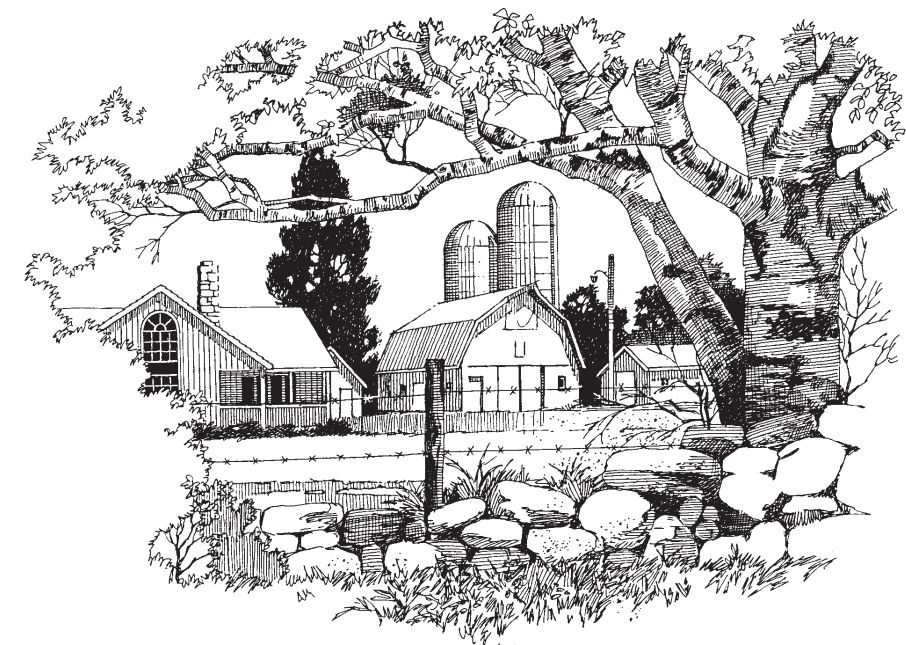


# Oklahoma Farm and Ranch Employment Handbook



E-1028

Oklahoma Cooperative Extension Service  
Division of Agricultural Sciences and Natural Resources  
Oklahoma State University



## Oklahoma New Hire Reporting Form

OES112(12-04)

Please fill out completely and mail to: Oklahoma New Hire Reporting Center  
 (PRINT or TYPE Please!) PO Box 52003  
 Oklahoma City, OK 73152-2003  
 OR FAX to: 1-800-317-3786 or OKC Metro Area (405) 557-5350

Download a copy of this form at:  
<http://www.oesc.state.ok.us/newhire/>

Information Number: 1-800-317-3785 or OKC Metro Area (405) 557-7133

### Employer Information

Federal Employer Identification Number   -

Oklahoma Account Number    -

Company Name

Payroll Processing Area Code, Phone Number  Extension

Payroll Processing Address Line 1

City  State

Payroll Processing Address Line 2

Country

Payroll Processing Address Line 3

ZIP Code

### New or Rehired Employee Information

Social Security Number    -

Occupation

First Name  Middle  Last Name

Starting Salary \$   Hour  Week  Commission / Other   Month  Year

Mailing Address

New Hire  Recalled  State of Hire

City

Date Started to Work or Recalled Month  Day  Year

State  ZIP Code    -

Dependent health insurance available?  Yes  No

Date of Birth Month  Day  Year

Is this person currently employed with your company?  Yes  No

# Oklahoma Farm and Ranch Employment Handbook

## Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 12 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529-2210. OMB No. 1615-0047. **Do not mail your completed Form I-9 to this address.**

**Shannon L. Ferrell, Esq., J.D.**  
Assistant Professor, Agricultural Law  
Oklahoma State University Department of Agricultural Economics  
532 Agricultural Hall  
Stillwater, OK 74078  
shannon.l.ferrell@okstate.edu

**Rodney Jones, Ph.D.**  
Area Extension Agricultural Economist  
Oklahoma State University Department of Agricultural Economics  
316 E. Oxford  
Enid, OK 73701  
rodney.jones@okstate.edu

Oklahoma State University, in compliance with Title VI and VII of the Civil Rights Act of 1964, Executive Order 11246 as amended, Title IX of the Education Amendments of 1972, Americans with Disabilities Act of 1990, and other federal laws and regulations, does not discriminate on the basis of race, color, national origin, gender, age, religion, disability, or status as a veteran in any of its policies, practices or procedures. This includes but is not limited to admissions, employment, financial aid, and educational services.

Issued in furtherance of Cooperative Extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Robert E. Whitson, Director of Oklahoma Cooperative Extension Service, Oklahoma State University, Stillwater, Oklahoma. This publication is printed and issued by Oklahoma State University as authorized by the Vice President, Dean, and Director of the Division of Agricultural Sciences and Natural Resources and has been prepared and distributed at a cost of \$3.00 per copy.

For more detailed information, you may refer to the *USCIS Handbook for Employers* (Form M-274). You may obtain the handbook using the contact information found under the header "USCIS Forms and Information."

### Section 3, Updating and Reverification

Employers must complete Section 3 when updating and/or reverifying Form I-9. Employers must reverifiy employment authorization of their employees on or before the work authorization expiration date recorded in Section 1 (if any). Employers CANNOT specify which document(s) they will accept from an employee.

- A. If an employee's name has changed at the time this form is being updated/reverified, complete Block A.
- B. If an employee is rehired within three years of the date this form was originally completed and the employee is still authorized to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.
- C. If an employee is rehired within three years of the date this form was originally completed and the employee's work authorization has expired or if a current employee's work authorization is about to expire (reverification), complete Block B; and:
  - 1. Examine any document that reflects the employee is authorized to work in the United States (see List A or C);
  - 2. Record the document title, document number, and expiration date (if any) in Block C; and
  - 3. Complete the signature block.

Note that for reverification purposes, employers have the option of completing a new Form I-9 instead of completing Section 3.

### What Is the Filing Fee?

There is no associated filing fee for completing Form I-9. This form is not filed with USCIS or any government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the Privacy Act Notice below.

### USCIS Forms and Information

To order USCIS forms, you can download them from our website at [www.uscis.gov/forms](http://www.uscis.gov/forms) or call our toll-free number at 1-800-870-3676. You can obtain information about Form I-9 from our website at [www.uscis.gov](http://www.uscis.gov) or by calling 1-888-464-4218.

Information about E-Verify, a free and voluntary program that allows participating employers to electronically verify the employment eligibility of their newly hired employees, can be obtained from our website at [www.uscis.gov/e-verify](http://www.uscis.gov/e-verify) or by calling 1-888-464-4218.

General information on immigration laws, regulations, and procedures can be obtained by telephoning our National Customer Service Center at 1-800-375-5283 or visiting our Internet website at [www.uscis.gov](http://www.uscis.gov).

### Photocopying and Retaining Form I-9

A blank Form I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed Form I-9s for three years after the date of hire or one year after the date employment ends, whichever is later.

Form I-9 may be signed and retained electronically, as authorized in Department of Homeland Security regulations at 8 CFR 274a.2.

### Privacy Act Notice

The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

**EMPLOYERS MUST RETAIN COMPLETED FORM I-9  
DO NOT MAIL COMPLETED FORM I-9 TO ICE OR USCIS**

Form I-9 (Rev. 08/07/09) Y Page 2



**Instructions**

Read all instructions carefully before completing this form.

**Anti-Discrimination Notice.** It is illegal to discriminate against any individual (other than an alien not authorized to work in the United States) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination. For more information, call the Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-255-8155.

**What Is the Purpose of This Form?**

The purpose of this form is to document that each new employee (both citizen and noncitizen) hired after November 6, 1986, is authorized to work in the United States.

**When Should Form I-9 Be Used?**

All employees (citizens and noncitizens) hired after November 6, 1986, and working in the United States must complete Form I-9.

**Filling Out Form I-9**

**Section 1, Employee**

This part of the form must be completed no later than the time of hire, which is the actual beginning of employment. Providing the Social Security Number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify). **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

**Noncitizen nationals of the United States** are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.

**Employers should note** the work authorization expiration date (if any) shown in Section 1. For employees who indicate an employment authorization expiration date in Section 1, employers are required to reverify employment authorization for employment on or before the date shown. Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, reverification does not apply unless they choose to present

in Section 2 evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I-766)).

**Preparer/Translator Certification**

The Preparer/Translator Certification must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his or her own. However, the employee must still sign Section 1 personally.

**Section 2, Employer**

For the purpose of completing this form, the term "employer" means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors. Employers must complete Section 2 by examining evidence of identity and employment authorization within three business days of the date employment begins. However, if an employer hires an individual for less than three business days, Section 2 must be completed at the time employment begins. Employers cannot specify which document(s) listed on the last page of Form I-9 employees present to establish identity and employment authorization. Employees may present any List A document OR a combination of a List B and a List C document.

If an employee is unable to present a required document (or documents), the employee must present an acceptable receipt in lieu of a document listed on the last page of this form. Receipts showing that a person has applied for an initial grant of employment authorization, or for renewal of employment authorization, are not acceptable. Employees must present receipts within three business days of the date employment begins and must present valid replacement documents within 90 days or other specified time.

**Employers must record in Section 2:**

1. Document title;
2. Issuing authority;
3. Document number;
4. Expiration date, if any; and
5. The date employment begins.

Employers must sign and date the certification in Section 2. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. If photocopies are made, they must be made for all new hires. Photocopies may only be used for the verification process and must be retained with Form I-9. **Employers are still responsible for completing and retaining Form I-9.**

**CONTENTS**

[Acknowledgments](#) ..... ii

[Disclaimer](#): 1

**I. Introduction** ..... 1

**II. Assessing Human Resource Needs for the Farm and Ranch** ..... 1

**A. Understanding the Vision Statement for the Farm and Ranch** ..... 1

**B. Assessing Current and Needed Human Resources** ..... 2

**C. Preparing Job Descriptions** ..... 3

**III. Preparing to be an employer** ..... 3

**A. Choosing an Entity Structure for the Farm and Ranch** ..... 4

**B. Establishing an "Identity" – Obtaining Your Federal EIN** ..... 4

**C. Preparing for Federal Tax Withholding** ..... 4

        1. [A Note about Employees and Independent Contractors](#) ..... 4

        2. [Form W-4](#) ..... 4

        3. [Withholding Federal Income Tax, Social Security Tax, and Medicare Tax](#) ..... 5

        4. [Withholding State Income Taxes](#) ..... 5

        5. [Federal Unemployment Taxes](#) ..... 6

        6. [State Unemployment Taxes](#) ..... 6

        7. [Deadlines for Employee Withholdings](#) ..... 6

**IV. Recruiting, Interviewing, and Hiring** ..... 7

**A. The Recruitment Process** ..... 7

**B. Selection and Interviewing** ..... 7

**C. Some Closing Thoughts on Recruitment and Selection** ..... 8

**D. Caution Regarding Negligent Hiring** ..... 9

**VI. Tasks for a New Hire** ..... 9

**A. Employment Eligibility Verification: Form I-9** ..... 9

**B. New Employee Hire Reporting** ..... 10

**C. Workplace Notices** ..... 10

**VII. On the Job: Working with Current Employees** ..... 11

**A. Orienting and Training Employees** ..... 11

**B. Motivating, Leading, and Directing Employees** ..... 12

        1. [The Importance of Communication](#) ..... 12

        2. [Generational Traits in Communication](#) ..... 12

**C. Handling Payday** ..... 13

**D. Minimum Wages and Overtime** ..... 14

**E. Recordkeeping** ..... 15

**F. When Children Work on the Farm or Ranch** ..... 15

**G. Safety Practices and Regulations for the Farm and Ranch** ..... 16

**H. Workers Compensation in Agriculture** ..... 17

**I. The Family Medical Leave Act in Agriculture** ..... 19

VIII. Evaluating Employees' Performance .....19

    A. Conducting Positive Evaluations .....19

    B. Discipline and Discharge .....19

IX. Discrimination issues .....20

    A. Handling Discrimination Concerns .....20

    B. The Oklahoma Anti-Discrimination Act and Title VII of the Federal Civil Rights Act .....21

    C. Racial / Color Discrimination .....21

    D. Religious Discrimination and Accommodation .....21

    E. Sexual Harassment .....21

    F. Disability Discrimination .....22

    G. Age Discrimination .....23

    H. Discrimination based on Genetic Information .....24

    I. Discrimination Based on Veteran Status .....24

    J. Discrimination Based on Criminal Records .....24

    K. Discrimination based on Credit Checks .....25

    L. Drug Testing Issues .....26

X. Compensation .....27

XI. Your Employer Reputation: Being the Place Where Everyone wants to work .....28

XII. Conclusion .....28

Appendix 1: Employer Checklist .....29

Appendix 2: Troublesome Interview Questions .....30

Appendix 3 - Federal and Oklahoma Workplace Notice Requirements .....32

Appendix 4 - Links to OSHA Standards for Agricultural Safety Regulations .....33

Appendix 5 – Forms .....34

## ACKNOWLEDGMENTS

The authors drew upon a number of excellent references to provide this material to Oklahoma's Farmers and Ranchers, particularly the educational and informational materials of the Internal Revenue Service and the U.S. Equal Employment Opportunity Commission. The work of Sarah Fogelman during her time with Kansas State Research and Extension was also of great assistance in helping us prepare the human resources materials included in this handbook.

Finally, the authors would like to express their profound gratitude to Mr. Paul A. Ross with McAfee and Taft, P.C. in Oklahoma City, Oklahoma, Ms. Susanna Gattoni of Hall Estill, P.C. in Oklahoma City, Oklahoma, and Ms. Leah Keele of Latham, Stall, Wagner, Steele & Lehman, P.C. in Tulsa. Each of these attorneys, well-recognized as experts in the field of employment law, provided exhaustive review and tremendously helpful comments with respect to components of this handbook.

Deductions and Adjustments Worksheet			
<b>Note.</b> Use this worksheet <i>only</i> if you plan to itemize deductions or claim certain credits or adjustments to income.			
<b>1</b>	Enter an estimate of your 2012 itemized deductions. These include qualifying home mortgage interest, charitable contributions, state and local taxes, medical expenses in excess of 7.5% of your income, and miscellaneous deductions . . . . .	<b>1</b>	\$ _____
<b>2</b>	Enter: $\left\{ \begin{array}{l} \$11,900 \text{ if married filing jointly or qualifying widow(er)} \\ \$8,700 \text{ if head of household} \\ \$5,950 \text{ if single or married filing separately} \end{array} \right\}$ . . . . .	<b>2</b>	\$ _____
<b>3</b>	<b>Subtract</b> line 2 from line 1. If zero or less, enter "-0-" . . . . .	<b>3</b>	\$ _____
<b>4</b>	Enter an estimate of your 2012 adjustments to income and any additional standard deduction (see Pub. 505)	<b>4</b>	\$ _____
<b>5</b>	<b>Add</b> lines 3 and 4 and enter the total. (Include any amount for credits from the <i>Converting Credits to Withholding Allowances for 2012 Form W-4</i> worksheet in Pub. 505.) . . . . .	<b>5</b>	\$ _____
<b>6</b>	Enter an estimate of your 2012 nonwage income (such as dividends or interest) . . . . .	<b>6</b>	\$ _____
<b>7</b>	<b>Subtract</b> line 6 from line 5. If zero or less, enter "-0-" . . . . .	<b>7</b>	\$ _____
<b>8</b>	<b>Divide</b> the amount on line 7 by \$3,800 and enter the result here. Drop any fraction . . . . .	<b>8</b>	_____
<b>9</b>	Enter the number from the <b>Personal Allowances Worksheet</b> , line H, page 1 . . . . .	<b>9</b>	_____
<b>10</b>	<b>Add</b> lines 8 and 9 and enter the total here. If you plan to use the <b>Two-Earners/Multiple Jobs Worksheet</b> , also enter this total on line 1 below. Otherwise, <b>stop here</b> and enter this total on Form W-4, line 5, page 1	<b>10</b>	_____

Two-Earners/Multiple Jobs Worksheet (See <i>Two earners or multiple jobs</i> on page 1.)			
<b>Note.</b> Use this worksheet <i>only</i> if the instructions under line H on page 1 direct you here.			
<b>1</b>	Enter the number from line H, page 1 (or from line 10 above if you used the <b>Deductions and Adjustments Worksheet</b> )	<b>1</b>	_____
<b>2</b>	Find the number in <b>Table 1</b> below that applies to the <b>LOWEST</b> paying job and enter it here. <b>However</b> , if you are married filing jointly and wages from the highest paying job are \$65,000 or less, do not enter more than "3" . . . . .	<b>2</b>	_____
<b>3</b>	If line 1 is <b>more than or equal to</b> line 2, subtract line 2 from line 1. Enter the result here (if zero, enter "-0-") and on Form W-4, line 5, page 1. <b>Do not</b> use the rest of this worksheet . . . . .	<b>3</b>	_____
<b>Note.</b> If line 1 is <b>less than</b> line 2, enter "-0-" on Form W-4, line 5, page 1. Complete lines 4 through 9 below to figure the additional withholding amount necessary to avoid a year-end tax bill.			
<b>4</b>	Enter the number from line 2 of this worksheet . . . . .	<b>4</b>	_____
<b>5</b>	Enter the number from line 1 of this worksheet . . . . .	<b>5</b>	_____
<b>6</b>	<b>Subtract</b> line 5 from line 4 . . . . .	<b>6</b>	_____
<b>7</b>	Find the amount in <b>Table 2</b> below that applies to the <b>HIGHEST</b> paying job and enter it here . . . . .	<b>7</b>	\$ _____
<b>8</b>	<b>Multiply</b> line 7 by line 6 and enter the result here. This is the additional annual withholding needed . . . . .	<b>8</b>	\$ _____
<b>9</b>	Divide line 8 by the number of pay periods remaining in 2012. For example, divide by 26 if you are paid every two weeks and you complete this form in December 2011. Enter the result here and on Form W-4, line 6, page 1. This is the additional amount to be withheld from each paycheck . . . . .	<b>9</b>	\$ _____

Table 1				Table 2			
Married Filing Jointly		All Others		Married Filing Jointly		All Others	
If wages from <b>LOWEST</b> paying job are—	Enter on line 2 above	If wages from <b>LOWEST</b> paying job are—	Enter on line 2 above	If wages from <b>HIGHEST</b> paying job are—	Enter on line 7 above	If wages from <b>HIGHEST</b> paying job are—	Enter on line 7 above
\$0 - \$5,000	0	\$0 - \$8,000	0	\$0 - \$70,000	\$570	\$0 - \$35,000	\$570
5,001 - 12,000	1	8,001 - 15,000	1	70,001 - 125,000	950	35,001 - 90,000	950
12,001 - 22,000	2	15,001 - 25,000	2	125,001 - 190,000	1,060	90,001 - 170,000	1,060
22,001 - 25,000	3	25,001 - 30,000	3	190,001 - 340,000	1,250	170,001 - 375,000	1,250
25,001 - 30,000	4	30,001 - 40,000	4	340,001 and over	1,330	375,001 and over	1,330
30,001 - 40,000	5	40,001 - 50,000	5				
40,001 - 48,000	6	50,001 - 65,000	6				
48,001 - 55,000	7	65,001 - 80,000	7				
55,001 - 65,000	8	80,001 - 95,000	8				
65,001 - 72,000	9	95,001 - 120,000	9				
72,001 - 85,000	10	120,001 and over	10				
85,001 - 97,000	11						
97,001 - 110,000	12						
110,001 - 120,000	13						
120,001 - 135,000	14						
135,001 and over	15						

**Privacy Act and Paperwork Reduction Act Notice.** We ask for the information on this form to carry out the Internal Revenue laws of the United States. Internal Revenue Code sections 3402(f)(2) and 6109 and their regulations require you to provide this information; your employer uses it to determine your federal income tax withholding. Failure to provide a properly completed form will result in your being treated as a single person who claims no withholding allowances; providing fraudulent information may subject you to penalties. Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation; to cities, states, the District of Columbia, and U.S. commonwealths and possessions for use in administering their tax laws; and to the Department of Health and Human Services for use in the National Directory of New Hires. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.



