compliance staff in the Wage Hour Division. Of their budgeted hours and budgeted investigation time, we have 37 1/2 staff years budgeted for that.99/

The question remains, as Congressman W. G. Hefner put it, whether the federal government has bitten off more than it can chew in its efforts to regulate farm labor contractors.100/

Recent Developments

Efforts to further amend FLCRA were made in the 95th Congress. The only bill to emerge as law created an exemption for the seed industry as discussed previously. However, the unsuccessful bills deserve attention since the issues raised have not been resolved and can be expected to resurface in the future. Recent cases that are related to the problems that the Congress was considering must also be discussed. This discussion will focus, therefore, on current policy debates over the particulars of the exemption scheme of FLCRA, recordkeeping requirements, and insurance regulations.

Exemptions

Great concern has been expressed by farmers, farm corporations, agricultural cooperatives, day-haul operators, and other users of "migrant labor" that FLCRA has achieved a scope of coverage far beyond what was required by the problems that motivated the Congress to move in this area in 1963. It has been suggested that the original congressional intent has been twisted by the DOL and the courts to create a situation where registration is required in many instances where it serves no purpose whatsoever. There is little doubt that the unusual definition of "migrant worker" in FLCRA has led to the regulation of far more than the traditional farm labor contractor. The scheme affords protection to many local seasonal workers, persons who have never been in the migrant stream. Under some views, registration is required not just by "middlemen" acting as farm labor contractors, but also by certain of the ultimate users of farmworkers and their employees. No doubt there will be an ongoing policy debate over whether this is justifiable. Several bills were introduced into the 95th Congress seeking to bring the debate to a head, but in the end only one relatively minor piece of legislation was reported out of committee and enacted into law.

Recall that "migrant worker" is broadly defined to include individuals whose primary employment is in agriculture as defined in the Fair Labor Standards Act or who perform agricultural labor as defined in the Social Security Act on a seasonal or temporary basis.101/ "Farm labor contractor" is defined to mean any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment.102/ Most of the efforts to amend the FLCRA in the 95th Congress focused on changing the exclusions which take certain persons out of the broad definition of farm labor contractor. Some attention, however, was given to changing the definition of migrant worker. Both sets of bills will be discussed.

The following discussion focuses on sole proprietors, farm corporations, employees of farmers, agricultural cooperatives, and day-haul operators who may be affected by FLCRA.

Sole Proprietors. A farmer who personally recruits a crew for his own use does not have to register. However, he must do so if he receives a "fee" for transporting that same crew to another farmer across state lines or outside a 25-mile intrastate radius. The "fee" involved may be nothing more than a recovery of expenses.

Several of the bills in the 95th Congress were designed to reduce the likelihood of necessity to register in such circumstances. The term "fee" was defined in certain of the bills to mean money or other valuable consideration in excess of the actual cost of providing services.103/ Thus, transportation costs collected from another farmer would not be characterized as a fee. In the context of one farmer dealing directly with another, this change would probably not have been objectionable, but because the change would have had further ramifications, discussed later, it was strongly opposed by the DOL. Another proposal would change the radius exemption to 75 miles and eliminate the week-per-year limitation.104/ Again, such a change would have had ramifications beyond one farmer dealing directly with another and thus was also opposed by the DOL.

Donald Elisburg, assistant secretary of labor, during hearings on the various bills, made the following statement:

> Where a few small individual farmers have made casual arrangements on a local

> basis to share the services of a common work force it is not the practice of Wage and Hour Division to allocate scarce resources to ascertain whether or not they are engaging in farm labor contractor activities.105/

Members of the congressional committee asked how an individual farmer would know whether he was "large" or "small" and thus whether he should comply with the FLCRA. The question has merit. Either the registration requirement applies or it does not and to suggest that some need not be concerned about it because of present enforcement policies, encourages disrespect for the law generally. Further, there is no guarantee that present enforcement policies will continue unchanged. While this may be likely, given budgetary constraints, it still leaves an air of uncertainty that is undesirable. While the bills introduced in the 95th Congress may not have been appropriately drafted to deal with the problem, revised legislation could be drafted to address it without producing the feared side-effects.

Farm Corporations. Another concern that various bills attempted to address is the status of the farm corporation. Many such corporations are family owned and operated and are really nothing more than family farm operations which for business, tax, and estate planning reasons have been incorporated. FLCRA says that a "farm labor contractor" is a "person" who engages in certain described activities.106/ "Person" is defined to include individuals, partnerships, associations, joint stock companies, trusts, and corporations.107/ However, when the exemption for a farmer who "personally" recruits, etc.. is read, the view advanced by the DOL is that the farmer in this context must be an individual or a member of a partnership.108/ The reasoning is that a corporation works entirely through its employees and thus cannot "personally" recruit, etc. The phrase "solely for his own operation" is also given significance in developing the argument that the Congress really did not intend the exemption to extend to corporate activities. The proposed amendments that would have removed the term "personally" would have undermined the DOL's position and thus such amendments were opposed.109/

As might be expected, litigation has resulted over the status of farm corporations under FLCRA and farm corporations have had success in winning decisions that registration is not required. One of the first of the cases is Jenkins v. S & A Chaissan & Son, Inc.,110/ where a motion to dismiss was granted to a corporation charged with violations of FLCRA. The court took the view that the legislative history reveals a congressional intent to regulate "middlemen" who have been the source of problems for farmworkers and farmers alike and that Chaissan was clearly not such a "middleman." Further, the court notes that Chaissan in its direct use of USTES did not receive a "fee" since the use of a fully subsidized employment service does not generate a benefit to Chaissan that can be labeled a "fee." The court conceded that the addition of the term "personally" by the 1974 Amendments was designed to eliminate an exemption for large farms that recruit directly, but the court devised no test for drawing the line between the "large farm" and "those which are run essentially as small businesses."111/ It is interesting to note that in Jenkins there is no clear indication in the court's opinion as to whether Chaissan is a family owned and operated farming corporation. The fact that certain of the owners had the surname Chaissan, according to the title of the case, indicates this as a possibility. In any event, the operation was alleged to be a substantial one, using some 90 farmworkers to harvest about 225,000 bushels of apples which would yield an estimated gross income of $733,500.112/

In Marshall v. Heringer Ranches, Inc.,113/ four brothers incorporated a family operation in 1973 and took stock holdings of equal value. The court granted summary judgment dismissing the corporate defendant in an action growing out of an alleged failure on the part of the corporate employer to determine that Heringer and Fernandez, both employees, possessed valid registration certificates. The court granted the motion in part on the theory that Heringer and Fernandez were not employees of a "farm labor contractor." Thus, the court reached the question as to the necessity of the corporation to register in this case. It was held that the exemption reaches the corporation in this instance since it was supplying workers for its own operation. In addition, there was no "fee" accruing to the corporation.114/ The court cited Jenkins 115/ and an opinion letter of the Wage and Hour Division,116/ but offered no analysis as to how the case at bar fit, merely concluded that it did.

The DOL and certain labor interests have argued that under the present state of the law, as interpreted in a Wage-Hour Opinion Letter, October 3, 1977,117/ the family farm corporation is exempt where the corporation remains under effective control of an individual whose authority is equivalent to that possessed by a sole proprietor.118/ This, according to the DOL and certain farm labor sources, is as it should be since abuses are not usually found in such operations. However, the same parties oppose the extension of an exemption to corporate farming generally since this would allow large agribusiness operations, using full-time recruiters, to avoid registration and FLCRA compliance. Abuses are feared where the corporate employer operates on a large scale and an impersonal basis.

However, in the recent decision in Marshall v. Green Goddess Avocado Corp.,119/ the DOL's position was rejected. The Ninth Circuit indicated that the purpose of FLCRA is to regulate middlemen who are

capable of exploiting both farmers and "migrant workers," thus there is no intent to make FLCRA applicable to the direct activities of even the largest agribusiness corporation. The decision noted that if such a corporation hires employees who are more than incidentally involved in farm labor contractor type activities, the FLCRA requires such employees to register and comply even if they are regular and full-time employees of the corporation. Therein, it is argued, lies the protection for "mirgrant workers."

Not all decisions have exempted a large corporation recruiting directly and solely for its own purposes as Cantu v. Owatonna Canning Co., Inc.120/ illustrates. The corporation was charged under FLCRA with violations perpetrated by two full-time officers of Owatonna, including misrepresenting the term of employment; forcing workers to labor 12 hours a day, seven days a week without overtime at wages below the minimum level; absence of adequate pay records; short changing farmworkers on pay slips; and employing children in the field under 12 years of age. Further, the labor housing provided was alleged to be so unsanitary that it caused eye infections and contagious diseases. The allegations also suggested that the drinking water was contaminated and caused illness to the children of the workers. The corporation had employed some 1,500 farmworkers over a three-year period. The District Court refused to dismiss the complaint, finding no exemption for corporations under the existing terms of FLCRA.121/

The Cantu case is of considerable interest because it demonstrates reasons why FLCRA should not be limited in its application to traditional itinerant farm labor contractors. Yet, under the Cantu approach, problems remain since the present version of the FLCRA does not discriminate between the large agribusiness employer and the family farm corporation although most parties in and out of government agree that under any interpretation such a distinction should be made. The courts are then in the difficult position of attempting to draw a line that does not exist in the language of the FLCRA while having as the only "official" statement the wage and hour opinion letter discussed above, hardly suitable authority to rely on in interpreting an act of Congress.

Employees. Considerable controversy has surrounded the status of employees of farmers who, as part of their duties, recruit and transport crews of farmworkers. Presently, an exemption applies to the farmer when he personally recruits for his own operation.122/ An additional exemption is designed to apply to full-time or regular employees who recruit for their unregulated employers "on no more than an incidental basis."123/ Several bills sought to change this by eliminating the phrase "on no more than an incidental basis" and by adding that the full-time or regular employees be "bona fide."124/ "Bona fide regular employee" was to be defined as an employee who is regularly employed on a seasonal basis.125/ Thus, a foreman hired on a seasonal basis to recruit and transport a crew for a "fee" would not be an employee who would have to register under FLCRA.

Those who advocated these amendments quoted the remarks of Senator Gaylord Nelson, delivered during the debates on the 1974 Amendments:

> Mr. President, the purpose of this provision is to prevent farm labor contractors from avoiding registration by becoming the employee of each and every grower for whom they recruit and hire migrant workers, while at the same time providing an exemption under the Act for the regular employee of a grower whose duties may include recruiting and hiring solely for this employer.126/

In his testimony during the 1978 Hearings, Congressman John J. McFall indicated that he could see no point in having the farmer's foreman register. He pointed out that the DOL, in case of a complaint, can always locate the farm and is not dealing with an itinerant farm labor contractor. Congressman McFall decried the necessity of a foreman keeping voluminous records required under FLCRA and having to supply copies to his employer, the farmer.127/

In his testimony, Donald Elisburg, assistant secretary of labor, indicated that to enact the proposed amendment would create a situation where the basic purpose of the act would be evaded since farmers could simply hire a farm labor contractor, call him an employee who is regularly employed on a seasonal basis, and thus qualify him for the exemption.128/ Even if such an employee's activities related only to recruitment, the proposed amendments would not require registration.129/

These bills did not become law, thus we are left with a situation where the courts will have to determine who is a "full-time" or "regular employee" and whether or not his activities solely on behalf of him employer in gathering or transporting a crew were on more than an incidental basis. The lack of precision in the law leaves much to be desired.

Some indication of the complexity of the problem emerges in two recently reported cases. In

Marshall v. Herringer Ranches, Inc.,130/ Herringer and Fernandez were full-time employees of a farm corporation that was not required to register. They engaged in recruiting crews for the corporate employer, but the court concluded that there was no obligation under FLCRA that they register. The court so found on the basis of three separate theories. First, the court said that it made no sense to say that the corporation need not register and then to say that its employees must. Since the corporation can operate only through its employees, the requirement of registration, if imposed on employees, would destroy the exemption for the corporation.131/ Such reasoning could give rise to the anomalous situation where employees of a corporation could escape registration, where employees of a sole proprietorship might not. The remaining two rationales are more workable given the scheme of the statute. As to Herringer, who owned 25 percent of the stock of the family corporaation, the court concluded that his activities in recruiting, etc., were "solely for his own operation." Thus, the exemption for the "farmer" who "personally" engages "solely for his own operation" ought to have application to Herringer. "Any other conclusion would exalt form over substance."132/ The third basis for the decision was that uncontradicted evidence demonstrated that Herringer spent less than 5 percent of his time "hiring" and "transporting" and Fernandez spent less than 10 percent of his time on such activities.133/ Thus, as a matter of law these men were engaged as employees in "such activity on no more than an incidental basis."

In Jenkins,134/ officers of the farm corporation were held to be entitled to dismissal on the theory that the corporation was not required to register and that they were acting as "agents"135/ of the corporation and not as middlemen in the recruitment process. Here the basic theory is that FLCRA is designed to regulate middlemen and not farmers. Such a view, if carried to its logical conclusion, would exempt all employees of exempt farmers. This simply does not jibe with the language of the statute, though it may be in tune with certain of the legislative history. The analysis in Marshall 136/ is more sophisticated to the extent that it looks at the percentage and type of activity of the employee and to the extent that it attempts to give a special status to an owner-employee of a farm corporation.

Unfortunately, the FLCRA and the cases leave more questions than answers. Should all servants of a corporation which itself is not required to be registered be exempt from registration? If so, what standard should be applied to determine which corporations need not register? Should a special status be given to employee-owners of corporations that are not required to register? Would this open a loophole whereby a contractor could be given a small ownership interest in a corporation and then be taken on as an employee? Should the "no-more-than-on-an-incidental-basis" test be applied to all employees of corporate and noncorporate entities regardless of their ownership status? Should the full-time or regular employee test be routinely applied? Some conclusions are suggested in the Recommendations section which follows.

Agricultural Cooperatives. Several bills were designed to give some relief to agricultural cooperatives. The argument was made that if a farmer can "personally" engage in recruiting for his own operation without having to register, why should the situation be any different if several farmers band together, form an agricultural cooperative, and have as part of its function recruiting and related activities to gather crews for the use of the individual members, all of whom are farmers?137/

In this connection, it was proposed that the exemption for nonprofit charitable corporations be expanded to cover "bona fide non-profit agricultural cooperatives" engaged in labor contracting activities solely for their own members.138/ Strong opposition to these changes was voiced. One witness for farm labor interests indicated in a prepared statement:

> The potential abuse of farm workers increases under a cooperative recruitment arrangement. Where a contractor recruits for several growers at once, the contractor has an incentive to over-recruit, anticipating a need to shuffle workers among different growers and different crops on an "as needed" basis. These needs create situations ripe for fraudulent recruitment with respect to the terms and conditions of employment.139/

A fear was also expressed that groups of crew leaders would form cooperatives and become employees of them in an effort to escape the provisions of FLCRA. That maneuver has apparently already been tried. At the time of the 1978 hearings, it was reported that four cases were pending in the U.S. District Courts in Texas and nine in the 9th Circuit. In all the cooperative form had been used to attempt to circumvent FLCRA. It was further reported that in the California cases the lower courts had held, in all instances, that the cooperative associations were participating in labor contracting under the act.140/

In the Jenkins 141/ case, one of the defendants was a cooperative association. There was some dispute as to the extent of its activities, but the court indicated that even if Valley Growers' activities, had been limited to filing a job order with U.S. Training and Employment Service on behalf

of its grower members, there would be no basis on which to dismiss the FLCRA claim brought against it. The court noted that by engaging in recruiting on behalf of its membership, the cooperative assumed the role of "middleman" and that is precisely the role that Congress intended to regulate. Further, the court found that a "fee" was received if the cooperative assessed charges for these services against its grower members. The court did not discuss the impact of general profits that the cooperative received from doing business with these members and whether such profits might also constitute a "fee" under the statute. In the end, the court indicated that the mere fact that the cooperative is not in the traditional image of a farm labor contractor does not detract from the fact that it clearly meets the statutory definition of a farm labor contractor.142/

In Usery v. Coastal Growers Association,143/ a cooperative had recruited crews for various members. The cooperative took the position that it did not have to register as a labor contractor because it exacted no "fee" for the services rendered. The court, however, found that the membership fees paid to the cooperative by various growers was a sufficient "fee" to meet the requirements of the FLCRA and that registration was required.

In light of the concerns expressed over granting an exclusion to agricultural cooperatives, it is unlikely that changes such as those proposed in the bills before the 95th Congress have much chance of passage in the foreseeable future.

Day-Haul Operators. Substantial efforts were made to substantially free day-haul operations from FLCRA regulation. Currently, the 25-mile-intrastate-radius rule and the 13-weeks-a-year limitation have the effect of putting many day-haul operators under the registration requirement. In many areas, workers are hauled from their homes and neighborhoods in cities to farms that lie more than 25 miles from the contractors' permanent place of residence. Also, many day-haul operators are likely to conduct their operations for more than 13 weeks out of the year. One proposed amendment called for the radius to be raised to 75 miles, for the application of the exclusion within that radius even if state lines were crossed and for the total elimination of the 13-weeks-a-year restriction.144/ Under such a plan, the contractor could operate year-round in one or more states within a 75-mile radius of his permanent place of residence and not have to register.

Another bill would have created an exemption for a farm labor contractor who operated within the suggested 75-mile radius, but would have kept the week restriction, raising it to no more than 26 weeks a year.145/

A third approach was designed to create an exemption for a farm labor contractor who engaged in the specified activities solely for the purpose of supplying workers who return each day, after work, to their permanent residences.146/

Strong testimony in favor of such changes came from Congressman W. G. Hefner. He discounted the need to regulate day-haul activities and asserted that the current state of the law is actually destroying jobs for local workers in his state, North Carolina. Congressman Hefner indicated:

> Local agricultural workers, under these circumstances, are not subject to the exploitation and abuse often felt by true migrant workers. If they are, which I do not feel is the case, they have effective remedies under State Laws. And most important, they have the economic freedom, which migrants do not, to simply refuse to work for someone who does not treat them fair and square.
>
> The effect of these requirements when they are enforced has been to deny local workers the opportunity to work, if they choose to, in the fields and orchards of whatever work may be in their State. The North Carolina Employment Security Commission has estimated that the number of day-haul workers available in some parts of the State has dropped by as much as four-fifths. This state agency should know, too, because it is often called upon to fill this void with migrant labor from other States.147/

These statements deserve consideration. If there is in fact encouragement of the use of traditional migrant labor in substantial numbers in North Carolina and other states, the amendments must be taken seriously, for further traffic in the migrant streams surely should not be encouraged. However, it may be very difficult to pin down a cause and effect relationship here and unless that can be done with some degree of certainty for a number of locations across the country, a cautious approach to the day-haul amendments is called for.

Other witnesses at the 1978 hearings indicated a strong need to continue to restrict the day-haul

exemption. Donald Elisburg, assistant secretary of labor, indicated that an expansion of the exemption would have its greatest impact in Florida, Texas, and California where investigations had turned up widespread violations of FLCRA by day-haul operators.148/

Another witness who spoke on behalf of farmworker interests made reference to 1973 and 1974 hearings and the mass of evidence that revealed abuses by day-haul operators including fraudulent recruitment, failure to deduct social security taxes, failure to provide pay records, failure to provide toilet, sanitation, and potable water facilities, employment of children illegally, arbitrary dismissals, blacklisting, absence of first aid equipment, use of substandard vehicles, and additional problems.149/ The witness concluded:

> Congress had abundant evidence of the need to subject day-haul operations to the protection of the Act. Conditions have not improved since 1974 and those protections must not now be eroded.150/

What may exist here is a case of the current law doing a great deal of good in some locations in the United States, but causing some fairly serious problems elsewhere. However, it is virtually impossible, by statute or regulation, to sort out the "good" states and the "bad" states or the "good" metropolitan areas and the "bad" metropolitan areas. Thus, unless the problems that exist in North Carolina are demonstrated to be commonplace across the country and the result of current regulation of day-haul operations, the better part of wisdom dictates the exercise of great caution when considering an expansion of the scope of the day-haul exemption.

Recordkeeping

Consternation has been expressed by farmers over the recordkeeping requirements of FLCRA. Currently, farmers who use contractors are required to receive and store copies of all the employee records the contractor is required to keep.151/

Testimony during the 1978 hearings indicated that the requirement often puts farmers in a difficult position since the farmer is in violation of FLCRA if he does not get such records. If this happens or seems likely to happen, the farmer has a choice between violating the FLCRA or refusing the workers and losing his crop.152/

Concern was also indicated that the requirement of producing such records in duplicate places an inordinate burden on small contractors.153/ Further, it was argued that it is normally easier for the DOL to check the contractor's records rather than those retained on the farms. It was suggested that as many as 50 to 100 growers would have to be contacted to get the records for a single crew for a normal citrus harvest season.154/

A representative of the Florida citrus industry states that the "record swapping provisions boggle our minds."155/ It was suggested that since the crew leader must notify the DOL within 10 days after a move, there ought to be no problem in locating the contractor if a check of his records is desired. Those who fail to give the required notice of new location could be subjected to very rapid revocation proceedings.156/

Donald Elisburg, assistant secretary of labor, stated:

> We oppose these changes. As you know, farm labor contractors are highly mobile and it is frequently difficult to locate records which may be necessary to pursue enforcement actions where violations have occurred. By requiring the users to obtain and maintain these records, we are able to facilitate enforcement of the act. Also, the users of the contractor services are, together with the contractor, joint employers of the farmworkers. By placing an obligation on the users, the act helps to assure that farmworkers are treated fairly and in a manner consistent with the law.157/

Importantly, the requirement that the farmer be provided with a copy of various records is in and of itself a way of prodding certain crew leaders into making the original records. Pressure from the farmer who knows he must demand such records may be as helpful as anything in rooting out total or partial noncompliance with basic recordkeeping requirements in some cases. Given this consideration and the position of the DOL, it seems that any attempt to change the recordkeeping requirements of FLCRA is likely to have little success in the foreseeable future.

Insurance

The 1963 Act included a requirement that as a prerequisite to registration the applicant had to

demonstrate financial responsibility or give proof of insurance coverage with respect to vehicles used to transport "migrant workers."158/ The 1974 Amendments elaborated on this, requiring coverage at the same level required under the Interstate Commerce Act for those involved in the transportation of passengers.159/ The secretary was given the power to promulgate regulations requiring a lesser level of coverage if coverage in amounts available to common carriers turned out not to be readily available to farm labor contractors.160/ Current regulations require a $100,000/$300,000/$50,000 policy for a vehicle designed for 12 or fewer passengers, and a $100,000/$500,000/$50,000 policy for a larger piece of equipment.161/

One bill introduced in the 95th Congress was designed to make state workers' compensation the exclusive remedy for injured workers where benefits are available to "migrant workers."162/ The DOL strongly objected to such an amendment, pointing out the wide variations in state workers' compensation laws on matters such as benefit schedules and exclusionary schemes affecting agricultural employment.163/ Concern has also been expressed over the lack of coverage under workers' compensation schemes while workers are being transported from one employer to another, lack of coverage for family members being transported, and lack of property damage coverage.164/ In promulgating existing regulations, the secretary deemed it infeasible to incorporate varied and unclear state laws into the federal requirements. Thus, when current regulations were finalized in July 1976, no provision was included offsetting vehicle liability insurance with workers' compensation coverage.165/

Farm labor contractors, on the other hand, feel they are being required to incur an unneeded expense by paying for both workers' compensation coverage and liability insurance that is designed to extend coverage even in the case of employment related accidents. Can the "migrant worker" who is injured on the job, however, recover against his employer personally and thus get the insurance coverage? If workers' compensation coverage exists, the injured employee can typically not pursue a negligence action against the employer. Since the insurance pays only where the employer is exposed to liability for his negligent acts, the premiums paid for employee coverage buy nothing. Even if the "migrant workers" were able to pursue a money judgment under the civil relief provisions of FLCRA, in addition to collecting workers' compensation benefits, the typical insurance policy required under the regulations would afford no coverage in the event a judgment was entered against the employer.

The problem seems to be an unwillingness to make the effort to work out a scheme coordinating the coverage required under the regulations and the local workers' compensation coverage. Wide variations in state workers' compensation laws raise a practical obstacle making the effort to coordinate coverage "administratively infeasible."166/

Recommendations

The status of the farmer who "personally" recruits a crew for his own use, and later transfers it to a neighbor for a "fee" ought to be clarified. There seems to be little point in regulating this kind of activity and if the Congress, by virtue of the level of funding for enforcement, does not intend to do so, this ought to be clearly stated in the statute. The receipt of a "fee" by a farmer who originally recruited the crew for his own use ought not to trigger the application of FLCRA.

The intent of the Congress as to whether FLCRA is designed to regulate the employment activities of the agribusiness corporations ought to be made clear. The danger of abuse is sufficiently documented to warrant regulation of recruitment and related activities even though the traditional middleman is not involved. However, the administrative determination not to apply FLCRA to the family farm corporation can be justified. The same rationale that provides the justification for not registering individual farmers who recruit personally for their own purposes is applicable. If there is to be a family farm corporations exemption, Congress should also make this clear. A similar problem comes up in other areas of the law that relate to the regulation of agriculture. Congress and many state legislatures have often failed to take into account the rapid rise in the use of the corporate form by family farm operations and have seldom drafted legislation with a conscious concern for such operations. Greatly increased attention to the family farm corporation is needed to add clarity to the law and to create policy that is as consistent as possible when applied to family farms, whether sole proprietorships, partnerships, or corporations.

Additional attention needs to be given to the uncertain status of employees who recruit exclusively for their farmer employer. The concerns of the DOL regarding the bills that were before the 95th Congress are understandable, but FLCRA should not apply to an employee who works for a farmer who is not required to register so long as the particular employee has no other employer during the current farming season. Whether such an employee's recruitment duties were "incidental" would not seem to be of any

importance. Such a change in the statute would probably not totally satisfy the concerns of farmers and their employees, but at least it would add a bit more certainty to the law and eliminate litigation such as that discussed above.

If the scope of FLCRA is to continue to extend beyond the regulation of the traditional itinerant farm labor contractor, as seems virtually certain, agricultural cooperatives should not have an exemption. Large-scale operations, whether in corporate or cooperative form, offer sufficient potential for abuse to require regulation. Further, the prospect of creating a loophole in FLCRA seems real enough to caution against the suggested exemption. It would be exceedingly difficult, indeed impossible, to distinguish legislatively between "good" cooperatives and "bad" cooperatives.

For the present, it seems unwise to expand the scope of the day-haul exemption. The 25-mile radius and the 13-week rules should remain unaltered. However, the incidence of violations by day-haul operators should be carefully monitored with a view to expanding the scope of the exclusion, deregulating or leaving the matter to the states if any of those alternatives become feasible in the future.

There seems to be no dispute about the requirement that the farm labor contractor maintain detailed records. However, there is a serious difference of opinion as to whether anything is accomplished by requiring the contractor to supply the farm employer with duplicate copies. It is true, of course, that unlike many other recordkeeping requirements this one does not impose a paperwork burden directly on the farmer. It is in actuality more of a storage function. Thus, while the Congress needs to become more sensitive to the continual expansion of recordkeeping requirements, this particular requirement, from the standpoint of the farmer, is less onerous than most. For the contractor, if a Xerox machine is not available, carbon paper can still be used with considerable efficiency. In the end, the DOL does bear an ongoing burden to demonstrate that this duplication of records is doing some good in the enforcement effort. If experience indicates that the farmers' copies are rarely resorted to, the farmers' present role should be eliminated.

For the moment, it seems that the DOL's position on the matter of insurance coverage required of registered contractors must be sustained. Once the problems with workers' compensation coverage for agricultural employment are resolved and the benefits available from state to state become reasonably uniform, the matter deserves review. Problems of this sort provide yet another argument for Congressional action in the workers' compensation area if the noncomplying states do not move quickly to implement the Essential Recommendations of the 1972 Commission.

One of the most constructive recommendations to come out of the 1978 hearings was made by a farm labor contractor. He suggested that improved performance and better compliance by farm labor contractors might be achieved through in-service training.167/ Such positive efforts have a way of netting far more for the dollar invested than the generally negative approach that is inherent in regulatory schemes. The regulations are necessary, of course, but a program of training and education for farm labor contractors could promote an understanding of the law and also help crew leaders to better deal with the many crew members who have serious financial, personal, health, motivational, and other problems.

Finally, FLCRA is in several respects a troublesome piece of legislation because of the way it is drafted. There are numerous vague phrases and provisions. There are provisions that most agree do not mean what they purport to say, at least when applied to certain fact settings. There is a need to rework the FLCRA to attempt to root out as many problem provisions as possible. In the meantime, the DOL could more favorably interpret the statutory language through the regulatory process.

Notes to Chapter 5

1. S. Rep. No. 1295, 93d Cong., 2d Sess. 2 (1974); S. Rep. No. 12906, 93d Cong., 2d Sess. (1974).
2. Ib.
3. Ib.
4. Ib.
5. Ib.
6. Ib.

7. Ib.

8. Guerrero v. Garza, 418 F. Supp. 182 (W.D. Wis. 1976).

9. De La Fuente v. I.C.C., 451 F. Supp. 867 (N.D. IH. 1978): See Hearings on Farm Labor Contractor Registration Act Before the Subcommittee on Education and Labor, 95th Cong., 2d Sess. 69 (1978). where the results of a 1978 investigation in Southern Florida are discussed. (Hereinafter cited as 1978 Hearings.).

10. See note 1 supra.

11. 7 U.S.C. §§2041-53 (1964).

12. Guerrero v. Garza, supra note 8.

13. Col. Rev. Stat. §§8-4-101 to 8-4-113 (1963).

14. Cal. Labor Code §§1682-1699.

15. Oregon Rev. Stat. §§658.405-.455 (1977).

16. Wash. Rev. Code §§19.30.010-19.30.900 (1978).

17. N.Y. Labor Law §212-a.

18. 7 U.S.C. §2042(d) (1976) which incorporates by reference 29 U.S.C. §203(f) (1976) and 26 U.S.C. §3121(g) (1976).

19. 7 U.S.C. §2042(a), (b); 2043(a) (1964).

20. 7 U.S.C. §2044(a)(1) (1964).

21. 7 U.S.C. §2044(a)(2) (1964).

22. 7 U.S.C. §2044(a)(3) (1964).

23. 7 U.S.C. §2045(a) (1964).

24. 7 U.S.C. §2045(b) (1964).

25. 7 U.S.C. §2045(c), (d) (1964).

26. 7 U.S.C. §2045(e) (1964).

27. 7 U.S.C. §2044(b)(1-10) (1964).

28. 7 U.S.C. §2048 (1964). It is to be noted that in the event the secretary chose the revocation option, the procedure set forth demands that he first give the violator a chance to voluntarily come into compliance. See S. Rep. No. 1295, supra note 1.

29. S. Rep. No. 1295, supra note 1 at 3.

30. Ib.

31. Ib.

32. 120 Cong. Rec. S-19308 (daily ed. Oct. 16, 1974).

33. H. R. Doc. No. 380, 93d Cong., 2 Sess. (1974).

34. Id. iii-iv.

35. P.L. No. 93-518 (1974). 88 Stat. 1652.

36. P.L. No. 94-259 §2 (1976), 90 Stat. 314; P.L. No. 94-561 §6 (1976), 90 Stat. 2643; P.L. No. 95-562 (1978).

37. 7 U.S.C. §2042(b) (1976).

38. 7 U.S.C. §2042(b)(1) (1976).

39. See e.g., Marshall v. Coastal Growers Ass'n, 598 F. 2d 521 (9th. Cir. 1979).

40. 7 U.S.C. §2042(b)(2) (1976).

41. Had the amended version been in effect, a different result would probably have been forthcoming in Salinas v. Amalgamated Sugar Co., 341 F. Supp. 311 (D. Idaho 1972).

42. 7 U.S.C. §2042(b)(3) (1976).

43. 417 F. Supp. 857 (M.D. Fla. 1976); see also Marshall v. Herringer Ranchers, Inc., 466 F. Supp. 285 (E.D. Cal. 1979), DeLeon v. Ramirez, 465 F. Supp. 698 (S.D.N.Y. 1979), Marshall v. Bunting's Nurseries of Selbyville, 459 F. Supp. 92 (D.Md. 1978).

44. 7 U.S.C. §2042(b)(4) (1976).

45. Usery v. Coastal Growers Ass'n, 418 F. Supp. 99 (D.C. Cal. 1976).

46. 7 U.S.C. §2042(b)(5) (1976).

47. 7 U.S.C. §2042(b)(6) (1976); while not required to register, such an employer must obtain an identification card and comply with the nonregistration aspects of FLCRA.

48. 7 U.S.C. §2042(b)(7) (1976).

49. 7 U.S.C. §2042(b)(8) (1976) as amended.

50. 7 U.S.C. §2042(b)(9) (1976) as amended.

51. 7 U.S.C. §2042(b)(10) (1976) as amended; 1978 Hearings, supra note 9 at 36, 433.

52. 7 U.S.C. §2042(b)(10) (1976) as amended.

53. 7 U.S.C. §2053 (1976).

54. 29 C.F.R. §40.13 (1978).

55. 29 C.F.R. §§40.14-.15 (1978).

56. 29 C.F.R. §40.19 (1978).

57. 29 C.F.R. §40.20 (1978), as revised 44 F. Reg. 44840 (1979).

58. 29 C.F.R. §40.12 (1978).

59. 29 C.F.R. §40.51 (1978).

60. 7 U.S.C. §2045(b)(6), (7), (8) (1976).

61. 7 U.S.C. §2044(b) (1976).

62. 7 U.S.C. §2048(b)(1) (1976).

63. 7 U.S.C. §2048 (1976).

64. 7 U.S.C. §2044(b) (1976).

65. 7 U.S.C. §2048(a) (1976).

66. 7 U.S.C. §2048(a) (1976).

67. 7 U.S.C. §2048(a) (1976).

68. 7 U.S.C. §2050b(b) (1976).

69. 7 U.S.C. §2040b(b) (1976).

70. 450 F. Supp. 1046 (M.D. Fla. 1978).

71. See also S.P. Growers Association v. Rodriguez, 17 Cal. 3d 719, 131 Cal. Rptr. 761, 552 P.2d 721 (1976).

72. 7 U.S.C. §2043(c) (1976).

73. 7 U.S.C. §2043(d) (1976).

74. 7 U.S.C. §2048(b) (1976).

75. 7 U.S.C. §2050c (1976).

76. 7 U.S.C. §2045(e) (1976).

77. 456 F.2d 890, 894 (10th Cir. 1972), cert. den. 409 U.S. 1042 (1972).

78. 7 U.S.C. §2040a (1976).

79. 7 U.S.C. §2050a(a) (1976).

80. 7 U.S.C. §2050a(b) (1976).

81. 413 F. Supp. 849 (S.D. Fla 1976).

82. 7 U.S.C. §2048 (1976).

83. 7 U.S.C. §2048 (1976).

84. Telephone interview with staff member Department of Labor, Nov. 21, 1975, 4:00 p.m.

85. Ib.

86. Ib.

87. Ib.

88. Ib.

89. Ib.

90. Supra note 8.

91. 1978 Hearings, supra note 9 at 64.

92. Id. at 50.

93. Id. at 73.

94. Id. at 50.

95. Id. at 50.

96. Id. at 50.

97. Id. at 129-130.

98. Id. at 129-130.

99. Id. at 68.

100. Id. at 24.

101. See note 18, supra.

102. 7 U.S.C. §2042(b) (1976).

103. H.R. 1092, 8894, 10053, 95th Cong., 1st Sess. (1977).

104. H.R. 8232, 95th Cong., 1st Sess. (1977).

105. 1978 Hearings, supra note 9 at 52.

106. 7 U.S.C. §2042(b) (1976).

107. 7 U.S.C. §2042(a) (1976).

108. The department's position is reflected in its unsuccessful argument in Marshall v. Green Goddes Av cado Crop., 615 F.2d 851 (9th Cir. 1980). See notes 117 and 118 infra and accompanying text for contrary position of department as to the family farm corporation.

109. 1978 Hearings, supra note 9 at 14-16.

110. 449 F. Supp. 216 (S.D.N.Y. (1978).

111. 449 F. Supp. 216, 228 (S.D.N.Y. 1978).

112. 449 F. Supp. 216, 228 note 17 (S.D.N.Y. 1978).

113. 466 F. Supp. 285 (E.D. Cal. 1979).

114. Consider the scope of the exemption discussed at note 42, supra and accompanying text.

115. Supra, note 109.

116. Opinion Letter, Wage and Hour Division, Employment Standards Division, Department of Labor, dated Oct. 3, 1977.

117. Ib.

118. 1978 Hearings, supra note 9 at 131-132 and 14-16.

119. 615 F.2d 851 (9th. Cir. 1980).

120. D. Minn. No. 3-76-CIV 374.

121. 1978 Hearings, supra note 9 at 132.

122. 7 U.S.C. §2042(b)(2) (1976).

123. 7 U.S.C. §2042(b)(3) (1976).

124. H.R. 8894, 10053, 95th Cong., 1st Sess. (1977); H.R. 10631, 10922, 95th Cong., 1st Sess. (1978).

125. Ib.

126. 1978 Hearings, supra note 9 at 6.

127. Id. at 17-19.

128. Id. at 55.

129. Ib.

130. Supra, note 114.

131. Supra, note 114 at 289.

132. Ib.

133. Id. at 289-290.

134. Supra, note 111.

135. The court must have been referring to servant-agent, rather than nonservant-agent.

136. Supra, note 114.

137. 1978 Hearings, supra note 9 at 122.

138. H.R. 8894, 95th Cong., 1st Sess. (1977); H.R. 10631, 10922, 95th Cong., 1st Sess. (1978).

139. 1978 Hearings, supra note 9 at 131.

140. Id. at 150.

141. Supra, note 111.

142. Supra, note 111 at 228.

143. 418 F. Supp. 99 (D.C. Cal. 1976).

144. H.R. 8232, 95th Cong., 1st Sess. (1977).

145. H.R. 8249, 95th Cong., 1st Sess. (1977).

146. H.R. 8234, 95th Cong., 1st Sess. (1977).

147. 1978 Hearings, supra note 9 at 24.

148. Id. at 54.

149. Id. at 130.

150. Id. at 131.

151. 7 U.S.C. §2050c (1976).

152. 1978 Hearings, supra note 9 at 18.

153. Id. at 31.

154. Ib.

155. Id. at 109.

156. Ib.

157. Id. at 58.

158. 7 U.S.C. §2044(a)(2) (1964).

159. 7 U.S.C. §2044(a)(2) (1976).

160. Ib.

161. 29 C.F.R. §40.14(a) (1978).

162. H.R. 10631, 95th Cong., 1st Sess. (1978).

163. 1978 Hearings, supra note 9, at 8 and 10.

164. Ib.

165. Id. at 10.

166. Ib.

167. Id. at 207.

Chapter 6

UNEMPLOYMENT INSURANCE AND AGRICULTURAL EMPLOYMENT

The unemployment insurance system originated as part of the Social Security Act of 1935.1/ The legislation was designed to encourage states to take steps to provide income security to hired workers during periods of unemployment, to bolster the economy generally, and to combat labor shortages precipitated by workers moving permanently from an area during periods of temporary unemployment.2/ The incentive came in the form of a credit against the federal unemployment tax for employers located in an approved state where local law met minimum federal standards.

By June 30, 1937, all states and the District of Columbia had elected to be included in the federal-state scheme.3/ Employment in agriculture was not covered under the original legislation. While a few states moved in later years to provide some measure of coverage, it was not until major changes were made in federal law during the 1970s that substantial numbers of agricultural employees were working in covered employment.

"Covered" in this study refers to "covered employment." When a worker is employed in "covered employment", the employer pays unemployment taxes that fund benefits. However, not all "covered" workers are entitled to benefits if they are suddenly out of work. A claimant may be denied benefits because he has not worked in "covered employment" for a sufficient length of time or has failed to meet other requirements that are prerequisite to eligibility. Further, the reason why the worker is unemployed may disqualify him from receiving benefits. For example, being fired for cause disqualifies a worker.4/ Alien status may also be a basis for denial.5/

Historical Development

General Unemployment Compensation

According to the U.S. Department of Labor, most states were reluctant to create unemployment systems prior to 1935, fearing that the taxes levied on employers would put them at a competitive disadvantage with employers in states with no programs.6/

The unemployment compensation provisions of the Social Security Act of 1935 removed the obstacle of interstate competition and, by virtue of the substantial but less than fully offsetting credit against the federal tax, provided the incentive to the states to set up their own programs. The federal tax applied to employers who had a certain number of employees during each of 20 weeks in the current or preceding calendar year. That number was originally eight, but was changed to four and finally to one. In addition, under current law the payment by the employer of $1,500 in cash remuneration during any calendar quarter of the current or preceding calendar year, results in liability for the federal tax.7/ Certain exemptions apply, even if these tests are met, including the agricultural exemption.

Since January 1, 1978, the federal tax has been 3.4 percent and is assessed against the first $6,000 of wages paid to each employee in covered employment. A credit against the federal tax for taxes paid into the state system or excused under an approved experience rating system is allowed to the extent of 2.7 percent of taxable payroll.8/ The effect is that a tax of 0.7 percent of taxable payroll is paid directly to the federal government.

In all but three states, the local unemployment tax is levied only against employers. In Alabama, Alaska, and New Jersey, a tax is also assessed against the employee.9/ Unemployment taxes are assessed against the first $6,000 of the employee's annual wage, except in 12 states where local laws go beyond the maximum prescribed in the federal legislation and set higher taxable wage limits.10/ Tax rates at the state level vary widely with sharply different maximums and minimums. Experience rating systems,

which also vary from state to state, allow individual employers in a state to be taxed at different rates within the established maximums and minimums depending on the firm's past unemployment record.

When a worker loses his job and files for unemployment benefits, he must demonstrate that he meets state requirements for eligibility. Not all unemployed workers who were employed in covered employment are entitled to benefits. In some states, the worker must wait one week before being eligible, even if all other criteria are met.11/ All states require that a worker must have been employed in insured work during a recent 12-month period called a "base period."12/ No state requires full-time employment for the entire 12-month period, however. During his "base period," the worker must have accumulated a certain number of "credit weeks" or a set amount of "wage credits." Some states require that a certain dollar amount must have been earned; others, a certain number of weeks worked; and a third group, both minimum earnings and a certain distribution of those earnings.13/

Minnesota provides an example of a state in the third group. To qualify for benefits during his "benefit year," the worker must accumulate 15 or more "credit weeks" and at least $750 in "wage credits" within the "base period" of employment in insured work.14/ "Base period" is defined as the 52 calendar weeks immediately preceding the first day of the worker's "benefit year."15/ "Benefit year" is the 52 calendar weeks beginning with the first day of the first week with respect to which the worker files a valid claim for benefits.16/ A "credit week" is any week for which $50 or more of wages have been paid or are due but not paid from one or more employers to the employee for insured work.17/ "Wage credits" are the amount of wages paid and wages due but not paid by or from an employer for insured work.18/

All states pay unemployment benefits by the week. In order to provide an incentive to take a job rather than draw unemployment, the benefits paid are substantially less than the weekly wage paid when the claimant is working.19/ The method used to calculate the weekly benefit varies from state to state, but generally the design is to have a benefit equal to at least half the worker's weekly wage, subject to a statutory maximum.20/

All states limit the number of weeks of benefits the unemployed worker can draw during his benefit year. In most jursidictions, the maximum is 26 weeks, but a few allow more, for example, Iowa, with 39 weeks.21/ Puerto Rico is the single exception to the 26-week rule, with a current maximum of 20 weeks.22/

Not every unemployed worker is entitled to draw unemployment benefits for the maximum number of weeks provided under local law. In many states, the worker may draw for no more than a certain percentage of the number of weeks in the base period during which wages were paid in covered employment, subject, however, to a right to a certain minimum number of weeks of benefits. In Minnesota, for example, the worker will draw for the lesser of 26 weeks or 70 percent of the number of credit weeks earned, computed to the nearest whole week.23/ Thus, a worker who has 30 credit weeks will draw benefits for 21 rather than 26 weeks.

In times of high unemployment, many unemployed persons discover that even 26 weeks is too brief a time in which to find new employment.24/ Therefore, some states have extended their programs during periods when unemployment in the state reaches certain specified levels. Currently, California and Hawaii will add 50 percent of the weeks of original benefits, Connecticut will extend by 13 weeks, and Puerto Rico, in certain industries, occupations, and establishments, by 32 weeks. Minnesota also has an extended benefits program.25/

The recessions of 1958 and 1960-61 induced Congress to enact federal provisions for temporary extension of unemployment benefits. The Temporary Unemployment Compensation Act of 1958 26/ (TUC) was effective until June 30, 1959. The Temporary Extended Unemployment Compensation Act of 1961 27/ (TEUC) was effective until June 30, 1962. The 1958 legislation made federal monies available to states agreeing to pay individuals who had exhausted state benefits additional benefits equal to 50 percent of the total amount to which they had been entitled under state law.28/ Most of these funds had to be repaid by the states to the U.S. Treasury.29/ TEUC has been characterized as the more important of the two pieces of legislation since it involved the federal government in direct financing of benefits for the first time.30/

When Congress enacted the Employment Security Amendments of 1970,31/ it established a permanent program of federal- and state-financed extended benefits during periods of high unemployment. These benefits are provided for up to 13 weeks beyond regular state payments and are available automatically when certain rates of insured unemployment have been reached. The "trigger" requirements have been adjusted several times.32/

Another tier of benefits was added by Congress in 1971 under The Emergency Unemployment Compensation Act of 1971 (EUCA) 33/ This legislation provided a maximum additional 13 weeks of benefits during periods of very high unemployment. EUCA, originally to expire in September 1971, was extended to March 30, 1973. Then, in December of 1974, The Emergency Unemployment Compensation Act of 1974 34/ was enacted, providing further extension of temporary supplemental benefits.35/ Originally 13 weeks of supplemental benefits were provided. The maximum for a worker counting regular state benefits and extended benefits under the 1974 law was not to exceed 52 weeks. The maximum was later raised by expanding the supplemental benefits to 65 weeks.36/

The Emergency Jobs and Unemployment Assistance Act of 1974,37/ through its Special Unemployment Assistance Program (SUA), provided widespread coverage to farmworkers for the first time. This resulted from provisions designed to extend coverage on a temporary basis to individuals who were not eligible for regular state benefits because of an exclusion applying to their particular industry, employer size, or occupation.38/ Agriculture, of course, was one such industry. SUA expired at the end of 1977 with the provision to continue paying benefits in certain cases through June of 1978.

On January 1, 1978, The Unemployment Compensation Amendment of 1976 39/ became effective and certain agricultural employment was covered on a permanent basis for the first time at the federal level.

Farmworker Coverage

Agricultural employment was excluded from "covered employment" under the 1935 Act and it was not until recent years that the policy of total exclusion was reversed. Several reasons have been advanced through the years to justify the exclusion. Agriculture, it was argued, would be a deficit industry where more money would be paid out annually in benefits than collected in taxes. This, it was suggested, would threaten the solvency of the entire compensation system. Further, the nature of much of agricultural employment was assumed to be seasonal and thus it could create insurmountable administrative problems. It was also argued that most farms are small with few hired workers and that farm employers had little if any experience in scientific management and recordkeeping. It was concluded that extension of the program to agriculture would not be feasible. Another point that has often been made is that agriculture cannot absorb the added costs of social programs, in this case the unemployment tax.40/ Finally, concern has been expressed that there would be a great danger of producing perverse work incentives for short-term agricultural employees.41/

Technically, the exclusion was inserted into the federal law and in many state laws by providing that agricultural employment is not "employment" for purposes of the statutes. The definition of agricultural employment in the federal statute was so extensive that it left unprotected certain off-farm agricultural workers and substantial numbers of processing workers in addition to the on-farm production workers. In 1970, "agricultural labor" was redefined at the federal level to have the same meaning as the term "agricultural labor" in the Social Security Act 42/ with one modification. The result of the redefinition was the extension of coverage to employees performing off-farm services in the production or harvesting of maple syrup, maple sugar, mushrooms, and hatching of poultry.43/ The extension also brought coverage to employees of processor farmers who produced not more than one-half of the subject commodity on the farm where the workers were employed.44/ Except for these changes, the federal scheme continued to exclude the bulk of on-farm production workers.