## Form W-4 (2012)

**Purpose.** Complete Form W-4 so that your employer can withhold the correct federal income tax from your pay. Consider completing a new Form W-4 each year and when your personal or financial situation changes.

**Exemption from withholding.** If you are exempt, complete **only** lines 1, 2, 3, 4, and 7 and sign the form to validate it. Your exemption for 2012 expires February 18, 2013. See Pub. 505, Tax Withholding and Estimated Tax.

**Note.** If another person can claim you as a dependent on his or her tax return, you cannot claim exemption from withholding if your income exceeds \$950 and includes more than \$300 of unearned income (for example, interest and dividends).

**Basic instructions.** If you are not exempt, complete the **Personal Allowances Worksheet** below. The worksheets on page 2 further adjust your withholding allowances based on itemized deductions, certain credits, adjustments to income, or two-earners/multiple jobs situations.

Complete all worksheets that apply. However, you may claim fewer (or zero) allowances. For regular wages, withholding must be based on allowances you claimed and may not be a flat amount or percentage of wages.

**Head of household.** Generally, you can claim head of household filing status on your tax return only if you are unmarried and pay more than 50% of the costs of keeping up a home for yourself and your dependent(s) or other qualifying individuals. See Pub. 501, Exemptions, Standard Deduction, and Filing Information, for information.

**Tax credits.** You can take projected tax credits into account in figuring your allowable number of withholding allowances. Credits for child or dependent care expenses and the child tax credit may be claimed using the **Personal Allowances Worksheet** below. See Pub. 505 for information on converting your other credits into withholding allowances.

**Nonwage income.** If you have a large amount of nonwage income, such as interest or dividends, consider making estimated tax payments using Form 1040-ES, Estimated Tax for Individuals. Otherwise, you may owe additional tax. If you have pension or annuity

income, see Pub. 505 to find out if you should adjust your withholding on Form W-4 or W-4P.

**Two earners or multiple jobs.** If you have a working spouse or more than one job, figure the total number of allowances you are entitled to claim on all jobs using worksheets from only one Form W-4. Your withholding usually will be most accurate when all allowances are claimed on the Form W-4 for the highest paying job and zero allowances are claimed on the others. See Pub. 505 for details.

**Nonresident alien.** If you are a nonresident alien, see Notice 1392, Supplemental Form W-4 Instructions for Nonresident Aliens, before completing this form.

**Check your withholding.** After your Form W-4 takes effect, use Pub. 505 to see how the amount you are having withheld compares to your projected total tax for 2012. See Pub. 505, especially if your earnings exceed \$130,000 (Single) or \$180,000 (Married).

**Future developments.** The IRS has created a page on IRS.gov for information about Form W-4, at [www.irs.gov/w4](http://www.irs.gov/w4). Information about any future developments affecting Form W-4 (such as legislation enacted after we release it) will be posted on that page.

### Personal Allowances Worksheet (Keep for your records.)

<b>A</b>	Enter "1" for <b>yourself</b> if no one else can claim you as a dependent . . . . .	<b>A</b>	_____
<b>B</b>	Enter "1" if: <ul style="list-style-type: none"> <li>• You are single and have only one job; or</li> <li>• You are married, have only one job, and your spouse does not work; or</li> <li>• Your wages from a second job or your spouse's wages (or the total of both) are \$1,500 or less.</li> </ul>	<b>B</b>	_____
<b>C</b>	Enter "1" for your <b>spouse</b> . But, you may choose to enter "-0-" if you are married and have either a working spouse or more than one job. (Entering "-0-" may help you avoid having too little tax withheld.) . . . . .	<b>C</b>	_____
<b>D</b>	Enter number of <b>dependents</b> (other than your spouse or yourself) you will claim on your tax return . . . . .	<b>D</b>	_____
<b>E</b>	Enter "1" if you will file as <b>head of household</b> on your tax return (see conditions under <b>Head of household</b> above) . . . . .	<b>E</b>	_____
<b>F</b>	Enter "1" if you have at least \$1,900 of <b>child or dependent care expenses</b> for which you plan to claim a credit . . . . . ( <b>Note.</b> Do <b>not</b> include child support payments. See Pub. 503, Child and Dependent Care Expenses, for details.)	<b>F</b>	_____
<b>G</b>	<b>Child Tax Credit</b> (including additional child tax credit). See Pub. 972, Child Tax Credit, for more information. • If your total income will be less than \$61,000 (\$90,000 if married), enter "2" for each eligible child; then <b>less</b> "1" if you have three to seven eligible children or <b>less</b> "2" if you have eight or more eligible children. • If your total income will be between \$61,000 and \$84,000 (\$90,000 and \$119,000 if married), enter "1" for each eligible child . . . . .	<b>G</b>	_____
<b>H</b>	Add lines A through G and enter total here. ( <b>Note.</b> This may be different from the number of exemptions you claim on your tax return.) ▶	<b>H</b>	_____

For accuracy, **complete all worksheets that apply.**

- If you plan to **itemize or claim adjustments to income** and want to reduce your withholding, see the **Deductions and Adjustments Worksheet** on page 2.
- If you are **single and have more than one job** or are **married and you and your spouse both work** and the combined earnings from all jobs exceed \$40,000 (\$10,000 if married), see the **Two-Earners/Multiple Jobs Worksheet** on page 2 to avoid having too little tax withheld.
- If **neither** of the above situations applies, **stop here** and enter the number from line H on line 5 of Form W-4 below.

----- Separate here and give Form W-4 to your employer. Keep the top part for your records. -----

<b>Form W-4</b>	<b>Employee's Withholding Allowance Certificate</b>	OMB No. 1545-0074
Department of the Treasury Internal Revenue Service	<b>2012</b>	
▶ <b>Whether you are entitled to claim a certain number of allowances or exemption from withholding is subject to review by the IRS. Your employer may be required to send a copy of this form to the IRS.</b>		
1 Your first name and middle initial	Last name	2 Your social security number
Home address (number and street or rural route)		
City or town, state, and ZIP code		
3 <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Married, but withhold at higher Single rate. <b>Note.</b> If married, but legally separated, or spouse is a nonresident alien, check the "Single" box.		
4 If your last name differs from that shown on your social security card, check here. You must call 1-800-772-1213 for a replacement card. ▶ <input type="checkbox"/>		
5 Total number of allowances you are claiming (from line H above or from the applicable worksheet on page 2)	5	
6 Additional amount, if any, you want withheld from each paycheck	6	\$
7 I claim exemption from withholding for 2012, and I certify that I meet <b>both</b> of the following conditions for exemption. • Last year I had a right to a refund of <b>all</b> federal income tax withheld because I had <b>no</b> tax liability, <b>and</b> • This year I expect a refund of <b>all</b> federal income tax withheld because I expect to have <b>no</b> tax liability. If you meet both conditions, write "Exempt" here . . . . . ▶ 7		
Under penalties of perjury, I declare that I have examined this certificate and, to the best of my knowledge and belief, it is true, correct, and complete.		
Employee's signature (This form is not valid unless you sign it.) ▶		Date ▶
8 Employer's name and address (Employer: Complete lines 8 and 10 only if sending to the IRS.)	9 Office code (optional)	10 Employer identification number (EIN)

For Privacy Act and Paperwork Reduction Act Notice, see page 2.

Cat. No. 10220Q

Form **W-4** (2012)

## DISCLAIMER:

*THIS PUBLICATION IS INTENDED TO PROVIDE GENERAL INFORMATION ABOUT LEGAL ISSUES. IT SHOULD NOT BE CITED OR RELIED UPON AS LEGAL AUTHORITY. STATE LAWS VARY AND NO ATTEMPT IS MADE TO DISCUSS LAWS OF STATES OTHER THAN OKLAHOMA. FOR ADVICE ABOUT HOW THESE ISSUES MIGHT APPLY TO YOUR INDIVIDUAL SITUATION, PLEASE CONSULT AN ATTORNEY.*

## I. INTRODUCTION

The employment laws that apply to agriculture can be challenging. We all remember the old saying "There is an exception to every rule." When talking about employment law and agriculture, though, there needs to be another saying: "There's an exception to every rule, and then there is an exception to every exception for agriculture." Labor law in the United States has long recognized that the agricultural industry operates in a unique environment and under unique demands. Lawmakers tried to accommodate those circumstances with specially-crafted rules that apply to our farms and ranchers. In so doing, though, they also created a complex legal landscape for the agricultural industry. With a little homework, though, farmers and ranchers can avoid many employment law pitfalls and can recruit and maintain a quality workforce that adds to their bottom line.

The complexity of employment law is not the only challenge faced by agricultural employers, though. In the near future, agricultural employers may face an increasingly competitive labor market. As the world economy improves from its recent recession, it is anticipated that over the next ten years, American employers will have 10 million fewer workers to meet their labor needs due to slowing population growth and mass retirements of Baby Boomers from the work force.<sup>1</sup> As a result, it is important for agricultural employers to not only understand the laws that apply to them, but also how to create a workplace where employees *want* to work.

This handbook will examine how many of the most significant employment laws apply in the agricultural context proceeding from the recruitment and hiring of employees through their time with the employer and their eventual separation from the employer. This handbook will also discuss some of the practicalities of interacting with employees, who are, after all, *human* resources.

## II. ASSESSING HUMAN RESOURCE NEEDS FOR THE FARM AND RANCH

While many farmers and ranchers want to jump directly to the question of "what do I have to do (and avoid) to hire an employee," they often skip what may be the most important piece of the whole process: carefully thinking about their own business plan and how a prospective employee may fit into that picture.

### A. Understanding the Vision Statement for the Farm and Ranch

The foundation for creating a meaningful work environment is to help employees see how they fit into the big picture. Farms and ranches that are able to stay focused on their long-term vision will be more successful. Therefore, it is important that all stakeholders in the organization, including employees, be aware of the long-term vision of the business, and be involved in strategic planning activities.<sup>2</sup>

Strategic planning involves thinking about where the business needs to be in the future. It involves considering what the various stakeholders want to happen to the business as a whole and evaluating what skills and resources the business participants bring to the table. The long-term concept of vision and/or mission statements form the foundation of a strategic management system by helping the business focus on what it is all about and where it hopes to be in the future. When everyone involved in the organization has a clear understanding of and broad acceptance of what the business does and why they do it, the path becomes much clearer. The authors strongly encourage farm and ranch managers to develop a vision statement for their business with heavy involvement from current employees, and to effectively communicate that vision to potential new employees.

1 See Andrea Johnson and Katrina Grider, SECURING HIRING SUCCESS, EASY GUIDES TO EMPOWER BUSINESS, Texas Bar CLE (Austin, November 19, 2010).

2 See Rodney Jones and Sarah Fogelman, FARM AND RANCH STRATEGIC PLANNING (VISIONING AND GOAL SETTING) (2005), available at <http://www.ksre.ksu.edu/library/agec2/mf2695.pdf>

**B. Assessing Current and Needed Human Resources**

Farmers and ranchers should begin building a staffing plan with some “deep thinking” about the type and quantity of work that will be necessary to achieve their business vision.

To start, assess current human resources by listing all the people involved in the operation and the roles they play. This sounds simplistic, but it can provide valuable insights regarding how an enterprise has currently allocated decision-making and work responsibilities. Think about what current and new tasks will be required in the business. Develop an estimate of the time required to accomplish all the various tasks in a timely manner, both now and in the future. This will help visualize seasonal work demands. Be sure to consider all of the tasks that need to be accomplished,

including production, marketing, maintenance, and management. A workload schedule by season may help as you plan, and incorporating the information into a template like the following example may be useful.

The example template illustrated in Figure 1 illustrates how the example diversified crop and livestock farm that is considering an expansion with rented land might begin to assess their human resource situation. The current human resources have been identified, along with the current primary roles. Full time stakeholders are fully employed, with individuals working extra hours and part time help utilized when workload peaks are experienced. When the current situation is portrayed in this manner, it is fairly easy to see that there are some impending human resource changes

**Figure 1 - Example Human Resource Assessment Template**

<i>Person</i>	<i>Current Role in Business</i>	<i>Timeline</i>	<i>Workload Constraints</i>	<i>Foreseeable Future Issues If 400 acres of Rented Land Added</i>
Dad	Crop Enterprise Manager General Labor Marketing and Production Decision Maker	< 3 years to retirement	Currently relies on help from son and employees during spring planting, summer harvest, and fall planting - harvest	Will require another 1,000 hours of equipment operator time spread over spring through fall time period
Mom	Record Keeping and Financial Management Marketing Decision Maker	< 3 years to retirement	Would like to shed financial management duties as retirement approaches	Record keeping and analysis time would be largely unaffected
Son	Livestock Enterprise Manager General Labor Marketing and Production Decision Maker	Foreseeable Future	OK for now, but as he takes on more management duties will likely need more help during fall and winter when livestock need attention	Will increase the number of stockers, resulting in approximately an additional 200 hours of time required between September and May
Full Time Employee	General Labor - Skilled Production and Equipment Maintenance Decision Maker	Foreseeable Future	Currently fully employed and working as many extra hours at peak times as desired	Additional time requirements will necessitate a combination of additional skilled and unskilled labor
Part Time Seasonal Help	General Labor - Unskilled	Always Uncertain	Need to maintain a source for part time unskilled labor during peak workload periods	

**Do I Need an EIN?**

File Form SS-4 if the applicant entity does not already have an EIN but is required to show an EIN on any return, statement, or other document.<sup>1</sup> See also the separate instructions for each line on Form SS-4.

<b>IF the applicant...</b>	<b>AND...</b>	<b>THEN...</b>
Started a new business	Does not currently have (nor expect to have) employees	Complete lines 1, 2, 4a-8a, 8b-c (if applicable), 9a, 9b (if applicable), and 10-14 and 16-18.
Hired (or will hire) employees, including household employees	Does not already have an EIN	Complete lines 1, 2, 4a-6, 7a-b (if applicable), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10-18.
Opened a bank account	Needs an EIN for banking purposes only	Complete lines 1-5b, 7a-b (if applicable), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10, and 18.
Changed type of organization	Either the legal character of the organization or its ownership changed (for example, you incorporate a sole proprietorship or form a partnership) <sup>2</sup>	Complete lines 1-18 (as applicable).
Purchased a going business <sup>3</sup>	Does not already have an EIN	Complete lines 1-18 (as applicable).
Created a trust	The trust is other than a grantor trust or an IRA trust <sup>4</sup>	Complete lines 1-18 (as applicable).
Created a pension plan as a plan administrator <sup>5</sup>	Needs an EIN for reporting purposes	Complete lines 1, 3, 4a-5b, 9a, 10, and 18.
Is a foreign person needing an EIN to comply with IRS withholding regulations	Needs an EIN to complete a Form W-8 (other than Form W-8ECI), avoid withholding on portfolio assets, or claim tax treaty benefits <sup>6</sup>	Complete lines 1-5b, 7a-b (SSN or ITIN optional), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10, and 18.
Is administering an estate	Needs an EIN to report estate income on Form 1041	Complete lines 1-6, 9a, 10-12, 13-17 (if applicable), and 18.
Is a withholding agent for taxes on non-wage income paid to an alien (i.e., individual, corporation, or partnership, etc.)	Is an agent, broker, fiduciary, manager, tenant, or spouse who is required to file Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons	Complete lines 1, 2, 3 (if applicable), 4a-5b, 7a-b (if applicable), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10, and 18.
Is a state or local agency	Serves as a tax reporting agent for public assistance recipients under Rev. Proc. 80-4, 1980-1 C.B. 581 <sup>7</sup>	Complete lines 1, 2, 4a-5b, 9a, 10, and 18.
Is a single-member LLC	Needs an EIN to file Form 8832, Classification Election, for filing employment tax returns and excise tax returns, or for state reporting purposes <sup>8</sup>	Complete lines 1-18 (as applicable).
Is an S corporation	Needs an EIN to file Form 2553, Election by a Small Business Corporation <sup>9</sup>	Complete lines 1-18 (as applicable).

<sup>1</sup> For example, a sole proprietorship or self-employed farmer who establishes a qualified retirement plan, or is required to file excise, employment, alcohol, tobacco, or firearms returns, must have an EIN. A partnership, corporation, REMIC (real estate mortgage investment conduit), nonprofit organization (church, club, etc.), or farmers' cooperative must use an EIN for any tax-related purpose even if the entity does not have employees.

<sup>2</sup> However, do not apply for a new EIN if the existing entity only (a) changed its business name, (b) elected on Form 8832 to change the way it is taxed (or is covered by the default rules), or (c) terminated its partnership status because at least 50% of the total interests in partnership capital and profits were sold or exchanged within a 12-month period. The EIN of the terminated partnership should continue to be used. See Regulations section 301.6109-1(d)(2)(iii).

<sup>3</sup> Do not use the EIN of the prior business unless you became the "owner" of a corporation by acquiring its stock.

<sup>4</sup> However, grantor trusts that do not file using Optional Method 1 and IRA trusts that are required to file Form 990-T, Exempt Organization Business Income Tax Return, must have an EIN. For more information on grantor trusts, see the Instructions for Form 1041.

<sup>5</sup> A plan administrator is the person or group of persons specified as the administrator by the instrument under which the plan is operated.

<sup>6</sup> Entities applying to be a Qualified Intermediary (QI) need a QI-EIN even if they already have an EIN. See Rev. Proc. 2000-12.

<sup>7</sup> See also *Household employer* on page 4 of the instructions. **Note.** State or local agencies may need an EIN for other reasons, for example, hired employees.

<sup>8</sup> See *Disregarded entities* on page 4 of the instructions for details on completing Form SS-4 for an LLC.

<sup>9</sup> An existing corporation that is electing or revoking S corporation status should use its previously-assigned EIN.