Few states moved on their own to extend coverage. Seaver and Holt reported that, as of 1974, only Hawaii, Puerto Rico, the District of Columbia, and Minnesota had extended coverage to at least some of the hired agricultural workers excluded under the federal scheme.45/

However, groundwork for changing the law was being laid. An 18-state regional research project was mounted primarily as a result of a congressional mandate in the Employment Security Amendments of 1970.46/ The project, known as NE-58, produced a study entitled "Economic and Social Considerations in Extending Unemployment Insurance to Agricultural Workers" which was submitted to the U.S. Department of Labor (DOL) on September 30, 1973. It recommended that coverage be extended to agricultural employment where the employer had four or more hired workers in each of 20 or more weeks in the current or preceding calendar year or where the employer had a cash payroll of $5,000 in any calendar quarter of the current or preceding calendar year. The report noted that this recommendation was to be contrasted with the federal standard for most nonagricultural employment which extends coverage where the employer has one or more hired workers for 20 or more weeks in the current or preceding calendar year or a $1,500 cash payroll in any calendar quarter of the current or preceding calendar year.47/

The NE-58 study provided considerable data.48/ Coverage as proposed and based on 1969 data, would affect only about 21 percent of agricultural employers while reaching 69 percent of the hired farm work

force.49/ Some variations would exist if individual states were examined. For example, 51 percent of Florida's agricultural employers would be affected and 95 percent of that state's hired farm work force.50/ There would also be sharp variations depending on the type of farm operation involved with coverage extending to very few field crop and general farms, 11 percent of the dairy farms, but more than 50 percent of the fruit, vegetable, and miscellaneous farms.51/ The important thing, of course, was that smaller operations, in terms of numbers of employees, would not be covered and this arguably would be important to those concerned with administrative difficulties and absorption of increased costs.

NE-58 and other studies suggest that arguments about the inability of farmers to absorb the extra cost of production and to handle administrative details were no longer valid given the data collected, the experience with Social Security, and other indicators.52/ It was suggested that not all of the costs of the unemployment system would actually increase the costs of production for certain farmers. For example, it was argued that the existence of this added fringe benefit might increase the willingness of workers to seek agricultural employment and also reduce job turnover, thus reducing attendant hidden labor costs of lost production, recruitment and training of replacements.53/

NE-58 also indicated that extending unemployment insurance to eligible farmworkers who become involuntarily unemployed would have little, if any, adverse impact on overall unemployment insurance cost rates in the 18 states studied.54/ It was noted that in California and Florida the inclusion would probably increase the overall benefit cost rates to a small degree. California, however, has provided agricultural coverage under its own law.55/ It was concluded that there might be some use of benefits as "rocking chair money" by seasonal workers who could work just long enough to qualify for benefits.56/ It was argued, however, that this might be a gain to the employer as well as to the employee since farmers would not be as likely to keep workers on during slack periods, thus incurring an expense simply to insure availability of a labor force during peak periods.57/

Congress, however, made no immediate move to change the exclusion in the federal statute, but the way was paved for the interesting and important SUA experiment. As has already been pointed out, in 1974 when the country was in the throes of a deteriorating economic situation, Congress enacted the Emergency Jobs and Unemployment Assistance Act of 1974.58/ This statute provided a temporary federal program of Special Unemployment Assistance (SUA) for workers who were ineligible for ordinary benefits for various reasons, including the existence of exclusions. New coverage, equivalent to that under state unemployment laws, became available for up to 12 million workers.59/ Individuals became entitled to benefits in the amount and for the length of time that would have applied had their employment been "covered employment" under state law. Significantly, 700,000 employees of large farms became potential beneficiaries as did many employees of small farms.60/ No specific statistics on small farms have been located but it was reported that there were about 1.4 million workers in small firms, small farms, nonprofit corporations, and other establishments that were potential beneficiaries.61/ Thus, with the exception of the few existing state laws, coverage was extended for the first time to the hired farm working force. Some advertising of the law was required, but once farmworkers learned about it, they behaved like most other American workers and benefits were paid.62/ SUA expired on December 31, 1977, although some benefits were paid for a time in 1978.

The impact of the SUA experience was the subject of a study prepared by Mathematica Policy Research, Inc., released January 1, 1977.63/ The study described the SUA program and noted that in all states the period over which the individual's prior work history was measured, the "base period," was the 52-week period immediately preceding the date of the SUA claim.64/ A farmworker, for SUA purposes, was thus considered to be in covered employment and if laid off it was simply a matter of checking work history against the state requirements to see if benefits could be paid. The remarkable thing about SUA is that the same standard for covered employment was applied in agriculture as in most other industries. If the farm employer had one or more hired workers in each of 20 weeks during the current or preceding calendar year or if he had a payroll of $1,500 in any calendar quarter of the current or preceding calendar year, his employees were potential beneficiaries. For all practical purposes, this comes as close to total elimination of noncovered employment as could ever be expected, even under the most radical of programs.

SUA was a federally funded program and there were no employer taxes involved in funding it. The benefits were originally designed to run for 26 weeks, but the act was later amended to allow 39 weeks of benefits.65/ During 1975, just over 1 million people received at least one payment under SUA and the total SUA payments in that year amounted to almost $700 million.66/ Of those receiving SUA benefits, 7 percent were farmworkers.67/ This represented about 1 percent of all job losers in covered employment, SUA included.68/ The Mathematica study did not indicate the dollar amount of benefits to agricultural workers or profiles of those receiving benefits.

The major conclusion reached by Mathematica had to do with the disincentive effect, if any, of SUA. It was reported that the mean value or "net" replacement ratio to SUA recipients other than school employees was 76 percent. In other words, the 50-percent-standard-wage replacement translated into a more significant figure when adjustments were made for savings in taxes, work-related expenses, and certain other items. Thus, the gross wage-replacement ratios did tend, according to the study, to understate that actual value of unemployment compensation relative to prior earnings.69/ The question then becomes whether this produced a substantial labor force disincentive. Will workers prefer unemployment compensation to staying in the labor force? For certain workers, the study suggested that the answer might be yes. However, for most, including farmworkers, the "net" wage replacement rate showed little disincentive effect.70/

The SUA experiment, therefore, taught us that unemployment compensation benefits can be paid to agricultural workers without generating hordes of applicants even in relatively difficult times and that one of the concerns about the extension of benefits to agriculture, the possibility of substantial labor force disincentive, is not a legitimate fear.

Current State of the Law

The termination of SUA did not mean the end of federal farmworker coverage. The Unemployment Compensation Amendments of 1976 71/ brought about a permanent extension of the system to certain agricultural workers effective January 1, 1978. However, as will be demonstrated by a review of the current law, the number of agricultural workers who are now potential beneficiaries is less than one-third the number who had that status in 1975 under SUA.72/

Effective January 1, 1978, covered employment at the federal level included work in agriculture where the employer had 10 or more hired workers during 20 weeks during the current or preceding calendar year or had a cash payroll for farm labor of $20,000 or more in any calendar quarter of the current or preceding calendar year.73/ Under this scheme, it is estimated that 459,600 farm employees will be potential beneficiaries and 17,400 farm employers will be affected and subject to paying unemployment taxes.74/ This, it is reported, represents about 40 percent of hired farmworkers and about 2 percent of all farm operators.75/ Obviously, the Congress did not adopt the recommendations of NE-58 which had called for covered employment to include agricultural employment where the employer had a cash payroll of $5,000 or more in any calendar quarter of the current or preceding calendar year or used four or more hired agricultural workers in each of 20 or more weeks in the current or preceding calendar year. However, when the present law was being considered in Congress, the original House bill 76/ had called for a four-or-more-employees-in-20-weeks test or a cash payroll test of $10,000. Given the impact of inflation since the NE-58 study, the raising of the $5,000 to $10,000 probably did not represent a substantial departure from the original study recommendation. However, during the hearings on the house bill, agricultural employer interests pushed hard for a total rejection of the permanent extension of coverage and, in the alternative, argued that if Congress was determined to act, that the test be changed to a 10-or-more-in-20-weeks or a cash-payroll-of-$20,000 test.77/

Typical of the arguments presented were those of the American Farm Bureau Federation: (1) the cost to farmer, which could range up to 5 percent of payroll, would have to be passed along to consumers given the limited profit margin in agricultural production; (2) the impact of SUA on agricultural employment has not been sufficiently documented to allow anyone to know the probable effects on costs, migrancy, and other matters; (3) in states where large numbers of agricultural workers are employed on a seasonal basis, there is likely to be more going out in benefits than coming in in taxes; (4) there would be an adverse impact on closely held farming corporations, nearly all of which have four or more employees, because taxes would have to be paid though it would be remote that anyone would ever collect benefits; (5) the presence of many seasonal workers would make it extremely difficult for farmers to keep accurate records; (6) many seasonal workers would not have benefits because of insufficient wage credits, thus it is better to handle their situation with an extension of SUA; (7) farmers are already overburdened with regulations, reports, and "bureaucratic excess;" (8) fruit and vegetable operations would be affected far more extensively than other types of operations; and (9) a limited extension of coverage would mean that the law would affect only larger operations that are in a better position to cope with the legal and accounting problems that would be created.78/ It is apparent that these arguments were given weight, given the provisions of the current law.

Laws have been updated in 46 states to bring them into compliance with the new federal legislation.79/ In addition, California, Hawaii, Minnesota, Rhode Island, the District of Columbia, Puerto Rico, and the Virgin Islands have provisions that are more liberal than required by federal law.

California mandates that agricultural employment is covered employment when the employing unit has one or more employees in any calendar quarter of the current or preceding calendar year and a payroll of more than $100 for such service in any calendar quarter.80/ In the District of Columbia, there is no noncovered employment, the hiring of one agricultural worker gives rise to covered employment.81/ In Hawaii, exempt employment still exists, but it is limited to situations where the agricultural employer paid less than $20,000 in cash remuneration in each of the calendar quarters of the current and preceding calendar years, and where either no more than 19 weeks exists in each such calendar year where agricultural employees were used, or no more than nine agricultural workers were used in any one calendar week in each such calendar year.82/ An employer election is permitted in Hawaii which results in the application of a special agricultural unemployment statute.83/ Minnesota has an exemption scheme much like that in current federal law except that instead of covered employment starting when 10 or more workers are used in each of any 20 weeks, covered employment starts when four or more agricultural employees are used for some portions of a day in each of 20 different weeks during the current or preceding calendar year.84/ The alternate test of cash wages of $20,000 or more in any quarter of the current or preceding calendar year is also present in Minnesota law.85/ After January 1, 1974 and prior to January 1, 1978, Minnesota had simply used the four-or-more-in-20-different-weeks test without the cash wage alternate test.86/ Puerto Rico defines covered employment as existing when any employing unit, including an agricultural unit, has employees.87/ Rhode Island treats employment of one or more on any day within the calendar year as covered employment.88/ The same test applies in the Virgin Islands.89/

Thus, agricultural employers who now run covered operations must pay unemployment taxes up to the established ceiling on each employee's wages. When the new law went into effect in most states, workers did not have enough wage credits accumulated to qualify for benefits until the last quarter of 1978.90/ A transition provision in the federal statute provided that if a state agreed to pay benefits to newly covered workers as of January 1, 1978, benefits paid through June 30, 1978, based on wage credits earned prior to that date, would be reimbursed out of general federal revenues.91/ States could also be reimbursed after June 30, 1978 in cases where they paid benefits based on newly covered wages earned prior to January 1, 1978.92/

Evaluation

The recent extension of permanent coverage to at least a part of the agricultural employment sector was a desirable thing. No adverse side effects of any consequence are likely to result and the cause of more equitable treatment of the hired farm labor force has been substantially advanced.

Some of the concerns that prevented an even broader extension of coverage as of January 1, 1978 are presented here. (1) Are there valid reasons to delay adoption of a more inclusive test for coverage of employment in agriculture? The American Enterprise Institute estimates that the four-or-more-employees-in-20-weeks or a $10,000-payroll test, the original house version, would have made about 700,000 farmworkers potential beneficiaries as opposed to an estimated 459,600 under the current law.93/ Some 6 to 7 percent of farm operators would have been affected as opposed to about 2 percent under current law.94/ The original proposal in NE-58, four or more employees in 20 weeks or a $5,000 payroll in a quarter, was designed to reach about 69 percent of the farm work force and about 21 percent of agricultural employers.95/ Putting agricultural employment on a par with other industries using the one-or-more-employees-in-20-weeks or a $1,500-payroll-in-a-quarter test, as was the case under SUA, was estimated to reach 89 percent of the employers and 96 percent of the agricultural wage items.96/ These statistics may not be as meaningful as they were a few years ago, given the number of workers currently in the hired agricultural labor force and the impact of inflation, but they do indicate that any one of these alternatives, including the four-or-more-employees-in-20-weeks or a $10,000-payroll-in-a-quarter test, would clearly move a bit closer to general coverage of agricultural employment. The question remains, why not move to a more inclusive test, particularly the NE-58 test or the test in the original house bill in the 94th Congress, both of which might be politically viable?

(2) Are there unmanageable administrative problems ahead if either of these extensions become law? This seems unlikely. The vast percentage of farm operators would still enjoy an exclusion and this should avoid the worst of the suggested administrative difficulties.97/ Further, success with other programs, such as Social Security and California's extensive disability insurance program begun in 1961 for establishments with one or more hired farmworkers, suggests that fears of administrative nightmares may be unfounded.98/ Admittedly, the problem of the myriad number of programs now impacting agriculture with their vastly differing threshold requirements does create a complex situation for farm employers and employees. However, short of ridding the law of most of these thresholds entirely, something that eventually ought to be considered, there will be no particular improvement of the

situation. However, little harm will be done in this context by moving this particular threshold to create less of an exemption.

(3) Will the further extension of coverage in agriculture generate solvency problems for the entire unemployment system? Studies indicate that this is not likely and that the effect, if any, will be quite minor even in states where agricultural unemployment is highest.99/ Although the average benefit cost rate for agriculture may be higher than in some other industries, it has been suggested that it will not be as high as the cost rate for the construction industry which has been covered for years.100/ This being the case, the justification for keeping the present level of noncovered employment for agricultural employment can hardly be based on the deficit industry argument.

(4) Will agricultural employers be able to pass on the cost of the program? One study has concluded that these costs will inevitably be passed through as has been the case with the costs of other social programs including Social Security. While some marginal operators may find the economic impact of unemployment taxes to be the "last straw," a decision affecting hundreds of thousands of workers should not be made on the basis of an adverse impact on a small number of employers. Most social legislation would have been defeated if this concern had been viewed as controlling.101/ Further, the costs may not be all that great since many agricultural employers are likely to have low experience ratings and will not be paying maximum taxes.102/ Finally, not all the cost impacts of covering agricultural employment will necessarily be cost increasing.103/

(5) Do the seasonal and migratory aspects of agricultural employment pose problems that command no further extension of coverage at this time? This does not appear to be the case. For seasonal workers, a tax may be assessed on a covered employer based on their cash wages even though many of these workers may never earn sufficient wage credits to qualify for benefits. Thus, these taxes are paid in vain. There are several responses to this concern. First, since these workers will not qualify for benefits under regular unemployment programs, their periods of unemployment will not have an adverse effect on the employers' experience rating. These taxes, however, contribute to the overall solvency of the system. The fact is, this situation exists under current law, but provides no impetus for repeal of what now is on the books. Further, to eliminate the tax on seasonal employment where the employer is otherwise required to remit calls is, in effect, an introduction to the law of a complex definition of "seasonal employment." Litigation will result. For a time Minnesota had a provision requiring a special computation for determining "wage credits" for "seasonal employment," but seeing the futility of such a provision, it was repealed in 1975.104/ The better view is to stay away from such a classification since the difficulties of its administration far outweigh any inequities resulting from its absence. As for migrant workers, it must first be realized that a relatively small portion, perhaps 7 percent, of the hired farm labor force falls into this category.105/ Given this reality, plus the fact that states are involved in interstate arrangements for combining employment and wages, the situation can be managed. States are required by federal law as a condition of approval of the tax credit to participate in agreements whereby an unemployed worker with covered employment and wages in more than one state is allowed to combine all such employment and wages to qualify for benefits or to receive higher benefits in one state.106/ The problems of multiple employers and record-keeping and reporting are alleviated considerably under current law by the provision which treats a crew leader as the employer for FUTA purposes where he is registered under the Farm Labor Contractor Registration Act of 1963 or is providing certain specialized types of agricultural labor.107/

(6) Will further extension of coverage increase the cost of goods to consumers? This concern should be rejected as a justification for refusal to opt for broader coverage. Such a cost is already reflected in most goods and services since at least 85 percent of the nation's workforce is currently covered by unemployment compensation laws.108/ Why agricultural employees should be discriminated against because of a potential passing on of cost of coverage to consumers is difficult to justify.

(7) Will some categories of farm employment be affected much more than others by a further extension of the act? The most appropriate response is that in all probability this impact has already been felt as a result of the change in the law effective January 1, 1978. This argument may have been pertinent when the question before the Congress was whether to move to a partial exemption or keep the total exemption. Once the decision was made to cover part of the agricultural work force the decision was also made to accept differing impacts, if any.109/

(8) Will unemployment compensation benefits appear to many workers to be more attractive than employment at the typically low wage levels offered in agriculture? SUA experience indicates that this is not the case.110/ Further, there appears to be little danger that the flow of migrant labor will be diminished, leaving farmers without crews to cultivate and harvest crops. It has been demonstrated that choosing unemployment benefits would be a choice to lessen an already low level of income and it is not probable that many migrants would make such an election.111/

(9) Will the problems of the family farm corporation be exacerbated by a further extension? This question is important since present law does not deal very well with the increasing use of the corporate form by the traditional family farm. Under federal law, services of family members in an unincorporated farm business are not "employment" under FUTA. State laws correspond.112/ Even where a partnership is used, the exception will apply if the requisite family relationship exists between the employee and each of the partners comprising the partnership.113/ There is, however, no exemption for family members employed by a family farm corporation. If such an exemption is desired to maintain consistency in the law in treatment of family businesses, it would be possible to create a definition of family farm corporation and to create an exemption as under the former version of the Minnesota unemployment compensation law. That provision was insufficient, however, as it applied only to the officers of the family farm corporation who might be employed by it.114/ In the case of a large family, it was probably necessary to create a number of vice presidencies to have all exempt. Still, the basic idea has merit and should be considered in connection with legislation designed so the existing exemption.

While the experience after January 1, 1978 must be studied very carefully with these questions in mind, it appears to be the prediction of available studies that the conclusions stated herein will be borne out by newly generated statistics.

Recommendations

After there has been a reasonable chance to evaluate the experience under current federal law and the corresponding provisions in most of the states, a careful review of the current exemption should be undertaken with a view to limiting its scope. Valuable lessons should also be available from the California and Minnesota experiences where more limited exemptions are already in effect.

In this connection, a commission was established in The Unemployment Compensation Amendments of 1976 and assigned the task, among other things, of identifying the purposes, objectives, and future directions for unemployment compensation programs.115/ It was hoped that the commission would provide sufficient data on the agricultural employment sector to allow the review called for above. If the assumptions made in the Evaluation portion of this study are borne out, it would seem appropriate to encourage reduction of the scope of the federal exemption either to the level recommended in NE-58, the level in the original house bill in the 94th Congress, or the level of present Minnesota law. However, no data or recommendations on agriculture appear, even in the Second Report of the National Commission on Unemployment Compensation.116/

It is noted in one study that large numbers of eligible workers have traditionally not filed for unemployment benefits to which they were entitled. It is also suggested that because most farmworkers do not have labor unions to carry the responsibility of educating members regarding unemployment insurance rights, the Agricultural Extension Service should consider mounting a major educational program.117/ This suggestion deserves serious consideration.

Notes to Chapter 6

1. U.S. Department of Labor, Growth of Labor Law in the U.S. (1967) at 276; Wisconsin enacted the first state unemployment insurance system in 1932.

2. Elterich and Bieker, "Cost Rates of Extending Unemployment Insurance to Agricultural Employment," 57 Am. J. Agr. Econ. 322 (1975)

3. Growth, supra note 1 at 276.

4. Growth, supra note 1 at 280.

5. 26 U.S.C. §3306(c)(1)(b) (1976).

6. Growth, supra note 1 at 276.

7. 26 U.S.C. §3306a(1) (1976).

8. Staff Document 78-154, Senate Finance Comm. & House Ways and Means Comm., Description of H. R. 10210 (94th Cong. 2d Sess.) §I(B), reprinted at C.C.H. Unemp. Ins. Rep. ¶21489.

9. C.C.H. Unemp. Ins. Rep. ¶3000.

10. Ib.

11. Id. at ¶3001.

12. Growth, supra note 1 at 280.

13. Ib.

14. Minn. Stat. §268.07 subd. 2.

15. Minn. Stat. §268.04 subd. 2.

16. Minn. Stat. §268.04 subd. 4.

17. Minn. Stat. §268.04 subd. 29.

18. Minn. Stat. §268.04 subd. 26.

19. Growth, supra note 1 at 281.

20. Ib.

21. C.C.H. Unemp. Ins. Rep. ¶3001.

22. Ib.

23. Id. at ¶3034.

24. Growth, supra note 1 at 282.

25. C.C.H. Unemp. Ins. Rep. ¶3001, fn. 7; ¶3034.

26. Growth, supra note 1 at 282.

27. Ib.

28. Ib.

29. Ib.

30. "A Study of Recipients of Federal Supplemental Benefits and Special Unemployment Assistance" Mathematica Policy Research, at 5.

31. P.L. 91-373, 84 Stat. 813.

32. Mathematica, supra note 30 at 5.

33. P.L. 92-224, 85 Stat. 920.

34. P.L. 93-572, 88 Stat. 2145; phased out Oct. 31, 1977 to Jan. 31, 1978 According to C.C.H. Unemp. Ins. Rep. ¶20,695, and note following 26 U.S.C.S. §3304.

35. Mathematica, supra note 30 at 5.

36. Id. at 8-9.

37. P.L. 93-567, 88 Stat. 2117.

38. Mathematica, supra note 30 at 9.

39. P.L. 94-566, 90 Stat. 2667, codified at 26 U.S.C. 3306 (o).

40. Staff Document, supra note 8 at 121.

41. Mathematica, supra note 30 at 6.

42. 26 U.S.C. § 3306(c)(1) (1976).

43. Compare 26 U.S.C. § 3121(g) (1976), with Int. Rev. Code of 1954, ch. 23, § 3306(k)(3), 68A Stat. 453.

44. Compare 26 U.S.C. § 3121(g)(4)(A) (1976), with Int. Rev. Code of 1954, ch. 23, § 3306 (1)(4), 68A Stat. 453.

45. Seaver and Holt, "Economic Implications of Unemployment Insurance for Agriculture," 56 Am. J. Ag. Econ. 1084 (1974).

46. Data base of study was 1969-70.

47. Seaver and Holt, supra note 45 at 1084.

48. See generally Seaver and Holt, supra note 45.

49. Id. at 1085.

50. Ib.

51. Id. at 1086.

52. Staff Document, supra note 8 at 122; Griffin, Walker, Weitzman and Youtie, A Social and Economic Analysis of the Exclusion of Farm Workers From Coverage Under The Indiana Workmen's Compensation Act of 1929 (1977) at 22-33.

53. Seaver and Holt, supra note 45 at 1089.

54. Staff Document, supra note 8 at 121; Hearings on Unemployment Compensation Amendments of 1976 before Senate Committee on Finance (94th Cong. 2d Sess. at 17).

55. Ib.

56. Seaver and Holt, supra note 45 at 1090.

57. Ib.

58. P.L. 93-567, 88 Stat. 2117.

59. 5 U.S. Dept. H.E.W. Research and Statistics (1975) Note 3.

60. Mathematica, supra note 30 at 50.

61. Ib.

62. Phone conference, Unemployment Insurance Service, U.S. Department of Labor, June 23, 1976.

63. Note 30, supra.

64. Mathematica, supra note 30 at 9.

65. Id. at 10.

66. Id. at 25.

67. Id. at 53.

68. Id. at 66.

69. Id. at 150, 165.

70. Id. at vii.

71. P.L. 94-566, 90 Stat. 2667, codified at 26 U.S.C. 3306(o).

72. Mathematica, supra note 30 at 22.

73. O'Byrne, Farm Income Tax Manual, 5th Ed., 1979 Supp. §1000.

74. Staff Document, supra note 8 at §I(A).

75. Ib.

76. H.R. 10210 (94th Cong., 2d Sess.).

77. Hearings, supra note 54.

78. Id. at 124-125.

79. C.C.H. Unemp. Ins. Rep. ¶3011 - ¶3062.

80. C.C.H. Unemp. Ins. Rep. ¶3015; West's Ann. Un. Ins. Code §611, §612, §613, §614, §676.

81. Id. at ¶3019; D.C. Code §46-301 et.seq.

82. Hawaii Rev. Stat. §383-7(1); see Hawaii Rev. Stat. §383-9 for definition of "agricultural."

83. Hawaii Rev. Stat. §383-78; Hawaii Rev. Stat. §384-1 et. seq.

84. Minn. Stat. §268.04 subd. 12(13), as amended 1980 Minn. Sess. Laws 508 §1.

85. Minn. Stat. §268.04 subd. 12(13), as amended 1980 Minn. Sess. Laws 508 §1.

86. Minn. Stat. §268.04 subd. 12(15)(a)

87. C.C.H. Unemp. Ins. Rep. ¶3050; Laws of Puerto Rico T29 §702(k)(1)(E).

88. Id. at §3051; Gen. Laws of R.I. §28-42-3(5)(b), (7), (26), (27).

89. Id. at §3057A; Virgin Islands Code T.24 §302(K)(1)(I).

90. Staff Document, supra note 8 at §I(A).

91. Ib.

92. Ib.

93. "Unemployment Compensation Amendments" A.E.I. Legislative Analyses (1976) at 11.

94. Hearings, supra note 54 at 124; Staff Document, supra note 8 at §I(A).

95. Seaver and Holt, supra note 45 at 1085.

96. Id. at 1086.

97. A.E.I., supra note 93 at 18.

98. Ib.

99. Id. at 20.

100. Ib.

101. Griffin, Walker, Weitzman, and Youtie, supra note 52.

102. Seaver and Holt, supra note 45 at 1089.

103. Note 53, supra and accompanying text.

104. Minn. Stat. §268.07 subd. (5)(1) (1974), repealed by Act of June 4, 1975, ch. 336, §25, (1975) Minn. Sess. Laws 984.

105. Hearings, supra note 54 at 30.

106. C.C.H. Unemp. Ins. Rep. §2050.

107. C.C.H. Unemp. Ins. Rep. ¶23069(o).

108. A.E.I., supra note 93 at 11.

109. Notes 49, 50 and 51, supra and accompanying text.

110. Mathematica, supra note 30.

111. A.E.I., supra note 93 at 21.

112. C.C.H. Unemp. Ins. Rep. §20175.

113. Ib.

114. Minn. Stat. §268.04 subd. 12(15)(a)(5), as amended 1980 Minn. Sess. Laws 508 §1, which adds definition of far.

115. But see, P.L. 95-19, 91 Stat. 39 §303 extending the due date to June 30, 1979. No further extension granted.

116. Issued July 1979 by the National Commission on Unemployment Compensation, 1815 Lynn St., Suite 440, Rosslyn, VA 22209.

117. Seaver and Holt, supra note 45 at 1092.

Chapter 7

WORKERS' COMPENSATION IN AGRICULTURE

Workers' compensation laws represent the judgment of the states that there should be mandatory medical coverage and income protection for employees who are injured on the job. Coverage for employment-related illness and disease has also become a reality. State statutes require employers to carry private insurance designed to pay claims up to limits established by statute, qualify as self-insured, or, in the case of a few jurisdictions, contribute to a state fund which exists to pay claims. The cost of the coverage or the amount of the contribution to the state fund is tied to the number of persons employed, the type of work involved, and the record of past employment-related injuries for the particular operation. As has been the case with most other social legislation, agriculture has traditionally been exempted from coverage. While agricultural exemptions are no longer universal, they persist in varying degrees in many jurisdictions.

Historical Development

Some 50 to 60 years ago claims under newly adopted state workers' compensation schemes began to replace negligence suits as the remedy for many workmen injured on the job.1/ The negligence system had proven to be unsatisfactory since it was always necessary to deal with the issue of fault and that frequently necessitated expensive and time-consuming litigation.2/ Further, neither employer nor employee could be certain as to the financial impact of an on-the-job accident if one occurred. The employee was not typically in a position to insure himself against extensive medical costs and loss of income. To recover against the employer involved establishing negligence on the part of the employer. If the employee-plaintiff in such a negligence suit failed to sustain the burden of proof,3/ or if the employer-defendant successfully defended on a contributory negligence,4/ assumption of risk,5/ fellow servant,6/ or pure accident theory,7/ there was no recovery. The employer was in a better position, however, because through a program of liability insurance, he could protect himself from financial ruin.

The advent of workers' compensation gave covered workers the assurance that financial aid would be forthcoming for job-related injuries regardless of who was at fault, unless the injury was self-inflicted or certain other exceptional circumstances existed. While this did not eliminate all litigation, the chances for recovery by the employee were vastly increased although limited in amount by the schedules contained in the statutes. Disputes could arise, however, over whether the accident was job related, whether the injury resulted in temporary, permanent-partial, or total disability and over the percentage of permanent-partial disability.

Some states were very slow to add occupational illness and disease coverage and this was termed a "shocking breach of responsibility."8/ A January 1, 1979 study, prepared by the Alliance of American Insurers, indicates that all states and the District of Columbia currently provide covered workers with "full coverage" for work-related illness and disease.9/ Such claims are often hotly contested with the insurance carrier or the state fund taking the position that the worker's medical problem did not originate or was not aggrevated by on-the-job conditions.

Dollar limits on loss of income benefits are set by statute, and the schedules vary from state to state. Worker's compensation statutes cover medical bills without limits in 44 states. Upper limits on coverage would defeat the objectives of the legislation.10/ The income protection payment schedules have been inadequate in many jurisdictions and, because of inflation, have become inadequate in others with authorized benefits far below the level which would be required to meet minimum living expenses for a disabled worker and his family.11/ In some of the state schemes, the income maintenance objectives are defeated for some workers by labeling a particular disability as permanent and then cutting off benefits after a set period,15 years for example.12/

Worker's compensation coverage has never been universal. As of 1972 the National Commission on

State Workmen's Compensation Laws reported that the combined coverage of all state schemes and the federal program designed to protect persons in the employ of the federal government and in maritime work was only about 85% of the work force.13/ Fifteen states reportedly covered less than 70 percent of their hired labor force.14/ In a number of states, some employees still come under coverage only if the employer, at his option, makes an election under local law. This situation persists in certain states where numerical, dollar, or occupational exemptions apply, leaving employees of an employer with a small number of workers, a small payroll, or a certain type of business, outside of the compulsory coverage provisions.15/

When workers' compensation laws were first enacted, agricultural workers were almost universally excluded.16/ It was argued that compensation benefits would be impractical to administer because of the seasonal nature of farm work and the great number of small farming operations employing one or a very few workers.17/ It was also assumed that the cost of coverage would be too much of a burden on farmers and that they would have difficulty in passing on the added expense to the consuming public.18/ It was also argued that agricultural work was relatively safe and that there was no need for the kind of compensation scheme designed for factory, construction, and other hazardous industries.19/ Other arguments advanced to justify the exclusion are summarized as follows: "The farm was considered by lawmakers to be a relatively safe employment, a family business, and a place where, if an accident occurred, familial responsibility would insure the injured's welfare. At the time of the initial workmen's compensation statutes, this view of the safety of the farm and the nuclear farm family was substantially correct. Further, insurance carriers have argued that the cost of writing and servicing farms is too high to prove profitable. Finally, state legislatures have long been composed in large part of persons, principally farmers and rural lawyers, who would have an interest in not covering farm workers."20/

Change came gradually, and by 1946 six states covered agricultural workers on substantially the same basis as other workers.21/ By 1966, the number had risen to 10 and in 1972 it stood at 17.22/

In July of 1972, the Report of The National Commission on State Workmen's Compensation Laws was issued, the result of a comprehensive study ordered by the Congress.23/ Finding that only about one-third of the states were covering farmworkers on essentially the same basis as other workers,24/ the Commission recommended a two-stage approach to coverage of farmworkers:

> As of July 1, 1973, coverage should be extended to agricultural employees whose employer's annual payroll exceeds $1,000. By July 1, 1975, coverage should be extended to farmworkers on the same basis as all other employees.25/

Other recommendations were:

> We recommend that workmen's compensation be compulsory rather than elective.26/
> We recommend that employers not be exempted from workmen's compensation because of the number of their employees.27/

A January 1, 1979 report by the Alliance of American Insurers indicated that compliance with the July 1, 1973 and the July 1, 1975 deadlines had not been as extensive as hoped.28/ As of January 1, 1979, only 11 states were in compliance with the July 1, 1975 standard, with five additional states in compliance only with the July 1, 1973 standard.29/ The rest of the states and the District of Columbia were in compliance with neither of the recommended standards.30/ Some of the noncomplying states provide limited farmworker coverage and in some cases that coverage is essentially equivalent to that provided other workers. In the latter instances, the failure to meet the July 1, 1973 standard and the July 1, 1975 standard results from the continued use of thresholds, with employers with fewer than a certain number of employees or with a payroll over $1,000 but under some other set figure being exempt from the law or in a position to provide workers' compensation coverage only on an elective basis. The January 1, 1979 study indicates that in 19 states there is still a total exclusion of coverage for agricultural workers.31/

Current Status of the Law

Workers' compensation schemes are almost totally a phenomena of state law, the only exceptions being certain federal programs designed to cover persons in the employ of the federal government and certain maritime workers.32/ The state laws vary significantly. However, some general observations may be made about the ways certain groups of states treat farmworkers under current workers' compensation statutes.33/

According to the January 1, 1979 report by The Alliance of American Insurers, the states that provide full coverage for agricultural workers and that have no dollar or numerical thresholds are Arizona,

California, Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, and Ohio.34/ The states that provide full coverage except for the $1,000 threshold requirement are Alaska, Iowa, Oregon, Pennsylvania, and Vermont.35/

States not in compliance with the "essential standards" fall into three main groupings: (1) states that have no mandatory coverage for agricultural employees, (2) states that have modified the blanket exclusion but continue to exclude from mandatory coverage those agricultural workers whose employer pays more than $1,000 but less than some higher dollar amount for hired labor in a set period of time, usually the preceding calendar year, and (3) states that have modified the blanket exclusion but continue to exclude from mandatory coverage employees of farmers using less than a certain number of hired workers during a stated period of time. In many of the states that fall into these three categories, the employer may voluntarily elect to bring his employees under coverage by securing the necessary compensation policy or by making the appropriate contribution to the state fund. Such an election insulates the employer from common law tort liability and leaves the compensation claim as the sole employee remedy, except in certain extreme cases such as the commission of an intentional tort by the employer.

New York and Minnesota provide interesting examples of jurisdictions using dollar thresholds other than the $1,000 threshold that was recommended for implementation by July 1, 1973.

In New York, farm laborers are covered only if they work on a farm where, during the preceding April 1 to April 1 period, the farm employer paid more than $1,200 in cash remuneration to farm laborers.36/ The wages of a spouse and minor children of the farmer are not counted unless they are under an express contract for hire.37/ Where the New York farmer employer has not met the $1,200 test, he may elect to bring his employees under coverage.38/

The Minnesota law also uses a dollar threshold, but because it attempts to deal directly with the family farm corporation, it is a more complex scheme than New York's. The Minnesota statute exempts several classes of agricultural employees: (1) persons employed by "family farms" which by statute are any farm operations paying or obligated to pay less than $8,000 cash wages to farm laborers in the preceding calendar year.39/ (The spouse, parent, or child of a farmer and the executive officer of a statutory family farm corporation plus his spouse, parent, or child employed by such corporation are not farm laborers for the $8,000 test);40/ (2) partners and the spouse, parent, or child of partners of a farm operation;41/ (3) executive officers of statutory family farm corporation and the spouse, parent, or child of said officer employed by such corporations; (4) executive officers of certain closely held corporations and the spouse, parent, or child of said officers employed by such corporations;42/ (5) farmers or members of farm families exchanging work with a farm employer or statutory family farm corporation in the same community;43/ and (6) casual employees.44/ Coverage is elective as to the owner or partner in a farm, including officers of a "family farm corporation" and their employed immediate relatives. It is also elective as to farm laborers, other than farmers in the same community exchanging work with the farmer-employer, who are not otherwise covered by the act.45/

Wisconsin, Florida, and Illinois provide examples of jurisdictions where farmworkers are treated differently than employees in other industries on the basis of numerical formulas.

In Wisconsin, compulsory coverage is extended to farmworkers who are employed by a farmer who, in a 20-day period during the calendar year, employs six or more employees.46/ Coverage becomes mandatory 10 days after the last day of such 20-day period. In other industries, a standard of three or more employees or a wage payroll of $500 or more in any calendar quarter is the test used.47/

Florida's coverage is extended to an employee working for an employer having three or more employees.48/ However, coverage is compulsory in farm employment only if the farmer employs five or more regular employees or 12 or more employees for seasonal labor completed in less that 30 days.49/

The Illinois threshold is of particular interest since it resembles the threshold requirement of the Fair Labor Standards Act. The exemption applies for agricultural enterprises employing less than 500 man-days of agricultural labor per quarter, exclusive of man hours supplied by family employees.50/

The threshold requirements, however phrased, have added to the general complexity of the law governing employment in agriculture. Many of the threshold-type statutes have provided complicated interpretation problems, particularly for farm employers who have incorporated.

Recent Developments

There is increasing support that universal coverage from day one of employment for all workers should be an immediate goal of this society. If the states do not move with great speed to correct existing inequities, the workers' compensation area, like many others, will likely become the subject of sweeping federal legislation.

Senators Harrison A. Williams, Jr. and Jacob Javits have been ardent supporters of such federal legislation and have introduced several bills in recent years. In his remarks introducing the National Worker's Compensation Standards Act of 1979, Senator Williams stated:

> The deficiences of our workers' compensation laws are a national tragedy. We cannot let this tragedy continue. This bill is not a rich man's bill. It is not a bill which will provide benefits that will make disabled workers wealthy. It only provides elementary justice and equity for the maimed and diseased workers of our Nation. It is a bill which our Nation can and must afford.51/

Arguing on behalf of an earlier version of the proposed act, Senator Javits noted the National Commission recommendation that by July 1, 1975 farmworkers be covered on the same basis as all other employees. He characterized the failure of 35 states to provide this coverage as "nothing less than outrageous."52/

The proposed National Workers' Compensation Standards Act of 1979 would provide certain basic standards to be introduced into the law, most growing out of the National Commission "essential recommendations" of 1972.53/ Where a state has a scheme which meets these standards, the secretary would so certify and the matter of administration would be left entirely to the state. If the state is deficient in certain respects, the bill would not provide for a federal take-over. However, the proposed legislation would place on the employer the obligation to individually provide supplemental compensation so that the compensation payments to the employee would be equivalent to the federally established minimums.54/ Many issues covered by local law would still be governed by that law, such as determining whether the injury or illness was work related, but the claim for supplemental compensation would be filed with the Benefits Review Board of the U.S. Department of Labor after state remedies had been exhausted. Employers would be required, if the law of the state did not measure up to the proposed federal standards, to carry insurance to provide the supplemental payments, qualify as a self-insurer, or make the election, if available under state law, to bring coverage to the federal minimum standards. Should an employer fail to make such provision, the employer would be exposed to personal liability for the supplemental payments, although not to any common law remedy as in tort. Each contract of insurance for comprehensive personal liability, such as a homeowner's policy, tenant's policy and presumably a farm and ranch liability policy would be presumed, by virtue of the provisions of the proposed federal law, to provide supplemental coverage under the workers' compensation scheme of the federal act, unless the employer had secured payment in another manner. Thus, what is a general liability policy could in effect, become in addition, a compensation policy.

The proposed National Workers' Compensation Standards Act of 1979 partially excludes agricultural employees by eliminating them from the definition of "employee":55/

> Sec. 3(5)(c)"any individual employed as an agricultural laborer by any employer who did not during any calendar quarter during the preceeding calendar year employ more than thirty workdays of agricultural labor. For the purposes of this subsection, "workday" means any day during which an employee performs any agricultural labor for not less than one hour. The person who operates a farm shall be deemed to be the "employer" of agricultural workers employed on that farm for the purposes of this Act, except where another person within the definition of "employer" in subsection (3) of this section has agreed in writing with the operator to accept workers' compensation responsibility and has informed the Secretary of his intention to accept such responsibility when applying for a registration certificate under the Farm Labor Contractor Registration Act of 1963, as amended;..."

In the 95th Congress, 2nd Session, an earlier version of the bill provided that the term "employee "employee did not include:56/

> Sec. 3(5)(b) "any individual employed as an agricultural laborer or in domestic service in or around a private home by any employer who during the current or preceding calendar quarter did not employ one or more individuals as agricultural or domestic on at least fifteen days:..."

The bill that Senator Javits introduced in the 94th Congress, 1st Session would have provided full coverage for all agricultural workers.57/ The term "employee," as it appeared in that proposed legislation at Sec. 3(5), had no exemption or exclusion for agricultural workers. The same verbiage was contained in an earlier bill introduced in the 93rd Congress, 1st Session.58/

Recommendations and Conclusions

States that have failed to eliminate exclusions which deprive some or all farmworkers of workers' compensation coverage should move with dispatch to delete such exclusions from the law. If the states fail in this and in other workers' compensation reforms, federal legislation should be enacted with the requirement of full coverage for all agricultural workers. Given the potential administrative burden of the federal scheme as currently proposed, the most desirable development would be for all noncomplying states to move quickly to bring their statutes up to the "essential standards" adopted by the National Commission.

Although various justifications have been posed for the various exclusions, upon close examination most of those justifications are based on unwarranted assumptions. Following are evaluations of several commonly relied upon assumptions.

(1) Would a law providing full coverage for all agricultural workers be impractical to administer? The Report of The National Commission on State Workmen's Compensation Law noted that the spector of administrative problems has hindered reform: "(t)he predominance of part-time help on farms, their geographic dispersion, and the fact that migrant workers may work for many different employers during the course of a year present difficulties in reporting, rating, medical care, rehabilitation, and auditing."59/ However, an important study of the Indiana law, with some national scope indicated that exclusions and thresholds cannot be justified on the basis of administrative complexity.60/ The study further indicated that none of the states with complete coverage "has anywhere reported administrative problems traceable to a lack of recordkeeping ability on the part of farm and ranch employers."61/ Indeed, if Ohio and other states with significant migrant farmworker populations can administer a law that provides full coverage from day one of employment, it is difficult to give much credence to continued speculation about administrative difficulties. The success that has been experienced in this area, as well as in the administration of the Social Security laws, can be traced in part to the fortunate advent of the computer.62/ From the standpoint of the individual farmer the recordkeeping required under a full coverage scheme is notably less complex than that required for federal and state income tax purposes.63/ Indeed, in those states that have partial exclusions, the elimination of thresholds should make the recordkeeping simpler for the smaller farm employer who currently should keep meticulous records geared to advising when he has passed over the arbitrary line and must bring himself into compliance by obtaining coverage, self-insured status, or state fund protection. The fact is that the present system in some states poses unnecessary administrative problems.

(2) How many farmers are fully informed with respect to thresholds and actually purchase coverage when required? Schramm's estimates indicate that there is widespread noncompliance with compulsory statutes where thresholds and formulas are involved.64/ For the lawyer, insurance man, or other specialist, such provisions may be relatively simple to find and interpret, but for the farmer who is faced with an increasing array of statutory and regulatory material in the farm employment area alone, the technicalities of some workers' compensation statutes can be unmanageable. On the other hand, it is exceedingly simple to inform the farm community that when a person is hired for farm production work, even for a single day, a call to the local office of the bureau, if a state fund is involved, or to a private insurance carrier, in other jurisdictions, is required.

(3) Will the cost of coverage be too much of a burden on farmers, particularly small operators, and will they have difficulty in passing on the added expense to the consuming public? The Indiana study looked into this issue and concluded that the cost of such coverage would be insignificant and that it is capable of being passed on quite readily. The estimate for Indiana was that the cost of production would be increased by only 15 cents per $100 of production.65/ At a time when agriculture was much less stable and prone to periodic economic depressions, there may have been some basis for

The economic burden argument, although there are those who doubt that it was ever valid.66/ But as the Indiana study points out, "(f)or any industry operating in a private enterprise setting, the full costs of producing output are, and must be built into the structure of long-run normal prices as these are determined by the market process."67/ There are still "bad-years" for agriculture. However, policy decisions in an area such as workers' compensation should not be made on the basis of such short-term considerations. As the Indiana study concludes: "The ability to weather such a "bad-year" from season to season depends overwhelmingly...on the general financial strength of the producer and on his or her access to adequate credit."68/ Thus, an individual relatively insignificant increase in cost of production is virtually irrelevant to economic survival and over time will be passed on.69/

The Indiana study also comes down hard on the so-called "last straw" argument which, if used in this setting, is that another addition to the cost of production, the cost of workers' compensation coverage, will be the thing that finally drives many farmers under. The study points out that the selection of the "last straw" for the marginal operator is a totally arbitrary and artificial decision.70/ Anything can be hit on as that "last straw," for example, increased gasoline prices, higher real estate taxes, increases in the price of fertilizer, or whatever one wishes to select. The real problem when a farmer does go under is not a single item, but an overall inability to run an economically viable farm operation in today's competitive setting. To argue that certain farmworkers ought to be denied workers' compensation coverage as part of an effort to salvage the marginal farmer is to advocate bad public policy.

When economic arguments are made, it should also be remembered that farmers who have not been required to carry workers' compensation coverage in the past, unless totally ignorant of possible personal exposure, carried special riders on farm and ranch liability policies to cover liability resulting from negligent acts causing injury to an employee. An extra premium is normally collected for such a rider and this cost will be eliminated when the workers come under workers' compensation. Thus, the cost of compensation coverage is not a totally new and added expense.

(4) Is agriculture going to move from the state if compensation coverage is made mandatory for all farm employees? The National Commission on State Workmen's Compensation Laws concluded that interstate differences in workmen's compensation costs for the average employer rarely exceed 1 percent of payroll. It was suggested that no rational employer would move his business to avoid costs of this magnitude.71/

(5) Is employment in agriculture relatively safe and is a compensation scheme designed for manufacturing, construction, and other hazardous occupations needed? It is doubtful that farm employment has ever been relatively safe and it is certainly not the case at present. In 1922, the U.S. Commissioner of Labor made the following remarks:

> "...That the old agriculture was an exceptionally nonhazardous industry is not believed by many who remember when the meadows were cut by gangs of haymakers with scythes, when grain was reaped with cradles and sickles, and threshed with flails; who remember the accidents from runaway teams of horses, from wood chopping, corn cutting with a corn knife, the hog killing, the horse breaking and training and the etceteras that only old men recall. The fact probably is that modern farming is less hazardous than the old. Very little conclusive evidence exists today as to the extent of this hazard."72/

It is unlikely that farming is less hazardous today than in earlier times, and the more accurate assertion is that it has probably always been extremely hazardous and is likely to remain that way. The Indiana report notes that national statistics first emerged in 1937 and indicated for agriculture 4,500 fatalities, 13,500 permanent injuries, and 252,000 temporary injuries.73/ These were figures for the total farm population and included nonwork-related accidents, however, only mining and quarrying, construction, transportation, and public utilities had higher rates of mortality.74/ The Indiana study asserts that from 1937 to 1975 agriculture was the only industry for which the mortality and injury rates increased.75/ More detailed figures from recent years (see the section on occupational safety and health) demonstrate convincingly that agriculture is not an unusually safe type of employment, but rather one of the more hazardous. Given this reality, arguments that workers' compensation coverage is not needed have to be disregarded. Also, since there is no evidence that work on a small farm is safer than work on a large farm, there is no basis for arguing that farm employers with just a few workers or a small payroll ought to be excluded.

One of the penetrating comments in the Indiana study is that one reason for the increasing injury and accident rate in agricultural employment may be the widespread absence of workers' compensation

coverage. The argument is that one purpose of worker's compensation legislation is to promote the prevention of occupational accidents and diseases through economic incentive. Firms with the lowest injury rates pay the lowest premiums to carriers and the lowest assessments to state funds.76/ The incentive effect of workers' compensation laws should be permitted to have its full impact in agriculture.

Since the traditional justifications for the exclusion of farm employees from coverage are of doubtful validity, there ought to be no further delay in bringing all such employees under coverage. Different treatment for farm employees, given the absence of rational justification, is, as Senator Javits indicated, "nothing less than outrageous."77/ Further, exclusions and thresholds may well fall if attacked in the courts on equal protection grounds under state and federal constitutional provisions. This was the fate of the exclusionary system in Michigan where the court found that difference in treatment between agricultural and nonagricultural employment to be without rational basis.78/ As one commentator has indicated, "This decision portends possible attacks upon the agricultural provisions of other states and, perhaps, upon exclusions other than this one. Such attacks may prompt states to comply with the Commission's recommendations."79/

In light of all of these factors, it is difficult to justify the proposed partial exclusion of agricultural workers in the bill now pending in the Congress.80/ The traditional justifications for exclusions simply do not stand under current scrutiny. Protection is needed as much by the employee who would be excluded, as by those who would not. The proposed exclusion will discourage states with exclusions and thresholds from totally eliminating them. The proposed exclusion would insert into the law a new threshold which is not consistent with other threshold requirements of federal and state farm labor law, thus inviting further confusion and creating undue complexity. It will be as easy to teach employers to obtain coverage in all employment situations, as to teach the proposed 30-workday recordkeeping requirement. It is hoped that the days are long past when political compromise on this sort of issue is required to insure the passage of the entire reform package.81/

Notes to Chapter 7

1. See Report of the National Commission on State Workmen's Compensation Laws 25 (1972) (hereinafter cited as 1972 National Commission Report.