APPENDIX 5 – FORMS

Form **SS-4** **Application for Employer Identification Number** OMB No. 1545-0003  
 (Rev. January 2010) **(For use by employers, corporations, partnerships, trusts, estates, churches, government agencies, Indian tribal entities, certain individuals, and others.)** EIN  
 Department of the Treasury Internal Revenue Service **▶ See separate instructions for each line. ▶ Keep a copy for your records.**

<b>1</b> Legal name of entity (or individual) for whom the EIN is being requested		
<b>2</b> Trade name of business (if different from name on line 1)	<b>3</b> Executor, administrator, trustee, "care of" name	
<b>4a</b> Mailing address (room, apt., suite no. and street, or P.O. box)	<b>5a</b> Street address (if different) (Do not enter a P.O. box.)	
<b>4b</b> City, state, and ZIP code (if foreign, see instructions)	<b>5b</b> City, state, and ZIP code (if foreign, see instructions)	
<b>6</b> County and state where principal business is located		
<b>7a</b> Name of responsible party	<b>7b</b> SSN, ITIN, or EIN	
<b>8a</b> Is this application for a limited liability company (LLC) (or a foreign equivalent)? <input type="checkbox"/> Yes <input type="checkbox"/> No		<b>8b</b> If 8a is "Yes," enter the number of LLC members ▶
<b>8c</b> If 8a is "Yes," was the LLC organized in the United States? <input type="checkbox"/> Yes <input type="checkbox"/> No		
<b>9a</b> <b>Type of entity</b> (check only one box). <b>Caution.</b> If 8a is "Yes," see the instructions for the correct box to check.		
<input type="checkbox"/> Sole proprietor (SSN) _____ <input type="checkbox"/> Estate (SSN of decedent) _____ <input type="checkbox"/> Partnership <input type="checkbox"/> Plan administrator (TIN) _____ <input type="checkbox"/> Corporation (enter form number to be filed) ▶ _____ <input type="checkbox"/> Trust (TIN of grantor) _____ <input type="checkbox"/> Personal service corporation <input type="checkbox"/> National Guard <input type="checkbox"/> State/local government <input type="checkbox"/> Church or church-controlled organization <input type="checkbox"/> Farmers' cooperative <input type="checkbox"/> Federal government/military <input type="checkbox"/> Other nonprofit organization (specify) ▶ _____ <input type="checkbox"/> REMIC <input type="checkbox"/> Indian tribal governments/enterprises <input type="checkbox"/> Other (specify) ▶ _____ Group Exemption Number (GEN) if any ▶ _____		
<b>9b</b> If a corporation, name the state or foreign country (if applicable) where incorporated	State	Foreign country
<b>10</b> <b>Reason for applying</b> (check only one box)		
<input type="checkbox"/> Started new business (specify type) ▶ _____ <input type="checkbox"/> Banking purpose (specify purpose) ▶ _____ <input type="checkbox"/> Hired employees (Check the box and see line 13.) <input type="checkbox"/> Changed type of organization (specify new type) ▶ _____ <input type="checkbox"/> Compliance with IRS withholding regulations <input type="checkbox"/> Purchased going business <input type="checkbox"/> Other (specify) ▶ _____ <input type="checkbox"/> Created a trust (specify type) ▶ _____ <input type="checkbox"/> Created a pension plan (specify type) ▶ _____		
<b>11</b> Date business started or acquired (month, day, year). See instructions.	<b>12</b> Closing month of accounting year	
<b>13</b> Highest number of employees expected in the next 12 months (enter -0- if none). If no employees expected, skip line 14.	<b>14</b> If you expect your employment tax liability to be \$1,000 or less in a full calendar year <b>and</b> want to file Form 944 annually instead of Forms 941 quarterly, check here. (Your employment tax liability generally will be \$1,000 or less if you expect to pay \$4,000 or less in total wages.) If you do not check this box, you must file Form 941 for every quarter. <input type="checkbox"/>	
	Agricultural	Household
		Other
<b>15</b> First date wages or annuities were paid (month, day, year). <b>Note.</b> If applicant is a withholding agent, enter date income will first be paid to nonresident alien (month, day, year) . . . . . ▶		
<b>16</b> Check <b>one</b> box that best describes the principal activity of your business.		
<input type="checkbox"/> Construction <input type="checkbox"/> Rental & leasing <input type="checkbox"/> Transportation & warehousing <input type="checkbox"/> Accommodation & food service <input type="checkbox"/> Wholesale-agent/broker <input type="checkbox"/> Real estate <input type="checkbox"/> Manufacturing <input type="checkbox"/> Finance & insurance <input type="checkbox"/> Other (specify) _____ <input type="checkbox"/> Wholesale-other <input type="checkbox"/> Retail		
<b>17</b> Indicate principal line of merchandise sold, specific construction work done, products produced, or services provided.		
<b>18</b> Has the applicant entity shown on line 1 ever applied for and received an EIN? <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes," write previous EIN here ▶ _____		
Complete this section <b>only</b> if you want to authorize the named individual to receive the entity's EIN and answer questions about the completion of this form.		
<b>Third Party Designee</b>	Designee's name	Designee's telephone number (include area code) ( )
	Address and ZIP code	Designee's fax number (include area code) ( )
Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, it is true, correct, and complete.		Applicant's telephone number (include area code) ( )
Name and title (type or print clearly) ▶		Applicant's fax number (include area code) ( )
Signature ▶	Date ▶	

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 16055N Form **SS-4** (Rev. 1-2010)

that will need to be accommodated. In the near term if the farm decides to take advantage of the expansion opportunity it appears that approximately 1,200 additional hours of labor will be needed unless the equipment compliment is changed accordingly. Within a fairly short few years it is also apparent that additional changes will be needed as two individuals approach retirement. It is easy to see which task gaps will need to be filled.

Assess how well-suited the current workers are for their current roles in the operation by evaluating skills and interests. Try to determine if there are people currently in the operation who have unique, but untapped skills, or are there people who would be happier in other roles. Consider if there are people who will be leaving the operation whose roles will need to be filled. That information, combined with the assessment of tasks and estimated time requirements will help identify the impending human resource gaps. In the earlier example, Dad and Mom will be leaving the operation so the Son and/or other stakeholders will need to determine whether or not the management roles that will be left void are roles that they are well suited for and interested in. This will help determine whether or not addition human resource acquisitions will be needed to fill management roles, production roles, or a combination. Only then can an intelligent plan be made to fill the gaps.

Options for filling those gaps include redefining tasks for the current workforce, adding new labor to the workforce, trading labor or tasks with others in the community, or substituting capital for labor. The specific strategy chosen will depend on how much of a gap exists between the current workforce and projected workforce needs, as well as the assessment of the fit between the tasks that need to be performed and the current workforce assignments.<sup>3</sup>

C. Preparing Job Descriptions

Job descriptions are an essential part of the employment process, from both a practical and legal perspective. Farms need to communicate the image of a well-managed and organized business to prospective employees. Job descriptions demonstrate that the business has thought about specific labor needs, and the skills that are needed to perform those tasks. The job description forms the basis for much of the employee-employer relationship, including recruitment, selection, training, and evaluation of performance. The job description helps the parties to reach a mutual

3 Gigi DiGiacomo, et al., BUILDING A SUSTAINABLE BUSINESS: A GUIDE TO DEVELOPING A BUSINESS PLAN FOR FARMS AND RURAL BUSINESSES MISA REFERENCE, Minnesota Institute for Sustainable Agriculture (2003)

understanding regarding important details of a job in order to avoid future problems or conflict.

Job descriptions are not difficult to write. Start by consulting with existing employees to write job descriptions for existing jobs. The goal is to provide a clear picture of the job so that both the employee and the employer fully understand expectations. Important components include a job title, a summary of major responsibilities, qualifications, specific duties or tasks, where the job fits in the organizational structure of the business, compensation and benefits, and a discussion of the work schedule.<sup>4</sup>

As discussed below, a well-reasoned and -written job description can also provide numerous protections for the employer throughout the recruitment, employment, and if necessary, termination processes.<sup>5</sup> There are a number of tools available to help you start the process of assembling your job descriptions, and some references to help with this process are included in Figure 2 below.

Figure 2 – Job Description References

Farm Journal Legacy Project Job Description Template, available at [http://www.agweb.com/legacyproject/article/tool\\_job\\_description\\_template/](http://www.agweb.com/legacyproject/article/tool_job_description_template/)

Ohio State University Fact Sheet: Writing Job Descriptions for Small Businesses, Fact Sheet CDFS-1376-95, available at <http://ohioline.osu.edu/cd-fact/1376.html>

Step 1: Defining Job Requirements. LINDA A. HILL, HIRING AN EMPLOYEE pp. 7-16 (Harvard Business Press 2008).

III. PREPARING TO BE AN EMPLOYER

Before hiring any new employees, a farm or ranch needs to make sure that a number of other affairs are in order. This includes determining if a business entity such as an LLC or corporation should be used for the enterprise and establishing a tax "identity" in preparation for withholding tasks.

4 See Richard Stup, JOB DESCRIPTIONS: THE BUILDING BLOCK OF ORGANIZATIONS. Penn State Dairy Alliance, 2002 available at <http://www.extension.iastate.edu/NR/rdonlyres/E831BB62-9F52-4EEB-9AD2-A561F4E5FB24/133737/Job-descriptions.pdf>.

5 For an excellent discussion of the importance of job descriptions in the legal context, see generally Johnson and Grider.

**A. Choosing an Entity Structure for the Farm and Ranch**

While a full discussion of selecting a business form for your farm or ranch (such as a corporation, LLC, or other structure) is beyond the scope of this handbook, you should consider what business form is right for your operation. Be sure to engage the help of your tax professional and attorney in selecting the structure that is right for you.

**B. Establishing an “Identity” – Obtaining Your Federal EIN**

If your farm or ranch operates as a separate entity (*i.e.* as anything other than a sole proprietorship), it will need a Federal Employer Identification Number, or “EIN,” to file its own tax returns and to withhold any Federal income, Social Security, or Medicare taxes. An EIN serves a business much like a Social Security number serves an individual. To apply for an EIN, use Form SS-4, “Application for Employer Identification Number,” which can be downloaded at <http://www.irs.gov/pub/irs-pdf/fss4.pdf>. Applying online allows you to immediately receive a temporary EIN, which will then be confirmed by mailing of the permanent EIN (which, in most cases, is the same as the temporary number). It also pre-enrolls the business entity in the Electronic Federal Tax Payment System, enabling the business to submit information and payments electronically.

**C. Preparing for Federal Tax Withholding**

1. *A Note about Employees and Independent Contractors*

Throughout much of employment law, classifying a worker as an “employee” or an “independent contractor” triggers different requirements for the employer. In the context of payroll withholding, an employer must withhold payments of federal and state income, Social Security, Medicare, and state and federal unemployment taxes for employees but need not do the same for independent contractors. What distinguishes the two? No single factor is can answer this question, but the IRS and Oklahoma Tax Commission (OTC) routinely look at the following factors to separate employees from independent contractors:<sup>6</sup>

- Detail of instructions: Persons given highly specific, detailed instructions about when and where to do work, what tools or equipment to use, and who is to do the work are more likely to be employees than independent contractors.

<sup>6</sup> IRS Publication 15-A, “Employer’s Supplemental Tax Guide,” available at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>, and Oklahoma Tax Commission Publication OW-2, “Oklahoma Income Tax Withholding Tables 2011,” available at <http://www.tax.ok.gov/publicat/2011%20Withholding%20WH%20Tables.pdf>.

- Training: The greater the level of training provided by the employer to the person, the more likely the person is to be an employee than an independent contractor.
- Financial investment and risk: Independent contractors frequently make significant financial investments in their own training and equipment, and bear the financial risk of their activities, while employees’ out-of-pocket investments are likely minimal and their pay is not as likely to be dependent on the outcome of a project.
- Characterization of the relationship: Written agreements that characterize the parties’ intentions with respect to the relationship, the permanency of the relationship (on a job-by-job basis or a continuous, daily engagement), and the extent to which the tasks of the person are central to the regular business of the employer are all evidence that may be examined to evaluate the relationship. Note, though, just because an employer calls someone an “independent contractor” does not make it so.

Understandably, employers often wish they could categorize people who work for them as independent contractors, but making that choice incorrectly can trigger significant liabilities for the employer. An objective evaluation of the circumstances is needed to make a sound determination. When in doubt about whether a worker is an employee or independent contractor, contact your attorney and tax professional.

2. *Form W-4*

As a new employee joins the farm or ranch, they should provide the employer with a Form W-4, “Employee’s Withholding Allowance Certificate.” Form W-4 can be downloaded at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>. Since the W-4 serves as the basis for the employer’s withholdings, employees should be encouraged to consult with their tax professional in preparing this form.<sup>7</sup> When receiving an employee’s W-4, the employer should also ask to see the employee’s Social Security card so that they can record the employee’s name and Social Security number accurately. If the employee does not already have a Social Security card, they can apply for one using form SS-5, “Application for a Social Security Card,” available for download at <http://www.ssa.gov/online/ss-5.pdf>.

<sup>7</sup> For assistance in determining their allowances, employees can consult IRS Publication 505, “Tax Withholding and Estimated Tax” available at <http://www.irs.gov/pub/irs-pdf/p505.pdf> and IRS Publication 919, “How Do I Adjust My Tax Withholding” available at <http://www.irs.gov/pub/irs-pdf/p919.pdf>.

**APPENDIX 4 - LINKS TO OSHA STANDARDS FOR AGRICULTURAL SAFETY REGULATIONS**

To access the OSHA regulations that apply to each of the following activities, use the URL to the right (or if you are reading this document in PDF format, click on the appropriate hyperlink). To go to the master listing of OSHA regulations, visit [http://www.osha.gov/pls/oshaweb/owasrch.search\\_form?p\\_doc\\_type=STANDARDS&p\\_toc\\_level=0&p\\_keyvalue=&p\\_status=CURRENT](http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=STANDARDS&p_toc_level=0&p_keyvalue=&p_status=CURRENT)

Activity	Regulatory Reference	Link
Grain Handling Facilities	29 C.F.R. § 1910.272	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9874">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9874</a>
Temporary Labor Camps	29 C.F.R. § 1910.142	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9791">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9791</a>
Field Sanitation	29 C.F.R. § 1928.110	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10959">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10959</a>
Storage and Handling of Anhydrous Ammonia	29 C.F.R. § 1910.111(a),(b)	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9757">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9757</a>
Logging Operations	29 C.F.R. § 1910.266	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9862">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9862</a>
Slow-moving Vehicles	29 C.F.R. § 1910.145	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9794">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=9794</a>
Hazard Communication (MSDS Sheets)	29 C.F.R. § 1910.1200	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10099">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10099</a>
Tractor Safety Systems	29 C.F.R. 1928.51(b)	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10957">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10957</a>
Tractor Operating Instructions	29 C.F.R. Part 1928, Subpart C, Appendix A	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10961">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10961</a>
Guarding of Agricultural Equipment	29 C.F.R. § 1928.57	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10958">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10958</a>
Handling Cadmium	29 C.F.R. § 1910.1027	<a href="http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10035">http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&amp;p_id=10035</a>



## APPENDIX 3 - FEDERAL AND OKLAHOMA WORKPLACE NOTICE REQUIREMENTS

### Federal Notices

The U.S. Department of Labor provides the “elaws Poster Advisor” which allows you to answer questions about your business, and in turn provides information on the specific federal notices that may be required for you. You can access the Poster Advisor at <http://www.dol.gov/elaws/posters.htm>

You must post this notice...	...if you meet these requirements	Link to notice
<b>Federal Notices</b> “Equal Employment is the Law”	You employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year <sup>168</sup>	Main Poster: <a href="http://www1.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf">http://www1.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf</a> Supplement: <a href="http://www1.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf">http://www1.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf</a>
Employee Polygraph Protection Act	Applies to all employers <sup>169</sup>	<a href="http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eppac.pdf">http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eppac.pdf</a>
Fair Labor Standards Act	You are subject to the Fair Labor Standards Act (see section VI.D)	<a href="http://www.dol.gov/whd/regs/compliance/posters/wh1386Agrcltr.pdf">http://www.dol.gov/whd/regs/compliance/posters/wh1386Agrcltr.pdf</a>
Occupational Safety and Health Act	Applies to all employers <sup>170</sup>	<a href="http://www.osha.gov/Publications/osha3165.pdf">http://www.osha.gov/Publications/osha3165.pdf</a>
Uniformed Services Employment and Reemployment Rights Act	Applies to all employers <sup>171</sup>	<a href="http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf">http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf</a>
Family Medical Leave Act	You employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year <sup>172</sup>	<a href="http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf">http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf</a>
<b>Oklahoma Notices</b>		
“Your Rights Under the Oklahoma Minimum Wage Act”	Employ more than ten full-time employees (or more than 10 full-time equivalent employees) at any one location OR have gross business volume of more than \$100,000 annually, BUT <ul style="list-style-type: none"> <li>Employers are exempt if they are subject to and comply with FLSA</li> <li>Employers also exempt with respect to agricultural production.<sup>173</sup></li> </ul>	<a href="http://www.ok.gov/odol/documents/WHMWPosterStatutoryLanguage.pdf">http://www.ok.gov/odol/documents/WHMWPosterStatutoryLanguage.pdf</a>
“Oklahoma Law Prohibits Discrimination in Employment”	Employ one or more individuals on salary or wages for work performance <sup>174</sup>	<a href="http://www.ok.gov/ohrc/documents/OHRC_Poster_E.pdf">http://www.ok.gov/ohrc/documents/OHRC_Poster_E.pdf</a>
“Oklahoma Workers Compensation Notice”	Employers subject to Oklahoma Workers Compensation requirements (see Section VI.h.) <sup>175</sup>	<a href="http://www.owcc.state.ok.us/CourtForms/Current/Form%201A%20-%20English%20rev%2007-05.pdf">http://www.owcc.state.ok.us/CourtForms/Current/Form%201A%20-%20English%20rev%2007-05.pdf</a>

168 42 U.S.C. § 2000e-10(a) (requirement to post); 42 U.S.C. § 2000e(b) (definition of “employer”)

169 29 U.S.C. § 2003 (requirement to post); 29 U.S.C. § 2001(2) (definition of “employer”)

170 29 U.S.C. § 657(c)(1) (requirement to post); 29 U.S.C. § 652(5) (definition of “employer”)

171 38 U.S.C. § 4334(a) (requirement to post); 38 U.S.C. § 4303(4)(A) (definition of “employer”).

172 29 U.S.C. § 2619(a) and 29 C.F.R. § 1903.2(a)(1)(requirement to post); 29 U.S.C. § 2611(4)(A)(i) (definition of “employer”)

173 40 OKLA. STAT. § 197.6 (posting requirement), 40 OKLA. STAT. § 197.4 (definitions)

174 25 OKLA. STAT. § 1301 (definition of employer); requirement for posting is not explicit, but appears implied from OKLA. ADMIN. CODE §§ 335:15-1-4, 335:15-1-15.

175 85 OKLA. STAT. § 322(C)

### 3. Withholding Federal Income Tax, Social Security Tax, and Medicare Tax

As an agricultural employer, you must start withholding Federal income, Social Security, and Medicare taxes when you either (A) pay cash wages of \$150 or more in a year to any one employee, or (B) if the amount of total wages paid to all of your employees in a year is \$2,500 or more.<sup>8</sup>

For 2011, the amount to be withheld for Social Security from the employee is 4.2% of gross wages. The employer must also contribute an amount equal to 6.2% of the employee’s gross wages (this amount cannot be deducted from the employee’s pay).

Example: Patty has one employee, Pete, and pays him \$12,000 in gross wages this year. This means that Patty would need to withhold \$ 504 (\$12,000 in gross wages x 4.2%) in Social Security taxes. Patty would also need to contribute \$744 (\$12,000 in gross wages x 6.2%) in Social Security taxes – this amount would have to come from Patty’s business, and could not be withheld from Pete’s paycheck.