2. Ib.

3. The employee would be prevented from recovering if he failed to introduce evidence sufficient to sustain a finding of negligence on the part of the employer.

4. If the employer could show that the employee contributed to the cause of the accident in any degree, either through an imprudential act or derelection in failing to take the proper precautions for his safety, the employee will be precluded from recovery; see Larson, note 16, infra at §§4.30-4.50.

5. This affirmative defense prevents a plaintiff from recovery where the employee has knowledge, either actual or constructive, of the risks to be encountered and consents to take the chance of danger; see Larson, note 16, infra at §§4.30-4.50.

6. Under this theory, the employee was prevented from recovering from the employer if the accident was caused totally or partially by the negligence of a coworker; see Larson, note 16, infra at §§4.30-4.50.

7. Recovery was not permitted if the accident was the result of pure happenstance with neither employer or employee having been negligent; see Larson, note 16, infra at §§4.30-4.50.

8. See A. Larson, "Basic Concepts and Objectives of Workmen's Compensation", Supplemental Studies for the National Commission on State Workmen's Compensation Laws 31, 35 (1973).

9. See National Commission Essential Recommendations Status of State Compliance: January 1, 1979 (hereinafter Status of State Compliance). This is a state-by-state report prepared by the Alliance of American Insurers.

10. See Larson, "Basic Concepts", supra note 8, at 35; in four states limits on medical payments apply only as to silicosis and related diseases.

11. See 1972 National Commission Rep. supra note 1, at 18, 19; Larson, "Basic Concepts", supra note 8 at 35.

12. See Larson, "Basic Concepts", supra note 8, at 35.

13. See 1972 National Commission Rep., supra note 1, at 15.

14. Ib.

15. Id. at 17.

16. A. Larson, The Law of Workmen's Compensation §58.10 (1973 Supp. 1976): see 2 W. Schneider, Workmen's Compensation §§629-78 (perm. ed. 1942, Supp. 1958, Supp. 1962, Supp. 1966, Supp. 1970, Supp. 1973) (State-by-state--except Hawaii--discussion of farm laborer's treatment under state worker's compensation laws.) See generally E. Blair, Reference Guide to Workmen's Compensation §4.04 (1974, Supp. 1975); S. Horovitz, Injury and Death Under Workmen's Compensation Laws (1944) at 214-27; A. Larson, supra, §§53-53.40; W. Schneider, supra §§626, 628-78; Davis, "Workmen's Compensation - Excluded Employment," 16 Drake L. Rev. (1966) at 68, 81-82.

17. See A. Larson, Law of Workmen's Compensation, supra note 16, §53.20 Administrative problems are generally greater when dealing with farmworkers because of the predominance of part-time help on farms, their geographical dispersion, and the fact that migrant workers may work for many different employers during the course of the year.

18. See Id.; W. Schneider, supra note 16, §628, at 615; but see S. Horovitz, supra note 16, at 215.

19. See Griffing, Walker, Weitzman & Youtie, A Social and Economic Analysis of the Exclusion of Farm Workers from Coverage Under the Indiana Workmen's Compensation Act of 1929, (1977) at 1-17 (hereinafter cited as Social and Economic Analysis).

20. See Schramm," Workmen's Compensation and Farm Workers in the United States", Supplemental Studies for the National Commission on State Workmen's Compensation Laws (1973) at 137-138

21. See 1972 National Commission Rep. supra note 1, at 46

22. Ib.

23. See 1972 National Commission Rep., supra note 1.

24. See 1972 National Commission Rep., supra note 1, at 17.

25. 1972 National Commission Rep., supra note 1, Recommendation R2.4 at 17.

26. 1972 National Commission Rep., supra note 1, Recommendation R2.1 at 17.

27. 1972 National Commission Rep., supra note 1, Recommendation R2.2 at 17.

28. See Status of State Compliance supra note 9.

29. Ib.

30. Ib.

31. Ib.

32. See 5 U.S.C. §3582 (1976); 5 U.S.C. §8101 (1976); 14 U.S.C. §760 (1976); 42 U.S.C. §§1701-1706, 1711-1717 (1976).

33. Unless otherwise noted, information is currently only to 1-1-1979.

34. See Status of State Compliance, supra note 9; Michigan is included in this listing, not because the state statute has been suitably amended, but because the exemption has been rendered inoperative by court decision as discussed in note 79, infra and accompanying text.

35. See Status of State Compliance, supra note 9.

36. See New York Workmen's Comp. Law §§2(4), 3(1) Group 14-b (McKinney 1974).

37. New York Workmen's Comp. Law §2(4) (McKinney 1974).

38. New York Workmen's Comp. Law §§3 Group 18, 212 (McKinney 1974).

39. Minn. Stat. Ann. §176.041, subd. 1; Minn. Stat. Ann. 176.011, subd 11a, as amended Laws 1980 Ch. 556, Sec. 12.

40. Minn. Stat. Ann. §176.011, subd. 11a, as amended Laws 1980 Ch. 556, Sec. 12.

41. Minn. Stat. Ann. §176.041, subd. 1, Minn. Stat. Ann. §500.24.

42. Minn. Stat. Ann. §176.041, subd. 1, Minn. Stat. Ann. §176.012.

43. Minn. Stat. Ann. §176.041, subd. 1; Minn Stat. Ann. §500.24.

44. Minn. Stat. Ann. §176.041, subd. 1,

45. See CCH Workmen's Comp. L. Rep. ¶6027(2).

46. Wis. Stat. Ann. §102.04-3(c) (1971).

47. Wis. Stat. Ann. §102.04-1 & 2 (1971).

48. Florida Stat. §440.02-2 (1973).

49. Ib. The Florida Workmen's Compensation Law was repealed effective July 1, 1979 by L. 1978, Ch. 78-300; new legislation was designed to replace it and enacted as L. 1979, Ch. 79-40.

50. See CCH Workmen's Comp. L. Rep. ¶6017(2).

51. See 1 CCH Special, Workmen's Comp. L. Rep. 56 (No. 23 Part 2, 1979).

52. See 1 CCH Special, Workmen's Comp. L. Rep. 48. (No. 89 Part 2, 1976).

53. S. 420, 96th Congress, 1st. Sess. (1979); 420 Amendments, 96th Congress, 1st. Sess. (1979). See, 1972 National Commission Rep., supra note 1.

54. Plus costs and expenses of litigation and attorneys' fees.

55. S. 420, 96th Congress, 1st. Sess. (1979); S. 420 Amendments, 96th Congress, 1st. Sess. (1979).

56. S. 3060, 95th Congress, 2nd Session (1978).

57. S. 2018, 94th Congress, 1st. Session (1975).

58. S. 2008, 93rd Congress, 1st. Session (1973).

59. 1972 National Commission Rep. supra note 1, at 46.

60. See Social and Economic Analysis, supra note 19, at 18.

61. See Social and Economic Analysis, supra note 19, at 20.

62. See A. Larson, "Basic Concepts," supra note 8, at 38

63. See Social and Economic Analysis, supra note 19, at 21.

64. See Schramm, "Workmen's Compensation and Farm Workers," supra note 20, at 141.

65. See Social and Economic Analysis, supra note 19, at 28.

66. See Social and Economic Analysis, supra note 19, at 24-5.

67. Ib.

68. See Social and Economic Analysis, supra note 19, at 25.

69. See Social and Economic Analysis, supra note 19, at 25, 28.

70. See Social and Economic Analysis, supra note 19, at 31-2.

71. See 1972 National Commission Rep., supra note 1, at 25.

72. U.S. Bureau of Labor Statistics, Proceedings of the Ninth Annual Meeting of the Int'l Ass'n of Indus. Accident Bds. and Comm'ns, Bull. No. 333 (1932) at 302.

73. See Social and Economic Analysis, supra note 19, at 5.

74. Ib.

75. See Social and Economic Analysis, supra note 19, at 8.

76. See Social and Economic Analysis, supra note 19, at 15-16.

77. See Note 52, supra.

78. Gallegos v. Glaser Crandell Co., 388 Mich. 654, 202 N.W. 2d 786 (1972); The constitutionality of worker's compensation laws was established in this country in New York Cent. R. R. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L. Ed. 667 (1916), which upheld the New York statute against numerous constitutional challenges. The White court specifically noted that the exclusion of farm laborers was not an "arbitrary classification" and denied a challenge based on the equal protection clause. Id. at 208.

79. "Developments in Workers' Compensation Law." 53 J. Urban L. 755, 775 (1976).

80. S. 420, 96th Congress, 1st. Sess. (1979); S. 420 Amendments, 96th Congress, 1st. Sess. (1979).

81. Farmworkers were not excluded from the initial compensation laws in Great Britain, Germany, or Italy. S. Horovitz, supra, note 15 §628, at 615. This lends additional support to the strength of the theory that the original exclusion of farmworkers was a political compromise necessary to get needed political support for the passage of the compensation law from the rural areas since the United States copies the acts of Great Britain and Germany in other respects.

Chapter 8

SOCIAL SECURITY FOR HIRED FARMWORKERS

In the middle of the 1930s, Congress determined that there was a need to impose on the population a compulsory "insurance" system designed to provide old age retirement benefits. The debacle of the depression years made it impossible to ignore the unpleasant reality that most persons could not or would not provide for old age on their own. The result was the Social Security Act of 1935,1/ which has been amended numerous times in succeeding years. Today, the system, identified as OASDHI,2/ pays billions of dollars annually in survivors, disability and health insurance benefits, in addition to retirement benefits.3/ Farm employees were not covered under the original version of the law, but starting in 1951 coverage was phased in and now extends to a substantial percentage of hired agricultural workers.4/ Certain continuing problems relate to the application of the act to agricultural employment.

Historical Development

Development of Social Security in General

The Social Security Act of 1935 5/ provided old age retirement benefits to millions of workers who were brought under the compulsory provisions of the statute. Benefits for dependents and survivors were added by 1939 amendments 6/ and benefits for the disabled by 1956 amendments.7/ In 1958, benefits were extended to the dependents of disabled workers.8/ The health insurance program, popularly known as Medicare, was initiated by Congress in 1965.9/ Numerous other amendments have addressed coverage questions and have periodically increased benefits.

It is essential to understand that in addition to the Social Security Act there are two other pieces of legislation that are critical to the operation of OASDHI. Two portions of the Internal Revenue Code, The Self-Employment Contributions Act 10/ and the Federal Insurance Contributions Act 11/ (FICA), provide for the collection of taxes needed to fund the benefit schemes.

Only persons who are "employees"12/ can have "wages"13/ under FICA and only those workers who have "wages" will pay FICA taxes and have employer contributions credited to their accounts. Only where there are taxable wages is there the possibility of a worker earning the quarters of coverage which are essential to attaining insured status. In other words, eligibility for benefits under OASDHI is determined by the extent of taxable employment, measured in terms of quarters of coverage.14/

There are three basic categories into which an insured worker may fall: currently insured, fully insured, and transitionally insured. To be "currently" insured, the worker must have earned at least six quarters of coverage in the last 13 quarters period ending with the quarter in which he died, became entitled to old-age insurance benefits or became most recently entitled to disability insurance benefits.15/ In the case of death, the 13th quarter can be the quarter in which death occurred. To be "fully" insured, more complex rules must be complied with, but the basic rule is that 40 quarters of coverage must have been accumulated.16/ However, one may be "fully" insured with fewer than 40 quarters if he has at least one quarter for each year since 1950 or for each year after the year in which he became 21, if that occurred after 1950. In any event, the minimum requirement is six quarters of coverage. "Transitionally" insured status applies to certain claimants who attained age 72 before 1969. The status may be achieved with fewer than six quarters having been earned.17/

Where the worker is fully insured, the whole range of retirement and survivor benefits is available.18/ Where the worker is currently insured, only certain of the survivor benefits are available: those for a widow or widower caring for a child, a divorced wife caring for a child, unmarried children or dependent grandchildren under age 18, certain students and disabled dependents over 18, and the lump-sum death benefit.19/ Transitionally insured workers are entitled to special reduced retirement benefits,20/ certain hospital insurance benefits,21/ and specified survivor's benefits.22/

A special insured status is needed to qualify for disability benefits and the test is somewhat more liberal than for fully insured status. One who is fully insured is entitled to disability benefits if the disability is sufficient in character and duration to meet established prerequisites to recovery.23/

A worker who is 65 or over and who is a Social Security beneficiary is automatically entitled to hospital insurance. Also, certain disabled persons and those suffering from chronic kidney disease are entitled to hospital insurance. A person who is not entitled to monthly insurance protection may still be eligible for hospital insurance protection if he attained age 65 before 1968 even if he has no quarters of coverage.24/

An elective hospital insurance plan is available to those age 65 and over who are not entitled to Social Security retirement benefits and who are not transitionally insured. Enrollment in this voluntary plan requires the payment of a monthly premium.25/

An aged, blind, or disabled person is eligible for supplemental security income under a program which began in January 1974 if the person has "countable" monthly income that falls below certain set levels.26/ Eligibility is not related to insured status or quarters of coverage.27/

The Social Security system currently reaches or has the potential of reaching most Americans. While it is technically labeled an insurance system, it does not have the characteristics of private insurance programs. Years of payments into the program may result in a return of a $255 lump-sum death benefit and no more. This would involve a situation where a worker died before reaching retirement age, left no spouse or dependents, and had suffered no disability. The annual contributions into the program by way of FICA taxes, while theoretically held in trust, are used to meet current claims for benefits. Thus, it has been argued that the system is, in essence, a taxation and income redistribution scheme with superficial insurance characteristics.28/

Special Treatment of Farmworkers

When the 1935 legislation was being drafted, The Committee on Economic Security recommended that all employed persons be included under the old age insurance system.29/ However, subordinate officials in the treasury department, particularly those concerned with internal revenue collections, objected to the inclusion of farmworkers on the theory that it would be impossible to collect payroll taxes from such workers.30/ Secretary of the Treasury Morgenthau presented this view to the House Ways and Means Committee where Secretary of Labor Perkins raised strong objections to such restriction of coverage.31/ However, the Ways and Means Committee adopted the Morgenthau recommendation, being influenced, according to one source, far less by the threat of potential administrative difficulties than by a feeling that farmers would object to being taxed for old age insurance for their employees.32/ Agriculture had routinely been excluded from laws regulating conditions of employment and the exclusion of farmworkers was thus consistent with established policy.33/ Secretary Perkins, while never favoring the exclusion, made no real effort to have it deleted once it was in the bill, feeling that the law could easily be amended in future years to afford wider coverage.34/

In 1951, approximately 710,000 35/ regularly employed farmworkers came under the compulsory provisions of the act by virtue of legislation passed in 1951.36/ The figure climbed to 725,000 in 1954 and then jumped to 1,788,000 in 1955.37/ The explanation for the startling increase is the 1954 amendments to the Social Security Act.38/ This milestone in farmworker legislation brought a substantial percentage of the hired farm working force under the compulsory provisions of the act by eliminating the regularly employed requirement. Taxes were to be paid by the employee and the employer where the cash wages from the particular employer amounted to $100 or more during the calendar year. It should be understood that because 1,788,000 farmworkers were under the compulsory provisions of the act does not mean that they had suddenly all achieved insured status. That depended in each instance on whether the covered worker accumulated the required number of quarters of coverage.

A major change in the threshold requirement for payment of FICA taxes came just two years later in 1957. Under the revised scheme, an agricultural worker had no FICA wages subject to tax unless there was cash 39/ remuneration of $150 or more from a particular employer or the farmworker was employed on 20 days or more by a particular employer.40/ In the latter instance, taxes were due even where the cash remuneration was less than $150, but only if the farmworker was paid on a time rather than on a piece-rate basis.

By 1969, 2,018,700 farmworkers fell under the compulsory contribution provisions. Of that group, 860,000 had benefit eligibility for retirement and survivor benefits, an additional 802,800 had eligi-

bility just for survivor benefits, and only 348,900 had not yet qualified for full or current coverage. Six thousand four hundred of the group died during the year.41/ Preliminary data for 1974 revealed 2,262,000 farmworkers with taxable wages.42/ No breakdown on insured status was available for 1974.

While the Federal Insurance Contributions Act requires payment of taxes, not every person who contributes earns quarters of coverage or sufficient quarters to attain insured status. Farmworkers have been and remain subject to the same rules as other workers as to the number of quarters required to attain insured status. However, under the system that prevailed from 1957 through 1977, the method for determining quarters earned was different for agricultural workers than for workers in other sectors. During these years, there were no wages to be taxed unless the wages were cash and employment on a specific farm satisfied the $150 test or the 20-days test. If there were cash wages on which taxes were paid but they amounted to less than $100 during the calendar year, zero quarters were earned. If $100 to $199.99 was taxed, one quarter was earned. If $200 to $299.99 was taxed, two quarters were earned. If $300 to $399.99 was taxed, three quarters were earned. If $400 or more was taxed, four quarters were earned. The number of employers worked for to accumulate the cash wages was not important, nor was the amount of wages paid in a particular quarter. Ordinarily, quarters of coverage based on farm wages were assigned to calendar quarters in the year beginning with the last quarter and then counting back. However, they could be assigned to different calendar quarters in the year if it was to the worker's advantage to do so. Another major change in the method of earning and assigning quarters to farmworkers became effective in 1978.

Current State of the Law

For Social Security purposes, agricultural labor is defined in the Internal Revenue Code, Section 3121(g),43/ and includes virtually all on-farm production employment plus employment in certain enumerated peripheral activities as well as employment in processing if the employer himself produced more than one-half of the commodity with respect to which the services are performed.44/ The definition in the Social Security Act is identical. The statutory definition of agricultural labor has given rise to frequent litigation growing out of a multitude of fact settings. Any attempt to review the many cases is outside the scope of this study.45/

Agricultural work performed by illegal aliens can theoretically produce insured status under the Social Security Act. Wages paid to such workers are subject to FICA taxes and taxes are being paid in some instances. However, benefits are rarely received by such persons because when they come forward to make claim, their illegal status is usually uncovered and deportation results. Benefits are not paid to deported workers.46/

Agricultural work performed by foreign workers lawfully admitted to the United States on a temporary basis has not been covered by Social Security since 1956. Agricultural work performed in 1955 and 1956 by foreign workers other than those from the British West Indies and those admitted from Mexico under the bracero program was covered by Social Security. Agricultural work performed by foreign agricultural workers legally admitted on a temporary basis from the British West Indies was covered in 1954 and for a time prior thereto. Agricultural work performed by workers legally admitted to the United States from Mexico was covered prior to July 12, 1951, although Mexican contract workers were never covered.47/

An agricultural worker, including a pieceworker, who receives cash wages of at least $150 from a particular farm employer during a calendar year must pay FICA taxes and the employer must contribute as well. If the cash remuneration is less than $150 from a particular employer, the agricultural worker, other than a pieceworker, will have "wages" if he works for the employer on 20 days or more during the calendar year.48/ This is the rule that has been in effect since 1957 and it survives even though changes have been made, effective 1978, in the method of determining quarters of coverage for agricultural employees. Since 1978, farmworkers have been included under a new provision which has general application and which replaces the old "$100-earns-a-quarter-of-coverage" test. In 1979, quarters of coverage were earned for every $260 of taxable "wages" earned during the calendar year.49/

Only in cases where the worker is over 62 years of age, disabled, or has died during the calendar year is there any necessity to allocate to particular quarters. Thus, a farmworker who earns $1,040 in wages in the final quarter of 1979 will have earned four quarters of coverage for that year.

Under current law, employers are required to maintain records for four years, although no particular form is prescribed. General guidelines are set forth in Circular A, "Agricultural Employer's Tax Guide," Publication 51 of the Internal Revenue Service (IRS), which is normally revised and

reissued annually. Employers who must withhold FICA taxes are required to follow depository rules which are prescribed by the regulations and summarized in Circular A. If, at the end of the year, the total amount of undeposited taxes (including income taxes withheld) for all workers is less than $200, no deposit is required and remittance may be made with a timely filed Form 943, "Employer's Annual Tax Return for Agricultural Employees." If the amount at the end of the year is over $200 but less than $2,000, a deposit must be made in an authorized commercial bank or a Federal Reserve Bank by January 31. If at the end of any month, other than December, the cumulative amount of undeposited taxes for the year is $200 or more, special rules apply which require periodic deposits within specified time limits. Penalties may be imposed for failure to deposit in a timely manner, absent reasonable cause.50/

While the method of determining "wages" is unique for agricultural employment, once that hurdle is passed and the number of quarters accumulated through the years has been determined, benefits are figured on the same basis as for other workers.

Evaluation

The Social Security Act as amended has provided a substantial number of farmworkers with an opportunity to build minimum retirement, disability, survivor, and health care benefits. Since few farmworkers are fortunate enough to have private programs available to them, most would have no protection other than workers' compensation where it is available, were it not for the Social Security system.51/

Inequities which have existed by virtue of the exclusionary features of the $150 test have been softened somewhat by a self-correcting process with inflation as the operative factor. The recent change to the one quarter for each $260 or wages with a maximum of four a year has been a slight step backward and has doubtlessly worked to the disadvantage of some farmworkers.52/ For those who earned only $400 in wages during a calendar year, it was possible, under the old system, to accumulate four quarters of coverage. Now, however, the same worker will accumulate only one quarter of coverage for the year. Still, except for the farmworker who works just a few weeks in the summer, it will be difficult to be employed for the entire cropping season and not accumulate several quarters of coverage. The major exception is the farmworker who moves to many farms during the year and has many employers. Here the $150 and 20-day tests still have the potential of working major inequities.

It is possible for pieceworkers and others who move rapidly from one farm to another to work an entire season without accumulating a single quarter of coverage. By working on one farm for less than 20 days and then moving on to another, never earning more than $149.99 anywhere, a worker could work the entire season and not have "wages" for Social Security purposes.53/ Documentation is sparse on the scope of this problem. However, one study indicates that in 1969 only 133,700 farmworkers had three or more employers, while 255,200 had two, and 1,629,700 had only one.54/ These statistics tend to minimize the need for concern about the $150 and 20-day tests. However, in the Florida citrus industry, a crew may move 50 to 100 times during a season.55/ At first, one would conclude that the farmworkers involved would have no chance to earn "wages." However, if these workers are members of a crew headed by a farm labor contractor who is deemed to be the employer, the problem does not exist.56/ The legislative intent in making the contractor the employer was to facilitate coverage for the crew members by combining several earnings into a single amount, increasing the chances of satisfying the minimum criteria for taxability and coverage.57/ However, another study indicates that as many as 29 percent of the nation's farmworkers fail to meet either the $150 or 20-day test.58/ The 20-day test does not apply to pieceworkers, and since migrant workers often work on this basis rather than on a time basis, their short periods of employment coupled with low wages often means failure to meet the $150 test with a particular employer.59/ Other figures tend to support the findings of these studies. According to the Social Security Administration taxable farm wages for 1974 were $4,820,000,000.60/ Yet, it is clear that the labor expense for farm employers for the same period was around $6,200,000,000.61/ Given these figures, it is apparent that as much as 22 percent of the wages paid were not taxed for Social Security purposes. However, the definition of agriculture which generated the $4,820,000,000 figure is somewhat broader than the definition that generated the $6,200,000,000 figure.62/

It is difficult to know if avoidance of Social Security taxes is a widespread phenomenon. Successful Farming magazine in 1978 contained "advice" on avoidance suggesting that since the only compensation that constitutes "wages" for FICA purposes is cash, farmers and employees can avoid the expense of FICA taxes if workers are paid with produce.63/ It was suggested that, if a month's wages would amount to $1,000, the farmer can simply haul a load of grain to the elevator and have a storage ticket

issued to the employee for enough bushels to make up the $1,000.64/ If the wages due the employee for the entire year add up to $10,000, the employer will, according to the Successful Farming article, have saved $605 in FICA taxes in 1978 and so will the employee.65/ The article then points out that the employee, upon selling the grain, can pay the minimum tax on $150 and work toward qualifying for minimum Social Security coverage.66/ The approach is consistent with the act and with the regulations which provide that "remuneration paid in any medium other than cash such as...farm products...does not constitute wages."67/

Another avoidance device is to treat the farmworkers as sharecroppers. This method worked out for a farmer in Sachs v. United States,68/ where migrant workers who did not plant cucumber crops came in and assumed responsibility for cultivation and harvesting. There was no crew leader involved, and each migrant family was assigned a portion of the field. When the crop was sold, the family received an amount equal to one-half of the receipts paid to the farmer. The court found that while the farmer furnished the seed, planted the crop, fertilized, furnished the equipment for cultivation, and periodically inspected the fields, the workers were not employees, but independent contractors. Of course, the farmer was thus not required to withhold or to pay Social Security taxes. One commentator has stated that "the Commissioner of Internal Revenue claims that one of his 'most intractable problems' is the distinction between an employee and an independent contractor. There is a substantial revenue loss if an individual is treated as an independent contractor when he is really an employee."69/

Any efforts by the IRS to challenge an independent contractor classification in a particular case are prohibited by Act of Congress through 1980 where the taxpayer did not treat the person in question as an employee for any period before January 1, 1981, filed all returns for periods after December 31, 1978, consistent with the independent contractor status, and had a reasonable basis for not treating the individual in question as an employee.70/ "Reasonable basis" is defined to exist when there has been "reasonable reliance" by the taxpayer on any of several specified past events or authoritative documents.71/

The real evil in the avoidance devices is that the farmworker may fail to pay FICA taxes on the proceeds from grain sold or self-employment income from the cucumber crop. Even if the farmworker does comply with the law, there is a good chance that he will pay the minimum tax, thus assuring bare minimum Social Security coverage when claims are eventually made. For those who have no other benefits, the minimum Social Security payments barely sustain life.

Another matter that cannot be ignored is the possibility of outright evasion of FICA taxes. The problem has been identified in two areas of farm employment. The first involves the farmer who only occasionally hires a few workers and who really has never come to appreciate his obligations under the law.72/ The other involves "migrant workers" who work for crew leaders. One study indicates that in 1972 as many as 200,000 migrant farmworkers who probably should have been covered under Social Security were unaccounted for.73/

Three things are helping to identify the problem so that it can be eradicated. The computer capabilities of the IRS make it possible to cross-check to see if the deductions on a farmer's income tax return for wages paid match data submitted by the same farmer on Form 943 and the accompanying W-2 forms. Such cross-checking should at least identify farmers who are failing to withhold and remit FICA taxes through ignorance. Also, the emergence of somewhat better enforcement of the Farm Labor Contractor Registration Act should help to reduce abuses by crew leaders. Finally, it is reported that the Social Security Administration and the Office of Economic Opportunity have made increased efforts to reach farmworkers with educational and information materials in English and Spanish designed to encourage readers to see that the FICA taxes are paid and benefits received.74/

Unfortunately, it is reasonable to assume that some farmworkers, considering their low pay, are quite happy to forget about the Social Security tax if the employer will, and take the immediate increase in take-home pay. The regressive nature of the FICA tax which hits lower paid workers as hard or harder than higher paid workers in terms of percentage of income taken has been identified as bad public policy by some.75/

Provisions of the act exempt amounts paid to an employer's spouse or the employer's children under age 21.76/ While this aspect of the act is consistent with the general social policy of "hands off" family operations, it raises some questions as to why these members of the work force should be denied the benefits of the system. Formation of a family farm corporation is one method of getting around the problem, and in some instances, formal creation of a partnership will accomplish the same thing. Not only does the farmer switch from self-employed status to employed status, but family members can become employees of the corporation thus coming under the compulsory contribution require-

ments. Salaries for the farmer who shifts from self-employed to employee status may be set at levels that allow higher contributions and thus the potential of greater benefits. However, the increased cost that results from going, in 1979 for example, from an 8.10 percent tax on self-employed earnings to what is in effect a 12.26 percent tax in the corporate setting is enough, when added to the costs resulting from the application of other social legislation, to deter some small family farmers from opting for the corporate form of business.77/

When the corporate form is used, some interesting problems have emerged when the farmer reaches retirement age. There have been several instances where farmers claim benefits, and then to avoid having more income than is permitted a retired person under the system, simply keep working but have the corporation pay salaries to other members of the family or pay out dividends rather than wages. In a number of such instances, the IRS has been successful in establishing that such devices are simply shams designed to conceal continued salary payments to the claimant.78/

A recent study by Griffing and others concludes that the eligibility of occupationally injured and disabled agricultural workers for Social Security disability coverage is severely limited.79/ This conclusion is reached in part on the basis of evidence, already cited herein, that about 29 percent of farmworkers fail to earn enough under the $150 and 20-days tests to have wages and thus are unable to accumulate quarters of coverage.80/ Failure of crew leaders to report wages when they should is also cited as a problem.81/ All of this, coupled with the need for a worker over 31 years of age and under age 65 to have 20 quarters during the 40 quarters prior to disability, is cited as creating a very special problem for farmworkers given their erratic and often limited work patterns.82/

The Griffing study notes that since disability payments are keyed to a complex formula which averages monthly earnings during the years the worker was receiving Social Security wages (including the five years of lowest earnings), farmworkers are likely to receive minimal payments.83/ It is further noted that where farmworkers are covered by Worker's Compensation for job-related disability the typical payment of two-thirds of the average weekly wage, up to a certain maximum, is likely to yield a substantially better benefit. The waiting period before Social Security benefits for disability can begin, plus the requirement of a finding of disability that will persist for at least one year, further limits the number of farmworkers who receive benefits. This is especially important to farmworkers who in many states are still not covered under worker's compensation and who do not generally have the benefit of private disability insurance to take care of disabilities not related to their jobs.

In the final analysis, the Social Security system as it now impacts agricultural employment is not without its inequities and problem areas. The level of benefits for those farmworkers who are covered is low because the wage base upon which benefits are determined is commonly at minimum levels. An ameliorating factor in some instances is that the farmworker in the family is not the principal source of income. This is the case with students and housewives who work in the fields for short periods each year. Further, many who fall into the statistical studies as farmworkers have nonfarm employment and thus farm wages alone are not an accurate measure of their overall earning power and FICA tax contributions. Still, low wages, erratic employment and other disadvantages tie together to produce minimum Social Security protection, if indeed, there is any coverage at all for many farmers.

Whatever the merits or deficiencies of the scope and scale of coverage provided at present, the Social Security experience has established that a complex and expensive social program can be administered with reasonable success for farmworkers as a class. To the extent that arguments are made against the extension of other social programs to agriculture on the basis of cost and administrative impossibility, the Social Security experiment provides a strong answer. It becomes exceedingly difficult to accept the proposition that there is something peculiar about agriculture that creates insurmountable administrative problems and a market structure that does not allow added costs of production to be absorbed.

Current Developments

The major Social Security bills that are pending in the 96th Congress at the time of this writing for the most part do not relate directly to matters discussed herein. Two bills are designed to deal with problems of self-employed farmers after retirement.84/ Another is designed to make changes in the disability scheme of the act.85/

One bill that was considered in the 95th Congress that did not become law, but is likely to resurface, is the Alien Adjustment and Employment Act of 1977.86/ This is the administration amnesty bill which would have allowed lawful admission for permanent residence to certain undocumented aliens and temporary resident alien status to certain others for a period of five years. Temporary resident alien status would have entitled those in it to contribute toward Social Security protection and receive various other benefits and social services not specifically excluded.87/ Persons in that category, however, would not receive supplemental security income, aid to families with dependent children, and Medicaid. Such legislation, if ever enacted, would probably withstand constitutional challenge.88/

Recommendations

In light of the funding crisis that exists for the entire Social Security system at the present time, suggestions that would call for a greater drain on the financial resources of the system may not have much chance of being implemented in the foreseeable future. Still, such suggestions must be voiced so that issues are not lost sight of.

Clearly there is a need for continuous study of the Social Security system as it relates to agricultural employment. Better data will help policymakers see the farm situation more clearly.

The impact of the $150 and 20-days rules is just one example of where a more accurate picture is needed. Serious doubts must be expressed over perpetuating those thresholds. They can be justified only on the theory that they save farm employers a certain amount of administrative work. Yet there can be no doubt that farmers are as capable as employers in other sectors and ought to be able to deal quite well with a $50 threshold as must employers of domestic help and babysitters or with no threshold at all. If 29 percent of the hired farm work force is kept out of the system by the threshold, the problem of the thresholds is exceedingly serious and needs immediate reexamination.89/

Farmworkers as a class suffer considerably from the regressive nature of FICA taxes. More should be done to eradicate the regressive characteristics of FICA taxes even if this means exploring the use of general revenues to partially fund the system.

Perhaps the time has also come to reexamine the exclusion of non-cash remuneration. Farming is one area where this type of remuneration is actually resorted to in order to avoid taxes. Are there really good administrative reasons for current policy or is Congress simply perpetuating certain assumptions about administrative difficulties that may no longer have validity, if indeed, they ever had merit?

The Congress also would be well advised to look at the problems of sharecroppers with a view toward creating a definition of independent contractor that would not include migrants who find themselves in the position of the families participating in the kinds of operations represented by the cucumber case discussed previously. It is one thing for a person to lease land and run his own farming operation as a self-employed person, but it is quite another to treat farmworkers as independent contractors when they are working under circumstances that have most of the characteristics of the master-servant relationship other than mode of pay. It is extremely difficult to determine just how many farmworkers are being forced into this category to their detriment not only under the Social Security scheme, but also with respect to other programs designed to regulate employment in agriculture.

Rigorous enforcement of FICA rules by the Internal Revenue Service and of farm labor contractors rules by the Department of Labor needs to be encouraged and this probably means more funding. Educational programs are also of critical importance and should be encouraged.

There is little question that Social Security disability programs will never achieve the same level as those under state worker's compensation laws. For this reason, plus many others, there is a need for the Congress to provide whatever pressure is necessary to cause all states to treat farmworkers on a par with those in other industries under worker's compensation laws.

Finally, if we intend as a society to use large numbers of illegal aliens in on-farm production work, there seems to be a moral obligation to afford these people social and economic benefits, including Social Security coverage, and in this connection the amnesty program deserves further consideration unless a better alternative can be suggested.

Notes to Chapter 8

1. 49 Stat. 622 (1935), as amended, codified as 42 U.S.C. §401 et seq.

2. An acronym for old-age, survivors, disability, and health insurance.

3. Social Security Bulletin, Annual Statistical Suppl. 1975, Tables 122 and 123.

4. One study suggests that 71% of farmworkers earn "wages" on which FICA taxes are paid. Griffing, Walker, Weitzman & Youtie, A Social and Economic Analysis of the Exclusion of Farm Workers From Coverage Under The Indiana Workmen's Compensation Act Of 1929 at 41. Other statistics indicate that as of 1974-75 about 78% of the "cash" remuneration paid to farmworkers was subject to FICA taxes. Taxable farm wages for 1974 were $4,820,000,000. Social Security Bulletin supra, note 3 at Table 38.

5. Supra, Note 1.

6. As amended Aug. 10, 1939, c. 666, Title II, §201, 53 Stat. 1362, as amended 42 U.S.C. §402.

7. As amended Aug. 1, 1956, c. 836, Title I §103(a), 70 Stat. 815, as amended 42 U.S.C. §423.

8. As amended Aug. 28, 1958 Pub. L.85-840, Title II §§202, 204(b), 72 Stat. 1020, 1021 as amended 42 U.S.C. §423.

9. As added July 30, 1965, Pub. L. 89-97, Title I 101, 79 Stat. 290, as amended 42 U.S.C. §426.

10. 26 U.S.C. §1401 et seq. (1976) as amended.

11. 26 U.S.C. §3101 et seq. (1976) as amended.

12. 26 U.S.C. §3121(d) (1976).

13. 26 U.S.C. §3121(a) (1976).

14. 42 U.S.C. §413 (1976) as amended.

15. 42 U.S.C. §414(b) (1976) as amended.

16. 42 U.S.C. §414(a) (1976) as amended.

17. 42 U.S.C. §426a (1976) as amended.

18. O'Byrne, Farm Income Tax Manual, 5th Ed. at §1019(e).

19. Ib.

20. 42 U.S.C. §427 (1976) as amended.

21. 42 U.S.C. §426a (1976) as amended.

22. 20 C.F.R. §404.113a (1978).

23. Social Security Handbook 1973 at §211.

24. Id. at §200.

25. Id. at §2114.

26. Id. at §2600.

27. 42 U.S.C. §1382(a) (1976) as amended; 20 C.F.R. §§416.201-.202 (1976), as amended 43 Fed. Reg. 25091.

28. Friedman, "Payroll Taxes, No; General Revenues, Yes," The Crisis In Social Security: Problems and Prospects, 2nd Ed., at 25-39.

29. Witte, The Development Of The Social Security Act at 152.

30. Id. at 153.

31. Ib.

32. Ib.

33. Ib.

34. Id. at 154.

35. Social Security Bulletin, Annual Statistical Supp. 1973 at 66.

36. Aug. 28, 1950, Pub. L. 81-734, Title I §104(a), 64 Stat. 477.

37. Supra, note 35.

38. Sept. 1, 1954, c. 836, Title I §106(a)(2) as amended. 42 U.S.C. §413(a)(2)(iv).

39. 26 U.S.C. §3121(a)(8)(A) (1976).

40. 26 U.S.C. §3121(a)(8)(B) (1976).

41. See U.S. Dept. Of Health, Education, And Welfare, Research and Statistics Note 8 (1975) Table 3, at 8.

42. McCormick, Social Security Claims And Procedures, 2nd Ed. at §200.

43. 26 U.S.C. §3121(g) (1976) as amended.

44. 42 U.S.C. §410(f) (1976) as amended.

45. See Annotation, 53 A.L.R.2d 406 (1957).

46. 20 C.F.R. §404.464 (1978).

47. McCormick, supra note 42 at §136.

48. 26 U.S.C. §3121(a)(8)(B); 26 C.F.R. §31.3121(a)(8)-1.

49. 42 U.S.C. §413(a)(2)(A) (1976), as amended by Pub. L. 95-216, §§351(c) and 352(a), the latter adding 42 U.S.C. §413(d); the statutory $250 figure is subject to being changed by regulation and was moved to $260 for 1979. No change 1980.

50. IRS Notice 201.

51. See Gruber, "An Analysis of the Hired Farm Work Force of the Ohio Cash Grain and Livestock Farms," M.S. Thesis, Ohio State Univ., 1974, Gruber reports on full-time hired workers on Ohio grain and livestock farms and notes the following fringe benefits on a percent of the work force basis (1970) at p. 55:

	Monthly Salary	Weekly Salary	Hourly Salary	All Workers
Health Ins.	72.9	17.9	6.4	26.4
Life Ins.	63.5	15.3	3.4	22.3

52. See, supra note 49.

53. It is also possible for a farm employee who works for a single employer more than 20 days in a mix of hourly work and piecework to fail to earn "wages." IRS Pub 51, Agricultural Employer's Tax Guide 1979 at p. 3 gives this example: "You pay Employee C $116 in 1979. $76 is for 19 days at $4 a day. The balance of $40 is for 8 days on a piecework basis. No taxes are due because neither the $150-a-year test ($116) nor the 20-days-a-year test (19 days) is met."

54. See A. Larson, "Basic Concepts and Objectives of Workmen's Compensation," Supplemental Studies For The National Commission On State Workmen's Compensation Laws (1973) at 32.

55. Hearings on Farm Labor Contractors Registration Act Before the Subcommittee on Economic Opportunity of the House Committee on Education and Labor, 95th Cong., 2d Sess. at 31.

56. O'Byrne, supra note 18, at §1001(a).

57. Research And Statistics Note 8, supra note 41, at 3.

58. Social And Economic Analysis, supra note 4, at 41.

59. Staff Report prepared for Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 94th Cong. 2d Sess., at 116.

60. Social Security Bulletin, supra note 3 at Table 38.

61. Based on 1975 annual average hired farm labor force of 1,323,600 working an average of 36.45 hours per week at the reported average hourly wage for 1975 of $2.43. Farm Labor, Feb. 27, 1976.

62. The $4,820,000,000 includes certain processing workers and others not considered in "farm labor" statistics.

63. Successful Farming, Feb. 1978, at 18.

64. Ib.

65. Ib.

66. Ib.

67. 20 C.F.R. §404.127(i)(1) (1978).

68. 422 F. Supp. 1092 (N.D.Ohio 1976); discussed at 37 A.L.R. Fed. 149(n).

69. O'Byrne, supra note 18, at 1978 Supp. 208-9; (note that quoted comment deleted from 1979 Supp); see also Annotation 37 A.L.R. Fed. 95 (1978).

70. Public Law 95-600, §530, as amended by Public Law 96-167, §9.

71. Discussed at Tanquary, "Employment Tax Provisions of the Revenue Act of 1978," 1 Agricultural Law Journal (1979) 221.

72. One of the authors has had experiences with such clients while in private law practice.

73. Staff Report, supra note 59, at 117.

74. Ib.

75. Pechman, "The Social Security System: An Overview," The Crisis In Social Security: Problems And Prospects, 2d Ed., 1978 at 33-35.

76. 42 U.S.C. §410(a)(3)(A) (1976).

77. One of the authors has witnessed this kind of decision-making while in private law practice.

78. See Newman v. Celebreeze, 310 F.2d 780 (2nd Cir. 1962); Ludeking v. Finch, 421 F.2d 499 (8th Cir. 1970).

79. Social And Economic Analysis, supra note 4, at 42.

80. Supra note 58.

81. Staff Report, Supra note 59 at 117.

82. Social And Economic Analysis, supra note 4, at 41.

83. Id. at 43.

84. H.R. 396 and H.R. 397, 96th Cong., 1st Sess.

85. H.R. 3236, 96th Cong., 1st Sess.

86. S. 2252, 95th Cong., 1st Sess.

87. Hearings on S. 2252 Before Senate Committee on the Judiciary, 95th Cong. 2d Sess., at 215-19.

88. Mathes v. Diaz, 426 U.S. 67, 96 S.C.T. 1883, 48 L.Ed.2d.478 (1976).

89. Supra note 58.

Chapter 9

HEALTH CARE POLICY AND THE HIRED FARMWORKER FORCE

Health care services in rural areas are not nearly as available as in urban areas. Former President Ford indicated:

> The physician and dentist shortages are more acute in rural America, emergency medical services are less available, occupational injury and accident rates are far higher, and comprehensive health and public health services are less available.1/

The problem, which has persisted for decades, is particularly acute for the hired farmworker force. As a class, hired farmworkers have poorer health, lower wages, less insurance, and live and work with greater health risks than most other inhabitants of rural America.

Arguably, the health problems of the hired farmworker force are in part the product of past and present farm labor policy. The absence of hour laws and the lack of effective regulation of dangerous working conditions has produced and continues to produce the ingredients for a high accident rate.2/ Lack of year-round employment and pay scales that hover around the minimum wage rates lead to low income with resulting poor nutrition, inability to pay for medical services, and the consequences which follow.3/ Child labor laws, which continue to some extent to sanction dangerous employment for youthful workers, can also be pointed to as a contributing factor.4/ Housing for seasonal farmworkers, whether employer supplied or not, has tended to be substandard and sanitation problems continue to be common.5/ The nonexistence of private accident, medical, and health insurance for many farmworkers and their families has meant that some problems have been compounded through lack of care. The lack of workers' compensation and Social Security benefits has aggravated the situation for some workers. Further, migrant farmworkers have, until recently, frequently been excluded from Medicaid coverage because they fail to meet state residency requirements and other eligibility standards.6/

Thus, hired farmworkers have been the disadvantaged among the disadvantaged. They have suffered not only from the general lack of health care services in rural areas, but their problems have been compounded by the circumstances of their life and work. While the health care problems of the hired farmworker force are serious generally, the migrant subgroup has suffered from particularly acute and chronic disadvantage.

Recent studies in the migrant community reveal shocking data:

> In Texas, less than 50% of the children were adequately immunized against diptheria, pertussis, tetanus, polio and measles. In Colorado, 40% of preschoolers were below one standard deviation and 18% below two standard deviations for head circumference. Infant mortality is 2 1/2 to 3 times the national average, and the post-neonatal death rate is twice the national average. Problems of infection and infestation are high as is the incidence of recurrence. Dental caries are common to nearly the entire population and extractions constitute 25% of all dental services; in Hidalgo County, Texas, just under 20% of the migrant families have clinical evidence of failure to thrive, vitamin or protein deficiencies or nutritional anemia.7/

A 1977 followup of the 1967 Field Foundation Study found living and working conditions for migrant farmworkers in Florida to have improved very little over the 10-year period. Medical and housing facilities had improved slightly, but many still suffered skin diseases and respiratory problems from exposure to pesticides.8/ A 1978 Inter-America Research Associates Study, commissioned by the U.S. Children's Bureau, found migrant conditions in the United States to be "deplorable."9/

While the above data and observations date from the last half of the 1970s, reports from earlier years read much the same. A study published in 1949 indicated:

> Studies by the Public Health Service and the Department of Agriculture reveal the tremendous burden of disease and disability carried by the migrants follow-

> ing the crops. In great measure the cause of this heavy toll of ill-health is to be found in the proverty of these workers, the unsanitary rural slums where most migrants make their homes, and their difficult working conditions. Public health and welfare medical services are especially meager in those areas where the concentration of migrants is often heaviest—40% of the counties are without the services of full-time local health departments. Moreover, residence requirements and local settlement laws make it frequently impossible for migrants to receive even such public health and welfare services as are available to local residents.10/

The documentation could continue for many pages. The fact is, the problems are very real and persistent. To the extent that the underlying causes are generated or aggravated by current farm labor policy, the situation is unconscionable. To the extent that the problems are aggravated by the lack of health care services, the situation may be unnecessary. There are strong indications that there has been a redirection in policy in this area in recent years, that changes have started to take place and that more are coming.

Health arguments have already been used from time to time to put across legislative proposals in a number of areas, and to some extent working conditions have been improved and underlying causes attacked. However, it is plain that protections and benefits for hired seasonal and migrant farmworkers lag far behind those in other industries.

Historical Development

The Farm Security Administration 11/ began to attack rural health problems around 1936. The initial purpose of the agency was to supervise a loan program designed to get farmers off relief and on the road to self-sufficiency. When loan failures were analyzed, it was discovered that about half were related to bad health.12/ Thus, the Farm Security Administration became interested in promoting a program of group medicine in rural areas. The idea was to let a large group of families contribute to the pool and let the fund thus created pay private physicians for treating illness and injuries occurring among the subscribing families. Farm Security Administration borrowers were required to sign an agreement to participate in the health program in their area and to contribute to the trust fund. The idea had considerable appeal and grew in those years when the rural community was recovering from the "Great Depression." The number of hired farmworkers reached is not recorded, and the commentaries on the period tend to speak primarily of farm owners and tenant farmers and their families.13/

However, in 1938 the Agricultural Workers Health and Medical Association (AWHMA) was formed in California to help provide services to hired farmworkers on a "pay-as-you-can" basis. The program peaked in 1940-41 with a budget of $1.4 million, and 55,000 persons enrolled.14/ The AWHMA operated acute diagnostic and treatment centers and referral centers utilizing public health nurses and local physicians in their own offices. The Farm Security Administration program was eventually transferred to the War Food Administration and to the Production Marketing Division of the U.S. Department of Agriculture. It was phased out in 1947.15/

In the ensuing years, until 1962, there is little evidence of legislative activity aimed at the health problems of rural farmworkers. On paper, the Hospital Survey and Construction Act, later known as the Hill-Burton Act,16/ was a major development for the rural poor. This legislation was designed to aid states in the construction of hospitals which could furnish adequate hospital-clinic and similar services to all people in an area. Priority was to be given to the construction of hospitals and facilities to serve areas with relatively small financial resources and, at the option of the states, rural communities.17/ Further, as a condition for the federal aid, the state was required to give assurance that the facility would provide a "reasonable volume of services" to "persons unable to pay."18/ Many facilities were constructed across the country, some in rural areas. However, it has only been in recent years that there has been any concerted effort to enforce provisions with respect to delivery of services to persons unable to pay. While Hill-Burton has had a beneficial impact generally, it has not served to meet the health needs of hired farmworkers to any substantial extent. Recent developments, including using Hill-Burton as a defense to a hospital collection suit and new federal regulations effective September 1, 1979, signal important change.

In the interim years until 1962, such legislation as Title V of the Housing Act of 1949,19/ amended in 1961, began to attack certain underlying causes. The legislation provided insured loans and low-rent housing grants to programs for domestic farmworkers. The program has continued into the

1970s. In 1973, for example, applications for insured loans totaled $10.2 million and for housing grants $1.7 million.20/

In 1962, Congress amended the Public Health Service Act 21/ with the Migrant Health Act. This legislation provided federal support for clinics offering services to domestic migrant workers and their families. Thus commenced the "classical period" in migrant health care, with programs focused on mobility aspects, sanitation, and direct medical care, but without adequate laboratories and physician time.22/ In 1965, the Migrant Health Act was amended to include provisions for hospital care.23/ Since less than $500,000 a year has been allocated for the program, hospitalization has been limited to emergency cases.24/ In 1970, the Migrant Health Act was further amended to allow delivery of health services to local seasonal farmworkers and their families in communities which experience seasonal influxes of migrant farmworkers.25/ With the increase in the scope of the program, the classical period ended, but many underlying deficiencies persisted.

A massive study by Dr. Shenkin resulted in proposals involving substantial redirection of the migrant health program.26/ Many of the Shenkin proposals became law when Congress further amended the Migrant Health Act in 1975.27/

For administrative purposes, the migrant health programs are now part of the Rural Health Initiative which seems to link a number of Bureau of Community Health Services programs, including Migrant Health Programs, Health Underserved Rural Areas Programs, Community Health Centers Programs, Family Planning Programs, Maternal and Child Health Programs, Appalachian Demonstration Health Projects, and the National Health Service Corps Personnel Program.

Another development which does not appear to be of particular significance to the hired farmworker force is the emergence of the HMO, a product of the Health Maintenance Organization Act of 1973.28/ HMOs have not yet offered a great deal to the poor, urban or rural.29/ With one possible exception, HMOs have not been established where there are significant populations of seasonal and migrant farmworkers.30/

In reviewing health care programs for hired farmworkers, private efforts should not be overlooked. For example, the United Farmworkers Union (UFW) has established the Rodrigo Terronez Memorial Clinic to serve the rural poor in the vicinity of Delano, California.31/ A 1975 report indicates that pursuant to UFW contracts the farm employer contributed 10 cents per worker per hour to the health plan which operates without government funds.32/ The clinic staff members worked for minimum wages, patients were asked to pay $2 for a visit to a physician up to the first five visits, whereupon succeeding visits for the problem were free. Nominal rates applied to certain other services.33/ In most parts of the United States the hired farmworker force is so seasonal and transient that the chance for workers to develop such a program, through a union or otherwise, is negligible.

Two programs designed to improve nutritional deficiency emerged in 1964. They are the Food Stamp Program, administered by USDA's Food and Nutrition Service and participating state agencies, and the Community Food and Nutrition Program of the Community Services Administration. Neither program is aimed specifically at the hired farmworker force, but both have the potential of reaching persons and family members in that category. Because of erratic employment patterns and transient characteristics, many farmworkers have had difficulty in qualifying for the Food Stamp Program in times of critical need.

Medicare and Medicaid have benefited the population generally. Unfortunately, the hired farmworker force has experienced problems obtaining the benefits afforded by these programs. The Medicaid program has been a particular source of difficulty for migrant workers. As a result of residency requirements, migrant workers have often been unable to qualify for Medicaid benefits. Changes in regulations, effective October 15, 1979, were designed to attack this problem.

Federal programs have been designed to improve the delivery of health services to migrant and seasonal farmworkers and food and nutrition programs have been designed to help root out underlying causes of health problems for these transient farmworkers. The current facilitating statutes and programs include the Migrant Health Act of 1962, the Rural Health Initiative (RHI), Medicare and Medicaid, Nutrition and Food Programs, the Hill-Burton Act, and Health Maintenance Organizations.

Migrant Health Act

The Migrant Health Act was enacted in 1962 and has been amended several times.34/ Initially, the act was codified in 42 U.S.C. §247(d). Major changes resulted from the Migrant and Community Health Centers Amendment of 1978, including a transfer to 42 U.S.C. §254(b).35/

Central to an understanding of the law is a recognition of a legislative distinction between high-impact areas and low-impact areas. The "high-impact area" is defined to mean a "health service area or other area which has not less than 4,000 migratory agricultural workers and seasonal agricultural workers residing inside its boundaries for more than two months in any calendar year."36/ In computing the number of workers residing in an area, it is essential to include the members of the families of such workers.37/ "Low impact areas" are those with fewer than 4,000 migratory and seasonal agricultural workers residing there for more than two months per year.

One of the critical changes that came about as a result of the 1978 legislation was a reduction of the "population requirement" from 6,000 to 4,000 for the purpose of designating high-impact areas. This should increase the number of high-impact areas and increase the effectiveness of the legislative scheme.

"Migratory agricultural worker" is defined as "an individual whose principal employment is in agriculture on a seasonal basis who has been so employed within the last 24 months and who establishes for the purposes of such employment a temporary abode."38/ A "seasonal agricultural worker" is an "individual whose principal employment is in agriculture on a seasonal basis and who is not a migratory agricultural worker."39/ Since 1970, when the classical period of the legislation terminated, the scheme has been to provide health services not only to migratory agricultural workers, but also to permanent local residents who fall into the category of seasonal agricultural workers.

The primary thrust of the legislation is to fund migrant health centers and migrant health programs. Funding is available for the planning, development, and operation of each. Migrant health centers, either through staff and supporting resources or through contracts or cooperative arrangements with other public or private entities, provide primary and supplemental health services for migratory agricultural workers, seasonal agricultural workers, and their families within the catchment area. A center must also provide services to individuals previously in the migratory agricultural worker category but who no longer have that status because of age or disability.

Migrant health programs may also provide "primary health services" but only migrant health centers may provide both "primary health services and supplemental health services." "Primary health services" include services of physicians, physicians' assistants, nurse-clinicians, diagnostic laboratory and radiologic services, preventive health services, emergency medical services, required transportation services, and preventive dental services as may be appropriate.40/ "Supplemental health services" include services which are not included as primary health services but which fall into the following categories: hospital services, home health services, extended care facility services, rehabilitative services, long-term physical medicine, mental health services, dental health services, vision services, allied health services, therapeutic radiologic services, public health services, ambulatory surgical services, and health education servicies including nutrition education.41/

High-impact areas have a priority in the awarding of grants for migratory health centers.42/ Since the migrant health centers are able to give the most comprehensive services, it is encouraging to observe in the 1978 legislation the obvious attempt to increase the number of high impact areas which will be entitled to priority in the establishment of such centers. This, was accomplished by the reduction of the population requirement from 6,000 to 4,000.

The secretary may make grants or enter into contracts to plan and develop migrant health programs in areas where no migrant health center exists and in which no more than 4,000 migratory agricultural workers and their families reside for more than two months.43/ The migrant health programs may be designed to provide emergency medical care, supply primary health services, develop arrangements with existing facilities to provide primary health services, and to otherwise act to improve the health of migrant and seasonal farmworkers and their families.44/

It is encouraging to note that not only in the 1978 legislation, but in previous versions of the Migrant Health Act, there has been a recognition of the fact that health problems are not resolved entirely by clinics.45/ While preventive medicine and dentistry can be practiced, there is no doubt that an attack on nutrition problems, working conditions, living conditions, sanitation problems, and the like is also critical. The Migrant Health Act authorizes the secretary to enter into contracts with public and private entities to assist the states in implementing and enforcing acceptable environmental health standards, including standards of sanitation in migrant labor camps and applicable federal and state pesticide control standards.46/ Further, studies are authorized which explore camp and field sanitation, pesticide hazards, and other environmental hazards to which farmworkers and their families may be exposed.47/ In particular, the secretary is required to conduct a study of the quality of farmworker housing, its effect on health, and the enforcement of standards affecting such housing.

These developments manifest a recognition of the need to change the basic direction of farm labor policy. If concerted attention is given to working conditions, housing conditions, health hazards, the extension of social legislation benefits, and other advantages accruing to most workers in this industrial society, a giant step forward will have been taken for the elimination of the underlying causes of acute and chronic health problems that are so evident in the migrant and seasonal hired farmworker community.

Problems have arisen in the administration of migrant health projects that have given rise to litigation. Included in the requirements for successful application for funding is the stipulation that there be a provision that the governing board of the migrant health center shall be composed of individuals, a majority of whom are being served by the center and who, as a group, represent the individuals being served.48/ A problem with a potential violation of that requirement arose in the case of Martinez v. Matthews.49/ There the court held that migrant and seasonal farmworkers were entitled to a preliminary injunction requiring the Migrant Health Center to comply with the requirements that individuals being served comprise the majority of the governing board. The effect was to require the election of a new governing board. The court indicated that the likelihood of plaintiff farmworkers' success on the merits of the case and the potential harm to farmworkers by virtue of delay would be significant in the achieving a representative voice in the health care area. In other words, to deny the preliminary injunction could, according to the court cause irreparable injury since the wrongs complained of had gone without remedy for an extended period and since potential harm to the operation was inevitable if there was a decision on the merits for the plaintiffs.

Southern Mutual Health Ass'n. Inc. v. Califano 50/ dealt with the critical question of whether a migrant health facility was entitled to a hearing prior to the termination of Department of Health, Education and Welfare (DHEW)funding. The appellant, Southern Mutual Health Ass'n. (SMHA), brought the action challenging a decision by DHEW to disapprove an annual application for the continued funding of appellant migrant health care facility in Franklin, Louisiana. DHEW took its action without providing SMHA with the opportunity for a hearing. The district court granted DHEW's motion for a summary judgment, holding that neither DHEW regulations nor the due process clause required DHEW to hold a hearing. The Court of Appeals for the District of Columbia subsequently held that SMHA had standing to challenge the DHEW decision since SMHA's existence had been endangered by DHEW's refusal to continue funding, and because SMHA's interest was within the zone of interest protected. The court also held that the action taken by DHEW was the termination of funding, and not just a decision to refund. The court ruled, therefore, that by its own regulations, DHEW was obliged to provide SMHA with a hearing.51/

The Rural Health Initiative

Rural Health Initiative (RHI) is an administrative effort by DHEW to combine its existing health resources programs to improve the delivery of health care to underserved rural areas. By seeking to combine existing elements of rural health care into integrated units, RHI hopes to promote local comprehensive health care systems that are self-sufficient and to provide career opportunities which will attract physicians and other health professionals to rural communities.52/ The programs funded under the Migrant Health Act are part of RHI. RHI seeks to link these programs with a number of other Bureau of Community Health Services programs, in particular: Health Underserved Rural Area Programs, Community Health Centers Programs, Family Planning Programs, Maternal and Child Health Programs, Appalachian Demonstration Health Projects, and the National Health Service Corps Programs.

The Health Underserved Rural Area Program, established in 1975, is administered by BCHS and involves the awarding of grants for research and demonstration programs in the area of rural health. There are two principal goals: (1) integration of primary care services into a complete system of health care delivery that is financially viable, professionally attractive, and capable of becoming self-sustaining and (2) development of mechanisms to provide better health care to Medicaid-eligible populations in rural areas.53/

The Community Health Centers Program is designed to develop health services' delivery capacity and to support ambulatory health care projects in rural, as well as in urban, medically underserved areas. Project grants are awarded to public and private non-profit corporations to help meet the cost of planning and development in the ongoing operation of community health centers. In fiscal year 1977, 455 community health centers received federal assistance totaling $215 million.54/

In fiscal year 1976, 2.6 million individuals received services in the 4,410 clinics operated under 227 grants made through the Family Planning Program administered by BCHS. It is estimated that 3 million individuals received such services in fiscal year 1977. The objective is to make comprehensive family planning services available to all persons who want them, with priority being granted to those

who cannot afford to pay. Family planning services are also provided through Migrant Health Centers.55/

The Office for Maternal and Child Health of BCHS administers a program of formula grants to state health agencies to fund maternal and child health and crippled children's services. Research grants are made to support studies designed to improve such services. Special programs deal with infant mortality, maternal mortality, infant morbidity, sudden infant death syndrome, genetic diseases, and hemophilia.56/

The Appalachian region encompasses portions of 12 states and all of West Virginia. Pursuant to the Appalachian Demonstration Health Program, grants have been awarded to support a variety of activities, including hospital construction, sanitary landfills, medical residency programs, and halfway houses for alcoholics. The majority of grants, however, have been used to establish, improve, or systematize the delivery of primary health services, with many rural sites being involved.57/

The National Health Service Corps was created to provide medical services to people living in over 1400 communities designated as critical health manpower shortage areas. While the Corps provides manpower and administrative and financial management assistance, the local community must agree to manage the practice and to provide a physical facility, supplies, and staff support. Those who are able to pay must remit the "reasonable cost" of health services, but patients unable to pay cannot be refused services. While these programs have had an important urban impact, they have also been critical in dealing with manpower shortages in rural areas.58/

RHI is concentrating on areas that are characterized by low population density; high proportions of elderly, needy, or uneducated citizens; poor transportation; and low physician-population ratios. At the end of 1977, RHI had 350 projects providing services to an estimated 666,625 people. Total grants to local non-profit organizations and groups in fiscal year 1977 under RHI totaled more than $7 million.59/

Medicare and Medicaid

The objective of the Medicare program is to provide hospital insurance protection for covered services to persons age 65 and older, and to certain disabled persons. Hospital insurance is also available to persons age 65 and older, not otherwise eligible, through the payment of a monthly premium. Persons under age 65, who have been entitled for at least 24 consecutive months to Social Security disability benefits or to railroad retirement benefits based on disability for 29 consecutive months, are eligible for hospital insurance benefits. Also, most people who have chronic kidney disease and require kidney dialysis or transplant are eligible.60/

Nearly everyone who reached age 65 before 1968 is elibible for hospital insurance, including those not eligible for cash Social Security benefits. However, a person reaching age 65 during or after 1968 who is not eligible for cash benefits needs some work credit to qualify for hospital insurance benefits. Given the peculiarities of the Social Security law as it applies to hired farmworkers, there is concern that some highly transient seasonal farmworkers, who do not work for crew leaders, may be employed season after season without accumulating work credits.61/

The object of Medicare Supplementary Medical Insurance is to provide medical insurance protection for covered services to persons 65 and older and to certain disabled persons. All persons 65 and older and those under 65 who are eligible for hospital insurance benefits may voluntarily enroll. As of July 1, 1979, the monthly premium was $8.70. The monthly premium is increased by 10 percent for each 12 months in which a person could have been, but was not enrolled.62/

The Medicaid program, otherwise known as the Medical Assistance Program, is designed to provide financial assistance to states for payment of medical assistance to eligible recipients. State and local welfare agencies must operate under a DHEW-approved Medicaid state plan and comply with all federal regulations in order to be eligible. Needy persons who are over age 65, blind, disabled, members of families with dependent children, and—in some states—persons under age 21, may apply to a state or local welfare agency for such medical assistance. Individual eligibility is determined by the states in accordance with federal regulations.63/

Under Medicaid, states must provide for the categorically needy as follows: in- and out-patient hospital services; other laboratory and x-ray services; skilled nursing home services; home health services for persons over 21; family planning services; physician services; early and periodic screening, diagnosis and treatment for individuals over 21. For the medically needy, states are required to provide any seven of these for which federal financial participation is available.

The federal funding involves a funding and matching scheme. Federal funds are available to match state expenditures under the state plan, and the federal share ranges from 50 percent to 78 percent according to a formula based upon the relation of the state's per-capita income to national per-capita income. The number of recipients receiving Medicaid assistance in fiscal 1979 is estimated to have been 22,894,000. For fiscal year 1980, it is estimated that 23,000,500 will receive such assistance.

There have been particular problems for migrant agricultural workers in the Medicaid area. The regulations that were in effect before, October 15, 1979, did not specifically address the residency problems of migrant workers.64/ Thus, the states reacted in a variety of ways, but with the general result that the migrant population was often excluded from benefits because of nonresidency status. In order to remedy this situation, revised federal regulations were proposed on August 8, 1978.65/ Final regulations were promulgated and appeared on July 17, 1979, and became effective October 15, 1979.66/

Many migrant agricultural workers were unable under definitions in the old regulations, to establish required residency. Further, many such migrants and family members were unable to meet the "categorical" eligibility requirements. One reason for this was that migrant families tended to be intact and thus did not fall into the category of families deprived of the support of at least one parent. Under the previous regulations, children in intact families could be covered, but this was optional with the states.

The new regulations specify that persons in a state for "purposes of employment" must be considered residents.67/ Individuals under age 21, except for the blind and disabled, must also be dealth with under the AFDC rules.68/ The Social Security Administration has also amended the AFDC residency regulations to correct this problem.69/

Under the new Medicaid regulations, a person is considered to be in a state for "purposes of employment" not only when the person has entered the state with a job commitment, but when the individual has entered seeking employment. Thus, the test is not whether the person is currently employed.70/ A state agency may not deny Medicaid eligibility because an individual has not resided in the state for a specified period. Further, the agency may not deny or terminate a resident's Medicaid eligibility because of temporary absence from the state if the individual intends to return after the purpose of the absence has been accomplished. The only exception is where the individual has been determined to be a resident of another state for purposes of Medicaid.71/

The regulations authorize interstate agreements setting forth rules and procedures to resolve cases in which two states might argue as to whether a particular individual is a resident for Medicaid purposes. The interstate agreement may not result in the loss of residency in both states and must provide a procedure for providing Medicaid to an individual pending the resolution of the dispute.72/

Nutrition and Food Programs

Given the low income of most hired farmworkers and hired farmworker families, the amount of money available to purchase food is more limited than for most other segments of the population. As long as this situation persists, there will be a higher incidence of health problems no matter how much funding is granted for medical and hospital care. While the elevation of the minimum wage and the advance of farmworker unions have brought some improvement in income levels, the overall picture remains largely unchanged and the need to provide resources to improve nutrition for many in the hired farmworker force continues.73/

The Food Stamp Program74/ offers assistance to economically needy families by providing food coupons (stamps) which are redeemable at a value greater than their purchase price. The amount of assistance provided to families varies inversely to family income relative to family size. Families with very low or no income receive stamps free.75/

Hired farmworkers, because of their generally low income status, rarely have the opportunity or eocnomic resources to improve their lifestyles.76/ Accordingly, Food Stamp assistance is of great importance from an economic and nutritional standpoint for many hired farmworkers and their families.77/ About 60 percent of farmworker families participating in the Food Stamp Program in November 1975 received a family income less than $5,000 and fewer than 5 percent had incomes of $10,000 or more.78/ Low-income status is often complicated by large family size. November 1975 statistics indicate that of those families receiving less than $5,000 per year, more than one-third had at least 6 members. About 67 percent of the families with incomes over $5,000 had 6 members or more.79/

The same study indicated that only 50 percent of farmworker families with incomes below $5,000 and with six or more family members receive Food Stamps. Nationally, 59 percent of all such families were recipients. Overall, however, about 10 percent of farmworker families received Food Stamps as opposed to a national figure of 6 percent.80/ The pressing question which emerges is why large numbers of eligible farmworker families have not taken advantage of the Food Stamp Program.

Generally, barriers to Food Stamp participation have included: amount of owned assets; work registration requirements for most able-bodied persons; lack of knowledge about the program; inadequate resources to meet purchase requirements; transportation problems; limited participation in other public assistance programs; negative attitude toward welfare programs and the federal government; and confusion about eligibility, given irregular flow of income and transient status.81/ The problem of inadequate resources to meet purchase requirements is a particular problem for some migrant families, given the outflow of cash and transportation and other expenses related to travel and living away from home. The difficulty of having an accurate determination of eligibility is also a matter of particular concern for the seasonally employed farmworker family.

Households are individually certified by local welfare offices, based on national eligibility standards. The certification period can be up to one year for the unemployable or the elderly and as short as circumstances require for those experiencing frequent changes in household status or income.82/ A problem has frequently arisen for farmworkers because at the time of application for certification there may be no income coming in. However, income may be anticipated for later in the certification period. Yet, the actual receipt of that income remains uncertain. In Gutierrez v. Butz,83/ the court prohibited the attribution of future income as income available at the time of the application on the theory that such income is not reasonably available to the household throughout the prospective certification period. Income actually available must be distinguished from anticipated income.

As a result of this court order, USDA issued an interim letter dated October 21, 1976 governing farmworker application. The confusion that arose over this letter is commented on as follows:

> The letter contemplates an initial certification for a semi-monthly period at a zero income level (or at the low level received by the household on the date of application) in order to introduce the household into the Food Stamp System. The Department's subsequent instructions to the states, however, have tended to confuse the question. Some states have erroneously limited the Gutierrez ruling to newly-arrived migrant households and have excluded seasonal or settled-out farmworker households which suffer fluctuations in income. Some states erroneously apply Gutierrez once a year and continue to anticipate nonexistent farmworker income for the remainder of the year.84/

In 1977, Congress enacted amendments to the Food Stamp Act and provided:

> The State agency, in calculating household income, shall take into account the income reasonably anticipated to be received by the household in the certification period for which eligibility is being determined and the income which has been received by the household in the 30 days preceding the filing of its application for food stamps, so that the State agency may reasonably ascertain the income that is and will be actually available to the household for the certification period.85/

It has been argued that the above enactment manifested the intent of Congress to codify the Gutierrez holding.86/ If this is correct, the projected seasonal income of farmworkers could not be "reasonably anticipated" under the statute and should not be taken into account in calculating eligibility.

Apparently confusion remained. As one commentator noted:

> USDA has failed to adequately communicate this codification to the states. Farmworker advocates have asked USDA to publish a single comprehensive notice summarizing the contours of current law on the question. Until USDA issues such a notice, questions about farmworker Food Stamp eligibility must be solved by reference to the 1977 amendments, to the USDA Instruction of October 21, 1976, and through the court rulings.87/

The Food Stamp Act Amendments of 1980 88/ give the states an option to determine benefits for certain types of households for a given month on the basis of the prior months' actual income. The statute indicates that the secretary may find it inappropriate to use the method for migrant farmworkers' households.89/

Another program, which is administered by the Community Services Administration, makes Community Food and Nutrition Grants to help counteract conditions of hunger and malnutrition among the poor. Included on the lists of eligible recipients are migrant and seasonal farmworker organizations. It is reported that, in fiscal year 1978, $4.2 million went to such programs.90/

Community Food and Nutrition grants are funded under the Economic Opportunity Act of 1964 as amended.91/ Grantees may use funds in a variety of ways to supplement, extend, and broaden other food programs and to provide Food Stamps on an emergency basis to low-income families and individuals.92/ Generally, there are four categories of projects that will be funded: (1) those which improve the opportunities of low-income people to gain access to and participate in various food and nutrition programs including the Food Stamp Program; (2) projects which improve the ability of low-income people to produce and purchase foodstuffs in a manner that fosters self-sufficiency, (3) education programs dealing with diet, nutrition, and health; and (4) emergency assistance.93/ Grants are made on a one-time basis and are generally for a period of one year.

The Hill-Burton Act

The Hill-Burton Act offered hope to the rural poor and thus to the hired farmworker force.94/ However, actual experience with the act since 1944 has been disappointing. The decade of the 1970s, however, has brought developments which may be opening up the possibility that the original intent of the legislation would be realized. Recent developments indicate that we may be moving into a period where a "reasonable volume of services to persons unable to pay" will in fact be delivered.

For some 25 years following its enactment, Hill-Burton remained exclusively a program to support the construction of nonprofit health facilities and let the market determine who would benefit by those facilities.95/ An attempt in the 1960s to compel the original promise of the legislation by legal action resulted in a decision that the distribution of federal money did not create a contract between the United States and the hospital for the benefit of persons needing services but who were unable to pay. The court indicated that the use of federal money did not transform the hospital into a private charity.96/

Lawsuits in the early 1970s were successful, however, in reviving two long-ignored provisions of the act. Those were the familiar provisions requiring grantees to afford a reasonable volume of services to persons unable to pay and to be open to all persons in the area served by the grantee.97/ Cases such as Cook v. Ochsner Foundation Hospital,98/ Euresti v. Stenner,99/ and Organized Migrants in Community Action, Inc. v. James Archer Smith Hospital 100/ suggested that plaintiffs had an implied right to maintain a private civil action under Hill-Burton to compel defendant hospitals to comply with these ignored provisions.

The litigation in the early 1970s precipitated HEW rulemaking activities.101/ The so-called "free service" regulations emerged and Title VI grantees were directed to come into compliance with statutory obligations. It has been argued, however, that the regulations had the effect of undoing to some extent the court victory.102/ The suggestion is that HEW had become "captive" of the viewpoint of the interests they were designed to regulate. This position is supported by pointing out that fairly generous standards were rejected in the rulemaking process and that the final 1972 regulations provided that there would be "presumptive compliance" with the statutory obligation when service to the poor was at 3 percent of cost of operation (less that attributable to Medicare and Medicaid) or 10 percent of the grants received by a facility, whichever was less.103/ In the alternative, a facility could certify that it would turn away no one seeking free care.104/ State supervising agencies were not allowed to require a higher level of services.105/ The maximum time during which the regulation would apply was held to 20 years from the opening of the facility or portion thereof receiving the Hill-Burton grant. There was no provision to make up for a lack of compliance in years prior to the regulations.106/

Various court cases filed after 1972 upheld the 3 percent-10 percent options, as well as the language in the regulations which limited the aided facility's compliance to 20 years for grants or to the time a loan remained unpaid for loan grantees.107/ Regrettably, even after these regulations became effective, there was a notable lack of enforcement.108/

As the 1970s progressed, there was more litigation.109/ The most interesting recent decision is that in Newsom v. Vanderbilt, 110/ where the court held that a facility must make up deficits where compliance from 1973 onward cannot be demonstrated. In addition, the case holds that Hill-Burton may be used as a defense to a hospital collection suit where the defendant is a person who should have received services without charge.111/ The 1972 regulations have been amended effective October 6, 1975,

and facilities at that point were required to make prior determination of eligibility in providing uncompensated services and to post notices of the availability of such services.112/ Those changes in the regulations, however, obviously did not head off the kind of problem that surfaced again in Newsom v. Vanderbilt.113/

Major statutory changes came in 1975. The old Title VI program was replaced by what is now known as Title XVI.114/ Among the important changes in the Hill-Burton scheme were requirements that facilities would be obligated for an unlimited period after receiving aid under Title XVI. Further, those facilities receiving aid under Title VI or Title XVI were required to file periodic reports demonstrating compliance with the statutory and regulatory requirements.115/

Regulations implementing the 1975 legislation were proposed October 25, 1978, and were issued in final form on May 18, 1979, to become effective in most instances no later than September 1, 1979.116/ With respect to Title VI-assisted facilities, the regulations retained a 20-year period of obligation but now provide a lengthening or shortening of the durational limit to allow deficit makeup and to recognize excess compliance. There will, apparently, be no going back to the period between 1972 and the new regulations to assess levels of compliance. Injustices of the past will thus not be recognized. The object is to assure that they do not occur in the future.117/

The 3 percent of operating cost formula and the 10 percent compliance level will remain in the new regulations. However, there is an important provision requiring the adjustment of the 10 percent compliance level by an inflation factor so that the real value of the services provided under the 10 percent standard will stay constant. The socalled "open-door option" has been eliminated.118/ It was felt that a clear dollar standard against which facility performance could be measured would simplify monitoring and contribute to public confidence that a "reasonable volume" of services had been made available.119/

With respect to the facilities receiving Title XVI funds, the situation will be quite different. While the rules setting the levels of "uncompensated services" are the same for Title VI grantees, the obligation of Title XVI grantees continues at all times following the approval of the Title XVI application unless the facility ceases to provide health services.120/

Further, the new regulations provide that where a facility fails to meet its annual compliance level in any fiscal year it will be obliged to adopt an affirmative action plan designed to give wide notice of the wide availability of uncompensated services, to expand the area served by the facility, to arrange for referrals, and take other designated steps.121/

Many of the Hill-Burton facilities operate in areas where migrant and seasonal farmworkers are few. However, of the almost 7,000 institutions which have received Hill-Burton grants, many operate in service areas where migrant and seasonal farmworkers live or work. The residence requirement that must be met by an individual seeking uncompensated services has been drawn in the new regulations in such a way as to not work to the disadvantage of transient workers. Persons are deemed to be residing in the Title VI or Title XVI facility service area if the person is living in the service area with the intention to remain there permanently or for an indefinite period; living in the service area for purposes of employment; or living with a family member who resides in the service area.122/ The intent is that persons residing in an area for purposes of employment, i.e., who are looking for a job, are on a job, or have recently completed a job, are covered as are family members living with them.123/ The object is to make clear that migrant workers and others who reside in a service area of an assisted facility may not be denied services on the grounds that they are not permanent residents. In addition, it appears from the new regulations that in respect to Title XVI facilities only, it is sufficient that one is simply employed in the facility service area without regard to where the person is living.124/

In addition to the uncompensated services requirement, the community service regulations, which also became effective for all facilities as of September 1, 1979, are designed to insure that services are fully accessible to the community. Specifically, the following alternative admission arrangements are enumerated in the regulations: obtaining the voluntary agreement of physicians with staff privileges to accept referrals of Medicaid recipients and patients without a personal physician; requiring physicians, as a condition of obtaining or renewing staff privileges, to accept referrals of Medicaid patients and patients without a personal physician; establishing a hospital-based clinic to which Medicaid patients and others requiring hospitalization may be admitted; contracting with qualified physicians to treat Medicaid patients or those without physicians; and authorizing a patient's physician to treat the patient at the facility even though the physician does not have staff privileges.125/ It has been stated that the "strengthened community service regulations are a major victory for the poor and the working poor."126/

A facility which denies uncompensated services to an eligible individual in violation of the new regulations must take steps to remedy the violation. These steps may include termination of collection action and repayment of wrongfully collected bills.127/

One interesting question remains unresolved. The 1978 decision in Newsom v. Vanderbilt 128/ indicates that a facility must make up deficits for compliance from 1973 onward. The new regulations do not require deficit make-up for periods prior to September 1, 1979. In other words, the new rules are not by their terms to be applied retroactively. Thus, it remains to be seen whether through litigation compliance deficits will in fact have to be made up in spite of the provisions in the regulations to the contrary.

Health Maintenance Organizations

In some respects the HMOs are reminiscent of the health care programs under the Health Care Farm Security Administration. Health Maintenance Organizations are legal entities which provide specific health services to members on a prepaid, fixed-payment basis, rather than on the traditional, fee-for-service basis.129/ One of the rationales for encouraging HMOs is the belief that they will provide a financial incentive to emphasize preventive medicine and control the use of health services to reduce overall health care costs.130/

The Health Maintenance Organization Act of 1973 131/ authorized a program designed to assist in the development of new HMOs and in the expansion of existing ones. Two features stand out in the legislative scheme. First, financial assistance is to be provided through grants, contracts, and loans. Second, certain employers are required to offer their employees the option of membership in an HMO if a "qualified entity" is operating in the service area.132/ The federal grants which have been authorized are designed to fund feasibility studies, planning, and initial development.133/

The act defines the basic health services which "qualified" HMOs must provide directly or indirectly. Under the original version of the act, basic health services included physician services, hospital services, emergency services, outpatient mental health services, alcohol or drug abuse treatment, diagnostic laboratory services, home health services, and preventive health services including voluntary family planning services, infertility services, and preventive dental care and eye examinations for children.134/ The 1976 amendments deleted children's preventive dental services as a required basic health service.135/

Supplemental services were originally to be provided or contracted out. These services include intermediate and long-term care, vision, dental, and mental care not included in the basic benefit package, long-term rehabilitation services, and prescription drugs.136/ The 1976 amendments made supplemental services optional.137/

There is evidence that HMOs have not reached the hired farmworker force. There are just two rural HMOs operating at the present time, one in south-central Colorado, the San Luis Valley HMO at Alamosa, serving a six-county area with a population of about 40,000, and the other in the southwestern quarter of North Dakota, the West River HMO at Hettinger.138/ How many hired farmworkers are enrolled in the two programs is not known at this writing, but given the nature and population of the areas, the potential is not great.

Other factors, beyond the existence of just two rural HMOs, suggest that the potential of HMOs for serving the hired farmworker force is limited. An extensive study of HMOs has suggested that they may not offer a great deal to the poor, whether urban or rural.139/ First, there is the matter of payment of the premiums. It is reasonable to assume that many farmworker families do not have sufficient financial resources to make such payments. Second, there is the matter of the general failure of HMOs to seek out the medically underserved areas.140/ Third, there is the fact that as of a June 1978 report, 94 percent of the studied HMOs' membership was supplied through employee group contracts.141/ Fourth, HMOs have generally enrolled few elderly or indigent individuals.142/ As of December, 1977, only 4 of 14 HMOs examined in a national study had contracted to enroll Medicaid recipients.143/ The following attitude gives one reason:

> The director of one HMO which had no Medicaid members said the HMO did not want Medicaid enrollees because it did not want a 'government subsidized, welfare image.' The president of another HMO said Medicaid was the HMO's 'lowest priority' because the 'bad image' of a 'poor people's program' might jeopardize marketing efforts.144/

Given all these factors, it seems plain that HMOs are not destined to be a significant factor in the delivery of medical services to the hired farmworker force.

This is unfortunate since it has been demonstrated that HMO enrollees spend substantially less time in the hospital and are subject to half the rate of surgery of patients who obtain medical services under the fee-for-service delivery system.145/

The only promising angle is the requirement that a Fair-Labor-Standards-Act-covered employer who employs on an average at least 25 persons per quarter must offer a "qualified" HMO option if there is an organization in the area.146/ The act indicates that the employer does not have to contribute more to the cost of the HMO plan than it contributes to other health benefit plans.147/ No statistics have been uncovered revealing the number of nontransient hired farmworkers employed by such employers and within the service area of a HMO. However, it is reasonable to assume that the number is very small and will remain so.

Evaluation

It is encouraging to observe that policymakers have gone off in new directions in recent years to deal with the ongoing health problems of migrant and seasonal farmworkers. In particular, the shift from an almost exclusive emphasis on migrant workers, to an emphasis on both migrant and seasonal farmworkers has been a welcome development. Dealing with health problems as they exist in the entire hired farmworker community makes substantially more sense than dealing only with the problems of a minority of the workers. Further, recent developments are most encouraging. In particular it is important to point to the recent changes in the Migrant Health Act designed to increase the number of high-impact areas, to the emergence of the Rural Health Initiative which attempts to coordinate and make more effective a variety of rural health care programs, to recent changes in Medicaid rules designed to qualify more migrant farmworkers, to the efforts to make the Food Stamp Program more readily available to migrant and seasonal farmworker families, and to the new regulations under the Hill-Burton Act designed to better fulfill the original objectives of that legislation. In addition, the emphasis on nutrition programs, family planning programs, and preventive medicine programs is to be applauded.

While problems in the delivery of health care services and nutritional services remain, aggressive and imaginative efforts are being made to deal with them. However, as laudable as they are, all of these programs are not likely to markedly reduce the unusually high incidence of certain medical problems in the migrant and seasonal farmworker force. Without detracting in any way from nutritional and preventive medicine programs, it must be conceded that until the pervasive underlying causes of poor health among hired farmworkers are attacked effectively, long-range permanent improvements cannot be expected.

Recommendations

There are no simplistic solutions to the problems under consideration. As necessary and beneficial as the health care and nutrition programs are, they alone cannot be expected to significantly reduce the unusually high incidence of certain medical problems found in the migrant and seasonal farmworker force. It can be argued, however, that the real beginnings of a permanent solution to these problems lies in fundamental economic reform. Welfare-type programs for poorly paid and underemployed local farm employees, government subsidized clinics for seasonal farmworkers and migrant workers, and other such programs are not a substitute for getting at the causes of health problems. If farmer-employers with the help of economists and other experts, can find ways to pass on substantially increased wage and fringe benefit costs, farmworkers could soon be placed on a par with workers in other American industries. With improved living conditions, better working conditions, and adequate medical care on a regular basis, many of the serious problems that persist could be eliminated. If this means further increases in the cost of food and fiber products to ultimate consumers, it is possible that this will result in hardships in some cases. However, it is arguable that it is better to directly subsidize the ultimate consumer through food stamps and other devices than to indirectly subsidize such consumers by perpetuating farm labor policies which result in low incomes for hired farmworkers and the attendant problems. Holding down prices in the supermarket certainly cannot be justification for perpetuating farm labor policies of the past.

With respect to providing health care services and nutritional services, it seems important to recommend that after recent changes have been operative for a reasonable period of time, an extensive study should be done to determine the extent to which migrant and seasonal farmworkers are actually being reached. If it is determined that significant numbers are not within the service areas of the various programs and clinics, further legislative and regulatory changes may be called for. If, on the other hand, it is determined that significant numbers are not taking advantage of available services,

it may be necessary to direct greater outreach and affirmative action programs. It would also be interesting to ascertain the extent to which private health and medical insurance is being made available to the hired farm labor force. Owners and their families may have group policies through farm organizations and the same may also be true of some tenants and sharecroppers. While some permanent farm employees are covered under group policies, the extent of such fringe benefits on a regional or a national basis could probably be ascertained. There is also the possibility that seasonal locals, particularly housewives and children, are covered by the husband and father's policy if he is employed. The concern is, however, that taking into consideration private coverage and all of the programs provided, there may still be many hired farmworkers who have no private insurance and who are not being reached by government programs. Since worker's compensation is still denied to many seasonal and migrant farmworkers, the workers who do not have other types of protection and services available may have no meaningful health program even in connection with job-related accidents and illnesses.

Finally, it is recommended that there be a constant review of the funding levels of the various programs. It is beyond the scope of this study to determine the adequacy of present funding levels, but if insufficient funds are available or if that situation develops in the future, Congress should be advised at once and given the opportunity to make appropriations.

Notes to Chapter 9

1. 41 Fed. Reg. 14363 (1976).

2. Jukes, "Insecticides in Health, Agriculture and the Environment," 61 Naturwissenschaften 6 (1974).

3. "Florida Seasonal Farm Workers: Follow Up and Intervention Following a Nutritients Survey," 66 J. Am. Dietetic Ass'n, 606 (1975).

4. See generally "Child Labor in Agriculture," this monograph.

5. S. Rep. No. 93-1137, 93d Cong., 2d Sess. 23 (1974); See Generally Shenkin, Health Care for Migrant Workers (Hereinafter Shenkin).

6. Legislative History, P.L. No. 94-63, 1 U.S. Code Cong. & Ad. News 469, 567 (94th Cong. 1st. Sess.).

7. Letter (Sept. 6, 1974) and "Briefing Outline for Migrant Health Program" from Ass't. Surgeon General, Director Bureau of Community Health Services, Department of Health, Education and Welfare, to Donald B. Pedersen.

8. Miami Herald, July 23, 1977, p. 17.

9. Miami Herald, Feb. 9, 1978, §4, p. 1.

10. Rod, "Health Problems in Industrial Agriculture," 39 Am. J. Pub. Health 1172 (1949).

11. The original legislative basis for the Farm Security Administration was the Emergency Relief Appropriations Act of 1935, April 8, 1935, c. 48, 49 Stat. 115. The president was given the authority to put the act into operation, and to this end Executive Order 7027, April 30, 1935, was issued establishing the Resettlement Administration. Later, by Executive Order 7530, Dec. 31, 1936, 2 Fed. Reg. 7, the functions and duties of the Resettlement Administration were transferred to the Secretary of Agriculture. By Memorandum 732, Sept. 7, 1937, 2 Fed. Reg. 1800, the secretary changed the Resettlement Administration to the Farm Security Administration.

12. Hellman, "The Farmers Try Group Medicine," 182 Harper's Magazine (1940) at 72.

13. Ib.

14. Shenkin, supra note 5 at 14.

15. Ib.

16. Act of Aug. 13, 1946, ch. 958 §2, 60 Stat. 1041. The statute as amended is codified at 42 U.S.C. §§291-291o (1976).

17. 42 U.S.C. §291c(a)(1) (1976).

18. 42 U.S.C. §291c(e) (1976).

19. Housing Act, ch. 338, 63 Stat. 413, 42 U.S.C. §1401 (1949), as amended 42 U.S.C. §1401 (1964).

20. Shenkin, supra note 5, at 16.

21. P.L. No. 87-692 initially codified at 42 U.S.C. §247(d), later amended by P.L. No. 89-109, §3; P.L. No. 90-574, Title II, §201; P.L. No. 91-209; P.L. No. 93-45, Title I, §105; P.L. No. 93-353, Title I, §102(d); P.L. No. 94-63, Title IV, §401(d); Title VII, §701(c); P.L. No. 95-66, Title I, §101-107; P.L. No. 95-626 which at Title I, Part A, 101 provides that it may be cited as The Migrant and Community Health Centers Amendments of 1978 and transfers the Migrant Health Act to 42 U.S.C. §254(b).

22. Shenkin, supra note 5 at 16.

23. Aug. 5, 1965, P.L. No. 89-109 §3, 79 Stat. 436, as amended, 42 U.S.C. §247d (1976).

24. Legislative History, P.L. No. 94-63, 1 U.S. Code Cong. & Ad. News 469, 566 (94th Cong. 1st. Sess).

25. P.L. No. 91-296.

26. See generally Shenkin, supra note 5.

27. July 29, 1975, P.L. No. 94-63 as codified at 42 U.S.C. §247(d) (1976 and Supp. II 1978).

28. 42 U.S.C. §300e et. seq. (Supp. III 1973).

29. Schneider & Stern, "Health Maintenance Organizations and the Poor: Problems and Prospects," 70 NW.U.L.R. 90 (1975).

30. See note 139, infra, and accompanying text.

31. Rudd, "The United Farm Workers Clinic in Delano, Calif: A Study of the Rural Poor," 90 Pub. Health Rep. 331 (1975).

32. Id. at 332.

33. Ib.

34. See note 21, supra.

35. P.L. No. 95-626.

36. 42 U.S.C. §254b(a)(5) (1976 and Supp. II 1978).

37. 42 U.S.C. §254b(a)(5) (1976 and Supp. II 1978).

38. 42 U.S.C. §254b(a)(2) (1976 and Supp. II 1978).

39. 42 U.S.C. §254b(a)(3) (1976 and Supp. II 1978).

40. 42 U.S.C. §254b(a)(6) (1976 and Supp. II 1978).

41. 42 U.S.C. §254b(a)(7) (1976 and Supp. II 1978).

42. 42 U.S.C. §254b(b)(1) (1976 and Supp. II 1978).

43. 42 U.S.C. §254b(c)(1)(B) (1976 and Supp II 1978).

44. 42 U.S.C. §254b(c)(1)(B) (1976 and Supp II 1978).

45. 42 U.S.C. §254b (1976 and Supp. II 1978).

46. 42 U.S.C. §254b(e) (1976 and Supp. II 1978).

47. 42 U.S.C. §254b(e)(2) (1976 and Supp. II 1978).

48. 42 U.S.C. §254b(f)(3)(g) (1976 and Supp. II 1978).

49. 544 F.2d 1233 (C.A.La. 1976).

50. No. 76-1748 (D.C. Cir., Dec. 23, 1977); 574 F. 2d 518.

51. 11 Clearinghouse Review 876 (1978).

52. See, Bureau of Community Health Services Programs, DHEW/HSA 78-5002 at 4.

53. Id. at 14.

54. Id. at 9.

55. Id. at 11.

56. Id. at 19-20.

57. Id. at 7.

58. Id. at 25.

59. Id. at 4.

60. 1980 Catalog of Federal Domestic Assistance Programs, Item 13.773.

61. See, Social Security for Farmworker, supra this monograph

62. 42 U.S.C. §1395 et.seq. (1976); 1980 Catalog, supra note 61 at Item 13.774.

63. 1980 Catalog, supra note 61 at Item 13.714.

64. 42 C.F.R. §435.403, §436.403 (1978).

65. 43 Fed. Reg. 35077 (1978).

66. 44 Fed. Reg. 41434 (1979).

67. Ib.

68. Ib.

69. 44 Fed. Reg. 41460 (1979), to be codified at 45 C.F.R. §223.40(f).

70. Ib.

71. To be codified as 42 C.F.R. §435.403(h); Castillo v. Creasy (N.D. Ohio, filed April 29, 1980), noted in 14 Clearinghouse Review 476 (1980), involves a challenge to an Ohio regulation which defines residency as physical presence with intent to remain.

72. To be codified as 42 C.F.R. §435.403(i).

73. The Food Stamp Act of 1964, P.L. No. 88-525, 78 Stat. 703, 7 U.S.C. §2011-2026 (1976) as amended.

74. Economic Opportunity Act of 1964, as amended, Title II Sec. 222(a)(1), P.L. No. 95-568, 92 Stat. 2426, 42 U.S.C. §2809 (1976), as amended.

75. Smith & Rowe, Food Stamp Participation of Hired Farmworker Families, USDA/ESCS, Agricultural Economic Report No. 403, at 3.

76. Id. at 2.

77. Ib.

78. Id. at 10.

79. Ib.

80. Id. at 3, note 5.

81. Id. at 9; Gutierrez v. Butz, 415 F. Supp. 827 (D.D.C. 1976).

82. 7 U.S.C. §2012(c) (1976).

83. 415 F. Supp. 827 (D.D.C. 1976).

84. 11 Clearinghouse Review 45 (1978).

85. P.L. No. 95-113, §5(f); codified as 7 U.S.C. §2014(f).

86. Fretz, "Food Stamp Eligibility for Farmworkers," 11 Clearinghouse Review 45 (1978), citing Cong. Rec. 8-9542-9543 (daily ed., Sept. 16, 1977); See recounting of 1976 hearings at 5 U.S. Code Cong. & Adm. News 2079 (1980).

87. Ib.

88. P.L. No. 96-249, 94 Stat. 357, 96th Cong. 2d Sess.

89. P.L. No. 96-249, §107.

90. 1979 Catalog of Federal Domestic Assistance Programs, Item 49.005.

91. Economic Opportunity Act of 1964, as amended, Title II, §222(a)(1), P.L. No. 95-568, 92 Stat 2426, 42 U.S.C. §2809.

92. 1980 Catalog, supra note 61 at Item 49.005.

93. Ib.

94. See note 18, supra, and accompanying text.

95. Rose, "Federal Regulation of Services to the Poor Under the Hill-Burton Act: Relaties and Pitfalls," 70 NW. U.L. Rev. (1975) 168-169.

96. Stanturf v. Sipes, 244 F. Supp. 883 (D.C. Mo. 1963), aff'd 335 F. 2d 224 (8th Cir.), cert. den. 37 U.S. 977, 13 L.Ed. 2d 567, 85 S.Ct. 676 (1965).

97. Rose, supra note 96 at 169.

98. 319 F. Supp. 603, 11 A.L.R. Fed. 677 (D.C. La. 1970).

99. 458 F.2d 1115 (10th Cir. 1972).

100. 325 F. Supp. 268 (S.D. Fla. 1971).

101. 37 Fed. Reg. 182 (1972).

102. Rose, supra note 96 at 174.

103. Id. at 175.

104. Ib.

105. Ib.

106. Id. at 176.

107. 44 Fed. Reg. 2940 (1979).

108. Id.

109. See, e.g., Saine v. Hospital Authority of Hall County, 502 F.2d 1033 (5th Cir. 1974).

110. 453 F. Supp. 401 (M.D. Tenn. 1978).

111. Accord, Magic Valley Credit Bureaus, Inc. v. Baker, (Idaho Dist. Ct., 1979), as noted in 13 Clearinghouse Review 795 (1980); collection suits dismissed where Hill-Burton defense raised, Youngstown Hospital Assoc. v. Martini (Mun. Ct. Ohio, 1979) as noted in 13 Clearinghouse Review 532 (1979), and J.M. Hollister, Inc. v. Schackelford, (Mun. Ct. Cal. 1979), as noted in 13 Clearinghouse Review 625 (1979); contra, St. Mary's Hospital v. Castner (City Ct. N.Y. 1979) as noted in 13 Clearinghouse Review 795 (1980), and St. Peter's Hospital v. Hall, 102 N.Y. Misc. 2d 73 (1979).

112. 44 Fed. Reg. 29400 (1979).

113. 453 F. Supp. 401 (M.D. Tenn. 1978).

114. P.L. No. 93-641.

115. 44 Fed. Reg. 29400 (1979).

116. 44 Fed. Reg. 29372 (1979).

117. 44 Fed. Reg. 29383 (1979).

118. To be codified at 42 C.F.R. §124.503(a)

119. 44 Fed. Reg. 29375 (1979), codified at 42 C.F.R. §124.501-.512.

120. Ib.

121. 42 C.F.R. §124.504.

122. 42 C.F.R. §124.603(a)(2).

123. See, Comments at 44 Fed. Reg. 29399 (1979).

124. To be codified at 42 C.F.R. §124.603(a)(1).

125. 12 Clearinghouse Review 186 (1979).

126. Ib.

127. See, Comments at 44 Fed. Reg. 29396 (1979).

128. 453 F. Supp. 401 (M.D. Tenn. 1978).

129. Comptroller General Report to the Congress: Can Health Maintenance Organizations Be Successful?—An Analysis of 14 Federally Qualified "HMOs," June, 1978 at 1.

130. Id. at 2.

131. 42. U.S.C. §300e (1976).