Medicare withholding rates for 2011 are 1.45% for the employee (withheld from the employee’s pay) and 1.45% for the employer (contributed by the employer, not deducted from the employee’s pay).

Example: Assuming Patty pays Pete \$12,000 in gross wages this year, she would withhold \$174 from Pete’s paycheck (\$12,000 x 1.45%) and would also contribute \$174 from the business for Pete’s Medicare taxes.

Calculating the Federal income tax to be withheld from the employee’s wages is a more complex enterprise, and you should engage the help of your tax professional when in doubt about your calculations. To start, consult the employee’s W-4 to determine the number of withholding allowances claimed by the employee. Next, using Publication 51, Circular A, choose a method of calculating the appropriate withholding amount. While there are several methods available to employers, the two most common are the “wage bracket method” and the “percentage method.”

To use the wage bracket method, consult the wage tables on pp. 26-45 of Publication 51, Circular A that

8 The details of Federal withholding for agricultural employers are laid out in IRS Publication 51, Circular A, “Agricultural Employer’s Tax Guide” available at <http://www.irs.gov/publications/p51/index.html>. Also, please note that these rules do not apply to hand-harvest laborers who are paid on a piece-rate basis; however, the wages paid to such laborers are counted in determining whether the \$2,500 payroll limit has been reached.

match your payroll period and the employee’s marital status as shown on their Form W-4. Then, based on the number of allowances claimed, find the amount of federal income tax to withhold.

To use the “percentage method,” find the number of withholding allowances stated by the employee on their Form W-4 and find your payroll period on the table at page 22 of Publication 51, Circular A and multiply the given “one withholding allowance” amount by the number of allowances claimed by the employee. Subtract that amount from the employee’s wage, and then find the corresponding withholding amount on the tables on pages 24 and 25 of the Circular.

Generally, Federal income, Social Security, and Medicare taxes must be deposited electronically. The frequency of these deposits depends on the amount of these taxes withheld. If the employer withheld \$50,000 or less of these taxes combined (i.e. the total of withholdings for Federal income tax, Social Security, and Medicare taxes) in the past year, then the withholdings can be deposited monthly. If more than \$50,000 of these taxes were withheld, the taxes must be deposited semi-weekly.<sup>9</sup>

### 4. Withholding State Income Taxes

While Oklahoma does not have a state equivalent of the Social Security or Medicare taxes, Oklahoma employers do have to withhold state income tax. The Oklahoma Tax Code assumes that all employers will withhold income taxes,<sup>10</sup> but the code does include an important agricultural exception. If you pay \$900.00 or less monthly to an employee “in connection with farming activities,” you not required to withhold income taxes from your employees’ wages.<sup>11</sup> If you will be paying any employee more than this amount in any month, though, you will need to prepare for withholding Oklahoma income tax from your employee’s paychecks.

In order to properly withhold Oklahoma income tax, your business will need to register with the Oklahoma Tax Commission. To register, you can use the forms provided in OTC Packet A – the Oklahoma Business Registration Packet, available at <http://www.tax.ok.gov/btforms.html>. You can also register online at <https://www2.oktax.onenet.net/OnlineReg/busreg-pk.html>.

9 See generally IRS Notice 96-10.

10 68 Okla. Stat. § 2385.2(A).

11 68 Okla. Stat. § 2385.1(e)(1) excludes “remuneration paid... for services paid to an employee in connection with farming activities where the amount paid is Nine Hundred Dollars (\$900.00) or less monthly” from the definition of “wages.” 68 Okla. Stat. § 2385.2(A) requires the deduction and withholding of wages by “every employer making payment of wages.”



To calculate the amount of Oklahoma income tax to be withheld, you will need to use the most recent version of the Oklahoma withholding tables. These tables are published as OTC Publication OW-2, and are available at <http://www.tax.ok.gov/publicat/2011%20Withholding%20WH%20Tables.pdf>.

If you are required to withhold Oklahoma income taxes, you will need to file withholding reports and deposit the tax amounts on a schedule determined by the amount of taxes withheld.<sup>12</sup>

<b>If the amount of tax withheld is...</b>	<b>...then file withholding report and deposit taxes:</b>
\$500 or less per calendar quarter	by the 20 <sup>th</sup> day of the month following the close of the <i>quarter</i>
More than \$500 but less than \$5,000 per calendar quarter	by the 20 <sup>th</sup> day of the following <i>month</i>
More than \$5,000 per calendar <i>month</i>	by the 20 <sup>th</sup> day of the following <i>month</i> AND required to file electronically

Withholding can be handled online using the Oklahoma Tax Commission's QuickTax system. You can register to use QuickTax at <http://www.tax.ok.gov/qtindex.html>.

Note that, regardless of whether you use the QuickTax system to handle your taxes electronically, you will also be required to keep records of your tax payments.

#### 5. Federal Unemployment Taxes

Taxes collected under the Federal Unemployment Tax Act (FUTA) are treated differently from Federal income, Social Security, and Medicare taxes. You need to submit a Form 940, "Employer's Annual Federal Unemployment Tax Return" if either of the following conditions are met: (A) you paid cash wages of \$20,000 or more to farm workers in any calendar quarter (January-March, April-June, July-September, or October-December) of the preceding year, or (B) if you employed 10 or more farm workers during at least some part of a day (even if the employees were not all present at the same time of day) during any 20 or more different weeks in the preceding year.

*Example: if you employed ten people just one day per week over a span of 20 weeks, you would trigger this requirement. On the other hand, if you employed ten people for less than twenty weeks, the requirement would not be triggered.*

Given the rather high threshold for FUTA taxes, we will not discuss them in further detail in this handbook. However, if you think that you may meet one of these thresholds, you can obtain more information about FUTA withholding in IRS Publication 15, Circular E, the Employer's Tax Guide, which is available at <http://www.irs.gov/pub/irs-pdf/p15.pdf>.

#### 6. State Unemployment Taxes

As mentioned above, Oklahoma has its own unemployment tax, which is administered by the Oklahoma Employment Security Commission (OESC). To register with OESC, you will need to complete form OES-1, available online at <https://eztaxexpress.oesc.state.ok.us/>.

You will be required to file unemployment taxes if you meet one or both of the following conditions:<sup>13</sup>

- (1) You total agricultural payroll in any calendar quarter (during this calendar year or the preceding calendar year) totaled to \$20,000 or more<sup>14</sup>; OR
- (2) For some portion of a day in each of twenty (20) different calendar weeks, whether or not the weeks were consecutive, in either the calendar year or the preceding calendar year, you employed in agricultural labor ten or more individuals, regardless of whether they were employed at the same moment of time.

As you have probably noticed, these requirements are virtually identical to those for FUTA withholding. Again, given that many agricultural employers will not reach these thresholds, we will not discuss them in further detail. If, however, your operation may meet these thresholds, you can learn more about Oklahoma's unemployment tax system through the OESC's handbook "Unemployment Insurance," available at [http://www.ok.gov/oesc\\_web/documents/OES-175.pdf](http://www.ok.gov/oesc_web/documents/OES-175.pdf).

#### 6. Deadlines for Employee Withholdings

A discussion of tax issues would be incomplete without a discussion of filing deadlines. Thus, the following is a brief outline of the tax filing deadlines for agricultural employers:

<sup>13</sup> 40 OKLA. STAT. § 1-210(5).

<sup>14</sup> For more information on the definition of what is included in the definition of "wages," see 40 OKLA. STAT. § 1-218.

From "Legal vs. Illegal Questions," OSU Career Services Fact Sheet, available at <http://www.hireosugrads.com/2/Students/ResourceLibrary-Interview.aspx>

## Legal vs. Illegal Questions



### Examples of Illegal Questions:

- Are you married?
- What was your maiden name?
- With whom do you live?
- How many children do you have?
- How old are your children?
- If you have children, what type of day care arrangements have you made?
- Do you plan to have children?
- What does your spouse do?
- Were you or your parents born in this country?
- How old are you?
- How tall are you?
- How much do you weigh?
- Do you have any physical disabilities?
- What religion do you practice?
- Where do you attend church?
- Where do you bank?
- Have you ever filed for bankruptcy?
- Have you ever been arrested?
- To what social, community, or religious groups do you belong?
- What is your military service status?
- If you are a veteran, what type of discharge did you receive?
- Have you ever received treatment from a psychologist?
- Have you had any major illnesses?
- Have you ever been hospitalized?
- Have you ever been treated for drug or alcohol addiction?
- Have you ever filed for worker's compensation?

### Examples of Legal Questions:

- Tell me about yourself.
- How would you like to be addressed?
- Would our requirement of weekend time commitments be a problem?
- Would you be flexible to relocation?
- What is your stance on overnight travel?
- Are you a citizen of the United States or a resident alien with the right to work in the U.S.?
- In what foreign languages are you fluent? (If applicable to the position.)
- Are you over the age of 18?
- Would your past employers or educational references know you by any other name?

<sup>12</sup> 68 Okla. Stat. § 2385.3.

## APPENDIX 2: TROUBLESOME INTERVIEW QUESTIONS

Don't ask:	Instead, ask:
<b>National origin questions</b>	
Are you a citizen of the United States	If you were offered this job, could you prove your eligibility to work in the United States?
Where were you born?	[Irrelevant]
Where did you learn to speak Spanish?	[Irrelevant]
Who is your closest personal relative we should contact in case of an emergency	Is there anyone you would like us to contact in case of an emergency?
What is your maiden name?	Is there any other name by which your references would know you?
<b>Religion</b>	
What is your religion?	This position may require you to work on weekends and holidays. Would you be able to handle that?
Where do you go to church?	[No suitable substitute]
To what social, community, or religious groups do you belong?	[No suitable substitute][Note that this question is likely irrelevant and can lead to numerous discriminatory problems]
<b>Disability</b>	
Do you have children that you need to take to day care? (Also goes to gender discrimination)	This position may require travel and work in the evenings. Would you be able to handle that?
Do you have any health-related issues that would prevent you from doing this job?	This job requires that you can perform [physical task]. Could you perform that task?
Are you taking any prescription drugs?	[No suitable substitute]
Are you a drug addict or alcoholic?	[No suitable substitute]
How tall are you? How much do you weigh?	This job requires you to work on equipment in confined spaces. Could you perform that task?
Have you ever filed for workers' compensation insurance? (Also goes to workers' compensation retaliation)	[No suitable substitute]
<b>Age</b>	
How old are you?	If hired, could you give me proof that you are over 18 years of age?
When did you graduate from high school?	Tell me about your education and experience.
Disparate impact	
Have you ever been arrested?	Have you ever been convicted of a felony?
Fair Credit Reporting/Fair Debt Collection Practices/Disparate Impact	
Have you ever declared bankruptcy or had your wages garnished?	[No suitable substitute; you <i>can</i> conduct a credit check on employees if (1) done in accordance with all state and federal laws and (2) if good credit is <i>necessary</i> to perform the essential functions of the job]
Do you own or rent?	How long have you lived in this area?
<b>Gender/Sexual Harassment</b>	
Are you married?	Irrelevant
Are you pregnant or do you plan to become pregnant? How many children do you have?	[No suitable substitute]
Are you married/single/divorced/engaged?	[No suitable substitute]
Do you think you can supervise men/women?	How well have you worked with men and women?
<b>Veteran Status</b>	
Have you ever served in the military?	What skills and experience do you have that could help in this position?
Have you ever received a discharge from the military?	Was your separation from active duty for reasons other than an honorable discharge?

### References:

PAUL FALCONE, THE HIRING AND FIRING QUESTION AND ANSWER BOOK 109-113 (AMACOM 2002)

LINDA A. HILL, HIRING AN EMPLOYEE 42 (Harvard Business Press 2008)

JOSEPH D. LEVESQUE, COMPLETE MANUAL FOR RECRUITING, HIRING & RETAINING QUALITY EMPLOYEES 218 (Prentice Hall 1996)

OKLAHOMA STATE UNIVERSITY CAREER SERVICES, LEGAL VS. ILLEGAL QUESTIONS, *available at* <http://www.hireosugrads.com/2/Students/ResourceLibrary-In->

[terview.aspx](#) (last accessed August 10, 2011).

TYLER M. PAETKAU, HIRING AND FIRING 26 (Entrepreneur Press 2007)

FRED S. STEINGOLD, THE EMPLOYER'S LEGAL HANDBOOK 1/26 (Nolo Press 1994)

For an excellent summary of what kind of pre-employment inquiries can and cannot be made, see the Michigan Department of Civil Rights "Pre Employment Inquiry Guide), available at [http://www.michigan.gov/documents/pre-employment\\_inquiry\\_guide\\_13019\\_7.pdf](http://www.michigan.gov/documents/pre-employment_inquiry_guide_13019_7.pdf) (last visited August 10, 2011).

- **By January 31:**
  - File form 943, Employer's Annual Federal Tax Return for Agricultural Employees
  - Furnish employee with completed W-2
  - Furnish anyone who you paid \$600 in non-employee compensation with a Form 1099
  - File Form 945, Employer's Annual Federal Unemployment Tax Return
  - File Form 945, Annual Return of Withheld Federal income Tax
- **By February 28**
  - File paper forms 1099 and 1096
  - File paper forms W-2 and W-3
- **By March 31**
  - File electronic forms W-2 and 1099
- **Quarterly (April 30, July 31, October 31, and January 31)**
  - Deposit FUTA taxes if the undeposited amount is over \$500
  - File TUCA taxes

## IV. RECRUITING, INTERVIEWING, AND HIRING

Now that you are "ready for business," you now need to apply the work that you did in evaluating your human resource needs toward crafting a job description to engaging the recruiting process.

### A. The Recruitment Process

Once you have a clear understanding of the job you are hiring for and the skills needed in successful candidates, those candidates must be corralled. A successful recruitment phase will provide several (*i.e.* more than one) qualified applicants for any particular position. Remember, in order to find someone who will "stand out in the crowd," you need a crowd. Options for recruitment include internal job postings, employee referral incentive programs, search firms, state agencies, educational institutions, online job sites, classifieds (including on-line classifieds), agricultural trade journals, and word of mouth. The most effective option may depend on the type of position being filled. For example, direct recruiting, search firms, and educational institution placement resources may be more effective when trying to fill managerial positions, while other methods such as job postings and media advertisements may be just as effective when recruiting for lower skilled positions. Recruitment efforts will also vary with regard to geographic scope, depending on the skill level being sought and an assessment regarding the likelihood of finding suitable candidates in various markets.

*Oklahoma Farm and Ranch Employment Handbook*

No matter what advertisement method or target geographic area is chosen, be sure to provide sufficient information for potential applicants to develop a good understanding of what it is you are looking for. Provide an appropriate job title, and briefly describe the job and requirements. Say something positive about both the business, and the specific job or work environment. If appropriate, provide information regarding potential wages or benefits. Don't forget to indicate how to apply. Inadequate advertisements with vague details and obscure application instructions will not get the quality of response you are looking for.

Another key ingredient of recruiting new talent is to make the business the kind of place where talented and hard-working people feel appreciated and valued. Word will get around about the culture of your organization. Make sure working conditions on the farm or ranch are as pleasant as possible. Develop an organizational chart that shows where each position on the farm fits in and details the "chain of command" in order to avoid confusion on the part of both employees and managers.

### B. Selection and Interviewing

The employee selection process is a series of hurdles. The candidate who most easily clears the hurdles should be the best candidate for the job. Therefore, it is up to the employer to define the hurdles which will best help select the best person for the job. The appropriate selection tools may depend upon the job description.

- Written applications provide a good first hurdle, as they gauge the applicant's ability to pass basic requirements of the job. Ask the applicant to provide names and phone numbers of past employers or references. Written applications may provide valuable information regarding criminal records, physical requirements, educational background, and prior work experience that are applicable to the position being filled.
- Written tests can be an excellent tool when technical knowledge is required for the job. Oral tests can help assess the applicant's ability to communicate, or interact with others.

Perhaps the most important hurdle is the interview itself. The objective is two-fold: to obtain information that is predictive of future performance of an applicant for a particular position; and to further inform the applicant about the business and the open position. A well thought-out interview process is a valuable supplement to other tools which may do a better job of measuring skills and abilities. Throughout the entire process take care to (A) avoid requesting (whether directly or indirectly) information that could lead to discriminatory risks, *i.e.* information that could be linked



to a protected characteristic as discussed below and (B) to make sure that the information and skills evaluated are directly relevant to the specific job in question.

The formal interview allows potential employees and the employer to get to know each other. Well-planned interviews consist of open-ended questions that elicit meaningful, relevant information from the candidate. Here are some tips for preparing a productive interview:

- Only allow trained personnel to conduct the interview process. As discussed below, many discrimination claims arise from the interview process. These risks can be minimized by equipping interviewers with information about what are, and perhaps even more importantly, what are *not* allowable interview questions.
- As an employer, prepare for the interview process by determining a limited number of questions that you will ask each candidate.
- Develop a rating system to score, objectively, the performance of each candidate on each question.
- Find a quiet, comfortable place where the formal interview can be conducted without interruption.
- Allow the candidate to do most of the talking.
- Be honest about the job, but at the same time emphasize the strengths of the position.
- At some time during the interview process it may be appropriate to give the candidate a practical test, allowing them to perform one or more of the skills required for the job. This can be an incredibly valuable tool, and if carefully crafted, can help the employer determine an applicant's ability to perform the job without eliciting discriminatory information. To that end, make sure that the tests closely match the actual requirements of the position in question.
- Although it is natural to try to make the candidate feel comfortable by engaging in "small talk," remember that such conversations can easily stray into discussions about issues that can lead to discriminatory information, even if the employer has only good intentions. Even seemingly benign questions like "Do you have children? How old are they? What do you do in your spare time" could all lead to such information. Keep conversations relevant to the position.
- Do not say anything that explicitly or implicitly creates guarantees of employment (*ex.* "Once you're hired, your part of the Widget Farms family for life.") Doing so runs the risk of limiting the employment-at-will status that most employers enjoy. See section VII.B. for a discussion regarding the employment-at-will concept.
- Set up interview times well in advance, with consideration given primarily to the applicants schedule. Keep in mind that applicants may be most

available on Saturdays, or other irregular times. At least a portion of the interview time needs to be in a quiet, private location to provide the best opportunity for the applicant to speak candidly.

- Practical demonstrations of specific skills such as machinery operation or working *with* livestock may also be used to evaluate potential performance.

Human resource decisions impact the entire business. Devote the necessary time and effort to prepare for the selection process. Develop a relevant job application and spend time formulating basic questions for the interview process. Remember, "wishing you had the perfect employee to fill a business need" may be an easier problem to solve than "having a hastily hired employee that you wish you did not have".

Bear in mind for any specific recruitment effort most applicants will likely be rejected. Plan for how you will let unsuccessful applicants know of their status in a timely manner as decisions are made. A well crafted letter should express appreciation for their time and interest in applying for your position and should notify them of their status. It is your responsibility to provide a response to all applicants.