132. Comptroller General, supra note 130 at 1.

133. Id. at 4.

134. Id. at 10.

135. Ib.

136. Id. at 10-11.

137. Id. at 11.

138. Telephone conference HEW/HMO Program, 1979; See 42 U.S.C. §300e-14a (1976).

139. Schneider & Stern, "Health Maintenance Organizations and the Poor: Problems and Prospects," 70 NW.U.L.R. (1975) at 90.

140. Comptroller General, supra note 130 at 22-23. See, Requirements for a HMO at 44 Fed. Reg. 42063, 42069 (1979).

Chapter 10

FARMWORKER EMPLOYMENT AND TRAINING PROGRAMS

During the Great Depression, there was high national unemployment and a severe shortage of agricultural labor in particular areas.1/ Pursuant to the provisions of the Wagner-Peyser Act of 1933,2/ the Farm Labor Service was established in the Bureau of Employment Security of the Department of Labor.3/ The Farm Labor Service was designed to function through state employment offices to bring farm labor placement services to rural America.4/ Thus it was the states, through their employment service offices, which actually implemented the program. The impetus for state action was, and remains, the availability of 100 percent funding by federal grants to qualifying state employment service offices.

Historical Development

The object of the Wagner-Peyser Act was to establish a cooperative federal-state system of employment services to be operated by the states through local employment offices established under state law.5/ Special attention was given to the needs of farm operators from the time the system was first established. Through the years, the objectives have been broadened and agency names have changed. For a time, we had the Rural Manpower Service of the United States Employment Service (USES), which is no longer maintained. USES, in turn, is part of the Employment and Training Administration, formerly the Manpower Administration, of the U.S. Department of Labor (DOL).

USES is responsible for seeing that state plans of operation conform with federal laws, provide uniform methods of operation, and include programs of referring labor from one area to another. USES also gives technical assistance to the states and participates in determining the level of funding necessary for the operation of the various state programs.6/ State employment service offices are totally funded by federal grants-in-aid pursuant to the Wagner-Peyser Act, Title II of the Social Security Act and various appropriation acts.7/

In order for a state to qualify for financial assistance, it must establish an agency authorized to cooperate with USES,8/ must submit plans for carrying out the scheme of the Wagner-Payser Act,9/ must operate within the rules, regulations, and standards of efficiency set by the Secretary of Labor,10/ and must properly expend the funds granted by the federal government.11/

Through the years, the Farm Labor Service and its successor, the Rural Manpower Service, sponsored a number of methods of recruiting hired farm labor. For meeting the short-run needs of farm employers, a "day haul" program was designed using publicity to recruit local workers who would assemble at designated pickup points to be transported to a job location for the day.12/ Programs were also initiated to attract children into seasonal farm labor during school vacation periods.13/ Where the local labor supply was insufficient or available workers inadequately skilled, individual growers or farmers could apply for out-of-state work crews.14/ This involved the interested employer submitting an order pursuant to announced contract terms for a certain number of workers for specified jobs. The order, if cleared, was transmitted to a regional office in an area where a labor surplus existed.15/ A crew or group of families was then routed into the migrant stream to fill the order, often hundreds or thousands of miles away. These methods are still being used by local USES offices.

When the Farm Labor Service emerged in the 1930s, there were serious labor shortages, thus, a more active concern for the needs of farm employers than for those of the farmworkers.16/ In 1969, when the Farm Labor Service was merged into the Rural Manpower Service, the emphasis was shifted to include promoting a decrease in the supply of unskilled farmworkers through counseling, retraining, and job development services.17/ Placement in farm work was no longer the only goal.18/ The same policy of phasing people out of seasonal and migrant work also appeared in certain programs under the Economic Opportunity Act.19/ Office of Economic Opportunity (OEO) programs were designed to phase out migrant farmworkers from agricultural occupations by retraining them for positions in industry. Adult literacy training for heads of households, vocational education, and job placement were emphasized.

The National Migrant Worker Program (NMWP) was developed and operated by the DOL as the first employment and training program specifically for farmworkers. Created administratively by the Secretary of Labor in June 1971, the program was funded with unapportioned monies appropriated under the Manpower Development and Training Act of 1962.20/ Approximately $25.6 million was spent by the NMWP during the four years of its existence. Participation was limited to migrants and their families to provide the training and placement for migrants desiring to relocate. The primary grant recipients were state employment service agencies, OEO farmworker programs, and certain private non-profit agencies.21/

When the NMWP and the OEO programs were phased out in 1974, the migrant programs were scattered among various departments of the federal government. OEO migrant and seasonal farmworker manpower programs were transferred to the DOL with retraining and assimilation into other sectors of the economy remaining as an objective, but receiving less emphasis.22/ What emerged was a three-pronged policy designed to supply employers' needs, improve the lot of those workers electing to remain in seasonal and migrant farm employment, and offering retraining and settling-out services to those desiring the same. New programs emerged in the DOL funded under §303 of the Comprehensive Employment and Training Act of 1973 (CETA).23/

Until regulations were promulgated, effective February 24, 1977, farmers and growers who availed themselves of the assistance offered by Rural Manpower Services by placing inter- or intra-state job orders had to meet certain requirements set forth in the Employment Security Manual. The employer was required to certify in writing the terms and conditions of employment. Orders expressing a preference for a particular worker or crew were to be reviewed to determine that the employer was not engaged in discrimination by race, age, sex, color, or national origin. If a crew leader placed an order, it was required that he be duly certified under the Farm Labor Contractor Registration Act unless an exclusion applied. In the written certification, the dates of employment were to be listed, subject to being adjusted in case of adverse weather conditions. Wages, hours, working, and housing conditions were also to be specified and state agencies were to conduct random field checks to see that the actual conditions and terms of employment complied with federal and state laws. All housing furnished by the employer was to meet standards of federal or state laws, whichever were more stringent. Various other requirements also applied, and special provisions applied to request for foreign workers. The order for foreign workers could not be filed if a sufficient number of domestic laborers were available.24/

On April 22, 1971, an administrative complaint was filed with the DOL charging Rural Manpower Services with violations of petitioners' rights under the Constitution, the Wagner-Peyser Act, Title VI of the Civil Rights Act of 1964, the Immigration and Naturalization Act, the Occupational Safety and Health Act, and the Social Security Act. It was charged that Rural Manpower Services and participating state agencies were allowing discrimination, violations of minimum wage laws, housing laws, sanitation regulations, child labor laws, and foreign worker regulations to go unchecked.25/

The Special Review Staff of the Manpower Administration issued a report in April 1972 identifying various problems and proposing a Thirteen Point Plan designed to correct them. The Thirteen Point Plan provided:

> 1. Steps are to be taken immediately in both the Rural Manpower Service and the employment service to begin a consolidation process which would result in integrated services at the local level. Such consolidation should be aimed at offering a broader spectrum of services to rural workers and employers and at providing sufficient resources to accomplish the objective. Surveys shall be conducted by the States to insure that as many resources as possible are directed to provide services in rural areas.
>
> 2. Immediate action shall be taken to correct any civil rights violation found during the review, whether it be with regard to race, color, sex, age, religion or national origin. Procedures shall be implemented to insure that there is full and continuing compliance with civil rights laws.
>
> 3. Steps shall be taken to insure that all child labor laws are being followed. Job orders will not be accepted which provide incentives for youth to work in violation of Federal, State or local laws.
>
> 4. The Employment Standards Administration shall insure that sufficient resources are allocated to enforce effectively the agricultural minimum wage where complaints are made or violative conditions are suspected. Additionally, Governors should be encouraged to provide staffs outside the State ES agency to assist farm workers in handling their complaints and in improving their working and living conditions.

5. State ES agencies shall establish mechanisms to handle workers' complaints where job working conditions and wage specifications have not been delivered as promised.

6. The Occupational Safety and Health Administration will continue the implementation of its responsibility for the work-related problems of farm employees and will address particular attention to the areas of field sanitation and safety, pesticides, housing and transportation. OSHA will coordinate its efforts with other agencies which also have responsibility in these areas. Care should be taken to insure that present manpower compliance efforts are maintained while OSHA is developing its program to assure these responsibilities.

7. Responsibility for enforcement of the Farm Labor Contractor Registration Act will be transferred to the Employment Standards Administration.

8. A vigorous effort to have frequent payroll audits of foreign worker users will be instituted to insure that the adverse effect rate is being paid to foreign workers who have been certified under the Immigration and Nationality Act. Such payroll audits should convert piece rates into hourly earnings so that comparison may be made to the hourly adverse effect rate. The adverse effect rate should also be set high enough to insure that earnings of domestic workers are not depressed by the presence of foreign workers.

9. Regional office staffs will monitor the States' performance of prevailing wage surveys to insure that the piece rates are converted to hourly rates so that it may be determined that, where applicable, the established piece rates are in accordance with the Federal and State Minimum Wage Laws. Prior to referral, each worker shall be given a written statement, in the language in which he is most fluent, of all wage, payment schedules, field condition and other specifications which might influence his earnings.

10. The Interstate Clearance System shall be improved by requiring that a farm worker be given a copy of the job order and an explanation of the job specifications in his most fluent language, and by other means.

11. The Manpower Administration shall require the State employment service agencies to bring their rural day haul operations into conformity with employment service policies and standards. Where such policies and standards are not being met, the MA shall consider alternative methods to provide service to workers and employers.

12. Employment Service Manual procedures will be published relating to such subjects as conflict of interest, taking applications on farm workers, methods of guaranteeing that no employer is served who is not in compliance with any relevant law, and insuring compliance with Social Security procedures. Once published, performance under these procedures is to be closely monitored. In addition, existing procedures contained in the Manual, such as those on services to workers, statistical reporting, discrimination, and child labor, performed by State Employment Service agencies, shall be closely monitored.

13. The Manpower Administration will work to broaden State Civil Service requirements where necessary to allow individuals with general farm experience, nonagricultural experience and nonagricultural college degrees to become eligible for positions in the Employment Service serving rural and other clientele.26/

Unsatisfied with these developments, disturbed by attitudes in the DOL and concerned about the refunding in place of the entire network of state Rural Manpower Service and Employment Services aimed at farmworkers, a suit was filed in 1972 in the U.S. District Court, District of Columbia. This landmark litigation, National Association for the Advancement of Colored People, Western Region et al. v. Peter J. Brennen, Secretary of Labor, will be referred to herein as NAACP v. Brennen.27/

Initially, the court found that the defendant had constitutional, statutory, and regulatory obligations to require that the federal and state agencies serving migrant and seasonal farmworkers provide a full level of services to all in that class.28/ The court made specific findings of fact that state Rural Manpower Services and Employment Services offices had engaged in the following practices:

a. Denied minority farmworkers the full range of employment services, including testing, counseling, and job training and up-grading services.

b. Subjected minority farmworkers to racial, national origin, sex and age discrimination in recruiting and referring applicants for local, intra- and interstate employment.

c. Provided substandard day-haul placement services and facilities to minority farmworkers.

d. Processed interstate clearance orders that discriminated by allowing employers to predesignate farmworkers by race, national origin, sex and age.

e. Processed misleading, inaccurate and incomplete job orders for agricultural labor.

f. Referred migrant farmworkers to employers who violated minimum wage and child labor laws.

g. Referred farmworkers to employers who failed to make Social Security payments to the workers' accounts.

h. Referred migratory and seasonal farmworkers to jobs where the living and working conditions violated housing, health and sanitation laws.

i. Referred migratory farmworkers to segregated housing.

j. Referred farmworkers to unlicensed crew leaders or to crew leaders who operate illegally.

k. Failed to enforce the Federal Contractor Registration Act.

1. Failed to assist Federal officials, charged with enforcing the Immigration and Naturalization Act and to follow their own regulations and directives that have been enacted to protect job opportunities, wages and working conditions of domestic farmworkers.

m. Been unresponsive to farmworkers' complaints.29/

The court found that refunding the system in July 1972, when all this was known as a result of the Special Review Staff Report, and the failure to implement the Thirteen Point Plan until August 1972, demonstrated that the DOL had knowingly perpetuated discriminatory and otherwise improper practices.

The court, however, did not find the Thirteen Point Plan to be so defective as to warrant its abrogation and the substitution of a new plan. Thus, defendant federal officials, their successors, agents, and employees were ordered to end any present or future participation in acts of discrimination or other unlawful practices against migrant and seasonal farmworkers. The order specifically enumerated the unlawful actions listed above, though it did not limit the scope of the remedy to those items alone. The DOL was obligated to terminate funding to states where local agencies perpetuated discriminatory and unlawful practices. The basic guidelines for the states to follow to avoid loss of funding were the Thirteen Points.

After the initial order of May 3, 1973, three additional orders were issued. The first on June 26, 1973, the second on August 24, 1973, and the third on August 13, 1974.30/ The first two supplemental orders provided for on-site reviews, monitoring systems, complaint processing, and additional follow-up measures. The August 1974 order provided additional remedies and for further action to implement prior orders.

Provisions of the August 1974 order required each state and local employment service office to provide manpower services to migrant and seasonal workers on the same level as services provided to nonfarm workers. Job Bank information was to be extended to cover rural areas and each migrant and seasonal job applicant, with certain exceptions, was to have a full employment history and application filled out at the time the worker utilized an employment service offices. In carrying out this directive the DOL required that the name "Rural Manpower Service" be removed from all offices and that rural

manpower staffs be integrated into the regular staffs to provide a full range of services for rural workers and employers.31/

The court required insurance that all crew leaders, employers, and their agents utilizing day-haul services, comply with federal and state social and safety legislation. The August 1974 order specifically required that employment service personnel refer every suspected violation of state or federal law to appropriate authorities.

The development of affirmative action programs was required in connection with staffing employment service offices. The August 1974 order further required that each state agency have sufficient staff to affirmatively contact migrant and seasonal farmworkers to counsel them on the availability of employment services. Written information in Spanish and English was to be distributed explaining the rights of workers under federal statutes and regulations. Employment Services personnel were directed to assist in filing and processing complaints made by workers.

All interstate job orders were to be subjected to review to determine whether minimum standards set forth in the court's order were being met. Standards which had previously been contained in the massive 4,000-page Employment Security Manual were to be published, and this resulted in the promulgation of new regulations, effective February 24, 1977, replacing parts of the Employment Security Manual, the General Administration Letter 10-75, and certain other directives.32/

The court ordered modification and refinement of existing data gathering systems to bring them into compliance with EEOC standards. The accumulated information, which is designed to reveal discriminatory practices, is to be made available for inspection and review by plaintiffs, and by representatives of all bona-fide migrant and legal services organizations. The subsequently issued regulations widen the availability of that data.33/

The August 1974 order also provided for a federal-state monitoring system which at a minimum was to provide an official in each state to be responsible for monitoring compliance; on-site review of employment service offices, at least 25 percent of which are to be offices providing services primarily to rural residents and migrant and seasonal farmworkers; annual on-site reviews of a sampling of employment service offices by the federal staff; and a free right to inspect and review all monitoring reports.

The order also dealt with complaints. Each state and local employment service office was required to provide migrant and seasonal farmworkers with information about a complaint mechanism designed to review and resolve problems that might arise in the operation of any employment service offices.

The August 1974 order also directed the defendants to promptly initiate decertification proceedings under the Wagner-Peyser Act in instances where it appeared that states were not complying with the law. Such decertification was already provided for under the terms of the Wagner-Peyser Act.34/

Under §303 of the Comprehensive Employment and Training Act of 1973,35/ there is statutorily mandated funding for migrant and seasonal farmworker manpower programs. The Congress found that chronic seasonal unemployment and underemployment in agriculture, substantially aggravated by recent advances in technology and mechanization, is an important aspect of the nation's rural manpower problem and has a substantial effect on the entire national economy.36/ Therefore, it was provided that funds available under Title III, to the extent of not less than 4.625 percent, must be set aside by the Secretary of Labor to finance programs and activities consistent with addressing these problems.37/

National Ass'n of Farmworker Org'ns v. Marshall 38/ is an action that was brought by grantees under §303 of CETA, as a class, charging that the Secretary of Labor had refused to provide the mandated funding. In 1977, the court ruled that the secretary was without discretion in allocating such funds and that he must reserve sufficient monies for fiscal year 1977 to meet the minimum requirement. This funding was made available and used to finance the Migrant and Other Seasonally Employed Farmworkers Program, Youth Community and Conservation Projects, and Youth Employment and Training Programs.

Current Status of the Law

Programs of the United States Employment Service

The objectives of the USES and the affiliated state agencies include placing persons in employment by providing a variety of placement-related services to workers seeking employment and to employers who have job openings.39/ Services to job seekers include outreach programs designed to contact those who

may need, but are not using, USES services.40/ Other services include interviewing, testing, counseling, and referral to employment opportunities.41/ The Wagner-Peyser Act requires the USES "to maintain a farm placement service"42/ and, while separate rural manpower offices are no longer maintained, the legislative mandate is being carried out by serving farm operators by including their order information in the same Job Bank that serves other employers. Farmworkers, however, are no longer referred only to farm work and are specifically entitled to receive employment services on the same basis as non-farm workers.43/ For a state to qualify for federal funding, it must be in compliance with provisions of the Wagner-Peyser Act, related employment services legislation, and a host of regulations.44/ As a result of the litigation in NAACP v. Brennen, new regulations were promulgated, effective February 24, 1977, to replace existing directives:

> These regulations replace Sections 1765-1769, 2000-2008, and 2056-2059 of the Employment Security Manual. The regulations also replace General Administrative Letter (GAL) 10-75, Field Memorandum (FM) 360-75 and other current directives governing the provisions and administration of services to migrant and seasonal farm workers including the Secretary's "13 Points" of April 1972 to the extent that the "13 Points" relate to Employment Service activities under the Wagner-Peyser Act. These regulations supersede the regulations at 20 CFR Parts 601-604 to the (sic) extent that the regulations at parts 601-604 conflict with these regulations. The regulations also supersede all Department of Labor and State agency directives which conflict with the regulations.45/

Effective July 10, 1980, the 1977 regulations were modified and supplemented by substantial amendments.46/ The current regulations deal with the general areas of administrative procedure,47/ state program budget plans under Wagner-Peyser,48/ basic structure of the federal-state employment services system,49/ the over-all policies of USES,50/ a general listing of laws, executive orders, and regulations affecting the system,51/ and many additional matters. Of particular significance to this study are the regulations governing services to migrant and seasonal farmworkers,52/ those related to employment of aliens temporarily in farm employment,53/ and those setting up the Employment Service (ES) complaint system together with review and assessment procedures for state agencies.54/ The regulations governing discontinuance of services to employers are also pertinent.55/

Under the regulations, the services to be offered to migrant and seasonal farmworkers (MSFWs) are to be as extensive as those offered to workers in other fields.56/ Separate offices which offer only farm employment are prohibited.57/ Unless the MSFW applicant signs a waiver and in effect requests only job referral services, he is to be afforded the full range of available services. Even if the waiver is signed, the MSFW shall be offered training and supportive services.58/

Job orders may be placed not only by farmers, growers, and ranchers, but by farm labor contractors. The regulations provide that such a contractor must, however, be registered if federal or state law requires, before services can be made available.59/

The regulations set forth a number of rules governing ES-operated day-haul operations, including a requirement that local offices monitor compliance by employers, their agents, and crew leaders with a variety of federal and state laws such as those dealing with vehicle registration, wages, hours, working conditions, nondiscrimination, and the like.60/ Suspected violations are to be referred to appropriate enforcement agencies.61/

Requirements for intra-state and inter-state job orders are set forth in detail in the regulations.62/ The party requesting workers must sign a statement setting forth in detail terms and conditions of the job offer including many specific items listed in the regulations. Declarations must be made about the crop, nature of the work, period and hours of employment, projected starting date and length of the job,63/ wage or piece rate,64/ proposed deductions from wages,65/ perquisites (if any),66/ any guarantee of number of days or weeks of work,67/ existence of bonuses or work incentive payments,68/ and other matters. Further, an assurance must be made that applicable employment laws will be followed.69/ Wages and working conditions must be at the prevailing levels in the area or meet the minimum as required by law, whichever might be higher.70/ The employer must agree to pay transportation costs at prevailing levels.71/ Local workers must be in short supply before interstate orders can be filled.72/ Housing meeting federal standards must be available at no cost or in a public housing project when workers who cannot return to their residence each day are recruited.73/

The most recent version of the standards provides that if an employer, after placing an order, fails to notify the order-holding office at least 10 working days prior to the original date of need of a change in that date, the employer shall pay the first week's wages whether the workers are used or not.74/ Alternate work may be assigned if the job order so stated.75/ Workers do have an obligation to check in periodically in order to qualify for the week's pay.76/

In areas where the system serves Spanish-speaking individuals, all literature, job orders, and other documents must be available in English and Spanish.77/ There are also provisions for Spanish-speaking staff.

Other regulations deal with matters that may come up after the job order stage. For example, information must be conveyed to crews and families scheduled through ES if there is any change in crop or recruitment needs that will affect them.78/ Field checks are required to determine if the conditions stated in job orders exist. If violations of employment laws are suspected or detected, the matters are to be referred by ES officials to the appropriate federal or state agencies for enforcement.79/

Compliance data are to be collected by ES officers as part of a required monitoring program.80/ The objective of self-monitoring is to provide some assurance that state agencies are complying with the regulations that govern their operations. Data that are generated are proving to be voluminous on the local level, but are being combined to produce state, regional and national reports. Such data are to be disclosed to the public under specified conditons.81/

Migrant and seasonal farmworkers include migrant farmworkers, migrant food processing workers, and seasonal farmworkers.82/ A "migrant farmworker" is defined as "a seasonal farmworker who had to travel to do the farmwork so that he/she was unable to return to his/her permanent residence within the same day."83/ A "migrant food processing worker" is defined as "a person who, during the preceding 12 months, has worked at least an aggregate of 25 or more days or parts of days in which some work was performed in food processing..., earned at least half of his/her earned income from processing work and was not employed in food processing year round by the same employer, provided that the food processing required travel such that the worker was unable to return to his/her permanent residence in the same day."84/ Full-time students traveling in organized groups are not included in either of these definitions.85/ A "seasonal farmworker" is defined as "a person who, during the preceding 12 months, worked at least an aggregate of 25 or more days or parts of days in which some work was performed in farmwork, earned at least half of his/her earned income from farmwork, and was not employed in farmwork year round by the same employer."86/ A farm labor contractor is not an employer for the purposes of this definition.87/ Full-time students are not included as seasonal farmworkers.88/

The current regulations reflect the impact of NAACP v. Brennen and their very existence can be attributed in large measure to the efforts of the DOL to comply with the various orders that were issued in that case.

If a state agency fails to abide by the regulations, remedial action may be ordered if the problems are not corrected. This can involve imposition of special reporting requirements, restrictions on certain expenditures, implementation of special operating procedures for a set time, special training for personnel, removal of certain decision-making powers from the state, funding of the state on a short-term or quarterly basis, holding public hearings, disallowance of funds for a specific geographic area, and other measures.89/ If there are serious or continual violations, proceedings may be instituted to decertify the state. Decertification would result in the termination of the federal-state cooperative venture and the total cutoff of federal funding.90/ There have been no instances of decertification so far.

An important part of the existing law is the state agency ES complaint system and the federal ES complaint system. Both systems emerged as a result of the requirements imposed in NAACP v. Brennen. The types of complaints that will be heard fall into two categories. First, there are those alleging an employer's failure to comply with ES regulations. The other category takes in those complaints by an individual, organization, or employer about ES actions or omissions under the regulations.91/ The regulations establish procedures for processing complaints at the state level.92/ Federal ES complaint procedures are also prescribed and include a requirement that state agency administrative remedies be exhausted before a complaint can be handled by an ETA regional office.93/ There is no published source of decisions of state hearing officers in ES complaint cases. Copies are sporadically sent to the Office of the Solicitor, Department of Labor. As of April 1979, only one case was appealed to the federal level and that case was settled.94/

Remedies that may be used in the case of an offending state ES office have already been enumerated. The regulations also contemplate that an employer may be deprived of the use of the ES system under certain circumstances. The suspension of services will continue at least until the employer provides conclusive, documented evidence that the violation(s) has been corrected or does not exist.95/

Employees who are the victims of failures on the part of ES or employers to comply with employment regulations have other remedies. In the case of a wage violation or a violation under the Farm Labor Contractor Registration Act, the remedies provided by the Fair Labor Standards Act of FLCRA can be pursued without resorting to the Wagner-Peyser Act or the regulations promulgated pursuant thereto. However, there may be cases where the violations are directly an outgrowth of a violation of Wagner-Peyser

or related regulations, as would be the case where an ES office has put through a job order with false or misleading information or where the employer refuses to live up to the declarations made in the job order. In such instances, remedies may be sought in the courts and it appears that there is no duty to first exhaust administrative remedies.96/

In a class action where ES has been engaged in practices that are discriminatory, in violation of statute, or in violation of regulations, NAACP v. Brennen establishes firmly that the federal courts have jurisdiction to entertain such cases and where appropriate to use injunctive remedies to compel changes in ES practices.

In the case of an individual proceeding against a state ES office, staff members of such an office, or against employer users of ES services, there is ample authority to indicate that causes of action may indeed be stated to support injunctive and monetary relief.

Three cases of great importance in this connection are: (1) the Fifth Circuit decision in Gomez v. Florida State Employment Service,97/ (2) the U.S. Supreme Court decision in Cort v. Ash,98/ and (3) the recent decision of the U.S. District Court, District of Connecticut, in Jenkins v. S & A Chaissin & Sons, Inc.99/

Gomez was the decision that established for the first time an implied federal cause of action for money damages under the Wagner-Peyser Act. The suit grew out of events occurring in 1967 when plaintiff farmworkers went to a farm in Florida pursuant to an order placed through the Florida State employment Service and USES. When the workers arrived, they found the wages lower than those called for in existing regulations and the housing woefully below required standards. It was charged that the Florida State Employment Service had failed to check to see whether the farmer was in compliance and, further, that the farmer had intentionally misled state officials. Plaintiffs asserted that they had suffered money damages and brought an action claiming a federally created remedy under Wagner-Peyser and also a cause of action under certain civil rights acts. The court found that a cause of action was stated under Wagner-Peyser because plaintiffs were the group protected under the statute, because the purpose of the act and legislative history pointed to an intent on the part of Congress to allow relief beyond the secretary's cutting off funds for the state or terminating employment services to the farmer and because civil suits under local law provided no meaningful remedy. The court noted that federal jurisdiction did not have to be based on diversity plus a claim for the requisite jurisdictional amount inasmuch as there is original jurisdiction in the federal courts with respect to any cause of action arising under a statute regulating interstate commerce. The court also found that a cause of action was stated under the enumerated civil rights acts and that jurisdiction existed on that basis as well.

The U.S. Supreme Court in Cort v. Ash (1975) set forth the following test to determine whether an implied federal cause of action has been stated:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' -- that is, does the statute create a federal right in favor of the plantiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plantiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?100/

The question that immediately arises is whether anything in Cort requires a different result in Gomez. The decision in Chaissin, while only at the district court level, spoke directly and with great clarity to this concern.

First, the Chaissin court noted that there is an express provision for a "farm placement service" in Wagner-Peyser and that it is thus certain that the Congress intended to provide special benefits, particularly to migrants for whom the statute is designed. Secondly, Cort did not say that the legislative intent to create a cause of action has to be expressed, thus, the analysis in Gomez which examines the legislative history, the purpose of the statute, and the statute itself, which nowhere denies such a right, is still a valid analysis. The third part of the Cort test raised the question of whether the private remedy would be consistent with the underlying purposes of the legislative scheme. The Chaissin court saw no inconsistency and was unimpressed with the argument that the private cause of action, if permitted, would conflict with the administrative complaint procedure now in the regulations. The complaint procedure, as the court noted, does not provide for the recovery of money damages, but only requires the employer to correct violations or risk loss of use of employment ser-

vices. Finally, Cort raised the question of remedies available in state courts, and the Chaissin court felt that nothing has changed since Gomez and that civil suits under local law cannot afford migrant workers adequate protection.

The Chaissin analysis is compelling. There is no reason to anticipate that there will be any substantial departure from it. Of course, there have been a number of other cases since Gomez, following its lead, and -- in some instances -- refining its application. For example, in Vasquez v. Ferre,101/ the court held that the state that receives the order for recruitment is solely responsible for inspection and enforcement of the standards of the act and regulations so that an action against the supplying state will not stand simply because the receiving state fails in its obligation. Gomez was interpreted in 27 Puerto Rican Migrant Farmworkers v. Shade Tobacco Growers Agricultural Ass'n 102/ as applying only to a violation of a specific federal regulation which deprives a worker of the fundamentals of human dignity. Thus, an employer's failure to provide workers with hot lunches was found to be beyond the subject matter jurisdiction of the federal courts. However, in Galindo v. DelMonte Corp.,103/ where the available work was inconsistent with the description in the work order which induced the migrant workers to travel to the area, the workers were deemed to have a cause of action. Examples of such inconsistencies are severe wage reductions and failure to pay the minimum wage.

In Abraham v. Beatrice Foods Co,104/ a class action brought against both private and state defendants growing out of alleged violations of the Wagner-Peyser Act and regulations promulgated thereunder, damages were not sought, just injunctive relief. The case grew out of a situation where the state employment office approved a clearance order and workers were recruited in Louisiana to come to Wisconsin. The recruited workers found the housing inadequate, the work insufficient, and not available on the terms stated in the job order, The question of sovereign immunity was raised in connection with the suit against the state and its officers, but the court found under the facts alleged that the State of Wisconsin had consented to have the defendant agency sued in federal court. Further, the court found sovereign immunity to be no bar to a suit against state officials where the prayer was for declaratory or injunctive relief.

The state ES offices have been allowed some discretion in implementing the system for recruitment of agricultural workers. For example, in DeGiorgio Fruit Co v. Department of Employment,105/ a state's refusal to supply workers to an employer whose present employees were on strike was found to be a reasonable referral standard. In Elton Orchards v. Brennan,106/ simplification of administrative efforts was found to provide a rational basis for allowing some employers to employ alien workers though orders by other employers for such workers were not filled. The complainant had applied for alien workers but was required to accept all domestic workers since there was an adequate supply at the time to fill its needs. Accordingly, where several employers have requested skilled and experienced aliens from the British West Indies, as an example, and some less desirable domestic workers are available, it is not an abuse of administrative discretion to require one grower to take the domestic workers while assigning aliens to other growers.

Programs of the Office of National Programs

The Office of National Programs is part of the Employment and Training Administration of the U.S. Department of Labor. It administers a number of employment and training programs including Migrant and Other Seasonally Employed Farm Worker Programs, Youth Community and Conservation Projects (YCCIP), and Youth Employment and Training Programs (YETP). The last two programs are for youths who are members of migrant and other seasonally employed farmworker families. All three programs are funded under §303 of the Comprehensive Employment and Training Act (CETA).

The migrant and other seasonally employed farmworkers programs are designed to improve agricultural employment conditions for those who remain in the agricultural labor market and to equip those who seek alternative job opportunities to compete in other labor markets and to secure stable year-round employment with an income above the poverty level.107/ Prime sponsors, certain public agencies, and appropriate non-profit organizations are eligible to receive funding if their grant applications receive favorable treatment.108/ Examples of grantees for Program Year 1979 include the California Human Development Corporation, Widnor, California; Proteus Adult Training, Visalia, California; the Florida State Department of Education, Tallahassee, Florida; Migrant and Seasonal Farmworkers, Raleigh, North Carolina; the Minnesota Migrant Council, St. Cloud, Minnesota; and Motivation Education and Training, Inc., Cleveland, Texas. There were 59 grant recipients located in 48 states and Puerto Rico in 1979.109/

Each program is designed to meet the special needs of those in its particular area, but may include classroom and occupational training, on-the-job training, work experience, job development, job

placement and communication assistance, health services, child care, nutritional services, legal aid, and other supportive services.110/

The 1975 program of one grantee, Migrant and Seasonal Farmworkers Association, Inc., provides an example of the kinds of services that may be provided. The association paid the cost of books, tuition, necessary transportation, and other related fees for certain individuals attending vocational classroom training at state technical institutes, a private non-profit cooperative offering training in eel fishing, an auto mechanics training center, and the National School of Heavy Equipment.111/ The students were also paid the minimum hourly wage for the number of hours spent in training. In addition, a work experience program was offered which was designed to train participants through actual performance in staff positions within the association or in other non-profit organizations. The association paid the participants' wages and reimbursed them for traveling expenses.112/ Further, on-the-job training was provided for some participants pursuant to employment training agreements negotiated with public and private employers. The association paid the trainee's employer an amount not to exceed half the starting wage rate for the position multiplied by the number of training hours for the occupation. The employer was in turn required to pay the usual entrance wage rate provided it was at least equivalent to the federal minimum wage. In 1975, the program offered on-the-job training in meat cutting, auto mechanics, and bulldozer operation.113/ Other employment and supportive services were offered including testing, counseling, placement, health care, nutrition assistance, child day care, family counseling, adult basic education, emergency assistance, and referrals to other agencies.114/

Agencies that receive grants may qualify for funding from other federal sources where joint funding is authorized. For example, a §303 CETA grantee may also qualify for funding under the Community Food and Nutrition Program administered by the Community Services Administration pursuant to the Economic Opportunity Act of 1964.115/ Another situation where joint funding may be available is through HEW, which has funding for Migrant Health Grants.116/

The current regulations applicable to the Migrant and Other Seasonally Employed Farmworkers Program became effective May 25, 1979.117/ The regulations set standards of eligibility so as to limit assistance to migrant and seasonal farmworkers and then only if the individual has been identified as a member of a family which receives public assistance or whose annual family income does not exceed the higher of either the poverty level or 70 percent of the lower living standard income level.118/ The objective, then, is to assist families in either settling out or improving their situation if they remain in migrant and seasonal farm work.

One important change resulting from the new regulations appears in the basic definition of seasonal farmworker. This is critical because it affects who can qualify as a participant in one of the funded programs. Previously, a farmworker was eligible as "seasonal" only if he did not work more than 150 consecutive days at any one establishment. This limit has been removed, but the applicant must still meet the new definition, which reads:

> "Seasonal farmworker" shall mean a person who during the 24 months preceding application was employed at least 25 days in farm work or earned at least $400 in farm work; and who has been primarily employed in farm work on a seasonal basis, that is, without a constant year-round salary.119/

Or, a participant may meet the definition of "migrant farmworker," which remains unchanged in the new regulations:

> "Migrant farmworker" shall mean a seasonal farmworker who performs or has performed farm work during the preceding 24 months which requires travel such that the worker is unable to return to his/her domicile (permanent place of residence) during the same day.120/

The Employment and Training Administration of the DOL, through its Office of National Programs, has two programs aimed specifically at young people who are members of migrant and other seasonally employed farmworker families.

The first is the Youth Community and Conservation Projects (YCCIP), which is designed to fund programs offering employment to young people, ages 16 through 19, in well-supervised work with a tangible output which will be of benefit to the community. Two percent of the funding for the entire YCCIP program is to be made available for projects designed to reach migrant and seasonal farmworker youth.121/ For program year 1979, a total of $2.1 million will be available. A notice appeared on March 2, 1979 announcing the competition for grants.122/ Regulations have been promulgated to supplement the general YCCIP regulations and to deal specifically with the program discussed herein.123/

The second program aimed at young people who are members of migrant and seasonal farmworker

families is a special version of the Youth Employment and Training Programs (YETP). The overall objective is to establish programs designed to make a significant long-term impact on the unemployment problems of youth. A variety of training and employment programs are possible so long as they are designed to enable participants to secure suitable and appropriate unsubsidized employment in the public and private sectors.124/ While the programs are to be designed to reach those in the 16-21 age group, the program aimed at children of migrant and seasonal farmworkers may in some instances serve youths ages 14 and 15 who are still in school.125/ Two percent of the funding for the general YETP program must be made available for eligible youth who are members of migrant and seasonal farmworker families.126/ For program year 1979, this translates into $12.1 million.127/ The notice mentioned above in connection with the YCCIP program also announced the current competition for grants for this special aspect of the YETP program.128/ Regulations have been promulgated to supplement the general YETP regulations and to deal specifically with the aspect of that program discussed herein.129/

Evaluation

ES Laws and Their Impact

The vigorous initiative of plaintiffs in NAACP v. Brennen has resulted in major changes in the administration of employment services programs for farmworkers. While problems continue to arise occasionally in certain offices, the overall impact of the effort to implement the "13 Points," first by administrative directive and then by regulations, has had a salutary effect and has resulted in a broader range of services being made available to migrant and seasonal farmworkers on a level close to that for non-MSFWs.

However, the question remains as to whether the effectiveness of the reforms has been blunted by a reduced use of ES offices by farm employers. This decline has been noticeable in many states, although current indications are that it may not be continuing at the pace observable three or four years ago and that there may even be some employers coming back and again placing job orders. It is extremely difficult to account fully for this decline, but without question certain factors have been important. In Ohio, for example, it has been to the economic advantage of some farmers to move to less labor-intensive crops such as corn and soybeans. Other farmers who have elected to stay with crops that have been traditionally labor intensive have been moving more and more to mechanization. In 1978 in Ohio, roughly 25 percent of the tomato harvest was mechanized, but just one year later, in 1979, the figure was close to 80 percent.130/ In addition, some farmers, unhappy with the "looking over the shoulder" phenomenon that occurs when ES services are sought, recruit their crews directly. While a good deal of the effort is aimed at obtaining local workers, some farmers are engaging in out-of-state recruiting.131/

If the number of orders is down, this is likely to have an effect on the number of seasonal and migrant farmworkers using ES offices. Potential users may tend to look elsewhere to make the contacts that will net needed jobs. There is no question that whatever the cause, the number of migrant and seasonal farmworkers using employment services has been dropping. National figures from the files of the DOL illustrate this.132/ In fiscal year (FY) 1976, total available applicants in the migrant farmworker category totaled 119,749 and 118,584 in the seasonal farmworker category. If FY 1977, while the number of total applicants in the seasonal farmworker category climbed slightly to 126,632, the number of applicants available in the migrant farmworker category dropped to 112,584. If FY 1978, total migrant farmworker applicants were down to 88,251 and seasonal farmworker applicants to 107,891. While the general decline in the number of jobs available and employers bypassing the system may account for these figures in part, there are other factors at work. To the extent that those in migrant streams have been settling out, the number of persons seeking services is bound to drop. Thus, rather than drawing negative associations from the decline in the number of MSFWs using the system, it might be argued that the trend attests to the success of the system in bringing stability to certain individuals and families, thus obviating the necessity for use of the employment services year after year.

The same data from the DOL 133/ reveal increasing effectiveness of employment services offices to migrant and seasonal farmworkers. The percentage of total applicants in the migrant farmworker category for whom job development contacts were made increased from 6.38 percent in FY 1976 to 9.69 percent in FY 1977 to 14.17 percent in FY 1978. The same pattern appears for seasonal farmworkers with such contacts being made for 5.02 percent in FY 1976, 6.58 percent in FY 1977, and 9.21 percent in FY 1978. The percentage of total migrant applicants counseled rose from 2.89 percent in FY 1976 to 3.5 percent in FY 1977 to 5.5 percent in FY 1978. Increases are also noted in counseling of seasonal farmworkers starting at 3.96 percent of of total applicants in FY 1976, increasing to 4.81 percent in FY 1977, and

reaching 6.54 percent in FY 1978. Referrals to support services have substantially increased through the years with the percentage of migrant farmworker applicants so assisted at 9.03 percent in FY 1976, 19.12 percent in FY 1977, and 25.7 percent in FY 1978. Referrals to support services for available applicant seasonal farmworkers stood at 4.66 percent in FY 1976, rose to 7.98 percent in FY 1977, and stood at 10.44 percent in FY 1978. As of FY 1978, all of these figures stand substantially above national figures for all non-MSFW applicants. Of the 20,313,986 in this category, 7.14 percent benefited from job development contacts, 5.10 percent were counseled, and only 4.36 percent were referred to support services. In the areas of testing and enrollment in training, the figures for migrant and seasonal farmworkers are not as impressive. However, the overall picture is most encouraging.

The institution of the Monitor Advocate System 134/ has had positive effects. In each state, one individual is designated to head this system and is responsible for receiving, investigating, and referring complaints about violations of state and federal employment laws. Another function of the Monitor Advocate is to conduct annual on-site reviews of local ES offices that have a substantial involvement with MSFW . The purpose of the on-site reviews is to ascertain whether local offices are complying with federal regulations and other directives that apply to their activities.

One of the services that ES offices are required to supply is referral to educational, retraining, and other support programs.135/ In this connection, many ES offices have steered workers to the programs such as those created under §303 of CETA. In some instances, a large percentage of the initial referrals to §303 CETA programs come from the ES offices.136/ Thus, while ES may not be directly involved in sponsoring and operating such programs, it has had an important role in the success of many of the educational and retraining efforts.

While crop changes and increased mechanization have reduced the number of positions, the need for a substantial hired farm labor force remains. Thus, the role of rural manpower services in ES is certain to be a continuing one. While there are no longer separate Rural Manpower Offices within the Employment and Training Administration at the regional and national level, there are still people in all of the state offices who are specifically assigned in this area and have appropriate titles. There is a chief of rural manpower or equivalent position in every state system.137/ The emphasis is no longer strictly on farm placement but includes a wide range of opportunities including those in rural industrial and commercial enterprises. For example, in FY 1978, 43.93 percent of migrant farmworker applicants were referred to agricultural jobs whereas 17.41 percent were referred to nonagricultural industries. During the same period, 27.26 percent of the seasonal farmworker applicants were referred to agricultural jobs whereas 27.86 percent were referred to jobs in nonagricultural industries.138/

The efforts of Rural Manpower Services within state ES offices deserve to be encouraged with careful monitoring to insure compliance with current regulations and to prevent "backsliding" to the situation that existed in many offices at the time of the inception of litigation in the NAACP v. Brennen.

MSFW Programs and Their Administration

The programs of the Office of National Programs are important from a humanitarian standpoint and from the perspective of the best interests of the economy as a whole. The Migrant and Other Seasonally Employed Farm Worker Programs have reached substantial numbers of individuals. In FY 1977, for example, approximately 245,000 eligible persons were served. Approximately 16,000 entered jobs ranging from skilled trades to technical positions in the medical field. Some 4,000 participated in work experience projects, approximately 5,000 in on-the-job training, some 17,600 in classroom training, and about 218,000 received supportive services such as health, medical, nutritional, legal assistance, and child care.139/

These programs have not operated without problems, however. A review of the 1975 program of the Migrant and Seasonal Farmworkers Association Inc., Raleigh, North Carolina, revealed certain deficiencies.140/ The resulting Report of the Comptroller General of the United States, released September 8, 1977, outlined certain administrative problems.141/ However, these were subject to being corrected with imposition of stronger controls and closer monitoring. One of the more disturbing aspects of the report was the indication that job placement had not been working out in a number of instances.142/ While the placement rate was at 108 percent of the anticipated level, and all of the placements were in "long-term" jobs (more than 150 days), 49 percent of the participants terminated in fewer than 90 days.143/ This was far below the DOL's performance standard which set 75 percent as the level of those placed who should stay on the job more than 90 days.144/ While it is not known whether this problem persists in the North Carolina program or whether it exists currently in other programs, it is the kind of thing that needs careful attention to avoid damaging the future of the entire program.

Again, in connection with the North Carolina program for the period studied, the emphasis of the association was on providing alternatives to agricultural labor. This emphasis is reported to have been in response to the needs and desires of involved farmworkers.145/ While the stated objectives of MSFW programs are to provide employment and supportive services directed toward either providing alternatives to agricultural labor or improving the lifestyle of farmworkers who wish to remain in agriculture, it is reasonable to expect pressure for the kind of emphasis present in the North Carolina program.

Where farm employers are cutting back on hired labor by switching crops or mechanizing, the remaining jobs often go to local workers. Thus, migrant workers are faced with the problem of settling-out and require a great deal of assistance including education and retraining. For example, in 1979 it is estimated that as many as 14,000 jobs in Ohio agriculture were displaced by a dramatic turn to mechanization by tomato farmers.146/ For those who enter the migrant stream in Texas in early spring, after having been involved in the local onion harvest, the next stop has often been Michigan for the cherry season. After that, it has been the Ohio tomato harvest and then back to Texas for the peanut or soybean harvest.147/ When the Ohio employment opportunity is eliminated from the cycle, affected workers must either find several weeks of work elsewhere or face up to the reality that following the migrant stream may no longer be feasible. This leads to settling out in Texas, Ohio, and elsewhere. At this point, the services offered by MSFW programs become vital. Whatever the inadequancies of these programs, their survival is essential since pressures to settle out are likely to increase rather than decrease in coming years. Whether contemplated funding levels will remain sufficient remains to be seen, but it is likely that careful consideration will need to be given to the possibility of pouring more resources into MSFW programs.

General Policy Considerations

There are fundamental policy choices that need to be constantly reexamined in this area of the law, given the fast-moving pace of events. Clearly, there will be a continuing need to provide a viable support services system to serve the needs of farm employers. This system ought not to be allowed to become so encrusted with regulations and technicalities that its use is actually discouraged. On the other hand, the system must be designed to regulate employment in agriculture sufficiently to protect those who are in the hired farmworker force, particularly those who do not have the benefit of a strong union. The balance is a delicate one and needs fine-tuning from time to time. It is apparent, as one views employment services law, that other regulatory schemes become involved in the overall administration of the ES system. This discussion has demonstrated where child labor laws, hour laws, OSHA regulations, and other employment-related laws fit in. To the extent that the whole system of employment law as it relates to agriculture has become exceedingly complex and technical, there is little doubt that the employment services area is burdened by tremendous detail, inconsistencies, and technicalities. It seems apparent that a comprehensive review of the law affecting the agricultural employment sector is badly needed.

In addition, there is the matter of the future of migrant farmworkers. Should an aggressive policy be established to phase out this phenomenon in our society? There are sharply differing views, even among migrant farmworkers. If careful studies based on the best available data indicate that farm operators are likely by some point in the future to be able to function effectively without the migrant farmworker force or with a very small force, it may well be that a stronger policy of encouraging settling out should be reflected in the law.

Recommendations

The recommendations in this area fall into five major areas: (1) future level of governmental support for ES and MSFW programs; (2) nature of training provided in various programs; (3) the attractiveness of ES services to farm operators; (4) goals for the foreseeable future; and (5) continuing study of the legal and economic aspects of systems now in place.

Future Government Support

It seems important that there be continued funding at adequate levels of ES programs and MSFW programs. The needs for the services offered by these programs, particularly the MSFW programs, may intensify in spite of present trends to the contrary. It is essential that close attention be given to employment trends in agriculture to anticipate upsurges in displacement and to assure that adequately funded programs are available in the right localities. To insure that the drop in usage of these programs is not the result of a failure to adequately communicate with those who are eligible, more

emphasis should be placed without delay on outreach efforts.

Nature of Training

Attention should be given to the developing need in agriculture for persons with special skills, with training programs being geared to offering instruction in machine operation, chemical application, farm equipment mechanics, agronomy, dairying, and whatever else appears to be appropriate. This will insure not only the betterment of hired workers, but an adequate hired labor force for farm operators.

Attractiveness of ES Services

With respect to the ES system, efforts should be made to make the use of available services by farm employers as attractive as possible. How the present situation can be improved is a puzzling question, but certain ideas merit study and consideration. For example, put greater emphasis on providing counseling and referral services to employers as they attempt to meet regulations, establish satisfactory bookkeeping systems, construct employee housing, establish employee insurance programs, and deal with similar concerns. In addition, review the entire regulatory scheme with which ES offices must contend, with a view to eliminating unnecessary, ambiguous, overly technical, and otherwise ineffective regulations. No farmer escapes the requirements of employment-related regulations by bypassing ES, but the employer does avoid an immediate confrontation with the regulators. Many will do this as long as regulations are viewed with suspicion and dismay. Regulatory schemes will never become popular with farm employers, but they ought to be subject to being made more palatable.

Goals of ES and MSFW Programs

ES programs and MSFW programs are goal-oriented. Thus, it is necessary to have objectives well in mind and clearly stated. Currently, the goals seem reasonably well defined: supply employers' needs, improve the lot of those workers electing to remain in seasonal and migrant farm employment, and offer retraining and settling-out services to those desiring them. If a heavy emphasis is to be placed on the last goal, with a view to phasing out the migrant phenomenon, more radical steps need to be studied. One possibility is to explore the possibility of more itensive rural development programs designed to bring to appropriate geographical regions seasonal work in industrial plants that can compliment the seasonal demands of agriculture, thus providing year-round employment opportunities for a hired work force. Business studies, economic studies, labor supply studies, and market studies would be required to test the feasibility of such an idea. For example, would it be feasible for farmers in some particular area to form a cooperative and, with the assistance of the regional Bank for Cooperatives, establish an enterprise manufacturing and installing irrigation equipment, which could curtail operations to release a large part of the employees during the farming season for on-farm production work? If the on-farm work is skilled or semi-skilled such an arrangement might attract year-round employees to rural areas.