#### C. Some Closing Thoughts on Recruitment and Selection

If the authors were to encapsulate the cautions in this portion of the article into one sentence, it would be "stay on point." As one author wisely summarized:

Non-discriminatory interview questions require that the questions be job-related. Avoid questions about age, race, religion, national origin, marital status, credit ratings, physical traits, arrest and conviction records, and disabilities (except as they affect ability to do a job). Questions that may not seem discriminatory to the interviewer may be perceived as inappropriate. All questions should be related to the position sought.<sup>15</sup>

You should also avoid screening processes or criteria that could have a disproportionate effect that effectively discriminates against a protected trait. For some examples of "disparate impact," consider the following:

- High school diploma requirements have been found to be discriminatory if a diploma is not a true requirement of the job (disproportionate on race).<sup>16</sup>
- Pulling a candidate's credit score may pose a risk of discrimination (disproportionate on race).<sup>16</sup>

<sup>15</sup> Gisela Bradley, EMPLOYMENT ISSUES, Texas Bar CLE (Austin, November 19, 2010), p.6:

<sup>16</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432 (1971)

## APPENDIX 1: EMPLOYER CHECKLIST

<b>Before the Recruitment and Interview Process</b>	
	Develop the farm's vision/ mission statement
	Assess current human resources: assets and needs
	Develop job description
	Obtain Federal Employer Identification Number (EIN) via Form SS-4
	Enroll in Federal tax withholding system
	Prepare accounting and deposit systems for Federal tax withholding and Oklahoma tax withholding
	Register with Oklahoma QuickTax system for Oklahoma tax withholding
	Register with IRS/Oklahoma Employment Security Commission for unemployment tax filing if needed
<b>Recruitment and Interviews</b>	
	Train recruiters and interviewers regarding the business, HR needs, and recruitment media
	Train recruiters and interviewers regarding permissible and impermissible interview questions
	Administer written job applications and job-based skills tests/ demonstrations
	Administer interviews
	Check references (if interviewee grants permission)
	Compile interview records for file
	Destroy any records that may contain private information of candidates not chosen (ex. SSNs)
<b>As Soon as a New Employee is Hired</b>	
	Prepare Form I-9 with employee
	Have employee prepare Form W-4 (Withholding Allowance Certificate)
	Report hiring through Federal New Hire Reporting Service
	Provide required workplace notices
	Provide employee training
	Prepare file for required employee records
<b>Payday</b>	
	Calculate employee pay, ensuring that applicable minimum wage/overtime rules are applied
	Withhold required state and federal taxes
	Provide payday statement detailing basis of pay and all withholdings
<b>Employee Evaluation / Discipline / Termination</b>	
	Conduct employee evaluations
	Discuss employee evaluation with employee; outline plan for improvement if needed
	Provide verbal correction for problematic performance or behavior
	Provide written correction for problematic performance or behavior
	Provide second written correction with possible suspension
	Terminate employee
<b>Termination</b>	
	Conduct termination meeting to discuss reason for action
	Recover all company property from employee
	Change passwords/ codes/ access to sensitive areas or materials



Incentive programs are often used to supplement base wages. Remember, bonuses increase labor productivity *only* if they are closely tied to a performance factor that the employee can control. Performance bonuses can be a significant motivator if they enable you employees to see and feel the results of their good work, but they can be frustrating and even counterproductive if bonuses are reduced or eliminated by factors that the employee can do nothing about.

At the end of the day, devising an overall compensation and incentive program involves two-way communication between the employer and the employee. From the employee's perspective, what are their needs?

- Pay
- Health insurance
- Leave
- Flexibility in work hours and days
- Housing
- Child care
- Retirement savings

Similarly, what does the employer need from their compensation program?

- Recruit new employees
- Motivate current employees
- Reward well performing employees
- Build employee loyalty

## XI. YOUR EMPLOYER REPUTATION: BEING THE PLACE WHERE EVERYONE WANTS TO WORK

The challenge as a farmer or rancher is to provide an employment opportunity that is attractive to people who have numerous other employment alternatives. Building a reputation of being an excellent place to

work is a long-term challenge. With that said, there are opportunities to capitalize on the advantages that many employees see in farm work, such as diversity, and opportunity to work outside. Keeping the perspective of the employees in mind is important. Allowing reasonable work hours and flexibility, keeping equipment in good repair, providing adequate training and opportunity for communication will go a long way.

Following are a few characteristics of outstanding employers:

- They like, enjoy, and appreciate their employees.
- They use written job descriptions.
- They provide training.
- They show trust.
- They notice employees doing the right things, and they say thank you.
- They develop pride in the organization as a whole.
- They celebrate successes.
- They communicate clearly and often.
- They compensate fairly.
- They seek out and provide the most sought after informal benefits.
- They provide for internal advancement
- They make the business family friendly.
- They show pride for advancing employees, even if the advancement is to another organization.

## XII. CONCLUSION

In this handbook, the authors have examined the human resource process for agricultural employers from the recruitment and hiring process, to getting the employee on the job and guiding them through their work, and concluding with the employee's evaluation. In short, with a little homework, agricultural employers can avoid many of the legal risks involved in human resource issues, and can cultivate a workforce that finds the farm a rewarding place to work. And that's good for everyone's bottom line.

During the recruitment and interview process, avoid questions that directly address a protected characteristic, but also be aware of questions that may be innocent enough (*i.e.* merely seek to engage the candidate in "casual conversation") but that could go towards a protected characteristic. For example, avoid talking about family (children) or plans for pregnancy – these topics can lead to information about a protected medical condition or a basis for sex-based discrimination. Don't ask questions about national origin or race, and furthermore, never ask for pictures of applicants – nothing good can come of it.<sup>17</sup> Using the "overqualified" excuse to not hire an older applicant has also been used as a pretext for age discrimination.<sup>18</sup> For a list of interview questions that can lead to trouble, see Appendix 2. Also, although it is not based on Oklahoma law, the Michigan Department of Civil Rights' "Pre Employment Inquiry Guide" does an excellent job of discussing what kind of pre-employment inquiries can and cannot be made. As it is largely based on Federal law, it still provides useful guidance for Oklahoma issues as well. The guide is available online at [http://www.michigan.gov/documents/pre-employment\\_inquiry\\_guide\\_13019\\_7.pdf](http://www.michigan.gov/documents/pre-employment_inquiry_guide_13019_7.pdf).

While checking references for a candidate, bear in mind that there can be issues of privacy and potentially discriminatory behavior at this stage of the process as well. Ask for references and permission to contact them, as well as permission to contact "indirect references" (an "indirect reference" is a reference derived from another reference; typically, they are found by asking an applicant's listed reference "is there someone else I should talk to about this candidate's qualifications for the job?"). Be consistent across all candidates to avoid discrimination issues. If a reference seems hesitant to provide information or seems to be telling less than the full truth, remind them that Oklahoma law protects employers from liability from responding to reference requests so long as their former employee has consented to using them as a reference and that the former employer acts in good faith.<sup>19</sup>

As a final note to the recruitment and interview process, remember that it is a good idea to carefully document the process and to take good notes. Be cautious in such notes, though. Make sure that they are relevant to the job as well – ask how it would look if such notes were put in front of a jury. Such notes are almost guaranteed to be requested as evidence should a discrimination case arise.

<sup>17</sup> Andrea Johnson and Katrina Grider, SECURING HIRING SUCCESS, EASY GUIDES TO EMPOWER BUSINESS, p. 11. Texas Bar CLE (Austin, November 19, 2010).

<sup>18</sup> See *EEOC v. General Dynamics Corp.* 999F.2d 113 (5th Cir 1993).

<sup>19</sup> See 40 OKLA. STAT. § 61.

## D. Caution Regarding Negligent Hiring

While the discussion to this point may have you afraid to ask anything of a candidate except to see their resume and to ask for their name, rank, and serial number, you must still diligently evaluate all of your potential employees. Not only does the prosperity of your farm and ranch depend on securing a quality workforce; your risk management strategy may hinge on it as well. Selecting a dangerous employee can not only put that employee's coworkers at risk, but also exposes the operation to liability if a third party is injured. Hiring an employee when you knew (or should have known) that the employee posed an unreasonable risk of harm to other employees or third parties can result in you or your business being held liable for the harm caused by that employee.<sup>20</sup>

## VI. TASKS FOR A NEW HIRE

By this point, you have worked hard to assess your human resources and craft a good job description. You have beat the bushes for excellent candidates, conducted a thorough and fair interview process, and you now have the ideal person for the job. Now what? This section will explore some of the tasks ahead of the employer as they welcome their new employee to the job.

### A. Employment Eligibility Verification: Form I-9

An issue that has received a great deal of attention in recent years, immigration law as it applies to employers comes from the Immigration Reform and Control Act of 1986 (IRCA).<sup>21</sup> While many employers may be intimidated by the concerns of immigration law, the IRCA also provides for one of the easiest and best defenses against such concerns: Form I-9.

All employers, regardless of their size or the nature of their business, are required to complete a Form I-9 for every employee.<sup>22</sup> The form is available for free download at [www.uscis.gov](http://www.uscis.gov). Importantly, you should only complete a Form I-9 with the employee *after* an offer of employment has been made. Otherwise, the I-9 form poses a great threat of national origin discrimination under the OADA and Title VII. However, you should also ensure that the form is completed on or before the employee's first day of work.

Both the employer and the employee have responsibilities when it comes to completing Form I-9. Employees must complete Section 1 of the form (although they can have assistance; the person providing such assistance must certify that they have helped the person provide true and accurate information).<sup>23</sup> Em-

<sup>20</sup> See, e.g. *Mistletoe Exp. Serv., Inc. v. Culp*, 353 P.2d 9 (Okla. 1959).

<sup>21</sup> 8 U.S.C. § 1324a *et seq.*

<sup>22</sup> 8 C.F.R. § 274a.2.

<sup>23</sup> 8 C.F.R. § 274a.2(b)(1)(A).

employees must also present documentation establishing both their identity and their authorization to work in the U.S.

Form I-9 has three lists of documents that an employee can provide: Lists A, B, and C.

- List A includes documents that establish both the identity of the person AND their authorization to work. If a person provides one of these documents, they do not have to provide any of the items listed in List B or List C.
- List B includes documents that establish the identity of the person, but do NOT have anything to do with their authorization to work.
- List C includes documents that establish a person's authorization to work in the U.S., but do NOT necessarily confirm identity.<sup>25</sup>

The characteristics of each of these lists are why someone must provide a document from *both* List B AND from List C; they must work together. Note that it is illegal discrimination to require a person to provide any one specific item from List A, B or C; the person must be allowed to choose whatever documentation they desire.<sup>26</sup>

As the employer, you have tasks to complete for Form I-9 as well. The employer will complete Section 2 of the form, "Employer Review and Verification." To do so, you must physically examine the documentation presented by the employee and ensure that the documents (1) appear to be genuine and (2) relate to the individual. A full "CSI" forensic analysis of the documents is not required – the employer must simply use a good faith, reasonable evaluation of the documentation provided. Employers can also use the US Citizenship and Immigration Services E-Verify system to electronically compare a person's documents to records from the Department of Homeland Security and the Social Security Administration. For information on the E-Verify system and to enroll, visit [www.uscis.gov](http://www.uscis.gov).

Form I-9 does not have to be submitted; it is to be retained by the employer. The form must be retained for three years after the date of hire, or one year after the person's employment is terminated, whichever is longer.<sup>27</sup> The benefits of properly completing a Form I-9 are numerous, but perhaps foremost among them are the legal protection it provides against the allegation of illegal hiring of someone who is not authorized to work in the U.S. Under federal regulations:

An employer or a recruiter or referrer for a fee for employment who shows good faith compliance with the employment verification requirements of §274a.2(b) of this part shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.<sup>28</sup>

On the other hand, failing to follow the I-9 procedures and hiring an unauthorized worker can lead to significant penalties provided under:

- Knowingly hiring an unauthorized alien: first offense not less than \$275 and not more than \$2,200 per each unauthorized alien
- Second offense - \$2,200 - \$5,500
- More than two offenses - \$3,300 - \$11,000
- A pattern or practice of violations can lead to a \$3,000 and/or imprisonment for six months.<sup>29</sup>

For an excellent and very thorough guide to handling the I-9 process, consult the USCIS "Handbook for Employers: Instructions for Completing Form I-9," available at <http://www.uscis.gov/files/form/m-274.pdf>.

#### B. New Employee Hire Reporting

The Federal New Hire Reporting System is administered by the Office of Child Support Enforcement.<sup>30</sup> There are no agricultural exemptions to this requirement, as all employers must comply if they would be required to submit a W-2 to that employee.<sup>31</sup> Oklahoma cooperates with the federal NHRS through the Oklahoma Employment Security Commission (OESC), which serves as the contact agency for Oklahoma employers to report their new hires.

To report a new hire to the OESC, you can file online at <https://www.ok.gov/oesc/newhire/app/index.php>. Alternatively, you can fill out a hardcopy of Form OES-112 and mail it to the OESC (see Appendix 5 for a copy of this form). New hire reports should be completed within twenty days of hiring the employee.<sup>32</sup>

<sup>28</sup> 8 C.F.R. § 274a.4.

<sup>29</sup> 8 C.F.R. § 274a.10.

<sup>30</sup> 42 U.S.C. § 653. See <http://www.acf.hhs.gov/programs/cse/newhire/employer/private/newhire.htm> for more information.

<sup>31</sup> 42 U.S.C. § 653A(a)(2)(A), 40 OKLA. STAT. § 2-802 (establishing Oklahoma reporting requirement), 26 U.S.C. § 3401(d) (definition of "employer"), 40

<sup>32</sup> 40 OKLA. STAT. § 2-802.

Under the Act, employers are also authorized to administer drug and alcohol tests to an employee if the employer "reasonably believes" that the employee is under the influence of drugs or alcohol.<sup>158</sup> While a number of circumstances may give rise to such a "reasonable belief," the Act defines several instances where testing is permitted.<sup>159</sup>

- Drugs or alcohol have been found on or near the employee or in the employee's vicinity.
- The employee has engaged in conduct that suggests he or she is impaired by drugs or alcohol.
- The employer has received a report of the employee's drug or alcohol use while at work or while on duty.
- The employer receives information that the employee has tampered with a drug or alcohol test.
- The employee has shown negative performance patterns.
- The Employee has shown excessive or unexplained absenteeism or tardiness.
- 

Beyond the reasonable belief circumstances, an employer can also require an employee to undergo drug and alcohol testing if the employee has been injured, has injured another person, or has damaged the employer's property as a result of an accident.<sup>160</sup> Employers can also establish a random drug testing program or a routine drug testing program, particularly if the class of employees to be tested "are engaged in activities which directly affect the safety of others."<sup>161</sup> But again, such testing should only be done with the proper policies and procedures in place, as such programs have frequently served as the basis for employment discrimination suits when improperly administered.

The Act gives employees the ability to ask for a "confirmation test." If an employee's test is positive for drugs or alcohol, the employee can request a confirmation test (a test to confirm or reverse the original result) within 24 hours of receiving notice of the positive test.<sup>162</sup> The employee must pay the costs of the confirmation test unless that test reverses the original results; in such a case, the employer must pay for the second test.<sup>163</sup> Employees are entitled to inspect and copy their testing records, and such records cannot be disclosed to any other party unless the employee consents in writing or unless the employer is subject to an order issued by a court or administrative agency requiring them to disclose the testing records.<sup>164</sup>

Adhering to the rules established under the Act is important because the Act specifically allows an

<sup>158</sup> 40 OKLA. STAT. § 554(2).

<sup>159</sup> *Id.*

<sup>160</sup> 40 OKLA. STAT. § 554(3).

<sup>161</sup> 40 OKLA. STAT. §§ 554(4), (5).

<sup>162</sup> 40 OKLA. STAT. § 556.

<sup>163</sup> *Id.*

<sup>164</sup> 40 OKLA. STAT. § 560.

employee or applicant who has been harmed by a willful violation of the Act to sue the employer for double the amount of any lost wages, plus attorneys fees and court costs.<sup>165</sup> Thus, if you want to implement a drug and alcohol testing policy for your applicants and/or your employees, it is vital to work with an attorney with experience in these matters to put together a testing policy consistent with the Act, and to always operate within that policy.

## X. COMPENSATION

Hopefully, you will not have to spend much time worrying about how to terminate employees, and rather you can spend more time wondering how to compensate your competent, hard-working employees.

When it comes to compensation many farm managers ask "What do I have to pay?" Perhaps a better question is "What message do I want my compensation package to send?" Direct compensation includes the salary plus any performance-based bonuses. Indirect compensation is far more varied including such things as health insurance, retirement programs, leave, housing, child care, and a variety of other things. Creative employers understand that it's not all about money, it's about meeting employee needs.<sup>166</sup> Smaller businesses such as most farms and ranches provide an environment where managers can get to know their employees better, and thus develop a more thorough understanding of individual needs.

For example, your employees may have needs that provide opportunities for creative compensation. Child care and health benefits send the message that you value family. Longevity bonuses say you value employees who stay with the business. Parties and special events let employees know that you appreciate it when employees go the extra mile. Flexible hours may be important to a working single parent. A recent graduate may be looking for stable work and a place to live. Periodic use of farm equipment for personal use may be important to certain employees.

The most important consideration is fairness. Internal equity refers to fairness between employees of the same business, while external equity refers to relative fairness compared to competing employers. If either internal or external equity is violated, a business will likely experience employee dissatisfaction and employees will either reduce performance or leave.<sup>167</sup>

<sup>165</sup> 40 OKLA. STAT. § 563.

<sup>166</sup> R. Schuler, *MANAGING HUMAN RESOURCES*. Cincinnati Ohio, South-Western College Publishing (1998).

<sup>167</sup> Gregory Billikopf, *LABOR MANAGEMENT IN AGRICULTURE: CULTIVATING PERSONNEL PRODUCTIVITY*. Agricultural Extension: University of California. Available at <http://www.cnr.berkeley.edu/ucce50/ag-labor/7labor/00.pdf> (last accessed August 10, 2011).

<sup>25</sup> See 8 C.F.R. § 274a.2(b)(V)(A).

<sup>26</sup> See the Immigration and Nationality Act, 8 U.S.C. § 274B(A)(6); 8 C.F.R. § 274a.1(i)(2)

<sup>27</sup> 8 C.F.R. § 247a.2(b)(2)(i)(A)



If the consumer report reveals information that causes an employer to take adverse action against that person (such as not offering employment to an applicant or disciplining/terminating an existing employee), then, *before taking such adverse action*, the employer must provide the applicant or employee with a copy of the consumer report that was obtained by the employer, and must also provide the applicant or employee with a written statement of their rights under the FCRA.<sup>147</sup> The Federal Trade Commission (FTC) has prepared a document that can be used for this purpose, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>.