Continued Study of the MSFW Problem

It is apparent that in order to give consideration to the recommendations set forth above, there will be a need for ongoing study of the trends in demand for hired farm labor and of the economic implications of what has been suggested. Such a study could conveniently be a part of the comprehensive review of current farm labor policy that is proposed in the chapter section that concludes this monograph.

Notes to Chapter 10

1. NAACP, Western Region v. Brennen, 360 F. Supp. 1006, 1009 (D.D.C. 1973).

2. 29 U.S.C. §§49-49k (1976).

3. See History following 29 U.S.C. §49 (1975).

4. Farm Labor Fact Book (1969) at 102.

5. 29 U.S.C. §49 et seq. (1976).

6. NAACP, Western Region v. Brennen, 360 F. Supp. 1006, 1009 (D.D.C. 1973).

7. Ib.
8. 29 U.S.C. §49c (1976).
9. 29 U.S.C. §49g (1976).
10. 20 C.F.R. §§601.5, 601.6, 604, 605 (1980).
11. 29 U.S.C. §49h (1976).
12. Farm Labor Fact Book (1969) at 102.
13. Id. at 103.
14. Id. at 103-104.
15. Clearance Order: Rural Manpower Job Offer, Form #MA 7-90 (1-74).
16. NAACP, Western Region v. Brennen, 360 F. Supp. 1006, 1009 (D.D.C. 1973).
17. Ib.
18. 20 C.F.R. §603.3 (1979).
19. Morris, "The Impact of Federal Legislation on Migrant Farmworkers," 12 Suff.U.L.R. 845 (1978).
20. Green, Migrant and Seasonal Farmworker Programs, U.S. Department of Labor E.T.A. at 18.
21. Ib.
22. Morris, supra note 21, fn. 132, at 846.
23. 29 U.S.C. §§801-992 (1976).
24. General Administration Letter No. 10-75 at 18-20.
25. NAACP, Western Region v. Brennen, 360 F. Supp. 1006, 1010 (D.D.C. 1973).
26. NAACP, Western Region v. Brennen, 360 F. Supp. 1006, 1020-21 (D.D.C. 1973).
27. Supra note 5.
28. See Declaratory Judgement and Injunction Order, 5 EPD ¶8637 (p. 7915-17) (1973).
29. Ib., also at 360 F. Supp, 1006, 1014 (D.D.C. 1973).
30. Supra note 5.
31. G.A.L., supra note 26 at 21.
32. 42 Fed. Reg. 4722 (1977).
33. 20 C.F.R. §653.110 (1979), as amended 45 Fed. Reg. 39464 (1980).
34. 29 U.S.C. §49h (1976).
35. P.L. 93-203, Title III, Part A, §303, 87 Stat. 859, codified at 29 U.S.C., §873 (1976).
36. 29 U.S.C. §873(a)(1) (1976).
37. 29 U.S.C. §873(d) (1976), as amended.
38. No. 77-44 D.D.C. Oct. 7, 1977.

39. 20 C.F.R. §653.101 (1979), as amended 45 Fed. Reg. 39459 (1980).

40. 20 C.F.R. §653.107 (1979), as amended 45 Fed. Reg. 39460-39463 (1980).

41. 20 C.F.R. §653.101(a) (1979), as amended 45 Fed. Reg. 39459 (1980).

42. 29 U.S.C. §49b(a) (1976).

43. 5 EPD ¶8637 (p. 7916) (1973).

44. 1979 Cat. Fed. Dom. Assist. Programs at Item 17.207.

45. 42 Fed. Reg. 4722 (1977).

46. 45 Fed. Reg. 39457 et seq. (1980).

47. 20 C.F.R., pt. 601 (1979).

48. 20 C.F.R., pt. 603 (1979).

49. 20 C.F.R., pt. 602 (1979).

50. 20 C.F.R., pt. 604 (1979).

51. 20 C.F.R., pt. 651 (1979).

52. 20 C.F.R., pt. 653, subpt. B (1979), as amended 45 Fed. Reg. 39459-39466 (1980).

53. 20 C.F.R., pt. 655 (1979).

54. 20 C.F.R., pt. 658, subpts. E, G and H (1979), as amended 45 Fed. Reg. 39469-39674; 39476-39484 (1980).

55. 20 C.F.R., pt. 658, subpt. F, (1979), as amended 45 Fed. Reg. 39674-39476 (1980).

56. 20 C.F.R. §653.101(a) (1979), as amended 45 Fed. Reg. 39459 (1980).

57. 20 C.F.R. §653.101(b) (1979), as amended 45 Fed. Reg. 39459 (1980).

58. 20 C.F.R. §653.103(d) (1979), as amended 45 Fed. Reg. 39459-39460 (1980).

59. 20 C.F.R. §653.104(b) (1979), as amended 45 Fed. Reg. 39460 (1980).

60. 20 C.F.R. §653.106 (1979), as amended 45 Fed. Reg. 39460 (1980).

61. 45 Fed. Reg. 39464 (1980), to be codified as 20 C.F.R. §653.108(p).

62. 20 C.F.R. §653.108 (1979), replaced by 45 Fed. Reg. 39466-39468 (1980) to be codified as 20 C.F.R. §§653.500-653.503.

63. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(i),(ii),(iii),(iv).

64. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(vi).

65. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(vii).

66. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(viii).

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69. 45 Fed. Reg. 39467 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(xii).

70. 45 Fed. Reg. 39467 (1980), to be codified as 20 C.F.R. §653.501(d)(4).

71. 45 Fed. Reg. 39467 (1980), to be codified as 20 C.F.R. §653.501(d)(5).

72. 45 Fed. Reg. 39467 (1980), to be codified as 20 C.F.R. §653.501(d)(7).

73. 45 Fed. Reg. 39467 (1980), to be codified as 20 C.F.R. §§653.501(d)(2)(xv); §653.501(d)(6).

74. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(v).

75. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(v)(E).

76. 45 Fed. Reg. 39466 (1980), to be codified as 20 C.F.R. §653.501(d)(2)(v)(B).

77. 45 Fed. Reg. 39459 et. seq., to be codified as 20 C.F.R. §§653.102; §653.103(b),(c); §653.501(f),(h);

78. 45 Fed. Reg. 39468 (1980), to be codified at 20 C.F.R. §653.502.

79. 45 Fed. Reg. 39468 (1980), to be codified at 20 C.F.R. §653.503.

80. 45 Fed. Reg. 39694 (1980), to be codified at 20 C.F.R. §653.709.

81. 45 Fed. Reg. 39464 (1980), to be codified at 20 C.F.R. §653.110.

82. 20 C.F.R. §651.7 (1979), as amended by 45 Fed. Reg. 39458 (1980).

83. Ib.

84. Ib.

85. Ib.

86. Ib.

87. Ib.

88. Ib.

89. 20 C.F.R. §658.704 (1979), as amended by 45 Fed. Reg. 39482-83 (1980).

90. 20 C.F.R. §658.705 (1979), as amended by 45 Fed. Reg. 39483-84 (1980).

91. 20 C.F.R. §658.401(a) (1979), as amended by 45 Fed. Reg. 39469 (1980).

92. 20 C.F.R. §658.410-416 (1979), as amended by 45 Fed. Reg. 39469-49472 (1980).

93. 20 C.F.R. §658.421(a) (1979), as amended by 45 Fed. Reg. 39472-39473 (1980).

94. Correspondence, Office of Solicitor, U.S. Department of Labor, April 15, 1979.

95. 20 C.F.R. §658.502 (1979), as amended by 45 Fed. Reg. 39474-39476 (1980).

96. Jenkins v. S. & A. Chaissin & Sons, Inc., 449 F. Supp. 216, 224 (S.D.N.Y. 1978).

97. 417 F.2d 569 (5th Cir. 1969).

98. 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

99. 449 F. Supp. 216 (S.D.N.Y. 1978).

100. 422 U.S. 66 at 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26, 36 (1975).

101. 404 F. Supp. 815 (D.N.J. 1975).

102. 352 F. Supp. 986 (D.C. Conn. 1973), affirmed 486 F.2d 1052 (2d Cir. 1973).

103. 382 F. Supp. 464 (N.D.Ill. 1974).

104. 418 F. Supp. 1384 (E.D. Wis. 1976).

105. 56 Cal. 2d 54, 13 Cal. Rptr. 663, 362 P.2d 487 (1961).

106. 508 F.2d 493 (1st Cir. 1974).

107. 20 C.F.R. §689.101(b) (1978), as amended.

108. 20 C.F.R. §689.105(a) (1978), as amended.

109. 44 Fed. Reg. 11856 (1979).

110. 1979 CAT., supra note 46 at 648.

111. Report of the Comptroller General, Stronger Controls Needed Over the Migrant and Seasonal Farmworkers Association Program in North Carolina, Sept. 8, 1977, at 2-3.

112. Ib.

113. Ib.

114. Id. at 506.

115. Pub. L. No. 95-568, Title II, §222(a)(1), 92 Stat. 2426, codified at 42 U.S.C. §2809 (1978).

116. Public Health Service Act, Pub. L. No. 95-626, Title III, §329, originally codified at 42 U.S.C. §329, originally codified at 42 U.S.C. §247d (Supp. I, 1977), now codified as amended by Pub. L. 94-278, Title VIII, §801(a), 90 Stat. 414 at 42 U.S.C. §254b (Supp. II 1978).

117. 44 Fed. Reg. 30594 (1979), to be codified as 20 C.F.R., pt. 689.

118. 44 Fed. Reg. 30597 (1979), to be codified as 20 C.F.R. §689.107(a)(3).

119. 44 Fed. Reg. 30596 (1979), to be codified as 20 C.F.R. §689.103.

120. Ib.

121. 29 C.F.R. §97.903 (1979).

122. 44 Fed. Reg. 11857 (1979).

123. 29 C.F.R. §§97.900-.922 (1979) supplementing 29 C.F.R.,pts. 94-99 (1979); §97.900(f) added at 44 Fed. Reg. 37911 (1979).

124. 1979 CAT., supra note 46 at 655.

125. 29 C.F.R. §97.1019 (1979).

126. 29 C.F.R. §97.1003 (1979).

127. 44 Fed. Reg. 11857 (1979).

128. Ib.

129. 29 C.F.R. §§97.1000-97.1024 (1979), supplementing 29 C.F.R., pts. 94-99 (1979); §97.000(e) added by 44 Fed. Reg. 37911 (1979).

130. Conferences with John Stark, Chief Rural Manpower, Ohio Bureau of Employment Services, May 26, 1976, July 27, 1979.

131. Ib.; compare Brown, "Displaced Migrants Threaten New Strike," Col. Citz. J. (July 12, 1979) at 3.

132. Data supplied by Office of Solicitor, U.S. Department of Labor.

133. Ib.

134. 20 C.F.R. §653.108, as amended by 45 Fed. Reg. 39462-39464 (1980).

135. 20 C.F.R. §653.101(a), as amended by 45 Fed. Reg. 39459 (1980).

136. See the outreach scheme of 20 C.F.R. §653.107(c) (1978), as amended by 45 Fed. Reg. 39460-39462 (1980).

137. Note 132, supra.

138. Ib.

139. 1979 CAT., supra note 46 at 648.

140. Rep't of the Compt. Gen., supra note 113.

141. Ib.

142. Id. at 17-18.

143. Id. at 17-18.

144. Id. at 18.

145. Id. at iii.

146. Note 132, supra.

147. Perez, "Migrant Farm Laborers Goal: Union Rights," Col. Dispatch (Dec. 17, 1978) at F-9.

Chapter 11

AGRICULTURAL LABOR-MANAGEMENT LAW

This chapter examines state and federal labor relations law as it relates to agricultural labor-management relations. It includes a review of the National Labor Relations Act 1/ (NLRA) and a discussion of the rationale of the NLRA agricultural exemption. A general discussion of developments in certain states is highlighted by the California Agricultural Labor Relations Act 2/ (hereinafter, the California Act) and the Arizona Agricultural Employment Relations Act 3/ (hereinafter, the Arizona Act).

Historical Development of Labor Relations Legislation

Development in General

Although early combinations of workers were found to be unlawful conspiracies, the common law came to accept unionization of workers as a lawful activity consistent with public policy.4/ However, there was nothing in the common law that prohibited employers from interfering with workers' efforts to organize or refusing to bargain once a union was formed.5/ Since employers could hire and fire whom they pleased, union members could be excluded from their employ. Such legal principles fostered bitterness, unrest, considerable violence, and economic disruption as the forces of labor and management clashed.

Government intervention came when the courts began to issue injunctions to restrain coercive activity by employees. This led to the charge that the courts were supporting management in labor disputes to the disadvantage of labor organizations, and eventually resulted in the passage of the Norris-LaGuardia Anti-Injunction Act in 1932.6/ This legislation severely limited the power of the federal courts to issue injunctions in labor dispute cases.

In 1935, Congress enacted the National Labor Relations Act to settle the industrial unrest which had typified labor-management relations for many decades.7/ Popularly known as the Wagner Act, the NLRA was designed to prevent conflict by the encouragement of collective bargaining. Conciliation, mediation and arbitration provisions were included to foster settlement of disputes. Major amendments were added in 1947 to equalize the rights granted to labor organizations and management.8/ The 1935 Act, as amended, is currently referred to as either the National Labor Relations Act or the Labor-Management Relations Act.

The NLRA expressed the conviction that federal legislation could prevent or minimize "industrial strife which interferes with the normal flow of commerce and with the full protection of articles and commodities for commerce...."9/ The Congressional declaration of purpose and policy indicates:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare and to protect the rights of the public in connection with labor disputes affecting commerce.10/

The federal legislation pre-empted much of the state regulation of labor-management relations. Some states have "little NLRAs," but only on those phases of commerce unregulated at the federal level.11/

Under the NLRA, the employer has an affirmative obligation to bargain collectively with employee representatives.12/ The parties must meet in good faith to discuss wages, hours, and terms of employment. However, they are not compelled to come to an agreement. Economic warfare may still result, but theoretically it is to take place within the bounds of the statute. The right to strike, while not

created by statute, is protected under NLRA.13/

Not all methods of economic warfare are available to labor organizations. Under the NLRA and certain state statutes, labor organization unfair labor practices are enumerated and may not be legally engaged in.14/ Certain activities on the part of the employer may also constitute unfair labor practices and constitute violations of the legislative scheme.15/ Remedies are provided in the event prohibited activities are engaged in. The law, which has grown out of construing rights and duties under NLRA, is voluminous and complex.16/

Agricultural Exemption

Agriculture is exempted under both state and federal statutes in the definition of "employee." The critical language in NLRA reads in part:"... but shall not include any individual employed as an agricultural laborer ...."17/ In spite of a statutory definition of agricultural labor, there has been monumental difficulty in drawing the line between covered and noncovered activities.18/ An example of a state exemption is found in Minnesota labor-management legislation where the definition of "employee" is qualified: "... but does not include any individual employed in agricultural labor...."19/

Curiously, when the Wagner Act was being considered, none of the agricultural unions sent representatives to testify at the congressional hearings.20/ During the debate in the House of Representatives, Mr. Marcantonio tried to have the agricultural exemption stricken, arguing: "It is a matter of plain fact that the worst conditions in the United States are the conditions among the agricultural workers."21/ He predicted that "a continuance of these conditions is preparing the way for a desperate revolt of virtual serfs."22/ He concluded, "...there is not a single solitary reason why agricultural workers should not be included under the provisions of this bill."23/

However, opposition was strong and it appeared that if any labor legislation was to be enacted, it would be necessary to compromise out the interests of farmworkers. Mr. Ellenbogen expressed the opinion that agricultural labor would not come within the definition of "interstate commerce" and, therefore, that the Supreme Court would strike down the legislation.24/ Mr. Boileau said, "... but in the vast sections of the Middle West, especially in those states where the farms are smaller and more or less of a family affair, where only the family is employed on the farm except with occasional employment of others, it would be very unfortunate to permit the organization of casual farmworkers."25/ The situation was summed up by Mr. Connery: "... I am in favor of giving the agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers."26/ Thus, the political compromise was effected and the legislation enacted with the exemption of agricultural labor.

The precedent of exemption set forth in the NLRA was followed in various states. For example, the legislative history of the Minnesota Labor Relations Act 27/ reveals an active "farm bloc" which had as its primary interest promoting legislation that would prevent interference by strikers with the movement of farm products on the highways of the state. Extension of the benefits of the state legislation to agricultural labor was evidently not a serious issue and an exemption resulted.28/

Current Status of the Law

Early Regulation of Agricultural Labor Relations

There is a long history of efforts to organize agricultural workers into labor unions and the history of American agriculture in the twentieth century is dotted with incidents of labor disputes, strikes, and violence.29/ However, such unions have had a tenuous existence at best because, while strikes could be engaged in, they could not compel the employer to come to the bargaining table by invoking statute, nor could they press unfair labor practices charges or take advantage of other protective provisions available to the mainstream of the American labor force. Harvest strikes, picketing of fields, and other activities directed at the farm employer were attempted, but often had little effect. In an effort to call public attention to their demands and to exert more intense and constant economic pressure on growers, the farm labor organizations turned more and more to promoting consumer boycotts of products produced by uncooperative growers and to pressuring wholesalers and retail merchants to refuse to handle such products. Public support was generated through publicity campaigns, the picketing of retail merchants, and picketing of "struck" products. Economic pressure resulting at least in part from such activities, brought a number of growers to the bargaining table, partic-

ularly in the late 1960s.

In some parts of the country, jurisdictional disputes between competing unions became intense. Battles between the United Farm Workers Union (UFW) and the Teamsters to organize workers on many California farms provide the best known example. Often, growers, wholesalers, and retailers were caught in the middle of such jurisdictional conflicts and were picketed as each group attempted to bring attention to its efforts to convince a particular grower to negotiate with its union, rather than the competing union.

Upset by the disruption caused by union activities, growers, wholesalers, and retailers fought back in the courts. Thus, an important part of the law affecting agricultural labor relations is found in court decisions limiting certain types of picketing, secondary boycotts, and other activities. Judicial action has been premised on several theories and the case law varies sharply from jurisdiction to jurisdiction. Interesting applications of secondary boycott acts, anti-injunction acts, antitrust statutes, jurisdictional strike acts, and common law tort theory have resulted. Some examples of the diverse judicial responses to farmworker union activities provide the basis for certain conclusions about the desirability of continuing to resolve agricultural labor-management problems outside the framework of a labor-management relations statute.

Secondary boycott and anti-injunction acts. Many states have secondary boycott statutes. For example, the Minnesota Secondary Boycott Act declares a secondary boycott to be an "illegal combination in restraint of trade and in violation of the public policy of this state" and therefore "an unlawful act."30/ A secondary boycott results, for example, when a secondary employer, who is not involved in the primary labor dispute, finds that his customers or workers are being driven away by union activities.

In Johnson Brothers Wholesale Liquor Co. v. United Farm Workers National Union,31/ the defendants had picketed and distributed handbills at retail liquor stores and had approached retail store managers asking them to remove Gallo products from their shelves. The objective was to pressure Johnson Brothers Wholesale Liquor Company into terminating its contract as distributor for Gallo products in Minnesota. If enough retailers ceased handling Gallo products, Johnson might have little choice but to yield to demands to cease wholesaling Gallo products. The Minnesota Supreme Court held that the Minnesota Secondary Boycott Act, unlike the Minnesota Labor Relations Act, applied to agricultural workers. The Court noted that farmworkers were excluded from the Labor Act because employer-employee relations in agriculture were assumed to be significantly different from those in other industries. This rationale, in the Court's view, did not have relevancy in interpreting the scope of the Secondary Boycott Act which protects neutral employers and employees from the actions of third parties. There being no express exclusion of agricultural labor organizations in the Secondary Boycott Act, the Court determined that the defendants' activities constituted an illegal secondary boycott.

In Johnson Brothers,32/ the Court also determined that the Minnesota Anti-Injunction Act,33/ while severely limiting the power of the Court to enjoin peaceful picketing, did not prevent an injunction in the event of a violation of the Secondary Boycott Act. Anti-injunction acts at the state level severely limit the use of injunctions against strikes and related activity where a "labor dispute" exists as that term is defined by the law of the picketers' state. Given the Minnesota Anti-Injunction Act, the Court did not feel that it could curtail the "giving of publicity to the existence of, or the facts involved in, any labor dispute whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."34/ Thus, while the Court felt that it was proper to terminate certain types of secondary boycott activity by injunction, it could not prohibit the picketing of a secondary employer where the purpose was merely to follow "struck goods."35/

Jurisdictional strike acts. Where an employer has negotiated a collective bargaining agreement with an agricultural union that cannot be certified because of the absence of labor-management relation legislation, jurisdictional strike acts allow injunctions to be issued to prevent another union from striking the employer, promoting work stoppages, and engaging in picketing. In United Farm Workers Organizing Committee v. Superior Court of Monterey County, 36/ the grower-plaintiff had entered into a collective bargaining agreement with the Teamsters. Thereupon, the UFW, in an attempt to gain the right to represent the workers, engaged in a variety of activities, but was enjoined under the California Jurisdictional Strike Act 37/ from engaging in strikes, work stoppages, and picketing at the employment site. While other labor legislation may have had no application in the agricultural setting, it had been determined that the Jurisdictional Strike Act did apply. The narrow issue that emerged on appeal was whether the real party in interest, here the grower, could use the Jurisdictional Strike Act as a basis for obtaining injunctive relief limiting the scope of picketing of retail merchants. The grower-plaintiff had stated in a supplemental complaint that the United Farm Workers'

Union had "wrongfully and unlawfully" instituted a boycott against plaintiff's agricultural products by ordering pickets to be placed at and around various grocery stores and other businesses selling plaintiff's products, throughout the state of California and the United States, for the purpose of urging the patrons of such stores not to buy products bearing plaintiff's trade name.38/ The injunction that issued in the lower court prohibited the UFW from "in any way promulgating or advertising" that a dispute existed with the grower. The injunction further precluded "urging, encouraging, or recommending, or asking any other person to urge, encourage or recommend, that any of plaintiff's customers boycott plaintiff's agricultural products."39/ The injunction also enjoined any appeal to the consuming public to refrain from purchasing the products in question. While the court on appeal felt that the California Jurisdictional Strike Act applied to the situation, it concluded that the injunction granted by the lower court was entirely too broad and ran afoul of the constitutional guarantee of free speech.40/ The court continued to sanction injunctive relief, but sharply curtailed its scope as to retail picketing, with the end result that the UFW was prohibited only from making "false and untruthful" statements in connection with the dispute. The court deemed it to be of significance that at the time of the decision no provision existed under California law for certification of the unit or to define the proper scope of union or employer activities. The court noted that it was entirely possible that none of the grower's employees wanted to be represented by the Teamsters. Thus publicity, including picketing, by a rival union had a proper function and the federal policy of limiting this kind of activity by an uncertified union where a rival union had already been certified offered no guidance.41/

Antitrust statutes. At least one case has raised the possibility that federal antitrust statutes may restrict the picketing and secondary boycott activities of farm labor unions. Bodin Produce Inc. v. United Farm Workers Organizing Committee 42/ involved an appeal from an interlocutory order denying a motion to dismiss the complaint of certain growers and shippers for failure to state a cause of action. While the district court rejected numerous allegations of the complaint because of labor exemptions in the antitrust statutes, it found a claim for relief to be stated in the allegations that, to the "great damage" of plaintiff growers and shippers, the UFW Organizing Committee had entered into a contract, combination, and conspiracy with various nonlabor groups, including retail merchants, the AFL-CIO, and other labor organizations, to impose a boycott of table grapes in California, Arizona, and elsewhere in the nation. Such allegations, according to the court, satisfied the Allen Bradley doctrine 43/ which subjects unions to the rules against restraint of trade where they act in concert with nonlabor entities that are subject to the antitrust provisions. The Ninth Circuit agreed, holding also that the exemption of agriculture under NLRA did not manifest a congressional intent to have farmworker unions treated differently than other unions for purposes of applying the protective provisions of the antitrust laws. The impact of Bodin may be to limit the use of the secondary boycott and certain other tactics by farmworker unions, when such unions act in concert with nonunion entities and thereby violate federal antitrust laws.

The tort of interference with business relations. Other cases have attempted to balance the right to recover for an unreasonable interference with business activities and the constitutionally protected right of free speech as it is exercised in the picketing process. In Metro Enterprises Inc. v. United Farm Workers Union 44/ the court was faced with picketing directed at the customers and employees of a retail merchant who refused to remove its stock of Gallo wine from its shelves. The court noted that under state law the right to picket is "not unlimited, and must be confined to peaceful dissemination of ideas."45/ The court found that, after the issuance of its initial order limiting the number of pickets, the union had again interfered with the pedestrian and vehicular traffic around the store, that the action of the union amounted to "threats, intimidation, harassment and coercion of customers of the plaintiff," and that the activity had become unlawful as an unreasonable interference with a third party's business and could be totally enjoined.46/ The court noted that "picketing as a means of exercising the right of free speech will be afforded constitutional protection only so long as it is lawfully conducted."47/ Nothing in the opinion, however, prohibited picketing a secondary employer merely to follow struck goods. What was objectionable was the effort to cause a general loss of patronage to the store.

M & H Fruit and Vegetable Corp. v. Doe 48/ is also illustrative of injunctive relief granted during the pendency of a tort action. In this case, UFW activists were picketing a retail merchant. While the court did not enjoin picketing a product of the primary employer, the offending farmer or grower, it did specifically enjoin certain types of activity:

> ...defendants shall not picket in front of plaintiff's place of business, but may picket no less than 50 feet away from plaintiff's extreme exterior store dimensions, ...enjoined from using any placards indicating any strike at plaintiff's establishment...but if the word "strike" is used in its placards, it shall indicate in the same sized letters--clearly readable and observable, that the strike is not

> as to plaintiff's employees or its place of business, but that it refers only to the primary employer-grower -- and it must fully name such primary target in equally sized large letters as above;...must state that it is solely as to the grapes grown or lettuce grown by such named primary target-grower-employer; that defendants shall not approach any customer at or closer than the distance of 50 feet...; that defendants shall not call out or insinuate that plaintiff is a murderer or child labor supporter or any other similar type of nefarious character; that defendants shall not tell any consumer or the public generally, nor attempt to influence them to buy at any other establishment;...49/

This order, which seeks to enjoin interference with business relations, does not prevent peaceful picketing of a struck product, but it does have the effect of prohibiting a fullfledged effort to promote a secondary boycott of plaintiff's retail store. Some courts have refused such a precisely delineated injunction on the theory that it is contrary to the First Amendment provision against prior restraint. Indeed, all of the cases discussed have had their sharp critics, and, while certain jurisdictions may momentarily have settled certain questions, there is wide diversity in the case law from jurisdiction to jurisdiction and within certain jurisdictions. Even in jurisdictions where definitive decisions exist, it has remained necessary to deal repeatedly with farmworker unions and their supporters who have not been easily dissuaded and who are believers in the effectiveness of the secondary boycott and aggressive picketing activities designed to discourage all patronage of stores handling struck products.

All of this suggests the necessity for legislative solution. In industry, generally, it became apparent several decades ago that some national effort was necessary to attempt to minimize the havoc wrought by industrial strife. The following comment on the experience prior to the adoption of the NLRA seems very timely when applied to the present state of labor relations law for agriculture:

> Behind the recent legislation there lies a long history of judicial attempts to regulate such activity. However, while the legislative attempts are by no means perfectly simple and clear-cut, the common law regulations were exceedingly complex and, in some cases, conflicting.50/

Agricultural Labor Relations Legislation

While the need for national legislation covering agricultural labor-management relations has not yet been perceived by a majority in Congress, a number of states have enacted agricultural labor relations laws. Kansas,51/ Idaho,52/ Hawaii,53/ Massachusetts,54/ and Wisconsin 55/ provide examples. Louisiana has a "right to work" statute covering agricultural labor.56/ Important and controversial pieces of state agricultural labor relations legislation emerged in Arizona and California. The Arizona Agricultural Employment Relations Act, which became effective August 13, 1972, attempts to provide a framework in which agricultural workers can organize and bargain.57/ The Arizona Act has a decidedly promanagement focus.58/ On April 20, 1978, in United Farm Workers Nat. Union v. Babbitt,59/ the Arizona Act was held to be unconstitutional in its entirety by a three-judge panel of the U.S. District Court for the District of Arizona. Oral arguments were heard in an appeal to the U.S. Supreme Court on February 21, 1979, and on June 5, 1979, the decision came down reversing the three-judge panel.60/

Perhaps the most significant agricultural labor relations legislation yet to be enacted is the California Agricultural Labor Relations Act, which became effective August 28, 1975.61/ The California Act is modeled to a great extent after the NLRA, although it has some unique provisions designed to fine-tune the Act to accommodate the realities of agricultural operations. Where possible, however, the California Act is, by its own terms, to be interpreted in light of NLRA.62/

Other states 63/ have also experimented with agricultural labor relations legislation, but a comparison of certain provisions of the Arizona Act, the California Act, and the NLRA provide's a basis for recommendations for future legislation, whether it comes at the state level, or at the national level in the form of an elimination of the agricultural exemption in the NLRA or a National Agricultural Labor-Management Relations Act.

While the right of union organization is guaranteed by all three statutes, it has long existed apart from legislative enactment.64/ Under both the Arizona and California acts, as well as under the NLRA, the bargaining representative selected by the certification process is to be the exclusive representative of the workers in the particular unit.65/

Sharp differences exist in the statutory schemes for certification of labor organizations. The

Arizona Act has a slow-moving certification process that the three-judge panel at the district court level in Babbitt found constitutionally deficient. While the U.S. Supreme Court reversed on the merits, it was not on the basis that the provisions of the Arizona Act were conducive to certification and the encouragement of collective bargaining under the act. The California Act, on the other hand, was designed to foster rapid certification through a process substantially more streamlined than even that of the NLRA.

In reviewing the certification procedure in the Arizona Act, the three-judge district court panel noted that before an election could be held, the union must demand and be denied recognition by the employer.66/ The Arizona Act is silent on how long the employer has to answer the demand. Once the demand is denied, the union is required to petition for an election showing that at least 30 percent of the employees in the unit wish to be represented by that particular union. The three-judge panel found that it would normally take 3 to 6 weeks for the union to gather such authorization cards. When the Arizona board has reasonable cause to believe that a sufficient number of workers desire the union to represent them, a pre-election hearing must be conducted. The Arizona Act does not indicate how quickly the hearing must be scheduled, but the three-judge panel concluded that the 20-day limit in the Arizona Administrative Procedure Act applies.67/ Once the Arizona board determines that an election can go forward, it is required to direct an election by secret ballot. Again, the Arizona Act makes no provision as to when the election shall be held. However, once the time is fixed, the employer is given 10 days to submit to the Arizona board a list of employees eligible to vote.68/ It becomes obvious that from the initial demand to the time of the election at least two months and very easily three and one-half months can elapse.

In its findings of fact the three-judge panel noted that the harvest period for many of the crops involved ran only three to seven weeks. Even in the case of crops harvested over a longer period of time, the work is likely to be intermittent and employees will often switch employers. Further, many of the workers, the three-judge panel found, would not return consistently to the same farm during the season or from year to year.

In connection with its consideration of the slow-moving features of the Arizona Act, the three-judge panel considered the matter of the designation of the bargaining unit. The Arizona Act provides that the bargaining representative is to be selected by a majority of the agricultural employees "in a unit appropriate for such purposes."69/ The Arizona board has the power in each case to determine the unit and is compelled by statute to decide whether it should consist of all temporary agricultural employees or all permanent agricultural employees of the particular employer.70/ The Arizona Act provides that a "permanent agricultural employee" is one, over 16 years of age, who worked for at least six months for the employer during the preceding calendar year.71/ A "temporary agricultural employee" is defined as any employee, over 16 years of age, who was employed during the preceding calendar year and is currently employed by the agricultural employer in question.72/ The Arizona board cannot create a unit made up of both permanent and temporary agricultural employees.

The three-judge panel concluded that as a practical matter the certification process, as defined in the Arizona Act, effectively prevents any meaningful election from ever being held. First, it is remote that the employees who initiate the demand for a union would still be employed at the time of the election. The rapid turnover of the employees, together with the lengthy certification process, compelled the three-judge panel to this conclusion. In addition, the panel felt that because many employees would not have worked for the employer in the preceding year, they would fall in neither the "permanent" nor "temporary" classification and would thus be excluded from the process entirely. The panel concluded that in many instances just a few workers, those who had been employed in the previous year, could participate and, if they should vote "no-union," other employees, no matter how numerous, would be barred from holding another election for 12 months. The three-judge panel indicated that an employer could encourage periodic elections which would be virtually certain to result in a "no-union" vote, effectively delaying certification and bargaining year after year.

Therefore, the three-judge panel found violations of the First and Fourteenth Amendments to the Constitution of the United States. The court noted violation of freedom of speech and of assembly provisions and of the due process and equal protection clauses. While the three-judge panel indicated that on this basis alone the entire act must fall, it nevertheless went on to discuss other constitutional deficiencies.73/

The U.S. Supreme Court, in reversing the three-judge panel on the merits of this issue, noted initially that the matter of election procedures did raise a case in controversy and that the abstention doctrine would not apply. The Supreme Court held that the constitution does not afford the right to compel an employer to engage in a dialogue or even to listen. Thus, the Arizona legislature was

not constitutionally obligated to provide a procedure whereby employees might compel their employers to negotiate. The Court did not see the Arizona Act as interfering with the constitutional guarantee of the right to individually or collectively voice views to an employer. Thus, the Supreme Court took the position that if the hired agricultural workers of Arizona have complaints about the statute, they should approach the Arizona legislature and not the federal courts. Given the unlikelihood of legislative relief, it appears that hired agricultural workers in Arizona will be compelled to live with the practical difficulties in the present Arizona Act.

The certification process under the California Act is markedly different and does not seem to suffer from the practical deficiencies found in the Arizona Act. An important feature of the California Act is that a valid certification election cannot be held unless the employer has not less than 50 percent of his peak agricultural work force employed.74/ This makes it virtually impossible for a handful of regular employees to organize, thus freezing seasonal workers out of the decision on bargaining representatives.

Under the California Act, the petition for the election must be signed by or accompanied by authorization cards signed by a majority of the currently employed agricultural workers in the bargaining unit. If, at the time the petition is filed, a majority of such employees are engaged in a strike, the California board is to use due diligence to attempt to hold a secret ballot election within 48 hours of the filing of the petition. Under normal circumstances, the election is to be conducted within a maximum of seven days of the filing of the petition.75/ This is to be contrasted with the current practice under the NLRA which results in election dates being set "by a process of negotiation in which each side seeks a tactical advantage, and in which the party seeking delay has the advantage of being able to force a pre-election hearing whether one is necessary or not,...."76/

Legislation was proposed in a recent session of the Congress to require the election under the NLRA to be held no less than 21 calendar days and no more than 30 calendar days from the service of petition. One of the issues that will face the Congress in considering the extension of the NLRA to cover agriculture is the matter of a sufficiently rapid election process to accommodate the seasonal and transient nature of much agricultural employment.

The secret ballot election requirements of the California and Arizona acts eliminate any opportunity to use the NLRA method of submitting signed authorization cards from workers to designate the exclusive bargaining representative. This, it has been argued, eliminates the chance of undue influence and threatening techniques being used on the part of pro-union and anti-union forces in the agricultural setting.77/

Under the California Act, a bargaining unit is usually made up of all agricultural employees of an employer, although where the farm is made up of two or more noncontiguous locations, the five-member California board will determine the appropriate unit.78/ Such legislation assumes a community of interest among the temporary and permanent employees, contrary to the presumption that prevails in the Arizona Act.

The Arizona Act limits the bargaining unit to a "farm." "Farm" is defined as any enterprise engaged in agriculture which is operated from one headquarters and includes separate tracts of land, if any, which are within a 50-mile radius of such headquarters.79/ The effect is to prevent multi-employer units and single units for employers who run a regional or statewide operation. This raises the possibility of some exceptionally large Arizona growers dealing with several bargaining units rather than one strong unified unit. Clearly, it is unlikely that multi-employer units will be provided for in any legislation, but the California model which allows the possibility of a statewide unit for an employer with many locations is noteworthy, particularly in light of the fact that in agriculture the same employee may often work at different locations for the same employer. To have an employee involved with several bargaining units may well be inappropriate.

Under the NLRA, the method of determining bargaining units when there is a dispute, is to have the National Labor Relations Board (NLRB) make the determination. A number of tests apply, subject to limitations imposed in 1947 by the Taft-Hartley Act.80/ In connection with establishing the bargaining unit, the balance of power between labor and management can likely be adjusted. If national legislation covering agricultural employment is again considered, special rules for determining the bargaining unit deserve to receive serious consideration.

Another matter of concern in the certification process relates to runoff elections. The Arizona Act provides that when the original ballot is prepared, the option to vote "no-union" must be included. If two or more unions are competing and a run-off is required, the Arizona Act has the unique provision

requiring that the run-off would be between the highest vote-getter and the "no-union" option, no matter how few votes the "no-union" option received initially.81/ This departs from the NLRB procedure and the California procedure, which call for the run-off election to be between the two largest vote-getters.82/ Under California practice, the workers are always to have the option to vote "no-union" in the initial election. They may also vote for a competing organization if it presents authorization cards from at least 20 percent of the employees within 24 hours before the election.83/

Right of access to farms by union organizers under the California, Arizona, and NLRA provisions sharply differ. The Arizona Act provides:

> No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time or facilities (emphasis added to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters or adherents.)84/

The three-judge panel in Babbitt considered this provision in light of evidence indicating the vast majority of farmworkers in Arizona to be migratory and generally residing in areas or labor camps located on property owned by the employer. The panel concluded that the quoted provision clearly stated that an employer did not have to provide a time and place for union representatives to communicate with workers. In short, the employer would not have to allow a union representative to come onto his property. The three-judge panel, citing a long series of cases starting with Marsh v. Alabama,85/ found the provision constitutionally defective because it prohibited too broad a scope of activity involving, in part, freedom of association and speech.86/

The U.S. Supreme Court, in its decision in Babbitt, held that the three-judge panel erred in dealing with the access issue. The challenge was characterized as not raising a case or controversy and was thus not justiciable. The Court reasoned that it would be pure conjecture to anticipate that access would be denied in any particular instance and in particular to farm labor camps that might be likened to the company town involved in Marsh v. Alabama. It indicated that adjudication of the challenge to the access provision would have to wait until an interest in seeking access to particular facilities can be asserted along with a palpable basis for finding that access will be refused.

There is no comparable access provision in the California Act and indeed the California board, exercising its rulemaking power, established an administrative access rule in 1975.87/ The validity of this access rule was upheld in ALRB v. Superior Court.88/

Under current NLRB practice, authority indicates that if coverage were extended to agricultural employees, access to the place of employment by union organizers would be required in most instances. The decisions in NLRB v. Babcok & Wilcox 89/ and Hudgens v. NLRB 90/ indicate that restrictions on access will stand only if reasonable effort through other available channels of communication will enable the union to reach the employees and only if the employer does not discriminate against the union by allowing distribution of information by other nonemployees. It would seem, however, that an extension of the NLRA to cover agricultural workers would require the review of these access rules in light of decisions such as Peterson v. Talisman Sugar Co.91/ holding that a farm labor camp is analagous to the traditional company town, making the precedent of Marsh v. Alabama 92/ clearly applicable.

Once the certification election is over, time must be permitted for resolution of objections. The Arizona procedure was not explored in Babbitt either by the three-judge panel or the Supreme Court. The California experience, however, has been commented on at some length by James Rutkowski, General Counsel for the UFW.93/ Rutkowski reports that objections are being routinely filed in California within the required time period and that this has typically resulted in a period of 12 to 14 months between the election and the time the union is certified as bargaining representative.94/ Rutkowski asserts that this has had an adverse impact on the ability to organize agricultural workers and to initiate the collective bargaining process. He points out that the seasonal nature of agricultural employment and the constantly shifting work force results in many cases in an entirely different work force being in place by the time of certification. While there must be an objection process designed to root out irregularities, there appears to be a need to find a way to rapidly dispose of spurious objections and to accelerate the process of resolving those which appear to have merit. This problem will need the careful attention of federal policymakers in connection with any move to enact national agricultural labor relations legislation.

Regardless of the statutory scheme, there is a need for an agricultural labor relations board to administer it. The California Act calls for a five-person board, the members of which are appointed by the governor with the advice and consent of the senate.95/ The board is given rulemaking power and

may sit on various matters in three-member panels.96/ Among the powers granted to the California board is the authority to hear charges of unfair labor practices. If the board determines that the labor organization or the employer stands in violation of the act, it may issue a cease and desist order and, where appropriate, order affirmative action including reinstatement of employees with or without back pay.97/ In addition, the board may from time to time demand reports showing the extent to which the order has been complied with. In difficult cases, the board may petition the superior court of the county wherein the alleged unfair practice occurred for temporary relief or a restraining order. The board may also apply to the superior court for the enforcement of its order where necessary.98/

A similar scheme exists in Arizona with an added feature allowing the board to initiate criminal proceedings against one who violates the act.99/ A convicted party would be guilty of a misdemeanor punishable by a fine of not more that $5,000, imprisonment for not more than one year, or both.100/ This provision was declared unconstitutional on its face by the three-judge panel at the district court level in Babbitt. It was noted that, given the enormous variety of activities covered by the Arizona Act, there would be no way for anyone to guess whether criminal sanctions might attach to contemplated activities. Thus, the statute was deemed unconstitutionally vague and in violation of the due process clause of the Fourteenth Amendment. Further, the three-judge panel concluded that there seemed to be no requirement of a finding of actual intent or malice as a prerequisite to conviction. While the criminal provision in the Arizona Act reads much like the provision of the NLRA, the emphasized language in the following quotation caused the three-judge panel in Babbitt to strike down the entire provision:

> Any person who wilfully resists, prevents, impedes or interferes with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than $5,000, by imprisonment of not more than one year, or both. Provided, however, that none of the provisions of this section shall apply to any activities carried on outside of the state of Arizona.101/

The U.S. Supreme Court in reviewing the decision of the three-judge panel in Babbitt, conceded that there was a case and controversy with respect to the criminal penalties issued. However, it held that the Arizona court should be given an opportunity to pass on the section given the Supreme Court's view that the statute can be read in different ways and that it is susceptible to constructions that might undercut or modify the vagueness attack. The Supreme Court conceded that if the criminal penalty provision is construed broadly to operate in conjunction with substantive provisions of the Arizona Act, it would unduly restrict the pursuit of First Amendment activities. Therefore, the matter of the criminal penalty provision is left unresolved and awaits a reading from the Arizona courts.

The Arizona Act contained unusual language on the scope of collective bargaining. While the three-judge panel and the U.S. Supreme Court in Babbitt did not deal with this matter, it is a matter that cannot be passed over lightly by policymakers in other states and at the federal level. Included in the Arizona Act's list of items legislatively left to employer discretion and control are setting of time of work, determining size and makeup of crew, assignment of work, determining place of work, hiring and discharging in accordance with employer's judgment as to ability, and determining the type of machinery and equipment to be used.102/ Cohen and Rose have suggested that it was probably intended to be unfair labor practice under the Arizona Act for labor organizations to even ask about these things at the bargaining table.103/ This could have a chilling effect on negotiations. While matters relating to wages, hours, conditions of work which directly affect the work of employees, matters of safety, sanitation, health, and the establishment of grievance procedures are subject to negotiations under the Arizona Act,104/ the listed restrictions clearly have the potential of impeding the resolution of some disputes.105/ Because the California experiment seems to be progressing satisfactorily without such limitations, a serious question emerges as to whether they have any merit.

Generally, the California Act, the Arizona Act and the NLRA list the following as employer unfair labor practices: interfering with employees as they attempt to organize;106/ dominating, interfering with, or being financially involved with a labor organization;107/ discrimination in hiring or tenure to encourage or discourage union membership;108/ discharging or otherwise discriminating against an employee who has filed charges or given testimony under the act;109/ refusal to bargain collectively: 110/ bargaining or entering into a collective bargaining agreement with a labor organization not certified pursuant to the act.111/

All three statutes provide a way for a labor organization to bring the employer to the bargaining table, something that was frequently impossible where no legislation existed unless the employer was

backed into a corner by the threat of a harvest strike or some other drastic measure. The California Act states that an employer can maintain an agreement with a duly certified union to require, as a condition of employment, that each worker join the union within five days following the beginning of employment.112/ This provision is to be contrasted with the Arizona Act which recognizes an individual's right to work without the necessity of joining a union.113/ At the federal level, Section 14 (b) of the Taft-Hartley Act gives the state "right-to-work" law precedence over the union-shop proviso in the NLRA.114/

A comparison of the Arizona, California, and NLRA provisions delineating the labor organization unfair labor practices reveals some similarities, but several sharp differences. While the California Act does mirror the NLRA with a few notable exceptions, the Arizona Act appears to be "cut from different cloth."

All three acts deal on more or less the same basis with the following labor organization unfair labor practices: restraining or coercing agricultural employers in the exercise of rights guaranteed under the respective acts;115/ restraining or coercing an agricultural employer in the selection of his bargaining representative;116/ causing or attempting to cause an agricultural employer to discriminate against an employee with respect to hiring, tenure, or terms of employment;117/ and refusal to bargain collectively in good faith when the union is duly certified.118/

Other areas where the three statutes are virtually identical on labor organization unfair labor practices include: (1) causing or attempting to cause an agricultural employer to pay for services which are not performed or are not to be performed,119/ and (2) the use of picketing or threats of picketing by an uncertified labor organization against an employer where the object is (a) to force the employer to recognize or bargain with the uncertified labor organization or (b) to force employees to accept such labor organization as their collective bargaining representative in instances where there is already a lawfully recognized labor organization, or there has been a valid election within the preceding 12 months, or, in some instances, a petition has been filed by another union.120/

Unfair labor practices by labor organizations can extend to certain types of strike activity, boycotting, and additional types of picketing activity. These provisions of the three acts vary markedly and the language becomes rather complex. The following comparison omits consideration of a number of technical legal issues.

There are at least three types of strikes: The economic strike, the strike in response to unfair labor practices by the employer, and the illegal strike. There are many examples of unlawful strikes: sit-down strikes denying the employer possession of the plant, strikes accompanied by violence, strikes where there is a no-strike agreement, wild-cat strikes (minority group action without authorization of the majority union,) certain jurisdictional strikes, certain secondary strikes, and strikes in the face of valid injunctions.121/ There is nothing in the NLRA or in the California Act prohibiting primary strikes or primary picketing where not otherwise unlawful.122/ In Arizona, however, there is a limitation on the "harvest strike." This does not take the form of an outright prohibition, but rather appears in the form of a grant of jurisdiction to the court to issue a 10-day restraining order, upon proper application, if the employer will agree to binding arbitration.123/ Actually, the language of the statute goes beyond "harvest strike" and authorizes the injunction when the resulting cessation of work will result in the "prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption... with a market value of $5,000 or more."124/

The three-judge panel in Babbitt, considering the provision that allows binding arbitration to be unilaterally imposed on a union, struck down that part of the Arizona Act as unconstitutional on its face.125/ The lower court felt that the compulsory arbitration provision denied employees due process and the right to a jury trial as guaranteed by the Seventh Amendment. However, the U.S. Supreme Court held that a case or controversy did not exist and that for the Court to speak on the issue would be wholly advisory. The appellees (plaintiffs below) conceded that, if an unlawful strike occurrs, employers may elect to pursue a variety of responses other than seeking an injunction and forcing compulsory arbitration. Further, the appellees conceded that they did not contest the constitutionality of the arbitration clause and that the three-judge panel on its own motion had taken up the constitutional issue. It appears that a test of the binding arbitration provision awaits an actual incident where an employer, in the face of an unlawful strike, seeks an injunction and invokes the compulsory arbitration provision.

All three acts deal with secondary activities and limit them in varying degrees. A secondary activity is one directed by the union against an employer with whom no dispute exists, with a view to

persuading that employer to stop doing business with the primary employer with whom the union has a dispute.126/ Secondary activities take many forms, but two are considered for illustrative purposes. One involves efforts to get another employer's employees to cease delivering and transporting the goods of the primary employer. The second has to do with efforts to convince the public to stop buying the products of the primary employer at retail stores or to get the public to stop patronizing the stores that handle such products.

In the first instance, all three acts provide that publicity, including picketing, will not be permitted if it has the effect of inducing any individual employed by any person, other than the primary employer, to refuse in the course of his employment to pick up, deliver, or transport goods of the primary employer.127/ Thus, as one commentator put it: "California growers, who had expressed dismay over the passage of any bill which would not prohibit the secondary boycott, may now be assured that their products may not legally be prevented from being delivered and unloaded at the place of business of the retailer."128/

The situation is quite different when it comes to the matter of engaging in secondary activity, such as picketing, to discourage consumers from purchasing the goods of the primary employer, often referred to as "struck goods." Under the NLRA, there is a provision that prohibits publicity in the form of picketing designed to dissuade customers from purchasing the products of the primary employer.129/ However, given the First Amendment protection of speech, the U.S. Supreme Court has construed the provision to prohibit picketing designed to dissuade people from patronizing the retailer, but not to prohibit picketing designed to stop customers from buying the struck goods.130/ The California Act, on the other hand, allows a duly certified union to engage in publicity, including picketing, designed to request the public to cease patronizing the retail store entirely.131/ Such picketing may be carried out lawfully where the employer is failing in his obligations to bargain collectively or where he is engaged in certain other unfair labor practices. The basic ban on picketing to force recognition or to compel an employer to bargain with an uncertified union remains in effect.