Oklahoma has a state law that largely mirrors the requirements of the FCRA. Under this law, the employer must also provide written notice to the applicant or employee that the employer is requesting a consumer report.<sup>148</sup> This notice must also include a box that the applicant or employee can check to receive a copy of the report – if this box is checked by the applicant or employee, then he or she must be provide a copy of that report free of charge.<sup>149</sup>

#### L. Drug Testing Issues

Drug testing by Oklahoma employers is governed by the Standards for Workplace Drug and Alcohol Testing Act.<sup>150</sup> Under this Act, employers have the option of requiring job applicants to undergo drug and alcohol testing; if an applicant tests positive for drugs or alcohol, the employer has legal grounds for refusing to hire the applicant.<sup>151</sup> While this provides a potent tool for employers to protect the safety of their employees and their workplace, it should also be used carefully. Employers should have a clearly-defined drug testing policy for applicants, accompanied by rigorous procedures, prepared with the help of an attorney well-versed in the Oklahoma drug-testing laws. Preparing (and of course, actually following) such policies and procedures can reduce the risk of drug testing being used as a basis for a discriminatory employment practice claim. For example, an employer who tests job applicants of one race, gender, or age with greater frequency than others runs the risk of a discrimination claim.

If an employer wants to require their applicants or employees to submit to drug and alcohol testing, then the employer must have a written policy detailing their testing procedures.<sup>152</sup> This policy must, at a minimum, include the following information:

- A statement of the employer’s policy regarding drug or alcohol use by employees
- Which applicants and employees are subject to testing
- The circumstances under which testing may be tested or required
  - See below for a listing of permissible circumstances listed in the Act
- The substances which may be tested
  - Note, though, that the employer can simply state that the substances to be tested are “drugs and alcohol” to included the widest possible variety of substances; if an employer specifically lists only certain drugs, they are then limited to testing only for those drugs
- The testing methods and sample collection procedures to be used
  - For example, will urinalysis be the only method used? Will blood testing be permitted?
- The consequences of refusing to undergo testing
  - The Act provides that in some circumstances, refusal to undergo testing can be a grounds for refusing to offer employment to an applicant, and for disciplining or terminating an existing employee<sup>153</sup>
- What actions (such as discipline or termination) may be taken if a positive test result occurs
  - Under the Act, an employer can discipline or terminate an employee for a positive drug test, but this consequence *must* be included in the drug testing policy<sup>154</sup>
- The ability of an applicant or employee to explain (confidentially) the test results
- The ability of an applicant or employee to obtain copies of all information and records related to his or her testing
- The confidentiality requirements of the testing program
- The procedures available to appeal a test result

Employers are required to give 10 days’ notice to their employees if there is any change to the employer’s drug testing policy.<sup>155</sup> Such notice must be given to all employees by either delivering a copy of the new policy in person, mailing it, transmitting it via email, posting it to an employee-accessible website, or posting it in a prominent place at the employer’s business.<sup>156</sup> New employees must receive a copy of the testing policy as soon as they accept an offer of employment.<sup>157</sup>

153 40 OKLA. STAT. § 562(B), 554(1).

154 40 OKLA. STAT. § 562(A).

155 40 OKLA. STAT. § 555(B).

156 *Id.*

157 *Id.*

147 15 U.S.C. § 1681b(3)(A).

148 24 OKLA. STAT. § 148.

149 *Id.*

150 40 OKLA. STAT. §§ 551 – 565.

151 40 OKLA. STAT. § 554(1).

152 40 OKLA. STAT. § 555.

For more information and helpful tips on using Oklahoma’s new hire reporting system, visit [https://www.ok.gov/oesc/newhire/app/helpful\\_hints.php](https://www.ok.gov/oesc/newhire/app/helpful_hints.php).

#### C. Workplace Notices

A significant number of notices need to be brought to the attention of new hires, often in the form of postings placed in a conspicuous area accessible to all employees. The Oklahoma Department of Labor has compiled a listing of these posters at [http://www.ok.gov/odol/Workforce\\_Protection/Wage\\_and\\_Hour\\_Services/Workplace\\_Posters/](http://www.ok.gov/odol/Workforce_Protection/Wage_and_Hour_Services/Workplace_Posters/). Because each notice may have different requirements as to which employers must post it, a table of these requirements is included in Appendix 3.

## VII. ON THE JOB: WORKING WITH CURRENT EMPLOYEES

Once your farm and ranch welcomes its new hire, the work is far from over. Now the employer has to work on training, motivating, and monitoring his or her workforce.

#### A. Orienting and Training Employees

Employee turnover is costly. In the first few weeks on a job a new employee will become accustomed to the business culture, and will decide if the job is a good fit for him or her. By this point, you have spent a significant amount of time and effort to find the best person for the job, and it is important to keep that employee on the right track. Someone currently in the organization (often the owner/operator) needs to be in charge of orienting the new employee to the organization. Primary goals of the orientation process include quickly fostering a sense of belonging and fit within the organization, creating a sense of the overall scope and vision of the organization, and clarifying specific expectations of the particular position.

New employees expect and deserve training and development. Thus, you should not let your hectic schedule keep them from investing the time needed to orient a new employee from the very beginning. A well-planned and thorough approach to orienting an employee to a new position will help the employee to quickly get accustomed to the operation and become a key contributor more quickly.

Proper training of new employees also has important implications for the farm and ranch’s risk management as well. Failing to train employees around the farm or ranch is particularly important due to the many workplace hazards present. Placing an employee in a position where they may cause harm to themselves or others can give rise to a claim of “negligent

hiring” or “negligent entrustment.” Negligent hiring is discussed above in section IV.D. A claim for “negligent entrustment” can arise when a party who owns or controls a piece of equipment allows a second party to operate that equipment when the first party knew, or should have known, that the second party is careless, reckless, and incompetent, and an injury results.<sup>33</sup>

With that said, new employee training and orientation is an area where many agricultural producers fall short. Often farmers wait until the last minute to hire a new employee, and that person is then thrown into the fray of a busy season. Remember, many potentially excellent employees have little or no experience in the agricultural industry. It can take several days for a new employee to become oriented into the business, and in agriculture a person may need to see a full year of an operation in order to get a feel for the various activities around the farm.

The most important part of the training process is good communication between managers, existing employees, and newer members of the team. Develop an orientation schedule and a training plan that spells out who will teach the new employees each of the various tasks. Orientation involves learning the organizational structure, business policies, and other rules and expectations associated with the work environment. Training involves making sure the specific tasks outlined in the job description can be done well. When designing a training program for the farm, remember to keep these points in mind:

- Include owners or top managers.
- Encourage questions.
- Provide a farm map and glossary of the farm’s terms (every farm has its own language – where exactly is the “Ferguson 40” anyway?).

For each specific task in your training program, be sure to include the following steps:

- Make sure the employee is at ease and the work place is well prepared.
- Tell the employee how to do the task.
- Show the employee how to do the task.
- Monitor the employee as he or she does the task, and allow plenty of time and answer questions.
- Review the work with the employee.

Lastly, make sure that all employees are treated equitably with respect to training opportunities. Giving employees training that, in turn, improves their opportunities for advancement or increased pay based on protected characteristics is another way that a discrimination claims can arise.<sup>34</sup>

33 See *Green v. Hariss*, 70 P.3d 866 (Okla. 2003); *Clark v. Turner*, 99 P.3d 736, 743 (Okla. Civ. App. 2004)

34 See generally JOSEPH D. LEVESQUE, COMPLETE MANUAL FOR RECRUITING, HIRING & RETAINING QUALITY EMPLOYEES (Prentice Hall 1996)



## B. Motivating, Leading, and Directing Employees

Motivating, leading, and directing employees within an organization is all about establishing trust and respect within the employee-employer relationship. Communicating clear expectations and providing frequent and effective feedback is essential. Employees are often more likely to hear negative feedback from supervisors rather than positive feedback. Sharing good news and providing that positive feedback will help maintain more effective relationships in the organization.

### 1. The Importance of Communication

Managers need to keep in mind that all employees are motivated by both economic and non-economic factors. Employers sometimes tend to think only about pay and benefits. Obviously the economic factors are important and the business must offer a fair and competitive compensation package. However, non-economic motivational factors such as challenging work, a feeling of accomplishment, recognition, increased responsibility and the opportunity of career advancement may be just as important. Communication is the key. Great managers excel at communicating with their employees.

A basic element of open communication is trust. As people, we all have a “bank account” with respect to our relationships. A history of honesty, courtesy, kindness, and fulfilling commitments are like “deposits” to this account, while betrayal, disrespect, and threats are like “withdrawals.”<sup>35</sup> Relationships with high trust bank account balances can handle difficult discussions about important issues in a much smoother fashion, again reinforcing the importance of communication in the employer-employee relationship.

Following are a few communication skills that managers or potential employers sometimes need to be reminded of as they begin having conversations.

- Remember to focus on the positive, and be mindful of what’s best for the overall organization.
- Spend a moment thinking about the bigger picture before saying anything.
- Bring up topics in the context of “I” or “we,” in order to avoid the perception of blaming the other person. For example, “when the combine broke down in the middle of harvest, I felt very out of control and did not know what to do,” might be a more effective way to open a conversation about how to move forward than “when you broke the combine in the middle of harvest it created a real crisis for the whole farm.”
- Actively listen. Watch the reactions of people while they are talking, and ask questions to clarify meaning. This not only assures that the message

is received clearly, but also shows the speaker that you are genuinely focused on their message at the moment.

- When it is your turn to speak, if it is important, say it more than once, and ask questions to ensure that others understand your meaning. As you are speaking, try to read the impact you are having on the listeners. Are they tense, or are they relaxed? What is their body language telling you?
- When you have scheduled time for important discussions, put forth the extra effort to remove any roadblocks to effective communication. Select a quiet location, and attempt to circumvent interruptions such as phone calls, or walk in visitors.

Finally, everyone can benefit from a reminder to work at good communication skills every day. Practicing good communication skills habitually when engaged in day-to-day interactions will most certainly increase the likelihood that good skills will rise to the surface when the conversations are more critical.

### 2. Generational Traits in Communication

Examining and understanding generational differences has become an important part of maximizing organizational effectiveness. Each group brings strengths that can enrich a farming business. However, each generation is motivated differently, aspires to different personal and professional goals, and interprets business practices differently. Understanding those differences leads to more effective communication and ultimately can lead to more success in implementing the business strategy.

The senior living generation (those born from about 1920 through the end of World War II in 1945), maintains control of a large percentage of the business assets (and in many cases the management) on farms and ranches today. Many of these individuals experienced the great Depression, the Dust Bowl, and several significant wars so they grew up in difficult times and developed a strong work ethic. Traditional value systems and the importance of extended family are deeply instilled. Their perception is that strong leadership moves people and organizations forward, so the command and control organizational system is a perfectly acceptable way to run the business, and subordinates should accept decisions made by the leaders.<sup>36</sup>

The “Baby Boomers” (generally considered to be those born between 1946 and 1964) experienced the Cold War, the civil rights and women’s movements, and the Vietnam War. They question the integrity of leadership, and evolved with a very career-driven mentality to prove their worth. They expect to work hard, but also expect to be compensated fairly, and

In almost any case, asking about an arrest is likely to be problematic since a number of cases have established that blacks and Hispanics are arrested at rates higher than their representation in the population, and thus such questions are likely to have an indirectly discriminatory effect. Asking about convictions is slightly less problematic if, again, the inquiry is directly related to the job in question. However, studies have also shown that conviction rates are also disproportionate for blacks and Hispanics relative to their representation in the population.

Employers should also know that under Oklahoma law, they cannot require an applicant or employee to disclose any information in their criminal record that has been expunged (meaning that the information has been sealed by the court, typically done for arrests that never resulted in a conviction, a conviction that was overturned, a minor offense occurring several years in the past, and in some other circumstances<sup>139</sup> nor can applicants or employees be required to answer any questions regarding expunged criminal records; in fact, applicants and employees are authorized to state that expunged events never occurred.<sup>140</sup>

## K. Discrimination based on Credit Checks

Increasingly, credit reports and credit scores seem to be used almost everywhere, and some employers have begun to request a credit report as part of an overall “background check” on new employees. While one can hardly blame employers for using an abundance of caution in today’s world, a great deal of caution must be taken in using credit checks on applicants and employees. As mentioned elsewhere, inquiries into applicants’ or employee’s backgrounds may not be, in and of themselves, discriminatory, they can give rise to a claim of “disparate impact” discrimination if they would affect persons with protected characteristics differently from others. As mentioned elsewhere in this handbook, credit checks have been shown in some cases to have disparate impacts, and these impacts have been noted by the EEOC.<sup>141</sup> Given these concerns, employers are generally advised to use credit checks only for applicants and employees who will have significant financial responsibilities or who will routinely handle significant amounts of funds.

At the federal level, the Fair Credit Reporting Act (FCRA)<sup>142</sup> governs credit reporting through consumer reporting agencies. Typically, the FCRA comes into play when someone such as an employer requests a “consumer report” (also known as a “credit check” or “credit report” and which may include a credit score)

on another person. Under the FCRA, a consumer report is defined as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes
- (C) any other purpose authorized under [15 U.S.C. § 1681b].<sup>143</sup>

In the vast majority of circumstances, an employer will not try to collect credit information directly, but will instead rely on a “consumer reporting agency” (also known as a “credit bureau”) to provide the information. The FCRA defines a consumer reporting agency as:

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.<sup>144</sup>

While the FCRA authorizes a consumer reporting agency to provide a consumer report to an employer if that information will be used for employment purposes,<sup>145</sup> the consumer reporting agency can only provide such a report if the employer has (A) provided a “clear and conspicuous” disclosure to the applicant or employee that a credit report will be requested (and such a disclosure must stand alone, *i.e.* it must be its own document that is not made part of any other documents or forms), and (B) the applicant or employee has provided a written authorization for the employer to request the consumer report.<sup>146</sup>

143 15 U.S.C. § 1681a(d)(1).

144 15 U.S.C. § 1681a(f).

145 15 U.S.C. § 1681b(a)(3)(B).

146 15 U.S.C. § 1681b(b). For an example of these disclosures and consent forms, see PAUL FALCONE, THE HIRING AND FIRING QUESTION AND ANSWER BOOK 176 (AMACOM 2002).

35 See Don Hofstrand, MAKING FAMILY BUSINESS DECISIONS, Iowa State University Extension File C4-72 (2007).

36 W. Strauss and N. Howe, GENERATIONS. New York: Quill (1991).

139 22 OKLA. STAT. § 18.

140 22 OKLA. STAT. § 19(F).

141 See EEOC Compliance Manual Section 15-VI(B).

142 15 U.S.C. § 1681 *et. seq.*

## H. Discrimination based on Genetic Information

New laws at both the state and federal level prohibit employers from discriminating against applicants or current employees based on genetic information about the employee. Before discussing these laws, though, we should first discuss what is meant by the term “genetic information.” The OADA defines it as

[I]nformation derived from the results of a genetic test...[but *not* including] family history, the results of a routine physical examination or test, the results of a chemical, blood or urine analysis, the results of a test to determine drug use, the results of a test for the presence of the human immunodeficiency virus, or the results of any other test commonly accepted in clinical practice at the time it is ordered.<sup>129</sup>

At the federal level, the Genetic Information Non-discrimination Act of 2008 (“GINA”)<sup>130</sup> uses a somewhat similar definition:

The term “genetic information” means, with respect to any individual, information about (i) such individual’s genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual.<sup>131</sup>

While the OADA and GINA both prohibit employers from engaging in discriminatory acts based on an applicant’s or employee’s genetic information, the laws handle the issue differently. Under the OADA (which, remember, applies to all Oklahoma employers even if they only have one employee), genetic information is simply treated as another protected characteristic, just like race, color, religion, national origin, and other traits are.<sup>132</sup> GINA, on the other hand, applies to employers with fifteen or more employees<sup>133</sup> and sets forth more specific requirements. While GINA prohibits discriminatory practices with respect to hiring, compensation, termination, etc. based on genetic information, it also prohibits employers from “requesting, requiring, or purchasing genetic information with respect to an employee or a family member of the employee.”<sup>134</sup>

You may be asking yourself why, as a farmer or rancher, you would ever want to have genetic infor-

mation about your employees or how you would ever come to have it. For most of us, this is not a yet a concern. However, employers that provide health insurance or other health-related benefits to their employees may, whether accidentally or on purpose, get access to genetic information about their employees. As health care costs continue to rise, there may be increasing pressure to use such information to avoid hiring or to discharge employees who may represent higher medical costs to their employers. This is precisely the reason the genetic information provisions of OADA and GINA were enacted. In short, employers should simply avoid requesting genetic information about applicants or employees in much the same way they should avoid unnecessary inquiries into their disability status under the ADA.

## I. Discrimination Based on Veteran Status

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that applies to all employers, regardless of size.<sup>135</sup> In essence, the USERRA prohibits discrimination against a person “on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.”<sup>136</sup> However, discharge because of dishonorable or bad conduct or conviction by court-martial makes the employee ineligible for the protections of the USERRA.<sup>137</sup>

As a result of these requirements, steer clear of questions regarding military service, although one may ask whether a candidate has received a dishonorable or bad conduct discharge or conviction under court-martial.

## J. Discrimination Based on Criminal Records

As with any other issue, employers need to be sure that if they are asking a candidate about their conviction record, it is because there is a specific and valid reason for the question, such as the fact that the employee will work with vulnerable people such as children or the elderly or that the employee will be in a position of trust (for example, conviction of fraud or embezzlement may be important if the job in question involved handling finances). Setting an outright bar on employment based on a conviction may not be discriminatory by definition, but it will also be viewed with a very skeptical eye by regulators.<sup>138</sup>

135 See, generally, 38 U.S.C. §§ 4301 *et. seq.*, 20 C.F.R. § 1002.34(a).

136 20 C.F.R. § 1002.18.

137 20 C.F.R. §1002.135.

138 See EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>.

their perception of family is more nuclear than extended. From a business perspective, they are motivated by broad participation in leadership and decision making. These “older” workers may well provide a valuable pool of potential farm employees. Previous work experience can bring valuable skills and work habits to the organization, however, they may have deeply instilled work habits or methods from years of previous employment that may not fit your organization. They may need to be provided somewhat more flexibility than younger employees due to other life commitments. In the orientation and training process, be thorough, but remember they have probably been around various work environments before so avoid boring them with concepts they already know.

The Generation X’ers (born from 1964 to 1980) experienced the introduction of personal computers, MTV, and Operation Desert Storm. Many grew up with single, or AWOL parents in an era of rapid change. They developed a sense of family among friends and a survivor mentality. Their perception of family includes a blend of the nuclear family and friends. From a business perspective they tend to be self reliant, non-committed to the organization, and un-impressed with authority. Finding creative ways to instill commitment to your overall business, and gaining their respect for your leadership and management abilities will help to bring out the best long term performance from this cohort.

Finally, Generation “NeXt” (sometimes called the “Millennial” generation) was born after 1980 and grew up experiencing numerous violent public events, including the Oklahoma City bombing and the Columbine massacre (made all the more terrifying given its setting in a school). These individuals also grew up with very busy, over-planned agendas. They are incredibly technologically adept, and they often view others as advocates for their own personal views, feeling somewhat entitled to much of what they desire. Their sense of family likely includes more un-related friends than it does actual relatives. From a business perspective they have not yet developed a commitment to work (or schedules for that matter), and they have little understanding of those who are less technologically savvy than they are. They expect immediate responses because they grew up in a completely connected world. Numerous authors have written extensively on the “NeXt” generation, and have indicated that they are perhaps more different from previous generations than any generation ever studied extensively.<sup>37</sup> This will increasingly be the generation that

37 See M. Taylor, 2006. GENERATION NeXt COMES TO COLLEGE: 2006 UPDATES AND EMERGING ISSUES. IN A COLLECTION OF PAPERS ON SELF STUDY AND INSTITUTIONAL IMPROVEMENT, 2006 Vol.2, ed. S.E. Van Kollenburg, 99-107. Chicago: The Higher Learning Commission. See, also, J.M. Twenge. GENERATION ME. New York: Free Press (2006).

will make up most of the workforce pool. The NeXt generation presents some interesting challenges to their often older employer-managers. They have a tendency to feel a sense of entitlement, are entertainment-oriented, have a short time horizon with expectations of immediate gratification which can conflict with expectations in the workplace. They often have incorrect preconceived notions regarding what employment means, often expecting the work environment to mimic their development years. As a generality, it has been said that generation NeXt has a “workforce readiness” issue.<sup>38</sup>

While much has been written about the societal and educational causes of this issue, suffice it to say that it is a well-documented issue that potential employers are faced with. This lack of workforce readiness is perhaps what has contributed to very high rates of job unhappiness and record high rates of job turnover, obviously at great expense to employers.<sup>39</sup> Answers to the issue are difficult to find. Clear communication of workplace expectations, and the difference between the workplace and previous experiences that generation NeXters have had is likely one key to successful work experiences, so place additional emphasis during the orientation process on teaching company expectations and work routines. Provide more frequent training to younger employees than might otherwise be required. Finally, accommodating their need to challenging work and quick reward when appropriate can motivate younger employees.

The point of this discussion is that examining and understanding generational differences is an important part of facilitating effective business communication. One fairly simple suggestion for employers is to simply go to their local library and check out a sample of the wealth of literature on the subject of generational differences. The important point to remember is to choose resources that are fairly recent, so they include the youngest generations that will be involved in the discussions.

## C. Handling Payday

Ignoring for the moment the sometimes-difficult task of making payroll, let’s look at the legal issues associated with workers’ paychecks (see above for payroll withholding issues).

The Oklahoma “payday law” sets forth a number of requirements for ensuring that workers receive their wages. Employees must be paid at least twice per calendar month on regular paydays, with such paydays designated in advance by the employer.<sup>40</sup> Along with

38 See Schneider, C. G., and R. Miller, 2005. LIBERAL EDUCATION OUTCOMES. Washington D.C.: Association of American Colleges and Universities.

39 Dychtwald, K., T.J. Erickson, and R Morison. WORKFORCE CRISIS, Boston: Harvard Business School Press (2006).

40 40 OKLA. STAT. §165.2.

129 25 OKLA. STAT. § 1301(7)  
130 42 U.S.C. §§ 2000ff *et seq.*  
131 42 U.S.C. § 2000ff (4)(A).  
132 See 25 OKLA. STAT. § 1302(A).  
133 42 U.S.C. § 2000ff(3)(B).  
134 42 U.S.C. § 2000ff-1(b).



each paycheck, the employee must receive a statement that shows all of the deductions from the employee's paycheck, such as the withholdings for taxes, insurance, and so forth. If an employee quits a job or is fired, he or she must be paid in full on the next regular payday either by normal paycheck distribution procedures or by mailing the paycheck by certified mail on or before the next regularly-scheduled payday.<sup>41</sup>

Note that employees who are exempt from the minimum wage and overtime provisions by Section 213 of the Federal Fair Labor Standards Act (29 U.S.C. § 213) do not have to be paid on this semi-monthly basis. As you will see below, this exemption may include many, if not all of your agricultural employees. Nevertheless, maintaining a regular payday and good documentation of your paychecks benefits both you and your employees by improving employee morale and encouraging you to keep good financial records associated with your payroll.

#### D. Minimum Wages and Overtime

The federal Fair Labor Standards Act<sup>42</sup> (FLSA) governs the minimum wages of workers and also specifies when they must be paid for working more than 40 hours per week. Currently, the federal minimum wage is \$7.25 per hour, and overtime (defined as the number of hours worked in excess of 40 hours in a seven-day period) must be compensated at a rate of one-and-a-half times that of the employee's regular hourly rate.<sup>43</sup>

Perhaps no area of labor law is as permeated (some would say cursed) with agricultural exceptions as the minimum wage and overtime provisions of the FLSA. To start, the FLSA defines "agriculture" as follows:<sup>44</sup>

"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 15(g) of the Agricultural Marketing Act, as amended [12 USCS § 1141j(g)], the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

41 40 OKLA. STAT. § 165.3.

42 29 U.S.C. §§ 201 et seq.

43 29 U.S.C. § 206(a)(1)(C), 29 U.S.C. § 207(a)(1). Oklahoma has incorporated the federal minimum wage by statutory reference at 40 OKLA. STAT. § 197.2.

44 29 U.S.C. § 203(f).

Before going into the numerous exceptions to the FLSA's minimum wage and overtime provisions, we first need to examine the agricultural operations that *are* subject to the minimum wage and overtime rules. The employees of an enterprise whose annual gross volume of sales made or business done is \$500,000 or more (exclusive of excise taxes at the retail level that are separately stated) are all subject to the FLSA on an "enterprise basis."<sup>45</sup> In other words, a farm with \$500,000 or more of annual gross sales must pay all of its employees minimum wages and overtime.<sup>46</sup> On the other hand, there are a number of ways that agricultural employees can be exempt from minimum wage and overtime requirements<sup>47</sup> (these are the exemptions provided by Section 213 of the Federal Fair Labor Standards Act (29 U.S.C. § 213), mentioned above):

- First, an employer who did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding year is exempt from both the minimum wage and overtime rules of the FLSA.

To understand this rule, it is important to understand the concept of a "man-day." A "man-day" is any day in which an employee performs agricultural labor for not less than one hour.<sup>48</sup> For example: In a given calendar quarter – let's say July, August, and September – Pete has two full-time hired employees who work at least one hour per day six days per week. He also currently has 12 migrant workers employed through a Farm Labor Contractor who worked at least one hour per day six days a week for five weeks. Pete's man-days of labor for the calendar quarter are: Full time (2 workers x 6 days per week x 13 weeks) = 156 man days. Migrant (12 workers x 6 days per week x 5 weeks) = 360 man days. Thus, Pete has used 516 man days of labor during the calendar quarter.<sup>49</sup> Note that your spouse and children do not count when calculating man-days.<sup>50</sup>

- Second, employees who are the parent, spouse, child, or other member of his employer's im-

45 203(s)(1)(A) (definition of "enterprise"); 29 U.S.C. § 206(a) (minimum wage); 29 U.S.C. § 207(a) (maximum hours).

46 See also Department of Labor Child Labor Bulletin No. 102, p. 2.

47 Most of these exemptions are specified at 29 U.S.C. § 213(a)(6).

48 29 U.S.C. § 203(u).

49 Example from Personal Correspondence with Jason Resnick, 4/27/2010.

50 29 U.S.C. § 203(e)(3)(u).

Equal Employment Opportunity Commission (EEOC) has phrased the issue this way:

Employers may ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.<sup>121</sup>

Employers can also ask an applicant to describe or demonstrate how they would perform specific tasks required by the job.<sup>122</sup>

The disability discrimination laws require you to make "reasonable accommodations" for employees unless doing so would constitute an "undue hardship."<sup>123</sup> The law defines reasonable accommodation as:

Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and...job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>124</sup>

"Undue hardship" has a rather lengthy definition, but it is also an important one as it specifies circumstances in which employers will and will not be required to make modifications to their workplace or work practices. In short, regulators will look at several factors to determine whether an accommodation would pose an "undue hardship." These factors include:

- How complex and/or expensive would the needed accommodation be?
- What are the financial resources of the facility involved?
- How many people are employed at the facility?
- How would the expense of the accommodation affect the finances of the facility?
- What kind of operations occur at the facility?
- What are the characteristics of the facility's workforce?

121 EEOC Notice Number 915.002, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995), available at <http://www.eeoc.gov/policy/docs/preemp.html>.

122 See *id.*

123 42 U.S.C. § 12112(a), (b)(5)(A), 25 OKLA. STAT. § 1302.

124 42 U.S.C. § 12111(9).

- Is the facility part of a business that involves several other facilities under one company?<sup>125</sup>

In the context of the recruitment and interview process, you should focus on the actual requirements of the job – what weights must be lifted? What motions must an employee make? In what conditions will employees have to work (heat, cold, hours, etc.)? While you can ask a candidate to demonstrate their ability to perform actual job tasks, you should not require the candidate to demonstrate capabilities that are beyond the actual scope of the job in question.

#### G. Age Discrimination

At the state level, the OADA explicitly prohibits discrimination based on age, with no defined age limit. At the Federal level, the Age Discrimination in Employment Act (ADEA) prohibits discrimination on the basis of age against persons over 40 years of age.<sup>126</sup> The ADEA applies to employers with 20 or more employees,<sup>127</sup> while again, the OADA applies to employers with one or more employees.<sup>128</sup>

To avoid problems with age discrimination during the recruitment and interview process, steer clear of any questions that would reveal information about age. While you can ask if an applicant is at least 18 years of age (as many licenses and other legal requirements specify that employees must be 18 or older), avoid asking questions such as "when did you graduate from high school," "how old are your children," or "when do you intend to retire?"

125 42 U.S.C. § 12111(10) defines "undue hardship" as follows:

The term "undue hardship" means an action requiring significant difficulty or expense...In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include— (i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

126 29 U.S.C. § 631(a), 623(a).

127 29 U.S.C. § 630(b).

128 25 OKLA. STAT. § 1301(1)(a).

common courtesy, these mines can be readily defused.

First, it is important to note that sexual harassment is regarded as discrimination based on sex within the context of the OADA and Title VII of the federal Civil Rights Act.<sup>110</sup> While Title VII of the Civil Rights Act applies to employers with 15 or more employees,<sup>111</sup> the OADA applies to all Oklahoma employers, even if they have only one employee.<sup>112</sup>

Sexual harassment can take two forms: *quid pro quo* and *hostile environment*. *Quid pro quo* sexual harassment occurs when an employer or supervisor asks for sexual favors as a condition of obtaining or continuing employment or for other job-related matters such as promotions.<sup>113</sup> The elements of a *quid pro quo* claim of sexual harassment are:

- the employee was a member of a protected class (and note: while we often think of “harassment” in the context of sexual harassment, harassment based on any protected trait, such as race, national origin, or religion can constitute a discriminatory act as well);
- the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
- the harassment complained of was based on sex;
- the employee’s submission to the unwelcome advances was an explicit or implied condition for receiving job benefits or that the employee’s refusal to submit to a supervisor’s sexual demands resulted in a tangible job detriment; and
- the existence of *respondeat superior* liability (meaning the situation was such that the employer should be held liable for damages).<sup>114</sup>

“Hostile environment” harassment consists of unwanted comments or advances, coarse joking, and similar conduct. To make a hostile environment claim, a prospective plaintiff must show the following elements:

- the plaintiff belongs to a protected group;
- the plaintiff was subject to unwelcome sexual harassment;
- the harassment complained of was based upon sex;

- the harassment complained of affected a “term, condition, or privilege” of employment; and
- the employer knew or should of known of the harassment and failed to take remedial action.<sup>115</sup>

*Quid pro quo* harassment is more likely to be a problem in the interview process than hostile environment harassment (since a claim for hostile environment harassment may require demonstrating a pattern of conduct, and such patterns may not have time to form in the course of an interview procedure). Nevertheless, you should be on guard against anything that could lead to either kind of claim in the interview process. While you may worry that it is difficult to know what is “sexual harassment” and what isn’t, you will likely find that with just a moment’s thought, you instinctively know what conduct is and is not appropriate for the interview.

#### F. Disability Discrimination

Both the OADA and the Americans with Disabilities Act (“ADA”) prohibit discrimination against a candidate or employee based on a physical disability.<sup>116</sup> While the ADA applies to employers with 15 employees or more,<sup>117</sup> remember that the OADA applies to any employer with one or more employees.<sup>118</sup>

In the context of the interview and application process, both the OADA and the ADA do not allow you to “conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”<sup>119</sup> In other words, you cannot require a candidate for a job to take a medical examination, nor can you ask them questions about their medical history. At first, this rule can be alarming. You may be thinking “my employees are going to be working on a farm and ranch – I have to know if they can handle the physical labor involved.” Fortunately, there is a way for you to determine if an employee can handle those tasks while still complying with the applicable laws.

An employer *can* determine the ability of an applicant to perform job-related functions.<sup>120</sup> While you should avoid asking questions about medical history and disabilities during the interview process, you can ask an applicant about whether they can perform the tasks required for the job in question. The Federal

mediate family are exempt from both minimum wage and overtime requirements.<sup>51</sup>

- Third, many (but not all) piece-rate laborers may be exempt from the minimum wage and overtime rules of the FLSA, depending on the circumstances of their work.<sup>52</sup>
- Fourth, if such employee is principally engaged in the range production of livestock, they may also be exempt from the minimum wage and overtime requirements of the FLSA. In this context, “range production” means grazing operations on wide expanses of land, where the computation of hours would be extremely difficult.<sup>53</sup>

As a “catchall” provision, the FLSA also provides that all agricultural employees are exempt from overtime.<sup>54</sup>

Importantly, independent contractors are not covered by minimum wage or overtime requirements.<sup>55</sup> Courts usually look at the following factors to see if someone is an “independent contractor:”<sup>56</sup>

- the degree of control exerted by the alleged employer over the worker;
- the worker’s opportunity for profit or loss;
- the worker’s investment in the business;
- the permanence of the working relationship; and
- the degree of skill required to perform the work.

The Department of Labor has an overtime pay calculator that can help both employers and employees, available at <http://www.dol.gov/elaws/otcalculator.htm>. These calculations are important, as a willful violation of the FLSA can be fined by up to \$10,000 or imprisonment for up to six months or both.<sup>57</sup> Employers can also be responsible for damages in the amount of unpaid wages or overtime compensation, plus that amount again as liquidated damages, *plus* attorneys fees.<sup>58</sup>

#### E. Recordkeeping

If an agricultural employer used less than 500 man-days of labor in the preceding calendar year, they

51 29 U.S.C. § 213(a)(6).

52 See 29 U.S.C. § 213(a)(6).

53 See 29 C.F.R. § 780.329.

54 29 U.S.C. § 213(b)(12).

55 See 29 U.S.C. § 203(d) (definition of “employer”).

56 See *Herr v. Heiman*, 75 F.3d 1509, 1512 (10th Cir. 1996), citing *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

57 29 U.S.C. § 216(a).

58 29 U.S.C. § 216(a),(b).

do not have to keep any FLSA employee records, unless they anticipate that they will trigger that standard this calendar year.<sup>59</sup> However, for an employee who is subject to either minimum wage or minimum wage/overtime requirements (and remember that in agriculture, there are many employees who are NOT subject to those requirements), the following records have to be kept for three years:<sup>60</sup>

- Name in full
- Social security number
- Home address with zip code
- Date of birth (if the employee is under 19 years of age)
- Sex and occupation in which employed
- Time and day of week on which the employee’s workweek begins
- Regular hourly rate of pay for any workweek in which overtime compensation is due
- Hours worked in each workday and totals hours worked in each workweek
- Total daily or weekly straight-time earnings or wages due
- Total premium pay for overtime hours
- Total additions or deductions from wages paid each pay period
- Total wages paid each pay period
- Date of payment and the pay period covered by payment

Oklahoma law also requires records to be kept for employees. The regulations of the Oklahoma Department of Labor require any employer subject to the Oklahoma Minimum Wage Act or any other provision of the Labor title of the Oklahoma Statutes to keep records of all of their employees, along with the “wages, hours, and other conditions and practices of employment maintained by [the employer]” and to keep such records for as long as the employee is employed by the farm and for five years after the employee leaves or is terminated.<sup>61</sup>

#### F. When Children Work on the Farm or Ranch

Children frequently work alongside their parents on the farm or ranch, and may even work in agricultural operations without their parents. Children, and their employers, are subject to a number of special labor rules.

First, a child of any age can be employed by his or her parent at any time in any occupation on a farm owned or operated by that parent.<sup>62</sup> If, however, chil-

59 29 C.F.R. 516.33(a).

60 29 C.F.R. § 516.2, 29 C.F.R. § 516.5.

61 Okla. Admin. Code § 380:30-3-3(d).

62 29 C.F.R. § 570.2, definition of “oppressive child labor” found at 29 U.S.C. § 203(l). Oklahoma has adopted the FLSA child labor standards through statutory reference at 40 OKLA. STAT. § 71.

110 See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (hostile environment sexual harassment held actionable under Title VII of the Civil Rights Act; see also *Collier v. Insignia Financial Group*, 981 P.2d 321, 325 (Okla. 1999).

111 42 U.S.C. § 2000e(b).

112 25 OKLA. STAT. § 1301(1)(a).

113 See *Collier*, 981 P.2d at 325, note 11.

114 See, e.g. *Highlander v. K.F.C. Nat. Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986), citing *Downes v. Federal Aviation Administration*, 775 F.2d 288, 291-292 (Fed. Cir. 1985).

115 See e.g. *Smith v. St. Louis University*, 109 F.3d 1261, 1264 (8th Cir. 1997).

116 25 Okla. Stat. § 1302(A), 42 U.S.C. § 12112(a)

117 42 U.S.C. § 12111(5)(A)

118 25 OKLA. STAT. § 1301(1)(a).

119 42 U.S.C. § 12112(d)(2)(A).

120 42 U.S.C. § 12112(d)(2)(B).



dren are working for someone other than a parent, the following are the minimum age standards for children in agricultural employment.<sup>63</sup>

- Age 16 or older: can perform any farm job, INCLUDING agricultural occupations declared hazardous by the Secretary of Labor, at any time (including school hours).
- Age 14: minimum age for employment outside of school hours in any agricultural occupation EXCEPT those declared hazardous by the Secretary of Labor.
- Age 12-13: may be employed outside of school hours with written parental consent on a farm where the parent is also employed.
- Under age 12: may be employed outside of school hours with parental consent on a farm where employees are exempt from the federal minimum wage provisions.

At this point, it is important to discuss those farm jobs regarded as “hazardous” by U.S. Department of Labor regulations. The following are such jobs, as defined by the federal Occupational Safety and Health Administration (OSHA):<sup>64</sup>

- Operating a tractor of over 20 horsepower (measured at the PTO), or connecting or disconnecting an implement or any of its parts to or from such a tractor
- Operating or working on (and this includes merely TOUCHING) a corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, feed grinder, crop dryer, forage blower, auger conveyor, unloading mechanism of a non-gravity type self-unloading wagon, power post hole diggers, power post drive, nonwalking type rotary tiller;
- Operating a trencher, earthmoving equipment, forklift, power saw
- Working in a yard, pen, or stall with a bull, boar or stud horse maintained for breeding purposes or a sow/cow with nursing young (calves with umbilical cord)
- Working on a ladder or scaffold over 20 feet in height
- Driving a bus, truck or automobile when transporting passengers or riding on a tractor
- Working inside an anaerobic environment (storage, silo, manure pit, or horizontal silo while packing)
- Handling or using a blasting agent
- Transporting, transferring, or applying anhydrous ammonia

In addition to these restrictions, children also cannot work more than 8 hours in a day or 48 hours in a week.<sup>65</sup>

Children are also subject to special recordkeeping requirements. An employer of a minor under the age of 18 must keep the following records:<sup>66</sup>

- Name in full
- Place where the minor lives while employed
- Date of birth
- Written consent of the parent, if written consent is required to employ the minor on the farm

Violation of the child labor rules can carry significant penalties. Employers who violate the child labor requirements of the FLSA can face a penalty of up to \$11,000 for each employee who is the subject of a violation.<sup>67</sup> If the violation results in the death or serious injury of an employee under 18 years of age, the penalty increases to \$50,000 and may be doubled if the violation was repeated or willful.<sup>68</sup> Willful violations can be punished by a fine of up to \$10,000 and/or imprisonment of up to six months.