In Arizona, quite a different story unfolded. The Arizona Act contains a provision, initially declared unconstitutional on its face by the three-judge panel in Babbitt, limiting consumer picketing to efforts to discourage the purchase of struck goods. Further, such picketing is permitted only where there is a primary dispute with the agricultural employer and where the publicity would not include language directed against any trade name, trademark, or generic name which might include the products of an uninvolved agricultural producer. The products of the employer with whom the primary dispute exists must be identified truthfully, honestly, and in a nondeceptive manner.132/ A constitutional problem was perceived by the three-judge panel because the violations of this provision, which is obviously designed to make picketing of struck products exceedingly difficult, is not just an unfair labor practice, but also a criminal act regardless of the intent of the violator. The three-judge panel saw this as a prior restraint on free speech.133/ Further, the requirement that there be a primary dispute was deemed inappropriate by the panel of judges since such a requirement does not exist for primary picketing. In AFL v. Swing,134/ the U.S. Supreme Court made clear that the right to free discussion, including picketing, does not turn on the existence or nonexistence of a primary dispute. Thus, there was a further chilling effect on free speech.135/ This analysis was relied upon to support the three-judge panel's finding that the Arizona consumer picketing provision violated the First Amendment and was unconstitutional on its face.

The U.S. Supreme Court, in reviewing the decision of the three-judge panel in Babbitt, conceded that there was a case and controversy with respect to the consumer publicity issue, but held that the lower court erred in failing to abstain from adjudicating. The Court felt that the language of the Arizona Act was sufficiently ambiguous to allow a construction that its proscriptions applied only in the case of misrepresentations made with knowledge of their falsity or in reckless disregard of truth or falsity. Since such an interpretation would, according to the Supreme Court, substantially affect the constitutional question presented, it was determined that it would be inappropriate to decide the matter on the merits until such time as the Arizona courts had construed the consumer publicity provision. Also, the Supreme Court read the Arizona Act in such a way that it does not prohibit publicity not directed at the products of employers with whom the labor organization has a primary dispute. Such publicity may not be given statutory protection, but neither is it proscribed. While it appears from the decision that the U.S. Supreme Court will not sanction the imposition of criminal penalties for unwitting misrepresentations in connection with consumer publicity and will not sanction the statutory provisions making it unlawful to treat as struck products products of a producer other than the primary employer, the state of the law in Arizona remains up in the air pending further litigation at the state level.

The agricultural employer in California is not forced to passively accept secondary activity by

employees even where it falls within legal limits. As one commentator suggests:

> An agricultural employer, however, will probably be permitted to use traditional countervailing tactics in response to this newly created right. Contractual remedies may be possible, although perhaps of limited effectiveness. Lockouts with temporary replacements may well prove to be the employer's most effective quid pro quo for the union's ability to engage in secondary activity. However, upon the union's abandonment of such activity or upon the employer's excessive response, the lockout with replacements should be prohibited and the process of orderly collective bargaining thereby preserved."136/

In many instances, those provisions of the three acts which have special importance as labor-management relations legislation in agriculture reflect efforts to fine-tune the balance of power between labor and management in the agricultural sector. There were sharply different views in California and Arizona as to the state of the balance of power before the enactment of agricultural labor relations legislation. The Arizona Act was, designed to introduce certain advantages for employers, whereas the California Act was designed to introduce certain advantages for labor organizations.

Emerging Developments

Four of the five issues raised in Babbitt v. United Farm Workers were left unresolved by the decision of the U.S. Supreme Court rendered on June 5, 1979.137/ Prior to the Court's decision, one commentator assessed the situation by noting that the courts had in almost every instance found the NLRA constitutionally acceptable.138/ The same commentator noted that the NLRA strikes the balance in labor-management relations in favor of employee rights over those of management.139/ The Arizona Act, it has been made clear, strikes the balance substantially in favor of management. It had been hoped, in some quarters, that the Supreme Court in Babbitt would have found a constitutional basis to say, at least in the area of agricultural labor relations, whether the balance struck in the NLRA is constitutionally required.140/ If that balance were required, the state legislatures would be well advised to model agricultural labor relations legislation after the NLRA or, if they elect, after the even more employee-oriented California Act.

Had the U.S. Supreme Court dealt with the merits on all constitutional issues in Babbitt and reversed, it is likely that the decision would have had enormous and, very possibly, immediate implications for the future of agricultural labor relations legislation. Congress would have been hard pressed to ignor agricultural labor relations under such circumstances, for it is certain that those who feel that labor relations in the agricultural sector should be treated at least on a par with industry generally would have clamored for federal pre-emption. The question that emerges, in light of the Babbitt decision, is whether the Congress will be inclined to continue to follow a wait-and-see attitude allowing the Arizona situation and the state-by-state experimentation to continue. Perhaps the decision on the merits and on the election provisions of the Arizona Act will provide enough incentive for the Congress to enact legislation designed to pre-empt. Should the Congress decide to act, numerous policy questions would arise.

There has been no rush on the part of the states that had not previously legislated to follow the lead of either California or Arizona. However, the issue has not been totally ignored at the state level. Legislation was introduced in the 1977 Minnesota legislature to create a part-time agricultural labor relations board to insure the right of farmworkers to bargain collectively. The bill detailed the rights of agricultural employees, defined unfair labor practices, and set forth the powers of the proposed board. However, the bill failed to become law.141/

Evaluation

The Arizona and California Acts raise three questions: (1) Given the experience of the years since the passage of the acts, which has been the most effective in bringing order to labor relations in the agricultural sector? (2) Do the lingering constitutional questions about the Arizona Act also exist in the California Act? and (3) Which underlying assumptions about the balance of power between labor and management in agriculture are the most accurate, those supporting the Arizona model or those calling for legislation such as that in California?

Apparently, widespread use has been made of the California Act, whereas little use was made of the Arizona Act. The constitutional challenge to the Arizona Act, which was mounted shortly after the statute was passed in 1972, probably has had a negative effect on its use. However, there is reason

to believe that the Arizona Act would have proved to be a rather ineffective tool, the litigation notwithstanding. There is little incentive for farmworkers to use the law given its impediments to organization, bargaining, and resolving of disputes. When any piece of legislation in the social or labor area is perceived by labor as a step backward, it is inevitable that rather than promoting improved relations between labor and management, the law will gather dust on the shelf. Laws in Kansas and Idaho, which from labor's standpoint have some of the less attractive features of the Arizona Act, have been little used.142/

The California experience, on the other hand, has been remarkably successful, though not without its problems. In the first five months the California Act was in existence, there were 225 representation elections, more than under the NLRA nationwide in the first three years of its existence.143/ The activity was so intense that in February 1976 it became necessary to suspend the activities of the board and lay off most of the staff because funds had been exhausted.144/ The board spent its initial appropriation of $1.3 million and an emergency loan of $1.25 million during this initial five-month period.145/ This frustrating situation led to the resignation of several board members.146/ However, on July 3, 1976, Governor Edmund Brown Jr. signed legislation approving a $12.8 billion state budget with new funding included for the board.147/ During the first two and one-half years of its operation, the board supervised more than 600 representation elections in California. The United Farm Workers Union was a party to about 470 of those elections and was formally certified in 227 instances.148/ By April 2, 1976, the UFW had obtained contracts in 104 cases and was involved in collective bargaining in 123 more units.149/ In some of the approximately 600 representative elections, other unions (the Teamsters, for example) were designated and there were also instances of a "no-union" vote. During the period to April 1978, the UFW was involved in 527 board hearings, including many dealing with unfair labor practices and representation.150/ This remarkable record is evidence of the vitality of the California Act which has brought order to what had been a troubled industry plagued with labor-management strife and bitter conflicts between unions.

Prior to the California Act, the UFW and the Teamsters had been locked in unremitting conflict over organizing agricultural workers in California.151/ Largely as a result of the structure provided by the act, these two unions, on March 11, 1977, signed an agreement that leaders of both said would terminate the destructive competition.152/ The UFW agreed to try to organize only those workers employed in agriculture, as described in the California Act. The Teamsters agreed to organize only among workers covered by the NLRA.153/ The "jurisdictional" division is decided by determining whether the employer is primarily engaged in farming. If he is, the UFW will have jurisdiction, even over truck drivers. If not, the Teamsters will have jurisdiction, even over a worker doing an agricultural job.154/

The fact that this legislative framework has in actual practice provided a way for farm labor problems to be resolved in California is a strong recommendation for the statute and provides a sharp contrast with the Arizona experience. Farmworker unions in California have shifted the use of their lawyers substantially since the act became law. As the general counsel for UFW indicated in an April 1978 presentation:

> When we had no Act, Union lawyers were constantly involved in litigation. It was often defensive litigation,...like the labor injunction, which labor unions had dealt with for 30 years prior to the passage of the NLRA. These the United Farm Workers have been dealing with regularly in the last ten years; we have had hundreds of cases involving labor injunctions against our activity. But we have also been dealing with offensive litigation in the courts involving areas only related to labor law. Since we have no labor law because of our exclusion from the NLRA, we had to rely on civil rights law, we had to rely on anti-trust law, we had to rely on the Contractor Registration Act, we had to use pesticide provisions to initiate litigation against employers. These were the only ways we could redress grievances. The result of this, however, was a tremendous tie-up of legal resources in this sort of litigation.155/

It is indeed encouraging to find that the California Act has provided a framework in which many agricultural labor problems can be resolved and that there has been a shift away from those time-consuming and far less promising types of litigation.

It is discouraging, on the other hand, to find that the one aspect of the Arizona Act which was submitted to constitutional test on the merits, the election procedure, survived in spite of its delay mechanism and tactical limitations. It is reasonable to anticipate that the election procedures of the Arizona Act will continue to be a disincentive to union organization in agriculture in that state.

It is unlikely that the constitutional questions that remain unanswered by Babbitt will be raised

by the California Act. The California Act has few of the features that were singled out in Babbitt that are likely to be the subject of further litigation as the Arizona courts take up the matters on which abstention was decreed and as cases in controversy arise in those matters that Supreme Court said would be prerequisites to further litigation.

The California Act has no general criminal sanctions which might be construed to punish virtually any violation of the act, no consumer publicity provisions that have the potential of being read to constitute undue restraints on secondary activities, no provisions that might be relied upon by employers to deny access by unions to migratory farmworkers residing on their property, and no mandatory compulsory arbitration provision that might in a given case result in the denial of due process and the right to a jury trial. Indeed, the fact that the California Act either conforms to the NLRA or provides even greater guarantees of free speech and freedom of association seems to insure its immunity to constitutional challenge.

The underlying assumptions that brought about the California Act are substantially different than those made in the legislative halls of Arizona. Deeply felt ideas about agriculture are involved and emotions tend to run high on some of the issues. Essentially, the Arizona view is that farm labor unions possess enormous power to disrupt agricultural production at critical times--harvest, for example. Because of the perceived tremendous advantage over farm operators, the Arizona view is that the law must be tilted to lessen the power of unions and give management a greater advantage than industry is generally granted under the NLRA. The California legislation, on the other hand, proceeds on the assumption that farmworkers and their unions are at a greater disadvantage in their dealings with management than is true of the national labor force generally.156/ Thus, the California Act was fashioned to deal with the particular circumstances of agriculture and to give agricultural labor more leverage than labor has been given under NLRA. Without saying that every provision of the California Act is necessary to satisfactory agricultural labor-management relations, it seems reasonable to conclude that the assumptions underlying the California Act are more accurate than those underlying the Arizona Act.

Fears of excessive power being granted to farmworker unions under legislation such as that in California have not been borne out by the California experience. As labor-management relations in agriculture reach new levels of maturity, fears of harvest strikes and other measures which threaten economic ruin to farmers should fade. Farmworkers, like laborers in most other industries, are not likely to intentionally destroy their employer and their jobs. Also, strikes during critical points in the agricultural production process are not likely to occur except under the most extreme circumstances because the loss of pay to workers will be so great. Farmworkers often depend on long hours during harvest season to make up for the slow times during the year. Further, in the agricultural sector, the ever-present possibility of increased mechanization exists and can be assumed to have a moderating effect on farmworker activities. Actions which force crop changes or mechanization will be to their decided disadvantage. In some segments of agriculture, mechanization may not be practical at present, but experience has demonstrated a remarkable capacity to produce machines to do jobs on farms in cases where mechanization had previously been thought to be remote, if not impossible.

This leaves the question of what steps are likely to be taken in the future on the state and federal level. In 1973, there were again efforts to either eliminate the agricultural exemption in the NLRA or to create a separate NLRB for agricultural matters.157/ While no legislation resulted, it was clear that few were satisfied with the present state of affairs.158/ What to do brought differing views. The Teamsters endorsed the extension of NLRA to include farmworkers. The United Farm Workers Union generally favored a bill including farmworkers under the NLRA if provision was made assuring no loss of the use of secondary activities as organizing and bargaining tools. The American Farm Bureau Federation preferred a bill that would establish a separate agency and a scheme along the lines of that enacted in Arizona.159/

It is likely that the whole matter will receive renewed attention in the Congress given the action of the U.S. Supreme Court in Babbitt. Four of the issues raised were left unresolved because of problems of justiciability and abstention. Assume, however, that (a) further litigation results in an access case where a violation of guarantees of free speech and association are established, given the terms of the Arizona Act; (b) that a compulsory arbitration matter develops which is found to result in a denial of employee due process and the right to a jury trial; (c) that the Arizona Supreme Court construes the criminal penalty provision of the statute so as to bring it within constitutional bounds; and (d) that the Arizona Supreme Court construes the consumer publicity provisions of the Arizona Act so as to salvage those provisions from constitutional attack. Even then, it is unlikely that the farm labor movement and the labor movement, generally, will be content to have the Arizona Act standing as a potential model for other states to follow as the movement to adopt agricultural labor relations leg-

islation spreads. The statutory election scheme of the Arizona Act is not remotely "as fair or efficacious" as labor interests would like. The obvious answer will be to press once again for national legislation pre-empting state statutes. Whether the political climate will be such that Congress will move is impossible to predict.

Finally, because farmworkers generally have great difficulty in negotiating with their farm employers about wages, conditions of employment, and related matters, pay levels, and other benefits have remained at relatively low levels when compared with other segments of the production economy. This is one of the primary conclusions reached in this study. Recognizing this, the Congress, and to some extent the state legislatures, have legislated to gradually include farmworkers under many pieces of social legislation from which they were excluded for so long. The result has been some improvements to the hired farm work force. However, wage levels remain low and, as a result benefits, for many other legislatively created programs also remain low because those benefits are tied to wages earned in the past. Enforcement of standards has been left primarily to a small and somewhat beleagured group of government inspectors in the areas of working conditions, employment of children illegally, occupational safety, and health.

Problems of poverty, poor health, and educational deficiency for young and old have been attacked in a variety of government programs that have produced benefits but have generally failed to root out underlying causes. While not a panacea, it must be suggested that logic plus the California experience indicate that the best chance for real improvement in the economic condition of the hired farm work force lies in the effective use of labor organization. There is evidence that the beginnings of this improvement can be noticed in California. As wages increase and, on an average, begin to approach double the minimum wage, effects will be felt in improved benefits under other social programs, including social security, worker's compensation, and unemployment compensation. At the same time it is hoped that the base cause of certain problems, poor health being the most notable example, will begin to be dealt with. For these reasons, it is recommended that efforts be made in the various states and at the national level, if necessary, to encourage the growth of farmworker labor unions by allowing them to operate under legislation at least as favorable as the NLRA, and hopefully under legislation that has at least some of the California modifications designed to deal with the special case of agriculture.

Inevitably, as the cost of hired labor increases, farm operators will be forced to deal with that cost. However, while there may be extreme difficulty in adjusting for some types of farming operations, every available indication is that over time these increased costs will be absorbed and passed to consumers and all but the most marginal of operators will survive.160/ Not only will they survive, but they are likely to have a more satisfied, thus more productive, labor force. In summary, Dyson's observation is directly on point: "The agricultural workers have been included gradually under more and more of the social legislation that this country offers its citizens, but a definite, steady labor relations policy would offer farmworkers the greatest chance for economic stability and advancement."161/

Recommendations

Given the decision of the U.S. Supreme Court in Babbitt, it is doubtful whether it remains feasible to continue to leave the regulation of agricultural labor relations to the states. The survival of the Arizona Act provides a substantial argument against allowing state experimentation to continue. Had the NLRA and the California Act been left as the primary models, the necessity of early federal action may not have been present and the desirable approach may have been to seek a greater experience at the state level.

Assuming that legislation will again be considered at the national level, the troublesome question of whether to eliminate the agricultural exemption from the NLRA or to create separate agricultural labor-management relations legislation will resurface. The question is not easily resolved. However, if a judgment must be made in the near future on the basis of existing experience, it seems that a simple elimination of the existing exemption would be an unwise approach. Too many things are unique to agriculture to attempt to apply the NLRA without modification.

Assuming that such modifications are necessary, the question then becomes whether to attempt to insert into the NLRA a number of special provisions applicable only in agricultural cases and whether the NLRB should be expected to absorb the resulting additional work. The best approach would seem to be to opt for separate legislation and the creation at the national level of a separate agricultural labor-management relations board.

Whichever option might be selected, it seems imperative that the following matters be given careful consideration as legislation is fashioned: (1) provision for a rapid certification process similar to that in California, allowing the employees who request an election to vote when it is held; (2) provision to insure that the election occurs at the time of the year when the employer has his maximum work force employed; (3) realistic definitions of "bargaining unit" to allow the creation of one unit even where the employer farms several locations; (4) provision for selection of bargaining representatives only by secret ballot with no alternative methods allowed; (5) provision for speedy resolution of election contests and representation disputes so that certification is not delayed for many months as has been often the case in California; (6) definition of "agricultural employment" as precisely as possible to eliminate disputes over which units must be organized under the NLRA and which under the Agricultural Labor Relations statute; (7) allowance of collective bargaining on at least as broad a range of issues as under the NLRA; (8) refraining from imposing restrictions on the timing of strikes which are otherwise legal; and (9) addressing the question of secondary activity with clarity and precision.

The last item may be the most difficult to deal with. The California Act provision allowing a certified union to engage in publicity, including picketing, designed to discourage consumers from patronizing a store that deals in struck goods is contorversial. If a truly effective labor-management relations scheme is provided, there is a serious question as to whether a certified agricultural labor organization really needs such power to effectively deal with management. No recommendation is made in this study on this point, but it must be observed that the elimination of such a provision as a compromise measure would undoubtedly "soften" the legislative measure and increase the chances that it would pass and become law.

The basic recommendation that farm labor unions receive encouragement is not made without consideration to the arguments of those who strongly oppose all extension of labor-management legislation to agriculture.162/ However, whatever evil some might perceive in the trade union movement today, it seems clear that through the years workers in covered industries have derived considerable benefit from being assured the right to bargain collectively with their employers. If there are problems that require reforming or fine-tuning the NLRA as it now applies to long-established unions, the Congress should be asked to make necessary changes. However, to deny labor-management relations legislation to agriculture because of alleged problems of imbalance in industries where strong unions have had many decades to develop seems manifestly unfair. By creating a separate agricultural labor-management relations act at the national level, the way is left open to adjust the NLRA as it affects the mainstream of the union movement without the necessity of adjusting the balance in the agricultural labor-management area.

Notes to Chapter 11

1. National Labor Relations Act (Wagner Act), ch. 372, §§1-13, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§151-169 (1976).

2. Agricultural Labor Relations Act of 1975 (Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975), Cal. Labor Code §§1140-66 (West Supp. 1980).

3. Ariz. Rev. Stat. Ann. §§23-1381 to -1395 (1971-80 Supp.). Arizona has an active Sunset Law program. Unless continued, the Agriculture Employment Relations Board will terminate on July 1, 1982 as per Ariz. Rev. Stat. Ann. §§41-2362 and 41-2377. Ariz. Rev. Stat. Ann. §§23-1381 et. seq. is repealed effective 1-1-1983 under Ariz. Rev. Stat. Ann. §§41-2370. Note that the act and the board have been continued in the past. 1980 Ariz. Sess. Laws, Third Special Sess. ch. 1, Sec. 16 and Sec. 19. See 1980 Ariz. Sess.Laws ch.60, §6.

4. "Philadelphia Cordwainer's Case (1806)", 3 Common & Gilmore, Documentary History of American Industrial Society (1910-11) at 59.

5. Hitchman Coal Co. v. Mitchell, 245 U.S. 229 38 S. Ct. 65, 62 L.Ed. 260 (1917);

6. Norris-LaGuardia Act, ch. 90, §1, 47 Stat. 70 (1932); (current version at 29 U.S.C. §101 et. seq.).

7. See generally Morris, "Agricultural Labor and National Labor Legislation," 54 Cal. L.R. 1939.

8. Labor-Management Relations Act (Taft-Hartley Act) ch. 120, §101, 61 Stat. 136 (1947); (current version at 29 U.S.C. §§141-88 (1976).

9. 29 U.S.C. §141(b) (1976).

10. 29 U.S.C. §141(b) (1976).

11. See notes 51, 52, 53, 54, 55 infra for examples of state laws dealing with agriculture.

12. 29 U.S.C. §158(a)(5) (1976).

13. 29 U.S.C. §52 (1976); 29 U.S.C. §163 (1976).

14. 29 U.S.C. §158(b) (1976); see also N.L.R.B. Seventh Annual Report (1942) at 49.

15. 29 U.S.C. §158(a) (1976).

16. See generally J.A. Jenkins, Labor Law (1968); R. Smith, L. Merrifield & T. St. Antoine, Labor Relations Law (4th ed. 1968); R. Smith, L. Merrifield & D. Rothschild, Collective Bargaining & Labor Arbitration (1970); C. Morris, The Developing Labor Law (1971).

17. 29 U.S.C. §152(3) (1976).

18. On the difficulties in determining the line between agricultural labor and non-agricultural labor, see Dyson, "The Farm Workers and the N.L.R.A.: From Wagner to Taft-Hartley," 36 Fed. Bar J. 121 (1977).

19. Minn. Stat. §179.01 (1974)

20. Dyson, Supra note 18 at 125.

21. 79 Cong. Rec. 9720 (1935).

22. Ib.

23. Ib.

24. 79 Cong. Rec. 9721 (1935).

25. Ib.

26. Ib.

27. Minn. Stat. §§179.01-179.17 (1974), as amended; See "History and Provisions of the Minnesota Labor Relations Act," 24 Minn. L. Rev. 217 (1939).

28. Ib.

29. See generally Morris, supra note 7.

30. Minn. Stat. §§179.43-.44 (1974), as amended.

31. 308 Minn. 87, 241 N.W.2d 292 (1976).

32. Id.

33. Minn. Stat. §§185.07-.19 (1974).

34. Minn. Stat. §185.10(5) (1974).

35. 308 Minn. 87, 241 N.W.2d 292 (1976).

36. 4 Cal.3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971).

37. Cal. Labor Code §§1115-1120 (West).

38. 4 Cal.3d 556, 561, 483 P.2d 1215, 1218, 94 Cal. Rptr. 263, 266 (1971).

39. Ib.

40. 4 Cal.3d 556, 571, 483 P.2d 1215, 1226, 94 Cal. Rptr. 263,274 (1971).

41. 29 U.S.C. §158(b)(4) (1976).

42. 494 F.2d 541 (9th Cir. 1974).

43. Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945).

44. 41 Ohio Misc. 171, 324 N.E.2d 805 (1974).

45. 41 Ohio Misc. 171, 172, 324 N.E.2d 805, 807 (1974).

46. 41 Ohio Misc. 171, 174, 324 N.E.2d 805, 808 (1974).

47. 41 Ohio Misc. 171, 173, 324 N.E.2d 805, 807 (1974).

48. 80 Misc. 2d 1012, 364 N.Y.S.2d,413, 415 (1975).

49. 80 Misc. 2d 1012, 364 N.Y.S.2d 413, 421-2 (1975).

50. CCH 1976 Guide Book to Labor Relations at 239.

51. Kan. Stat. Ann. §§44-818, 44-830.

52. Idaho Code §§22-4101, 22-4113.

53. Hawaii Rev. Stat., Title 21, Ch. 377.

54. Mass. Gen. Laws Ann. 150A, §5A.

55. Wis. Stat. Ann. §111.11.

56. La. Rev. Stat. Ann. §§23-881, 23-888.

57. Ariz. Rev. Stat. Ann. §§23-1381 to -1395 (1971-80 Supp.); for an interesting discussion of the Arizona statute and the court test of its constitutionality see White and Gibney." The Arizona Farm Labor Law: A Supreme Court Test," 31 Labor Law Journal 87 (1980).

58. See generally Cohen & Rose, "State Regulation of Agricultural Labor Relations - The Arizona Farm Labor Law - An Interpretive and Comparative Analysis", 1973 Law and Social Order 313.

59. 449 F. Supp. 449 (D. Ariz. 1978).

60. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 99 Sup. Ct. 2301, 60 L. Ed.2d 985 (1979).

61. Cal. Labor Code §§1140-66 (West Supp. 1979).

62. 29 U.S.C. §§151-168 (1976).

63. See notes 51, 52, 53, 54, 55, supra.

64. Ariz. Rev. Stat. Ann. §§23-1389(A) (1971-80 Supp.); Cal. Labor Code §1152 (West Supp. 1979).

65. Ariz. Rev. Stat. Ann. §231-1389(A) (1971-80 Supp.); Cal. Labor Code §1156 (West Supp. 1979); 29 U.S.C. §159(a) (1976).

66. Ariz. Rev. Stat. Ann. §23-1389(C)(1) (1971-80 Supp.).

67. Ariz. Rev. Stat. Ann. §41-1009.

68. Ariz. Rev. Stat. Ann. §23-1389(I) (1971-80 Supp.).

69. Ariz. Rev. Stat. Ann. §23-1389(A) (1971-80 Supp.).

70. Ariz. Rev. Stat. Ann. §23-1389(B) (1971-80 Supp.).

71. Ariz. Rev. Stat. Ann. §23-1382(1) (1971-80 Supp.).

72. Ariz. Rev. Stat. Ann. §23-1382(1) (1971-80 Supp.).

73. 449 F. Supp. 449, 459 (D. Ariz. 1978).

74. Cal. Labor Code §1156.3(a)(1) (West Supp. 1980).

75. Cal. Labor Code §1156.3(a)(4) (West Supp. 1980).

76. Senate Report No. 95-628, 95th Cong. 2nd Sess., Labor Law Reform Act of 1978 S. 2467 at 21.

77. "California's Attempt to End Farmworker Voicelessness: A Survey of the Agricultural Labor Relations Act of 1975." 7 PAC. L.J. 197, 214 (1976).

78. Cal. Labor Code §1156.2 (West Supp. 1979).

79. Ariz. Rev. Stat. Ann. §§23-1382(5) (1971-80 Supp.).

80. Morris, The Developing Labor Law at 200 ff.

81. Ariz. Rev. Stat. Ann. §23-1389(D) (1971-80 Supp.).

82. Cal. Labor Code §1157.2 (West Supp. 1980).

83. Cal. Labor Code §1156.3(a)(4)-(6) (West Supp. 1980).

84. Ariz. Rev. Stat. Ann. §23-1385(c) (1971-80 Supp.).

85. 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

86. For a criticism of the analysis of the court on this point see Note. "Labor - Arizona Agricultural Employment Relations Act - United Farm Workers Union v. Babbitt, 449 F. Supp. 449 (D. Ariz. 1978)," 1978 Ariz. State L. J. 257, 273 (1978).

87. Cal. Adm. Code, Title 8, §20900 as amended,

88. 16 Cal.3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, appeal dismissed for want of substantial federal question, 429 U.S. 802 (1976). The access rule and the litigation sustaining its validity are discussed at length at Note, "ALRB v. Superior Court: Access to the Fields - Sowing the Seeds of Farm - Labor Peace," 7 Golden Gate U.L.R. 709 (1977).

89. 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956).

90. 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed.2d 196 (1976).

91. 478 F.2d 73 (5th Cir. 1973).

92. 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1972).

93. Rutkowski, "Future of United Farm Workers," 1978 San Fernando Valley College of Law Symposium on Labor Law and Industrial Relations 21.

94. Id. at 26.

95. Cal. Labor Code §1141 (West Supp. 1980).

96. Cal. Labor Code §1144 (West Supp. 1980).

97. Cal. Labor Code §1160.3 (West Supp. 1980).

98. Cal. Labor Code §1160.4 (West Supp. 1980).

99. Ariz. Rev. Stat. Ann. §23-1392 (1971-80 Supp.).

100. Ariz. Rev. Stat. Ann. §23-1392 (1971-80 Supp.).

101. Ariz. Rev. Stat. Ann. §23-1392 (1971-80 Supp.); compare 29 U.S.C. §162 (1976).

102. Ariz. Rev. Stat. Ann. §23-1384(A)(1) (1971-80 Supp.).

103. Cohen & Rose, supra note 58 at 351.

104. Ariz. Rev. Stat. Ann. §23-1385(D) (1971-80 Supp.).

105. Cohen & Rose, supra note 58 at 351.

106. Ariz. Rev. Stat. Ann. §23-1385(A)(1) (1971-80 Supp.); Cal. Labor Code §1153(a) (West Supp. 1980); 29 U.S.C. §158(a)(1) (1976).

107. Ariz. Rev. Stat. Ann. §23-1385(A)(2) (1971-80 Supp.); Cal. Labor Code §1153(b) (West Supp. 1980);

108. Ariz. Rev. Stat. Ann. §23-1385(A)(3) (1971-80 Supp.); Cal. Labor Code §1153(c) (West Supp. 1980); 29 U.S.C. §158(a) (3) (1976).

109. Ariz. Rev. Stat. Ann. §23-1385(A)(4) & (6) (1971-80 Supp.); Cal. Labor Code §1153(d)(West Supp. 1980); 29 U.S.C. §158(a) (4) (1976).

110. Ariz. Rev. Stat. Ann. §23-1385(A)(5) (1971-80 Supp.); Cal. Labor Code §1153(e) (West Supp. 1980); 29 U.S.C. §158(a)(5) (1976).

111. Ariz. Rev. Stat. Ann. 23-13 ; (1971-80 Supp.); Cal. Labor Code §1153(f) (West Supp. 1980); 29 U.S.C. §158(b)(4)(c) (1976).

112. Cal. Labor Code §1153(c) (West Supp. 1980).

113. Ariz. Rev. Stat. Ann. §23-1385(B)(2) (1971-80 Supp): Ariz. Rev. Stat. Ann. §§23-1301 et. seq.

114. 29 U.S.C. §158(a)(3) (1976).

115. Ariz. Rev. Stat. Ann. §23-1385(B)(1) (1971-80 Supp.); Cal. Labor Code §1154(a)(1) (West Supp. 1980); 29 U.S.C. §158(b) (1)(A) (1976).

116. Ariz. Rev. Stat. Ann. §23-1385(B)(2) (1971-80 Supp.); Cal. Labor Code §1154(a)(2) (West Supp. 1980); 29 U.S.C. §158(b)(1)(B) (1976).

117. Ariz. Rev. Stat. Ann. §23-1385(B)(5) (1971-80 Supp.); Cal. Labor Code §1154(b) (West Supp. 1980); 29 U.S.C. §158(b)(2) (1976); however, under the California Act at §1153(c) the union may make an agreement with the employer requiring that employees take membership in the union on or after the fifth day of employment. The provisions of NLRA coupled with those of Taft-Hartley leave this matter to the states. In Arizona an employee has the right to work without joining the union. Ariz. Rev. Stat. Ann. §§23-1301 et. seq.

118. Ariz. Rev. Stat. Ann. §23-1385(B)(3) (1971-80 Supp.); Cal. Labor Code §1154(c) (West Supp. 1980); 29 U.S.C. §158(b)(3) (1976).

119. Ariz. Rev. Stat. Ann. §23-1385(B)(5)(a) (1971-80 Supp.): Cal. Labor Code §1154(f) (West Supp. 1980); 29 U.S.C. §158(b)(6) (1976).

120. Ariz. Rev. Stat. Ann. §1385(B)(12) (1971-80 Supp.); Cal. Labor Code §1154(g); 29 U.S.C. §158(b)(7) (1980).

121. CCH 1979, supra note 50 at 242-3.

122. Cal. Labor Code §1154(d)(2) (West Supp. 1980).

123. Ariz. Rev. Stat. Ann. §23-1393(B) (1971-80 Supp.).

124. Ariz. Rev. Stat. Ann. §23-1393(B) (1971-80 Supp.).

125. 449 F. Supp. 449, 455 (D. Ariz. 1978).

126. Zepke, Labor Law at 125.

127. Cal. Labor Code §1154(d)(4) (West Supp. 1980), construed in light of Brewery and Beverage Drivers, Teamsters Local 67 v. NLRB, 220 F.2d. 380 (D.C. Cir. 1951); 29 U.S.C. §158(b)(4)(D) (1976); Ariz. Rev. Stat. Ann. §§23-1385(B)(6) and 23-1321 (1971-80 Supp.).

128. "California's Attempt to End Farmworker Voicelessness." supra note 77 at 224.

129. 29 U.S.C. §158(b)(4)(D).

130. NLRB v. Fruit and Vegetable Packers, 377 U.S. 58, 84 S.Ct. 1063,12 L.Ed.2d 129 (1964).

131. Cal. Labor Code §1154(d)(4) (West Supp. 1980).

132. 449 F. Supp. 449, 462 (D Ariz, 1978).

133. 449 F. Supp. 449, 463 (D. Ariz. 1978).

134. 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941).

135. 449 F. Supp. 449, 463 (D. Ariz. 1978).

136. "Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act," 29 Stan. L. R. 277, 295-6 (1977).

137. 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 985 (1979).

138. Preview of United States Supreme Court Cases, Oct. 1978 Term, No. 28, at 2-4.

139. Ib.

140. Ib.

141. 11 Clearinghouse Review 239 (1977).

142. Linden, "Judges Strike Down Ariz. Ag. Labor Law," Packer, May 6, 1978 at AZ; Koziara, "Agricultural Labor Relations Laws in Four States - A Companion," 100 Monthly Lab. Rev. 14 (1977).

143. Rukowski, supra note 93 at 22.

144. "California ALRB on the Rocks," American Vegetable Grower, March 1976 at 48.

145. Ib.

146. "Farm Board Chief Resigns," San Francisco Chronicle, April 17, 1976 at 8; "Farm Labor Board Loses One More," San Francisco Chronicle, April 20, 1976 at 6.

147. New York Times, July 4, 1976 at 18.

148. Rutkowski, supra note 93 at 22-3.

149. Rutkowski, supra note 93 at 23.

150. Ib.

151. New York Times, March 11, 1977 at 1.

152. Ib.

153. Ib.

154. Ib.

155. Rutkowski, supra note 93 at 30.

156. Secondary Boycotts, supra note 136 at 295.

157. H.R. 881, H.R. 4007, H.R. 4011, H.R. 7513, 93rd Cong., 1st. Sess.

158. Dyson, supra note 18 at 141.

159. Ib.

160. See, e.g. Griffing, Walker, Weitzman & Youtie, A Social and Economic Analysis of the Exclusion of Farmworkers from Coverage Under the Indiana Workmen's Compensation Act of 1929 (1977).

161. Dyson, supra note 18 at 144.

162. See, e.g. Petro, "Agriculture and Labor Policy," Labor Law J. 24 (1973); see also Camp, "Trading Chavez for Big Brother," Manion Forum No. 958.

Chapter 12

ALIEN FARMWORKERS AND IMMIGRATION AND NATURALIZATION LAWS

It has frequently been suggested that one of the more serious problems facing American farmworkers is the adverse impact of alien workers on job opportunities, wages, and working conditions. The concern is not only with those who have gained entry illegally, but also with those who are in the United States legally. Mexico, because of its proximity, its lower level of economic development, and its high unemployment rate, is the source of most alien farmworkers. The flow of alien farmworkers, both documented and illegals, from the Caribbean area, while substantially less than from Mexico, is also a matter of concern.1/

There are three basic categories of alien farmworkers: (1) aliens who have legally entered under the auspices of the U.S. Employment Service; (2) commuter workers, some in agriculture and some in other walks of life, who enter legally with their so-called "green cards;" and (3) illegal aliens who are in the country in violation of U.S. immigration laws.2/ This latter group, from what statistics are available, appears to be by far the largest of the three. A brief historical survey puts the current situation in perspective.

Historical Development

With the exception of a ban on Asian immigrants introduced in the late 1800's, quotas were not a part of U.S. immigration policy until the enactment of the Immigration Act of 1924.3/ Fogel indicated:

> Until legislation excluded Asian immigrants in the late Nineteenth Century, restrictions on the migration of people to the U.S. had only been qualitative, banning criminals, persons with various diseases, and those who were thought unlikely to be able to earn a living in the U.S. The last qualification was interpreted loosely because immigration policy until World War I was dominated by the desire to provide unskilled labor for America's farms and industries. Able bodied workers were admitted when national unemployment was high as well as when it was low.4/

The quotas as initially established in the Immigration Act of 1924 did not extend to Western Hemisphere countries.5/ Many persons who crossed the Mexican border nevertheless failed to obtain available visas. Little attention was paid to this situation until the Great Depression, when legal immigration from Mexico was reduced by strict enforcement of provisions in the immigration laws banning people likely to become public charges.6/ Illegal entry from Mexico also declined because of the high unemployment in the United States.7/ Massive "rounding up" and "sending home" of Mexican nationals also occurred during this period, creating a tension in the relations between the United States and Mexico that continues to cause adverse comment.8/

Illegal entry increased again after World War II, but the level was held down by Public Law 78, commonly referred to as the bracero program, which was in effect from 1951 through December 1964.9/ Under this program, Mexican contract labor was supplied, primarily to U.S. agriculture in Texas and California, with the number of foreign workers exceeding 400,000 a year from 1956 through 1959.10/ Strong organized labor opposition, together with other forces, brought the program to an end and set the stage for the current situation.11/ In 1968, an immigration quota of 120,000 for the Western Hemisphere became law.12/ However, the ceiling has had no real effect with respect to Mexico since the number of legal immigrants has increased since 1968.13/

Today, illegal entry from Mexico is at unprecedented levels and the problems that have been allowed to develop seem to defy solution. However, only approximately 20 percent,14/ of employed illegal aliens work in agriculture. Therefore, the overall policy problems that must be faced transcend concerns with farm labor policy.

Not all aliens who work in U.S. agriculture are in the country illegally. The two categories of legal alien farmworkers and the illegal alien farmworker category must be considered in turn.

Current Status of the Law

"H-2" Workers

The first of the three categories of aliens includes those who enter the United States farm work force legally under the so-called "H-2" program of the U.S. Employment Service.15/ These aliens are classed as nonimmigrants under the Immigration and Nationality Act.16/ The statutes offer this description:

> (H) an alien having a residence in a foreign country which he has no intention of abandoning...(ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country....17/

In the last few years, the largest users of the H-2 program have been East Coast apple growers. There have also been requests from Florida growers for sugarcane workers, from Montana farmers for irrigation pipelayers, and from Idaho ranchers for sheepherders.18/ Statistics for the year ending June 30, 1967, and the nine following years indicate that the number of agricultural workers entering through this program has been quite small and that they have come primarily from the West Indies. For example, for year ending June 30, 1976, 572 H-2 workers entered from Canada, 11,568 form the West Indies, and 185 Basque sheepherders from Spain.19/ No Mexican laborers entered under the program from July 1, 1968, to June 30, 1976. A 1978 House of Representatives report on undocumented workers indicated that there was a request for 800 workers by Imperial Valley growers in the late 1970's, but there has been little incentive for farm employers in the Southwest to apply for H-2 workers.20/

The Department of Labor (DOL) has issued extensive regulations governing the admission of nonimmigrant workers under the H-2 program.21/ Agricultural, as well as certain other employers, anticipating a labor shortage, may request certification for the use of temporary foreign labor, but the application must be filed 80 days prior to the anticipated need to permit a 60-day search for domestic workers.22/ The applicant must give assurance that he will cooperate in the active recruitment of U.S. workers including the placement of at least two advertisements in local newspapers of general circulation.23/ By the sixtieth day of recruitment or 20 days before the date of the specified need, the appropriate regional administrator must grant the application to the extent that there has been a determination that there will not be enough U.S. workers to fill the employers' needs.24/

The DOL periodically sets adverse hourly wage rates which will be the prevailing hourly rates in the area for the type of employment involved. Employers must pay the foreign workers at these levels or above. This regulation exists because of a perceived need to prevent adverse effects upon U.S. workers.25/

An employer who hires temporary foreign labor through the H-2 program is subject to numerous additional regulation. The job offer that is made must comply with regulations regarding wages, housing, and insurance where there is no worker's compensation coverage, supplying of tools, cost of meals, transportation, term of employment, and guaranteed number of work-days, record keeping, payroll deductions, and a number of other items.26/ If U.S. workers are supplied to fill the declared need, they must be hired on at least the same terms as those proposed for the foreign laborers. These many regulations, coupled with the fact that it is often very difficult for an agricultural employer to be aware of his manpower needs 80 days in advance, have tended to keep many employers from using this method of hiring foreign nationals. There has also been a suggestion that the DOL has engaged in foot-dragging when H-2 applications have been made, with one member of Congress speculating that there has been pressure from organized labor to discourage the use of the program.27/ During public hearings in 1978, a DOL official conceded "that we are not without sin in this whole situation," but added that there had been cases where farm employers preferred foreign workers and, for that reason, did not search the domestic labor market in an appropriate way.28/

In Elton Orchards v. Brennan,29/ a New Hampshire apple grower sued when his request for certification of West Indies workers for his orchards was turned down. The grower had instead been given inexperienced domestic workers from Louisiana. He alleged that, since other orchards in the area were given West Indies laborers, denial of such workers to him was an arbitrary and capricious act. The Court of Appeals held that the DOL need only have a rational basis for excluding him from certification. To recognize the right of this grower to use aliens for his business would negate the policy of first using domestic workers.

Given the numbers involved, and given the fact that foreign laborers are brought in under the H-2 program ostensibly only when there is a shortage of available domestic labor, it is difficult to see that the program presents a serious threat to the U.S. farm labor force.

"Commuters"

Canadians and Mexicans are able to attain what is known as "commuter" status and are commonly referred to as "green-carders." The name is derived from the original color of the Alien Registration Receipt Card (formerly Immigration Form I-551) that the worker must carry. Most commuter crossings are at the U.S.-Mexican border.

A commuter is required to initially obtain an immigrant visa and is charged to the appropriate numerical ceiling. The visa must then be presented at a port of entry where an Alien Registration Receipt Card is issued. The cards, which are issued to both daily and seasonal commuters, is issued for a six-month period at the end of which the employment status of the individual is reaffirmed and another card issued.30/ As of 1976, about 64,000 persons had commuter status with most being daily commuters and less than 15 percent being seasonal commuters.31/

In 1924, when Congress passed the immigration act, residents of the Western Hemisphere were deemed "non-quota immigrants."32/ Nationals of these countries had to obtain immigration visas only if they wished to reside permanently in the United States. Otherwise, they passed freely across the borders as members of various nonimmigrant classes.33/ This created a large loophole in U.S. immigration law since aliens barred from the United States under quota restrictions simply migrated to Canada or Mexico and commuted to the United States from these countries to work. This led to the promulgation of General Order 86, which applied quota restrictions on aliens of quota countries regardless of where they crossed the border.34/

However, immigration officials did not want to upset established employment patterns of citizens of Canada and Mexico, many of whom held jobs in the United States without protest by American organized labor. Therefore, immigration officials created an "amiable fiction" under which these foreign commuter workers were considered immigrants even though they did not establish permanent residence in the United States. Under that scheme, Canadian and Mexican nationals had to apply for entrance to the United States as nonquota immigrants. Upon satisfying all the ordinary entrance requirements, these aliens were given visas that allowed them to live permanently in the United States but did not require them to do so. Thus, the commuter practice was established and has continued relatively unchanged.35/ A daily or seasonal commuter is classified as a "special immigrant" under the statute,36/ as one lawfully admitted for permanent residence, who is returning from a temporary visit abroad. The nature of the amiable fiction becomes clear as one observes that a person who returns to his residence in Mexico after a day's work, or, in the case of a seasonal commuter, after a harvesting season is over, and then returns to the United States to work, is categorized as returning to the United States from a temporary visit abroad.

In Saxbe v. Bustos,37/ an American farmworker brought suit against the United States challenging the commuter system's legality. The U.S. Supreme Court, in allowing the existing commuter practice to remain undisturbed, upheld the Immigration Service's amiable fiction that a commuter's place of employment coincides with an unrelinquished lawful permanent residence in the United States. Schnidman has suggested that the opinion in Saxbe "reflects an underlying concern that termination of the longstanding administrative practice would have important economic, political and social implications."38/ Without doubt, any sudden change in the present commuter system could cause economic hardship for affected aliens, their families, and their communities.

As the court noted in Saxbe, some have suggested that a termination of the commuter program would also have a deleterious effect on international relations.39/ Others, according to Schnidman, disagree and observe that when Congress allowed the bracero program to lapse, there were no repercussions from Mexico.40/ However, U.S.-Mexican relations were proceeding under substantially different conditions in the 1960s, as will be indicated more fully later.

There may be substantial displacement of domestic workers as a result of the continued operation of the commuter program. There may also be a tendency for commuters to depress wages, lower working conditions, and impede unionization and collective bargaining. If this is true, it would be a matter of particular concern to domestic farmworkers in the western and southwestern United States where green-carders are most numerous. However, given the numbers involved and the fact that only a portion of commuters are involved in agricultural work, there is serious doubt that there is real basis for these concerns. There is no solid statistical evidence to indicate that alien commuter workers depress

wages and working conditions in American Agriculture.

"Illegal" Aliens

Aliens who have entered the United States illegally constitute the third category of alien farmworkers employed in this country. The "illegals" provide the greatest potential for adverse effects on domestic farmworkers, if for no other reason than the sheer numbers involved. The extent of the suggested adverse impact, if any, is exceedingly difficult to assess. As Leonel J. Castillo, former Immigration and Naturalization Service commissioner, indicated in a 1978 hearing:

> The social and economic impact of this undocumented alien population on the United States is difficult to assess. This is because the present state of valid research on undocumented aliens is generally insufficient for a meaningful evaluation of their effect on the United States.41/

However, there are some estimates of the possible extent of illegal migration into the United States. The Social Security Administration estimated that in 1973 there were four million with a range of 3 to 6 million illegal aliens in the United States.42/ Testifying on May 17, 1978, Castillo indicated that there had been "1 million apprehensions last year" with approximately 900,000 of those apprehensions along the Mexican border. Some 30 percent of those apprehended were repeaters.43/ It must be assumed that many who enter illegally are not apprehended and remain in the United States causing the total illegal population to grow annually. Zero Population Growth concludes that an assumption that 800,000 enter and remain each year is reasonable.44/ That figure is probably on the high side, particularly with respect to the number remaining.

While the number of illegals who seek and find employment in agriculture may be substantial, there is good reason to believe that it amounts to only a fraction of the total illegal population. Immigration officials estimated that in 1975 about 1 million jobs were held by illegals, with approximately 335,000 of them in agriculture.45/ A 1977 report indicates that there were more than 64,000 illegals in the Grain Belt states: Colorado, 26,500; Kansas, 12,500; Missouri, 10,000; Wyoming, 5,000; Iowa, 4,000; Nebraska, 3,000; North Dakota, 2,000; and South Dakota, 1,400.46/ There was, however, no indication of how many of the Grain Belt aliens were employed or of how many were employed in agriculture. Another report indicates that in the summer of 1980 the number of farmworkers in California increased by 10,000 as a result of an influx of illegal aliens.47/

A survey reported in 1973 found that 72 percent of the apprehended illegals were involved in or seeking farm work.48/ A 1970 survey showed that 40-45 percent of the workers in Mexican border cities were either holding or had held jobs in the United States and that agriculture was the largest source of employment.49/ Another commentator reports that nearly three-fourths of illegal aliens come to seek farm work.50/ A broader focus and an attempt to look at actual employment is more appropriate. In that context, the 335,000 figure reported by immigration officials, while a very rough estimate, is probably the most reliable indicator at the moment. Fogel, who feels that only about 20 percent of the illegals are employed in farm work, notes that "their predominant employment is in all types of low-wage nonfarm firms, with concentrations in apparel and textile manufacturing, food processing and preparation, and other services."51/

In spite of the lack of sound statistical data, there have been strong assertions that illegal aliens are having an adverse effect on the U.S. economy, including the agricultural sector. A labor spokesman indicated during congressional hearings in 1973 that illegally employed aliens take jobs that would be filled by U.S. workers, depress wages and working conditions of domestic workers, compete with unskilled and uneducated locals, reduce the effectiveness of employee organizations, increase the burden on U.S. taxpayers through added welfare costs, and constitute a group highly susceptible to exploitation by employers.52/

Although isolated data can be gathered to support these contentions, there are many who question the basis for such concerns. Nafziger has indicated that "there is strong and persuasive evidence that the undocumented Mexican alien takes jobs no one else wants."53/ Sterba concluded that there are indications that many employers pay illegal workers the same wages as other workers and provide the same benefits and working conditions.54/ However, Sterba conceded that many employers probably take advantage of the situation by paying less than the minimum wage and by requiring illegals to work under unsafe and unhealthful conditions.55/ Abuses such as issuing stop-payment orders on payroll checks that have been issued to workers just prior to deportation have been noted.56/ Abuses as extreme as the existence of underground labor exchanges where illegal aliens are bought and sold and forced to work for little or nothing have been reported.57/ Other dramatic cases of violations of antislavery and peonage statutes are also coming to light.58/

According to Fogel, there are those who feel that to the extent competition exists from foreign workers, it probably mostly in the higher-paying categories where undocumented Mexican aliens are of little significance.59/ Natziger noted that the secret-ballot provisions under the California Agricultural Labor Relations Act have helped to strengthen organized labor in agriculture even in the presence of undocumented aliens.60/ A recent DOL study 61/ based on interviews with apprehended illegals showed that 77 percent paid Social Security taxes, 73 percent had federal tax withheld from their paycheck, just 1.3 percent had received food stamps, and only 0.5 percent were on welfare.62/ The truth of the matter is that as long as migration across the U.S.-Mexican border is largely out of control, there is little chance of generating statistical data that will give a clear picture of the plight of the "illegals" or the impact of illegals on employment opportunities and conditions in agriculture for domestic workers.

Any analysis of the phenomenon of illegal aliens in the United States must deal with the reasons for this mass migration. In the case of Mexicans coming to the United States, the critical factors seem to be social and economic. Castillo has referred to a "push-pull" factor.63/ The source country—in this case Mexico—contributes the "push" factor given its burgeoning population, high unemployment, low wages, poor living conditions, and the like. The "pull" country—in this case the United States—offers available employment at relatively higher wages, no penalaties or the remote chance of penalty on those who hire illegals, and no real penalties for illegals who are caught other than being sent back to Mexico and the inconvenience of having to reenter the United States. While there are infractions of U.S. law when one enters the country illegally, there are no practical consequences other than being deported. The poor cannot be fined and hundreds of thousands cannot be imprisoned.64/ In addition, the United States as a pull country offers better living conditions, greater educational opportunities, and the drawing power of family already living here. Castillo discounts geographic proximity as a major factor and concludes that the push-pull factor will continue to operate as long as there are great differences in economic opportunity between developed and underdeveloped countries.65/ Once these differences are largely eliminated, the migration will slow and a situation such as that which exists on the U.S.-Canadian border can be expected.

The current state of U.S. immigration law and the enforcement capabilities of border authorities. as currently staffed, equipped, and funded, allows the push-pull factor to operate virtually unimpeded. The rather cumbersome nature of the H-2 program and the commuter scheme, coupled with the Western Hemisphere quota for immigration, does not begin to deal with the pressure to emigrate from Mexico or to leave temporarily to work in the United States. The lack of penalties for employing illegals and the inability under the present state of the law to impound the vehicles of smugglers of people create a situation where jobs can be had and transportation to reach them exists. Smugglers who have been caught have been punished lightly by a couple of months in prison and fines of a few hundred dollars.66/ The border itself, while not wideopen, is relatively easy to cross without detection. The border patrol has basically the same number of people it had 30 years ago.67/ Castillo, testifying in 1978, indicated that there are about 2,200 border patrol officers for the entire United States with about 300 on duty at any one time on the 2,000-mile southern border.68/ Further, current methods of documentation of workers is such that, once they are in the United States, they have no difficulty in getting Social Security cards, driver's licenses, and other standard forms of identification. According to Fogel, some have suggested that the design of current U.S. law, the level of border patrol funding, and the known operation of the push-pull factor represents a de facto U.S. policy to tolerate the movement of illegals into the Southwest and other parts of the United States to meet the labor requirements of U.S. agriculture and industry.69/

Emerging Developments

The Carter administration manifested an awareness of the problem of alien workers in the United States. The president's cabinet committee studying the problem made the following recommendations: (1) employers who hire illegal aliens should be subject to civil fine, (2) new identity cards for legal aliens that are difficult to counterfeit should be issued, (3) illegals who are already in the United States should, under certain conditions, be granted amnesty and allowed to remain in the country, and (4) efforts should be made to create jobs in the immigrant's homeland by means of investment, development aid, and more liberal trade agreements.70/

Certain of the Carter administration's proposals will not be easily implemented. Opposition from certain political quarters and from the press has been manifested. James Reston of the New York Times, in commenting on Secretary of Labor Marshall's and former Attorney General Bell's proposal for limited amnesty for those illegal aliens who have been in the United States for five years on good behavior, indicated that giving such persons the status of legal resident aliens would result in their bringing

their immediate families and dependents into the United States in formidable numbers.71/ Reston asserted that there is an average of more than five dependents living in Mexico for each illegal Mexican now living in the United States.72/ The suggestion is that an influx of such numbers of unemployed Mexicans could constitute a serious strain on the United States' economy. Assuming that Reston's numbers are correct, there is some doubt that amnesty provisions would lead to such a result. On the other hand, the presence of large numbers of family members in Mexico may be providing a pull in that direction which the amnesty scheme might eliminate.

The amnesty proposal has not been introduced in the 96th Congress. However, a number of other related bills were introduced. The major issues which those bills sought to address were: (1) imposing civil and possibly criminal sanctions on employers who knowingly hire illegal aliens, (2) denying the deduction, under the Internal Revenue Code, for labor expense incurred in hiring illegals, (3) increasing the size of the border patrol, (4) improving the documentation provided to legal aliens working in the United States, (5) instituting strict reporting requirements regarding employment of legal aliens, (6) authorizing the use of sophisticated electronic sensing devices in border patrol operations, (7) reduction in the time to 20 days between application and date of need for the H-2 program as it applies to agriculture,(8) authorizing impounding of vehicles, vessels, and aircraft used to smuggle people into the United States, (9) extensive disclosure of illegals receiving public assistance, and other miscellaneous measures.73/

Notable in their absence from the bills were provisions designed to grant amnesty to illegal aliens who have been in the United States since a certain date or for a set length of time, provisions designed to increase the quota for immigration to the United States from Mexico and other Western Hemisphere countries, and provisions for substantially increased bilateral or multilateral aid to Mexico.

Some states have not been waiting for Congress to make the intentional employment of illegal aliens unlawful. A 1977 study reported that 12 states have passed such legislation.74/

The California Labor Code provides:

> "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."75/

The penalty is a fine of not less than $200 nor more than $500 for each offense. The U.S. Supreme Court, in De Canas v Bica,76/ found the California statute to be constitutional and thus sanctioned state legislation regulating the employment of illegal aliens. The Court held that the doctrine of federal preemption had not been violated and that there had not been an infringement of the exclusive congressional power of immigration and naturalization. However, the problems of proof for a prosecutor, who must demonstrate that the employment was with knowledge of illegal status and under circumstances where there would be an adverse affect on lawful resident workers, make enforcement extremely difficult with the result that the practical effect of the statute is very limited.

Recommendations

Given the present state of the law in the United States, there appears to be little prospect of making substantial inroads into the number of illegal aliens entering the country from Mexico short of the construction of a "Great Wall of China," the stationing of a vast number of border patrol officers, and significant air and sea surveillance. Few seriously advocate such drastic measures. The traditions of this society and moral and political concerns over our relationship with oil-rich Mexico rule out such an approach. Mexico's official attitude is that the "silent migration," as President Lopez Portillo terms it, whether legal or not, is something the United States needs and should not complain about.77/ Unofficial comments in Mexico indicate a feeling that the illegals are going into Texas, New Mexico, Arizona, and California by right since those areas were historically a part of Mexico.78/ There can be no doubt that the Mexican government views the opportunity for its underemployed and unemployed to go into the United States as an important "safety valve" and of critical importance to the welfare of Mexico.

Efforts have been made to construct 12-foot-high fences along short stretches of the border where traffic has been the heaviest. Labeled the "Tortilla Curtain," construction began on June 19, 1979, of a four-mile-long segment in the vicinity of El Paso, Texas.79/ Much controversy arose in the United States over this plan. There was a substantial outcry over earlier fence designs which had called for razor-sharp projections capable of severing fingers and toes.80/ Such efforts are likely to have very limited effect on the overall migration into the United States and may well be a source of irritation in the developing relationship with Mexico.

On the other hand, the creation of an open border with no restrictions whatsoever does not seem to be an acceptable alternative. Such a move may release a mass migration from Mexico to the United States on a scale heretofore unimagined. Further, an open border would be an invitation for persons from countries other than Mexico to use such a route into the United States.

The current state of affairs is also not a viable alternative. It is manifestly undesirable to have immigration laws which are, with respect to the Mexican border, virtually meaningless.81/ It is also undesirable to have a situation where millions of people in the United States, many on a permanent basis for all practical purposes, must live day to day classed as "illegals." The attempt to speak of such persons as "undocumented," and admittedly less inflammatory term, does not alter the fact they are in constant violation of U.S. immigration laws and are a class apart from legal U.S. residents. This illegal status is to their ongoing disadvantage and makes them subject to continual suspicion, exploitation, and derogation by many elements in our society. Unfortunately, the taint probably rubs off on many Mexican-Americans who are U.S. citizens, or who are here legally under the immigration laws. Yet, by virtue of U.S. immigration laws and related administrative policies, the United States has "allowed" these illegals to enter and remain, some now having been here for many years. As one commentator has suggested, it is no accident that we have massive numbers of foreign laborers in this country.82/ Cheap, docile labor has been attractive to U.S. employers, including those engaged in agriculture.83/ Political, moral, and practical considerations rule out mass deportation and closing of the border.

Further, the impact of the illegal element on the administration and enforcement of many of our domestic laws must be significant, although this is impossible to document. It stands to reason, however, that a person in the country illegally is not likely to come forward to report child labor violations, wage and hour infractions, occupational safety and health problems, wage and hour complaints, unfair labor practices, abuses under the Social Security system, misuse of workers' compensation and unemployment schemes, and other matters. In addition to not being hired in the future—a threat to many domestic migrant and seasonal workers—there is, for the illegal, the added threat of detection and being deported.

Some have suggested that the answer to the current crisis may lie in part in a massive increase in the use of H-2 or commuter status with strict penalties on employers who knowingly hire illegals. As part of such a scheme, aliens who fail to attain H-2 or commuter status would be subjected to an increased program of deportation. However, it is doubtful that widespread compliance would be expected by domestic employers or alien workers. Such a system would simply be too cumbersome to accomplish much. Further, it would not effectively deal with the illegals currently in the country.

The only long-range answer to the problem seems to be the economic development of Mexico to largely eliminate the "push" aspect of the push-pull phenomenon. Some hope is on the horizon in the anticipation that Mexico will soon have substantial revenues from the sale of oil and gas. Expansion of the oil and gas industry should substantially upgrade the Mexican economy and generate many jobs at better pay levels than at present. However, some feel that there is reason to doubt that the Mexican government will pour substantial resources into the development of its poorer northern states where most of the migration into the United States originates. Yet, it seems inevitable that unless progress is severely impeded by continued high rates of population growth,84/ further development and industrialization of areas in Mexico other than the northern states may create a pull to those developing parts of Mexico, thus taking some of the pressure off the U.S. border.

Those who are skeptical about the Mexican government's intentions toward poorer rural areas should note a growing Rural Development Public Investment Program, known as PIDER.85/ Seventy percent of the investment is in promoting productive activities to provide permanent jobs, raise personal income, and generally improve the social lot of those in chronically depressed rural areas.86/ The Mexican government spent $320 million on PIDER in 1979, the figure is to climb to $500 million in 1980.87/ The United States is giving no direct assistance, but has backed loans to Mexico from the World Bank and the Inter-American Development Bank.88/ It is too early to measure the impact of this program on immigration from Mexico. However, it is the kind of program that may eventually have an important impact.

The United States cannot sit by and wait a number of years for Mexico to take the pressure off the U.S. border. So long as substantial migration continues and so long as the U.S. has great numbers of illegals within its borders, the most promising alternative appears to be to somehow legalize the migration to the point where the legal route will be reasonably attractive and the illegal route much riskier than at present. If the number of illegals crossing the border diminishes substantially, there may be a chance that the remaining illegal traffic can be dealt with and in the end reduced to a trickle.

A substantial reduction of illegal traffic will involve some hard decisions, and whether they are politically salable in the United States remains to be seen. Certainly, some program of amnesty for certain illegals already in the United States should be a part of the package. Evidence of ability to provide financial support could be a prerequisite to authorization to those granted amnesty to bring in additional family members from Mexico. In the alternative, a numerical limit could be placed on how many could enter for family reunification.89/

A second part of the program would call for an increased immigration quota for Mexico. Realistic standards in terms of qualitative requirements would have to be adopted. Under normal conditions, the U.S. economy should be resilient and expandable enough to accomodate substantially more immigrants than are presently permitted from Western Hemisphere countries.90/ The U.S. economy will probably have to absorb these people as "illegal" in any event and the absorption may as well be accomplished "above board," with dignity and in a systematic way. For those who desire to work in the United States temporarily the H-2 and commuter programs may still serve a purpose.91/ If administration of these programs can be improved so that the decision that there will be no adverse effects on the U.S. work force can be made quickly, farmers and other employers may be more willing to use the program, particularly if penalties are imposed for knowingly hiring illegals. One commentator has suggested that sanctions should be imposed without scienter if the employer hires an unreasonably large number of illegals, 25 for example. 92/

Better border patrol control will also have to be a part of the program with an increase in the number of officers and an updating of equipment available to them. Some immediate efforts to provide more meaningful assistance to improve employment opportunities and wage rates in the northern states of Mexico would also seem important. It has been suggested that past efforts to move American industry into these areas has yielded low-paying jobs, but probably has contributed to the migration to border cities, exacerbating unemployment problems and leaving many with their next step, illegal entry into the United States.93/ More meaningful bilateral and multilateral assistance seems to be called for.94/

President Portillo has suggested giving legal status of "guest migrant worker" similar to that of Turkish workers in West Germany.95/ He suggests granting this status to 750,000 Mexicans a year and, at the same time, increasing the U.S. annual immigration quota.96/ He also advocates some form of amnesty for Mexicans now in the United States illegally in return for which Mexico would attmept to tighten its own borders to prevent illegal movement into the United States.97/ Whether the guest migrant worker concept should be substituted for expansion of current H-2 and commuter programs is questionable, but the amnesty program deserves serious study, particularly if it will bring the side-benefit of intensified Mexican border patrol activity. Strong objections to the guest migrant worker proposal come from those who fear institutionalization of a second-class citizenery with attendant exploitation.98/

If a comprehensive program, fashioned from these suggestions, is instituted, there would no doubt be a difficult period of transition. However, the end result could well be a stemming of the tide of illegals entering the United States. The gross numbers of Mexicans entering the United States might not fall substantially until the push factors are reduced, but, in the meantime, some semblance of control could be brought to the situation, the crisis atmosphere substantially eliminated, and good relations with the Mexican government fostered.

The most compelling argument for the recommendations set forth above is that, if people are going to enter the United States under any foreseeable circumstances, something ought to be done to record their entry and give it legal status. Once this occurs, the United States can begin to determine just what impact the whole phenomenon is having on domestic society, something that is now virtually impossible. Recent efforts to gather meaningful statistics have failed miserably.99/ Once the situation is under reasonable control and data are available, it should be possible to make some reasonably accurate determinations about adverse effects, if any, on the domestic work force. If the poor and uneducated in the United States are really being harmed, a "liberal dilemma" truly arises.100/ Does the United States at that point move to assist its own poor or those who stand without, assuming such a choice has to be made? The decision will be difficult given the traditions of this society, but at least a decision, if politically feasible, to assist those legally inside the borders, will be made intelligently and with some chance of corrective measures being implementable.

After the border is under some semblance of control, it should be possible, if politically feasible, to cut back on H-2 workers or commuter workers for a time or adjust the immigration quota and actually be able to deal with any increased efforts at illegal entry that may follow. Further, it is reasonable to suggest that, if we reach a more controlled state, good cooperation from Mexicans legally

in the United states may be forthcoming since it would be in their own self-interest to discourage illegal entry at a time of domestic unemployment or other economic difficulty.

The key to the handling of the current problem is a comprehensive approach in the United States that the Mexican government can tolerate. President Portillo has indicated that his country wants to export goods, not people, and there is no reason to doubt the sincerity of his statement.101/ However, the "safety valve" of immigration to the United States remains important to Mexico for the foreseeable future and, considering the United States' need for Mexican oil and gas, there may be no way that U.S. policy can be formed in a vacuum and without close bilateral cooperation with Mexico.102/

Piecemeal legislation in the United States is not likely to yield desired solutions. Unfortunately, much that is being proposed in the Congress falls into the piecemeal category. Further study is not likely to yield a better understanding of the situation, better data, or a panacean solution. Comprehensive legislation needs to be divised and acted on at an early date.

Notes to Chapter 12

1. See account of plight of Haitian agricultural workers illegally in the U.S. at N.Y. Times, August 24, 1980, at 1.

2. Many commentators and officials now refer to such persons as "undocumented" aliens, but in this study they will continue to be called "illegal" aliens.

3. Immigration Act ch. 190, 43 Stat. 153 (1924), current version at 8 U.S.C. §§1151 et seq. (1976).

4. Fogel, "Illegal Alien Workers in the United States," 16 Industrial Rel. 244 (1977).

5. Ib.

6. Ib.

7. Fogel, supra note 4, at 245.

8. Ib. Many studies refer to massive deportation activities. Technically, this is not correct since quasi judicial deportation proceedings have normally not been resorted to, and are not currently resorted to, in connection with returning Mexican nationals to Mexico. This is done without formal proceedings and it is only where the individual claims a right to remain that deportation will be used.

9. See, Craig, The Bracero Program: Interest Groups and Foreign Policy (1971); Act of July 12, 1951, Pub. L. No. 78, 65 Stat. 119 as amended, 7 U.S.C. §§1161-1468 (1968) as amended, 7 U.S.C. §§1462-1467 (Supp. III 1962).

10. U.S. Labor Department files.

11. Fogel, supra note 4, at 245.

12. Id. at 244.

13. Id. at 248.

14. Id. at 254.

15. 8 U.S.C. §1101(a)(15)(H)(ii) (1976).

16. 8 U.S.C. §1101(a)(15)(A)-(J) (1976), as amended.

17. 8 U.S.C. §1101(a)(15)(H)(ii) (1976).

18. Hearings on Undocumented Workers: Implications for U.S. Policy in the Western Hemisphere Before the Sub-committee on Inter-American Affairs of the House Committee on International Relations, 95th Cong., 2nd Sess. 22 (1978) (hereinafter Hearings on Undocumented Workers).

19. Dept. of Justice: I & N S Annual Report 1976, Table 18, at 116.

20. Hearings on Undocumented Workers, supra note 18, at 22.

21. 20 C.F.R. §§602.10-602.10b (1978), replaced effective April 10, 1978 by 20 C.F.R. §§655.200 et seq.

22. 20 C.F.R. §655.200(a) (1978).

23. 20 C.F.R. §655.203(d) (1978).

24. 20 C.F.R. §655.206(a) (1978).

25. 20 C.F.R. §655.207 (1978); 44 Fed. Reg. 32211-12 (1979); 44 Fed. Reg. 55826 (1979).

26. 20 C.F.R. §655.202 (1978).

27. Hearings on Undocumented Workers, supra note 18, at 22.

28. Id. at 23-4.

29. 508 F.2d 493 (1st. Cir. 1974).

30. Dept. of Justice: I & N S Annual Report 1976, at 8.

31. Ib.

32. Immigration Act ch. 190, §4(c), 43 Stat. 153 (1924), current version at 8 U.S.C. §1151 (1976).

33. "Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems, 48 N.Y. Univ. Law Rev. 439 (1973).

34. "Aliens in the Fields: 'The Green-card Commuter Under the Immigration and Naturalization Laws,'" 21 Stan. L. Rev. 1750 (1969).

35. "Commuters," supra note 33, at 462.

36. 8 U.S.C. §1101(a)(27)(A), formerly designated (27)(B).

37. 419 U.S. 65, 95 S.Ct. 272, 42 L.Ed.2d 231 (1974).

38. Schnidman, "Saxbe v. Bustos: 'Amiable Fiction of the Alien Commuter - An Old Farm Hand That Should be Retired,'" 2 Ohio North. L.R. 766 at 771 (1975).

39. Saxbe v. Bustos, 419 U.S. 65, at 79.

40. Schnidman, supra note 38, at 773.

41. Hearings on Undocumented Workers, supra note 18, at 4.

42. Id. at 3; compare Crewdson, "Study Suggests 6 Million or Fewer Illegal Aliens in U.S.," N.Y. Times, Feb. 3, 1980, at 1, reporting somewhat lower figures.

43. Id. at 7.

44. N.Y. Times, Aug. 10, 1977, §B at 2.

45. Sterba, "Aliens: Where They Come From, What Awaits Them," N.Y. Times, May 1, 1977, §4 at 3.

46. N.Y. Times, Feb. 13, 1977, §1 at 31.

47. L.A. Times, Aug. 10, 1980, at 1.

48. "Commuters," supra note 33, at 481.

49. 93 Monthly Labor Review 22 (1970).

50. Nafziger, "A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States," 56 Ore. L. R. 63 at 86 (1977).

51. Fogel, supra note 4, at 254.

52. H. Rep. No. 108, 93rd. Cong., 1st. Sess. (1973).

53. Nafziger, supra note 50, at 70.

54. Sterba, supra note 45.

55. Ib.

56. Ib.

57. Crewdson, "Thousands of Aliens Held in Virtual Slavery in U.S.," N.Y. Times, Oct. 19, 1980, §1, p. 1., col. 1.

58. Ib.

59. Fogel, supra note 4, at 255.

60. Nafziger, supra note 50, 92.

61. N.Y. Times, May 1, 1977, §4 at 3.

62. See also Nafziger, supra note 50 at 73-75.

63. Hearings on Undocumented Workers, supra note 18, at 2.

64. Fogel, supra note 4, at 250.

65. Hearings on Undocumented Workers, supra note 18, at 2.

66. Fogel, supra note 4, at 250.

67. Hearings on Undocumented Workers, supra note 18, at 10.

68. Id. at 7.

69. Fogel, supra note 4, at 246.

70. N.Y. Times, May 1, 1977, §4 at 2.

71. N.Y. Times, May 4, 1977, §A at 23.

72. Ib.

73. H.R. 225; 244; 326; 405; 800; 1517; 1934; 2213; 2214; 2442; 2614; 5254; 5261 (96th Cong., 1st Sess.).

74. Fogel, supra note 4, at 261.

75. Cal. Lab. Code §2805.

76. 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).

77. Reston, "Mexico Lectures the U.S.," N.Y. Times, Feb. 16, 1979, p. 27, Col. 1.

78. Ib.

79. Columbus Dispatch, June 20, 1979, §A at 4.

80. Time Magazine, Oct. 30, 1978, p. 47; Dec. 4, 1978, p. 11.

81. Concur, Nafziger, supra note 50, at 105.

82. Midgley, "The 'Informal' Masses," N.Y. Times, May 20, 1979, §4, p. 21, col. 5.

83. Ib.

84. Population growth in Mexico is estimated to be between 3.2 and 3.6%. A 40% underemployment and unemployment rate has been cited. 2.8 million new entrants to the work force are anticipated between 1978 and 1982. Hearings on Undocumented Workers, supra note 18, at 14, 17, and 31.

85. Riding, "Mexican Plan Slows Emigrant Flow to U.S.," N.Y. Times, Feb. 15, 1979. p. 3, col. 4.

86. Ib.

87. Ib.

88. Ib.

89. Hearings on Undocumented Workers, supra note 18 at 91.

90. See, Fogel, supra note 4, at 255 for estimated data on U.S. growth.

91. Concur as to "H-2," Nafziger, supra note 50 at 103.

92. Id. at 101.

93. Crewdson, "U.S. Industry in Mexico's Border Cities, A Promise Dims," N.Y. Times, Feb. 22, 1979 at 18.

94. Hearings on Undocumented Workers, supra note 18, at 14.

95. N.Y. Times, Feb. 19, 1979, at 5. The example involving Turkey and West Germany is but one example of a number of treaties and conventions involving freedom of movement of persons and Social Security for migrant workers. Consult Encyclopedia of European Community Law and such publications as Social Security for Migrant Workers (ILO) 1977.

96. Ib.

97. Ib.

98. L.A. Times, July 31, 1980 at 1.

99. 40 U.S. News & World Report 40 (1979).

100. Fogel, supra note 4, at 259.

101. N.Y. Times, Feb. 17, 1979 at 5.

102. Compare Houston Chronicle, editorial, Sept. 7, 1980, §4 at 2.

Chapter 13

OVERVIEW

A General Commentary on Agricultural Employment Policy

Special attention has been given to 11 areas of concern. In each instance, specific recommendations have been made, but it is intended that all such recommendations be viewed in light of this general commentary and the general recommendations that follow. Farm employment policymaking has been characterized by a tendency to enact laws and promulgate regulations in a compartmentalized fashion. Therefore, it is important to identify and comment on some of the more pressing concerns that cut across the artificial lines of the topics considered in this study. Matters selected for comment are labor supply; compensation and benefits; equitable regulation; and special subgroups, including migrant workers, hired workers who are members of the farmer's family, sharecroppers who are currently classified as independent contractors, farm labor contractors, youthful workers, and illegal aliens.

Labor Supply

While it is difficult to predict the precise nature of changes that will take place in American agriculture between now and the end of the century, it seems reasonably certain that the size of farms will continue to grow and that reliance on machines and chemicals will continue to increase. Crop changes are also likely to continue to occur from time to time on specific farms and in certain geographical areas. Many factors can be cited in an effort to explain why these things have been happening and why they are likely to continue to occur. Inevitably, the increasing cost of hired labor will be identified as one of those factors.

As wage rates and related costs are forced up by changes in the law and, in some locations by union pressure, certain agricultural operators will continue to find it more economical to convert to less labor-intensive crops or rely more on machines and chemicals. Therefore, it is no surprise to learn that the hired labor force in American agriculture has been shrinking in size and that more is being demanded of many of the hired workers who remain by way of increased technical skills and knowledge of agronomy, animal husbandry, and the like.

In recent years, certain exceptional situations aside, there has been a general labor surplus in agriculture, resulting largely from the decrease in the number of available jobs. Accordingly, there seems to be no immediate concern about meeting the hired labor needs of agricultural operators and there have been no serious complaints that settling-out programs and retraining programs administered in the Department of Labor have been creating a labor supply shortage.

The question arises, however, whether further changes in agricultural employment policy, such as those suggested in this study, are likely to generate shortages, other than on an isolated and short-term basis. Assuming that labor costs increase as more and more farmworkers are brought under existing programs and as the labor movement gains added strength in agriculture, the kinds of adjustments that we have been experiencing are likely to continue. Farmers who find it advantageous to switch to less labor-intensive crops or methods will do so if they can. Others, who would have difficulty making these changes, may be forced to ride out a period of adjustment and allow market forces to operate over a period of time to pass these increased costs on to the consumer. Thus, the demand for hired labor will probably continue to decrease. However, it seems unlikely that the size of the available hired work force will decrease at a faster rate than the decline in demand so as to produce a crisis. Indeed, it seems reasonable to expect that if wages and benefits go up in the agricultural employment sector, the economic return from such employment may be substantial enough to generate more competition for existing jobs than at present. Further, there is no reason to suspect that employment services programs will diminish in scope and effectiveness. Indeed, it appears that the increased attention given to the whole rural employment scene should be an assurance to farmers and others that best efforts will be made to insure an adequate hired work force for all rural enterprises, including agriculture.

Compensation and Benefits

Viewed in its entirety, this study points to establishing as a clear national goal the providing of a hired farmworker force at a cost that is fair to farm operators, while at the same time moving steadily toward bringing that work force into the mainstream of the national production labor force. Is this a realistic goal? Is it possible to accomplish the objectives set forth for the hired farmworker force without bringing impossible and unreasonable labor costs to farm operators?

In several sections of this study, the matter of the cost of various employment-related legislation to agricultural operators has been discussed. It has been pointed out that the extension of benefits under a number of legislative schemes has been delayed and in some instances is still not a reality because of the fear that the cost would be too great for agricultural employers to absorb. Doubt has also been expressed that such costs can be passed along to the consuming public.

It has been argued in various sections of this study that this concern ought no longer to stand in the way of expansion of benefits to farmworkers. It is recognized that this is a controversial position and that the concerns of agricultural operators cannot be dismissed lightly. However, whatever the peculiarities of agriculture when viewed against the economic structure of American industry in general, agriculture has passed on a host of increased operating costs, particularly in the post-World War II era. This includes costs attributable to the use of hired workers. Wages have increased, social security taxes have become a commonplace expense, unemployment taxes are paid in some instances, as are worker's compensation premiums. Even in the states where the increases have been the greatest, agricultural employers have been able to adjust and, with few exceptions, have survived. A price is to be paid in terms of the number of available jobs for hired farmworkers in light of crop changes and mechanization yet, for those who remain in the hired farmworker force, wage rates and benefits have improved.

Much lies ahead before most farmworkers will be brought into the economic mainstream and pressure for better wages and benefits will continue. What is called for is neither a sudden halt in efforts to improve the economic situation of farmworkers nor a sudden elimination of all existing exclusions and exemptions. What is necessary is a coordinated effort that will allow future changes to be made in a staggered fashion designed to give agricultural operators the time to make adjustments and to allow the slow market process to operate to pass through increased costs.

What is needed, therefore, is a major study delineating the labor costs involved in farming, broken down to indicate how much of the overall cost is attributable to each piece of existing social legislation and each current benefit plan. The potential impact of further changes in social legislation on labor costs should be carefully studied with special attention being given to the situation of farmers with specialized operations, those located in district regions of the country, and those using a small number of hired workers. Only through such a comprehensive study can data be gathered that will allow informed judgments to be made about the order in which changes in existing laws should be made and the intervals that may be needed between future legislative acts to allow farm employers to cope.

Workable Regulation

Much in this study has been directed toward the current state of the law and suggesting ways in which agricultural employment regulations and programs might be made more effective, less confusing, and more equitable. It is ironic, that in 1980 the administrative complexities of employer-employee law are greater in agriculture than in most other industries. Congress and the state legislatures have succeeded in doing what they repeatedly said they must not do -- impose heavy administrative burdens on agriculture.

Currently, a farmer who hires workers for his agricultural operation must, if he is to feel secure about being in compliance with agricultural employment laws, be a master of a vast array of technical rules and remain ever vigilant to know when thresholds are reached that trigger the application of a host of different requirements. Small- and medium-sized farm employers have a particularly heavy burden, for it is the farmer with a small labor force, one to 12 workers, who may be constantly hovering around various thresholds. When that farmer uses youthful workers, "day-haul" workers, or migrant workers, the problems are compounded.

By way of review, consider this sampling of regulations that might have application on a particular farm and the questions that the farm operator must continually ask himself: Has the 500-man-days test been met, thus triggering the application of federal minimum wage requirements? If that test has

been met, are there still workers who are excluded and who can be paid at a lesser rate? If the minimum wage must be paid, have prerequisites been valued properly, have piece rates been calculated to meet the minimum wage, are there state wage laws or hour laws that must be observed where federal law does not apply or in combination with federal law? If youthful workers have been hired, have they been assigned appropriate work given their ages and have the proper consents and certificates been obtained? Must youthful workers be paid at the same level as adults employed on the same farm? Which OSHA regulations currently apply to agriculture? Is the exclusion for employers with 10 or fewer hired workers still in effect and does it apply to the particular farmer's operation? Does the "general duty" clause apply to the particular operation and what obligations exist if it does? Have any workers worked long enough or earned enough to require Social Security withholding and filing of the annual returns? If withholding is required, has the amount withheld reached a sufficient level to require compliance with depository rules? Is the farmer engaged in activities that require him or his employees to register as a farm labor contractor? Is the farmer getting any workers through a farm labor contractor and, if so, must that contractor be registered and must the farmer thus demand evidence of that registration and copies of various records? Does the farmer meet the 10-or-more-hired-workers-during-20-weeks test under unemployment compensation laws or some different threshold test if one more favorable to workers has been enacted in the particular state? If unemployment taxes must be paid, what rate applies to the particular farm and what forms must be filed? Does worker's compensation apply to agriculture in the employer's state at the moment; if so, has the farmer met the threshold requirements under state law and, if so, how is satisfactory coverage obtained? Are there any state laws that require that health insurance be provided for hired farm workers? If the farmer elects to use his state employment services office, what regulations then apply and will this have an effect on wage rates that must be paid and other benefits required by law? What are the rights of union organizers if they should attempt to organize the farmer's employees? Is there labor-management legislation at the state level applicable to the farmer's operation? Can alien workers be hired and, if so, what treatment are they entitled to under all of the above laws and regulations? If some of the employers are relatives, when and how do they fit into the regulatory scheme? How does one determine whether one or more of the workers on the farm are independent contractors and what are the obligations to such workers, if any, under current law? What records must be kept and in what form and how long when one or more of the above schemes has application? How do civil rights laws affect agricultural employment? What does one do if the local, state, and federal laws seem to apply to some activity but with inconsistent provisions? What happens if the farmer buys a farm and continues to use some of the seller's employees?

The list could be made much more elaborate. The purpose of posing these questions is to illustrate the degree of sophistication that is being demanded of farmers as they attempt to understand when regulations become applicable and the substance of those regulations.

If the present system, viewed in its entirety, is to be more manageable for farm operators and more effective for farmworkers, two important developments are essential.

First, assuming that there will be no sudden simplification of the law, it is clear that much needs to be done to communicate current requirements to farm operators, farm-labor contractors, farm employees, and to many of the attorneys -- general practitioners for the most part -- who represent them. Several references have already been made in this study to problems with governmental efforts to communicate with those who are faced with the necessity of comprehending their status under the myriad statutory and regulatory programs affecting farm employment. It is not sufficient that the laws be published in official form. It is manifestly unreasonable to expect that those affected, or even their attorneys, will have all of the following on hand: the United States Code, the Code of Federal Regulations, the Federal Register, the relevant state statutes, the state administrative code, the state register, and reports of decisions of administrative agencies. This material is costly, and occupies many shelves. Even where all relevant volumes are available, it takes many hours to work through indexes, some of them extremely inefficient, to locate all of the current statutes and regulations bearing on farm employment.

Some efforts have been made to attack this problem. For example, the Ohio Agricultural Management Association, an affiliate of the Ohio Farm Bureau Federation, prepared a short document entitled "Summary of State-Federal Farm Labor Laws" designed for Ohio farmers.1/ Extension services in some states have also attempted to fill the void by publishing farm labor handbooks.2/ The Migrant Legal Action Program, Inc. has produced and made available a wide range of excellent publications and resource materials.3/ All of these publications, while very helpful, need constant updating and, unless supplemented or revised on more than an annual basis, lose much of their usefulness. State and federal agencies publish specialized pamphlets, forms, and guides, but what is missing is a comprehensive treatment of the many regulatory and assistance programs which is kept up-to-date. What is needed is a comprehensive looseleaf service with frequent supplementation.

A 1980 publication goes a long way toward filling this need by including, in a multi-volume agricultural law treatise, good analytical material on most, though not all, of the areas considered in this study.4/ Further, for the user who does not have access to federal legal materials, the notes set forth in full text, many of the most important federal statutes and regulations, plus some selected state statutes and regulations.5/ Given the rapid pace of development of certain of the agriculture employment law areas, the frequency of supplementation will impact the value of the work as a source of primary materials.6/

The second phase of the suggested plan to improve the effectiveness of current statutes and regulations involves the implementation of many of the specific suggestions made earlier in this study. One of the more critical is the gradual elimination of many thresholds that apply in agriculture, but not in other industries. The substance of the regulatory schemes are difficult enough to deal with without having the question in so many cases of whether the regulations apply at all. The gradual elimination of most, if not all, thresholds and, thus, the exclusions and exemptions, would bring about a simpler and arguably more effective system of regulation. Such changes would also be socially desirable from the perspective of those who have vital concerns about the lot of hired farmworkers. From the standpoint of agricultural operators, benefits would include a less complex regulatory system and, quite probably, a more satisfied and more productive work force. As has already been pointed out, careful phasing out of thresholds is necessary so that resulting increased costs can be accommodated by farm employers without adverse long-range effects.

Special Subgroups

While the sections of this study allude to particular problems of migrants, family members employed on family farms, sharecroppers, farm labor contractors, and youthful workers, the only subgroup treated separately was the alien work force. At this point, some broad suggestions are made about each of these groups with a view to supplementing specific recommendations set forth previously.

Migrant farmworkers. As farmworkers are increasingly brought closer to the mainstream economically, there is little question that more jobs will be eliminated. This means that some workers who rely entirely or heavily on income from agricultural employment, including many now in the migrant streams, will continue to be displaced and forced to settle out. Thus, for the foreseeable future, programs should be continued and possibly expanded to assist these workers and their families in the adjustment period. Retraining, education, and relocation programs such as those funded through the Office of National Programs of ETA deserve continued funding and should be reassessed continually to determine whether additional appropriations are required. Health, nutrition, child care, and similar service programs also will have to remain in place for the foreseeable future until migrant and seasonal farmworkers are either settled out and are economically independent or have found permanent, year-round employment in agriculture which brings a family income significantly above the poverty level. It is hoped that the time will come when these special programs can be reduced substantially and remain in place only to deal with hard-core poverty problems which will probably always exist at some level. The pace of mechanization and other changes leading to the requirement of fewer workers probably cannot be predicted accurately; thus, there must be a great deal of flexibility from year to year and from region to region in determining the level of funding for these programs.

Family members. There is a need for a comprehensive look at the treatment of family members in agricultural employment legislation and, in particular, the treatment of family members who are employed by family farm corporations. As has been pointed out a number of times in this study, there is confusion and inconsistency in the law as it applies to such persons. A satisfactory definition of family farm corporation needs to be arrived at and careful attention needs to be given to whether family members employed by such a corporation are to be excluded or included under employment-related legislation. Unfortunately, in many instances the problem has simply not been addressed. No specific recommendations are made, but it is urged that there be more conscious decisionmaking in this area.

Sharecroppers. This study does not explore the status of sharecroppers in any detail and only makes incidental references to their situation. However, there may be a great number of people working in agriculture as independent contractors who are functioning at about the same level of management independence as hired farmworkers. Whether there are conscious efforts on the part of farm operators to slip people into this category rather than putting them on the payroll or whether it is simply a matter of custom or tradition in certain areas is difficult to say. However, it seems likely that many are being treated for all practical purposes as employees, while not qualifying for benefits under most of the social legislation discussed in this study.

The problem is perplexing and disturbing since most of these workers and their families are presumably in as much need as are many hired farmworkers. However, short of major changes in the defini-

tion of independent contractor as that concept applies to the relationship of farm operator and sharecropper, it is difficult to see what can be done. Careful study of the law and of relevant economic data is clearly needed. Given the current data base, it is difficult to predict what numbers will emerge and what a detailed economic analysis will indicate.

Farm labor contractors. Much has been said in this study about the problems of farmers and hired workers in their relationships with farm labor contractors. Those problems are important and much continued attention to the legislation in this area can be anticipated as competing interests promote changes in existing law.

In addition, however, there is a definite need to look at the problems of the farm labor contractor as he deals with government regulations, with his workers, and with farm employers. As this study suggests, some farm labor contractors may have very difficult problems with crew members ranging over a broad spectrum. They may also have problems with some farmers who use their services begrudgingly and without understanding the regulatory scheme that the contractors must live with. Much could be done to improve the lot of all concerned if there were more active efforts to assist farm labor contractors in keeping current with the law and in assisting highly qualified members of their own profession in offering training and consultation to others. The possibility of government assistance for such programs needs to be given serious consideration.

Youthful workers. Total elimination of the use of youthful workers in agriculture is not a realistic or desirable goal. Yet, to insure that such workers are employed in safe jobs, healthful conditions, and are being treated fairly, strict regulations are needed. Unfortunately, the current system of regulations is too complex to be more than minimally successful. This study has proposed major changes in the law designed to produce a situation where more control is possible than at present, but under a scheme that does not depend as much on employers being up-to-date on a plethora of regulations and being motivated to abide by them. One impact of what has been proposed would be to insure a supply of youthful labor under appropriate circumstances to farm operators who have a real need for this type of labor input, but to discourage the use of child labor where the primary objective of the farm operators is to save money.

Illegal aliens. While it is possible to discuss theoretically the status of illegal aliens under agricultural employment laws, it is difficult, if not impossible, to assess the real-life situation. There are simply no accurate data to indicate how many workers are involved, where they are employed, or how they are being treated. Are such workers being routinely discriminated against by employers? Are employers typically ignoring employment laws? What impact do illegal aliens have on the overall farm employment picture in the United States? Attempts to answer these questions lead inevitably to a great deal of guesswork.

As this study points out, the best information currently available suggests that there are large numbers of such workers, that many have been in the United States for some time, that others continue to return to the United States season after season, and that there are no prospects that the situation is going to change in the foreseeable future. Further, there is no move afoot to engage in mass deportation. Therefore, it has been suggested in this study and elsewhere that a positive approach would be to face these realities and afford illegal alien workers some kind of legal immigrant status. When this happens, there is an excellent chance that most of these people will surface and we will be able to identify them and begin to study their situation and obtain some accurate information on which to make policy judgments. The continued existence of the illegal phenomenon tends to fog the entire agricultural employment picture, particularly in some parts of the country, making it very difficult to assess the impact and effectiveness of existing agricultural employment laws.

General Recommendations

These recommendations, for the most part, cut across the various chapters of this study and are designed to supplement and, in some instances, coordinate the recommendations made in particular areas.

Review of Regulatory Schemes

Current statutes and regulations affecting the farm employment scene are in need of a general review with a view to correcting mistakes, clarifying ambiguities, eliminating unnecessary provisions, and dealing with oversights. This review should be comprehensive so that conflicts between different sets of regulations can be uncovered and dealt with.

Economic Study

An overall economic study of the farm employment sector should be mounted. Careful attention should be paid to generating a breakdown of labor costs so that the impact of current social legislation can be identified on an item-by-item basis. Major commodity categories should be studied separately and regional breakdowns would also be important. If there appears to be a reasonable prospect that legislation will be passed in the near future granting amnesty to illegal aliens, the proposed study might be delayed until it is possible to identify and include those in this group who are engaged in agricultural employment. The cost of further increasing coverage and benefits for hired agricultural workers under the various legislative areas covered in this study should be projected. Estimates of how long it would take farm operators, particularly those with a small number of employees, to pass through added costs should also be attempted. Consideration should also be given to studying the current impact of negotiated wage levels and benefits in California and elsewhere in labor costs. Such a study, updated annually, would provide an ongoing data source vital to the design of a systematic phase-out with the least possible economic disruption of most of the current exclusions and exceptions that apply to agricultural employment.

Coordination of Future Legislation and Rulemaking

Future changes in agricultural employment statutes and regulations should be made only after useful evaluation of the effects such changes may have on the entire agricultural employment regulation scheme. This approach would give greater assurance that what is being done is socially appropriate from the standpoint of farmworkers and reasonable from the standpoint of farm employers. While the goal of bringing farmworkers into the mainstream of the national production economy is advocated, there cannot be an immediate wholesale abandonment of existing thresholds, exclusions, and exemptions. All this must be accomplished in phases to insure that farm operators have sufficient opportunity to adjust their operations or to allow the market to pass through added costs. It is imperative that the piecemeal approach to legislation be replaced by comprehensive planning. This is particularly important to smaller farm operators if exclusions, exemptions, and thresholds are phased out.

Any legislative scheme that is considered in the future should give attention to recordkeeping and reporting requirements as they now exist in many statutes and regulations. It should be possible to devise a uniform, universal, and reasonably simple farm employment recordkeeping system to generate the kind of data required by the various programs. A cooperative venture by various agencies could produce such a system with the cost legitimately charged off to enforcement expenses. Once in place, such a recordkeeping system would probably produce more cooperation from employers and may well help to root out unintentional violations of many statutes and regulations.

The Information Problem

Closely related to the recordkeeping recommendation is the suggestion that -- either at the private level or, if need be, at the public level -- a complete agricultural employment law service be available in a form that can be frequently supplemented. If available at a reasonable cost, such a service could do much to improve the effectiveness of current statutes and regulations as well as promote a better attitude toward agricultural employment laws. A system that elicits the following remarks has a strike or two against it from the outset: "Government laws and regulations have exploded in such profusion that it is difficult if not impossible for farmers to keep up-to-date. Unfortunately, as the saying goes, 'ignorance of the law is no excuse.' You could be taking very grave financial risks when you hire farm labor."7/

Special Subgroups

Attention to the problems of certain subgroups within the farm labor force should be given priority. As more on-farm production jobs are eliminated, retraining and relocation assistance will continue to be required, particularly for migrant workers. Needs in this area may actually increase. It is hoped that such increased needs can be anticipated so that programs can be in place and sufficiently funded to deal with the situation as it arises. Problems of sharecroppers need attention. If the major study advocated above is carried out, it should include a careful analysis of the legal and economic situation of sharecroppers so an accurate assessment can be made as to whether their self-employment status is, in many cases, nothing more than a thinly veiled device to avoid the employer-employee relationship and the regulations applicable to it. If this suspicion is verified, serious consideration should be given to making changes in the law that would somehow bring these people into

the mainstream of agricultural employment law so that they may qualify for all available benefits. The matter of illegal aliens employed in agriculture also needs attention. Once these workers are identified, it will be possible to assess their impact on the agricultural employment scene and the effectiveness of delivery to them of social services and benefits under employment-related laws. Finally, special attention to problems of youthful workers is recommended with a view to evolving employment laws that are not afflicted with undue complexity.

Labor-Management Legislation

Finally, it is of great importance to remember that even the full extension of all existing employment-related laws will not alone bring farmworkers to or near the level of other production workers in this society. The minimum wage lags well behind the industrial average and wages for farmworkers, even in employment covered by current minimum wage legislation, are not much above the current statutory minimum. This means that annual income is quite low and many other benefits are paid at low levels since they are tied to past experience. As long as earnings hover around the poverty level and unemployment, worker's compensation, social security, and other benefits, if any, are paid at the low end of the scale of benefits, life will be difficult for those who depend entirely or heavily on agricultural employment for their livelihood. Thus, the underlying conditions generating poor nutrition, poor health, and poor educational experiences will be ever present and programs that attempt to treat these conditions, while vital, will have little chance of preventing the same problems from appearing in generation after generation. Thus, for those who remain in farm work, the only obvious way of pushing wage levels to 150 to 200 percent of current minimum wage levels and simultaneously creating the potential of better benefits under many social programs, is to fight, no doubt at the cost of some jobs, through farmworker labor unions. The states -- or the federal government, if the key agricultural states fail to act in a reasonable time -- should support the union movement in agriculture by extending the protection afforded by labor and management relations legislation, with the California Act as the most likely model.

The complex problems of agricultural employment are never going to become simple, but much can be done to improve the current state of the law and the way in which it is administered. It is not suggested that the proposals in this study that focus on the improvement of the lot of hired farmworkers can be put into effect without controversy and without causing difficult periods of adjustment for some farm operators. However, the results of the proposals contained in this study make the obstacles worth running. What is good for the hired farmworker force may also be generally good for farm operators and agriculture and rural society in the long run. A better paid, more secure, more stable, more satisfied, healthier, more skilled, less frequently injured, less transient, and more productive hired farmworker force should be an exciting prospect for all elements in American agriculture.

Notes to Chapter 13

1. Slade, "Summary of State-Federal Farm Labor Laws," Ohio Farm Bureau Federation (n.d.).

2. Ohio Farm Labor Handbook, Ohio Cooperative Extension Service (November 1976), as an example.

3. See Farmworker Resource Directory for Advocates (April 1980), which lists the available materials. Contact, MLAP, 806 15th St. N.W., Suite 600, Washington, DC 20005.

4. Harl, Agricultural Law (Matthew-Bender, 1980), particularly §§16.01 - 23.07[2] and §§38.01 - 38.06. This multi-volume treatise deals with a number of other important areas of agricultural law, in addition to the employment related matters.

5. Ib.

6. The current intent is to supplement the work more than once a year, possibly on a semi-annual basis.

7. Slade, supra note 1.