#### G. Safety Practices and Regulations for the Farm and Ranch

As mentioned previously, the farm and ranch carry their own unique workplace hazards. In fact, every year thousands of farm workers are injured and hundreds more die in farming accidents, making agriculture one of the most hazardous industries in the nation. Therefore, several workplace safety concepts and rules apply to the agricultural work environment. Direct benefits of sound safety practices on the farm or ranch included reduced worker illnesses, injuries, or even deaths. Economic benefits include reductions in medical expenses, insurance premiums, and lost production. In addition, a safer workplace improves morale and productivity.

Specific steps that can be taken to improve farm safety include the following:

- Make your employees aware of farming hazards and prepare them for emergency situations such as fires, vehicle accidents, chemical exposures, electrical hazards, etc.
- Make sure operators are familiar with operator manuals and product labels for equipment and products used in their jobs.
- Keep equipment in good repair, and make sure guards are in place.

<sup>65</sup> See also 29 C.F.R. § 570.35 (restriction of hours for children 14 and 15 years of age – includes restriction that student cannot work during school hours).

<sup>66</sup> 29 U.S.C. 516.33(f).

<sup>67</sup> 29 C.F.R. § 579.11(a)(1)(i)(A).

<sup>68</sup> 29 C.F.R. § 579.11(a)(1)(B).

Under both Oklahoma and federal law, “discrimination” can include adverse actions in hiring, firing, promoting, disciplining, compensating, and training employees based on a “protected characteristic.”<sup>98</sup> Protected characteristics are race, color, religion, sex, national origin, age, genetic information, physical disability, and veteran status. As an example, then, refusing to promote someone because of their race, or failing to give employees of a certain age the same training opportunities as other employees can constitute illegal discrimination. Let’s look in more detail at some of the discrimination laws that can apply to employers.

#### B. The Oklahoma Anti-Discrimination Act and Title VII of the Federal Civil Rights Act

The Oklahoma Anti-Discrimination Act (OADA) includes all employers, even if they have only one employee.<sup>99</sup> Under the OADA, it is illegal to discriminate among job candidates or employees based on a number of “protected traits” which include “race, color, religion, sex, national origin, age, genetic information,<sup>100</sup> or disability.”<sup>101</sup> This includes not only discriminating against a potential employee in hiring but also treating a current employee differently based on one of the protected traits. Since the OADA addresses areas that overlap with a number of federal laws, especially the Title VII of the Federal Civil Rights Act of 1964 (the federal law will be referred to as “Title VII”), on various aspects of discrimination we will address each area separately, alongside the federal laws that also apply.

#### C. Racial / Color Discrimination

Both the OADA and Title VII prohibit discrimination against job applicants or employees based on race and color.<sup>102</sup> However, neither law defines specifically what is meant by “race” or “color.” Perhaps

<sup>98</sup> See 42 U.S.C. § 2000e-2(a), 25 OKLA. STAT. § 1302. Oklahoma’s Anti-Discrimination Act is meant to help implement, at the state level, many of the policies embodied in the federal Civil Rights Act. See 25 OKLA. STAT. § 1101(a) (superseded as of November 1, 2011).

<sup>99</sup> The OADA defines “employer” as “a legal entity, institution or organization that pays one or more individuals a salary or wages for work performance...” See 25 OKLA. STAT. § 1301(1). “Employers,” in turn, are specifically prohibited from discriminatory actions by the terms of 25 OKLA. STAT. § 1302.

<sup>100</sup> “Genetic information” is defined at 25 OKLA. STAT. § 1301(7) as “information derived from the results of a genetic test. ‘Genetic information’ shall not include family history, the results of a routine physical examination or test, the results of a chemical, blood or urine analysis, the results of a test to determine drug use, the results of a test for the presence of the human immunodeficiency virus, or the results of any other test commonly accepted in clinical practice at the time it is ordered.”

<sup>101</sup> 25 OKLA. STAT. § 1302(a).

<sup>102</sup> 25 OKLA. STAT. § 1302, 42 U.S.C. § 2000e-2(a),

the best guidance on the topic, then, comes from the EEOC Compliance Manual, which explains “race” as including ancestry, physical characteristics, race-linked illnesses, culture, association, and “reverse” discrimination (discrimination against a majority race).<sup>103</sup> “Color” is described as “pigmentation, complexion, or skin shade or tone.”<sup>104</sup> Thus, treating an applicant or employee differently based on any of these traits can be regarded as a discriminatory action.

#### D. Religious Discrimination and Accommodation

Discriminating against an applicant or an existing employee on the basis of religion is prohibited under both the OADA and Title VII. Recall again that while Title VII applies only to employers with 15 or more employees,<sup>105</sup> the OADA applies to all Oklahoma employers, even if they have only one employee.<sup>106</sup> Discrimination against applicants or employees based on religion clearly includes refusing to hire someone because of their religion, hiring only members of a certain religion (although there are obvious exceptions to this rule – religious organizations like churches can take applicants’ and employees’ religious beliefs into consideration<sup>107</sup>), or making promotional, training, or compensation decisions based on employees’ religious beliefs or practices. Further, coercing an employee to abandon, alter, or adopt a religious practice as a condition of their employment can also be considered discrimination under Title VII, and likely under the OADA as well.<sup>108</sup> Title VII further requires that employers make reasonable accommodations to handle situations in which an employee’s practice of their religious beliefs conflict with their work. For example, if an employee’s religion prohibits them from working on certain days or requires observance of certain holidays, an employer should work with that employee and with others to make reasonable efforts to accommodate those needs, so long as doing so does not cause an undue hardship to the employer.<sup>109</sup>

#### E. Sexual Harassment

While discrimination based on any of the protected traits under the OADA can pose a number of “landmines” for employers, discrimination based on sex can be one of the most challenging to handle and avoid. However, with a little training and a dollop of

<sup>103</sup> See EEOC Compliance Manual Section 15-II, available at <http://www.eeoc.gov/policy/docs/race-color.pdf>.

<sup>104</sup> See EEOC Compliance Manual Section 15-III.

<sup>105</sup> 42 U.S.C. § 2000e(b).

<sup>106</sup> 25 OKLA. STAT. § 1301(1)(a).

<sup>107</sup> See EEOC COMPLIANCE MANUAL, Section 12-II(D), available at <http://www.eeoc.gov/policy/docs/religion.pdf>.

<sup>108</sup> See EEOC COMPLIANCE MANUAL, Section 12-III(A), see also 25 OKLA. STAT. § 1302.

<sup>109</sup> See EEOC COMPLIANCE MANUAL, Section 12-IV.

<sup>63</sup> 29 C.F.R. § 570.2(b).

<sup>64</sup> 29 C.F.R. § 570.71.



for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong.<sup>92</sup> In other words, either an employee or an employer can terminate the employment relationship at will.<sup>93</sup> There are, however, exceptions to this rule. An employer cannot terminate an employee for a discriminatory reason.<sup>94</sup> If there is an employment contract between the employer and employee, terminating the employee may be a breach of that contract.<sup>95</sup> Finally, an employer cannot terminate an employee if doing so would violate a “clear and compelling public policy,” *i.e.* terminating an employee for doing something clearly supported by public policy or for refusing to do something clearly against public policy.<sup>96</sup>

Remember, though, the assumption is that an employer can terminate an employee for *any* reason, so long as these rules are not violated. Clearly, there is no law or rule against terminating an employee for poor job performance. Failing to terminate an employee that continually fails to perform up to the defined standards for his or her job can mean decreased performance from your other employees as well. Worse yet, failing to terminate an employee that is not performing his or her tasks in a safe manner can result in injury

92 *Hayes v. Eateries, Inc.*, 905 P.2d 778 (Okla. 1995), *citing* *Burk v. K-Mart*, 770 P.2d 24, 26 (Okla. 1989).

93 *Hayes*, 905 P.2d at 781, *citing* *Singh v. Cities Service Oil Company*, 554 P.2d 1367, 1369 (Okla. 1976).

94 25 Okla. Stat. § 1302(A). *See also* *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1215 (Okla. 1992).

95 *See* *Hinson v. Cameron*, 742 P.2d 549, 555 (Okla. 1987), *citing* *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Civ. App. 1976). Note that in some cases, there does not have to be an explicit document, labeled as an “employment contract” in order for an employment contract to exist. For example, in *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987), the Oklahoma Supreme Court laid out five factors to consider in determining whether an *implied* contract for employment exists. These are: “(a) evidence of some “separate consideration” beyond the employee’s services to support the implied term, (b) longevity of employment, (c) employer handbooks and policy manuals, (d) detrimental reliance on oral assurances, pre-employment interviews, company policy and past practices, and (e) promotions and commendations.” Additionally, an employee manual has been found to constitute an employment contract if it is sufficiently precise in defining what will entitle an employee to certain benefits or if sets specific procedures that must be followed for the termination of an employee. *See, e.g. Langdon*, 569 P.2d at 527.

96 *Burk v. K-Mart*, 770 P.2d at 28-29. The *Burk* rule may be difficult for employers to define, as its definition does not easily lend itself to black-and-white lines. As stated in *Burk*, it is a violation of public policy “where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.” *Id.* at 29.

to them and/or to others as well. Tragedy can result in such cases, compounded by potential legal liability for the harm caused by the negligent employee.<sup>97</sup> As a result, sometimes it is not only prudent to fire an employee – it may be necessary.

When terminating an employee, remember to be completely honest with the individual. Select an appropriate time and venue that will not distract other employees nor unduly embarrass the employee being terminated. During the termination meeting, provide the employee with the specific reasons for their discharge. Be brief, and be clear about when employment will be terminated. Make arrangements to collect any company property in the possession of the employee, and make arrangements to change passwords, access codes, or other security measures if necessary to prevent unauthorized access to company property or materials. Additionally, make arrangements to give the employee his or her final paycheck, as discussed above in section VI.C.

## IX. DISCRIMINATION ISSUES

Regardless of whether you face a hiring, promotion, training, or termination decision, you should always ask yourself whether there are any potential discrimination concerns at issue. Here, we will discuss a number of the anti-discrimination laws at the state and federal level. Bear these rules in mind, and with a little horse sense, you can avoid many common mistakes.

### A. Handling Discrimination Concerns

Discrimination issues can arise at any point in the employment relationship – during recruitment and hiring, during the tenure of the employee, and of course, if the employee is let go. Thus, as you prepare to engage a new employee, it is as good a time as any to review a range of federal and Oklahoma laws dealing with discrimination and their application to the agricultural Sector.

97 *See* *Jordan v. Cates*, 935 P.2d 289, 292 (Okla. 1987), *stating*:

In Oklahoma it is well settled that to impose liability on an employer for its employee’s intentional tort that (1) the relationship of master and servant must exist and (2) the tortious act must have been committed while the employee was acting within the scope of employment. *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241, 1244 (Okla.1993); *Brown v. Ford*, 905 P.2d 223, 230 (1995). Oklahoma’s jurisprudence also holds that punitive or exemplary damages may be awarded against the principal for a servant’s act under the doctrine of respondeat superior. *McDonald v. Bruhn*, 190 Okla. 682, 126 P.2d 986, 988 (1942); *Holmes v. Chadwell*, 169 Okla. 191, 36 P.2d 499, 500 (1934).

- Communicate safety hazards and emergency procedures with employees.

For more tips on how you can improve the safety of your farm workplace, see the Occupational Health and Safety Administration (OSHA) fact sheet “Farm Safety,” available at [http://www.osha.gov/OshDoc/data/General\\_Facts/FarmFactS2.pdf](http://www.osha.gov/OshDoc/data/General_Facts/FarmFactS2.pdf).

The Occupational Safety and Health Act serves as the primary law governing workplace safety. The reach of this Act is fairly broad, but as with many of the laws discussed here, it also has significant agricultural exemptions. For the purposes of the Act, “employer” is defined as “a person engaged in a business affecting commerce who has employees.”<sup>69</sup> The regulations implementing the act specifically address agriculture by noting that any agricultural employer with one or more employees is subject to the act, but members of the employer’s immediate family are NOT covered by the Act.<sup>70</sup> Further limiting the application of the Act to agriculture, Congress has frequently added riders to annual appropriation bills prohibiting OSHA from enforcing the provisions of the Act against agricultural employers with ten employees or less.<sup>71</sup> Nevertheless, farm employers of any size would be wise to work within the OSHA guidelines, as doing so can greatly improve farm safety and reduce the risks (both medical and economic) of on-farm injuries.

The Act imposes what is called the “general duty” clause on all parties that meet the Act’s definition of “employer.” The general duty clause states: “Each employer shall 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 his employees...”<sup>72</sup> In short, the general duty clause establishes a duty for all employers to provide a safe workplace and to work to minimize the risk of harm to his or her employees.

Besides the general duty clause, the Act also provides another important means of encouraging workplace safety. The Act also requires all employers to “comply with occupational safety and health standards promulgated under this chapter.”<sup>73</sup> While the general duty clause creates an “umbrella” that covers a broad range of circumstances, the occupational safety and health standards target specific activities. These standards establish procedures, specify safety equipment, and require employers to communicate with their employees about the hazards involved with specific tasks.

69 29 U.S.C. § 652(5)

70 29 C.F.R. § 1975.4(b)(2)

71 *See* Public Law 102-170; November 22, 1991; *see also* N. Harl, ed. *Agricultural Law Manual*. p. 3-13, § 3.03[1].

72 29 U.S.C. § 654(a).

73 *Id.*

The OSHA standards for several circumstances unique to agriculture are found at 29 C.F.R. Part 1928. Standards found there include:

- Grain handling facilities – 29 C.F.R. § 1910.272
- Temporary labor camps – 29 C.F.R. § 1910.142
- Field sanitation (providing water and sanitary facilities in fields where hand labor is used) - 29 C.F.R. § 1928.110.
- Storage and handling of anhydrous ammonia – 29 C.F.R. § 1910.111(a),(b)
- Logging operations – 29 C.F.R. § 1910.266
- Slow-moving vehicles – 29 C.F.R. § 1910.145
- Hazard communication – 29 C.F.R. § 1910.1200
- Requirements for ROPS and seatbelts on tractors manufactured after October 25, 1976 – 29 C.F.R. Subpart C.
  - Tractor operators must also be given operating instructions compliant with 29 C.F.R. Part 1928, Subpart C, Appendix A.
- Guarding of Agricultural Equipment – 29 C.F.R. § 1928.57
- Requirements regarding cadmium – 29 C.F.R. § 1910.1027

These standards apply to farms that are subject to the Act (see discussion regarding agricultural exemptions above). For links to each of these standards, see Appendix 4. Oklahoma State University also hosts a website with a large collection of resources regarding farm safety, available at <http://ehs.okstate.edu/links/farm.htm>.

In addition to following the OSHA standards, employers must also keep records regarding workplace fatalities, injuries, and illnesses.<sup>74</sup> For more information on OSHA recordkeeping requirements and forms, see the “OSHA Recordkeeping Handbook,” available at <http://www.osha.gov/recordkeeping/handbook/index.html>.

### H. Workers Compensation in Agriculture

Oklahoma’s workers compensation system is designed to provide workers payment for the treatment of injuries sustained on the job and, to an extent, for the wages lost as a result of those injuries. At the same time, the system also provides employers with a means of securing insurance in order to pay the claims of their employees should it become necessary.

The Workers’ Compensation Code includes an important exclusion for agricultural employers. The Workers’ Compensation Code does not apply to “any person who is employed in agriculture or horticulture by an employer who had a gross annual payroll in the preceding calendar year of less than One Hundred Thousand Dollars (\$100,000.00) wages for agri-

74 29 U.S.C. § 657(c); 29 C.F.R. § 1904.4(a).



cultural or horticultural workers, or any person who is employed in agriculture or horticulture who is not engaged in operation of motorized machines.”<sup>75</sup> In other words, if your business paid less than \$100,000 to your *agricultural* employees (excluding other employees, such as office or administrative employees) in the last calendar year, the Code does not apply to your agricultural employees. Similarly, the Code does not apply to agricultural employees who do not work with motorized equipment, regardless of the size of the employer’s payroll.<sup>76</sup>

Note that this exemption is meant to apply solely to employers and employees directly involved in production agriculture, and not to enterprises that merely “look” agricultural. For example, Oklahoma court decisions have drawn clear lines between employers and employees involved in livestock production (exempt) as distinguished from horseracing stables (not exempt)<sup>77</sup> and those growing horticultural crops (exempt) from those involved in commercial landscaping businesses (not exempt).<sup>78</sup>

There is one more exemption that may also exclude a number of agricultural operations, even if it is not specifically “agricultural” in nature. Under the Code, if an employer has five or fewer employees, and all of the employees are related by blood or marriage to the employer, the employee is not covered by the Code.<sup>79</sup>

If your payroll exceeded \$100,000 in the last calendar year, then your business is subject to the Code. Under the Code, an employer *must* provide benefits to an injured employee, regardless of fault for the injury.<sup>80</sup> The benefits to be paid depend on the nature of the injury, and are defined by formulas found in the Code.<sup>81</sup> To make sure that employees are paid the benefits they are guaranteed under the Code, employers are required to either buy insurance from a state-approved insurance company or association, or by “self-insurance.” Self-insured employers must demonstrate to the Administrator of the Workers’ Compensation Self-Insurance Guaranty Fund that they have the necessary financial assets in place to pay whatever workers’ compensation claims may arise. This is one by providing an irrevocable letter of credit or surety bond to the state, or by providing proof of other financial

assets to pay such claims.<sup>82</sup> Employers who self-insure must still participate in the Workers’ Compensation Self-Insurance Guaranty Fund.<sup>83</sup> Self-insured employers must make a contribution to the fund based on their of their workers compensation losses (*i.e.* benefits paid to injured workers) until the fund reaches a preset amount.<sup>84</sup> Given the financial risk involved with workplace injuries, you should work with your financial professional and an attorney experienced in representing employers in workers compensation matters to help you determine the best way to obtain workers compensation insurance for your business. It should also be noted that the state of Oklahoma has a workers’ compensation insurance program, known as CompSource. For more information on CompSource, visit <http://www.compsourceok.com>.

While complying with the Workers’ Compensation Code may sound like a burden for employers, it does carry a very important benefit. If a covered employer adheres to the rules of the Code and promptly pays required benefits, the payment of those benefits is the “exclusive remedy” available to the employee. In other words, if an employer has been following the rules of the Workers’ Compensation Code, an injured employee is only entitled to the benefits provided in the Code – he or she cannot sue the employer for additional amounts or under other legal theories.<sup>85</sup>

The Workers’ Compensation Code contains important protections for workers with good faith worker’s compensation claims. Under the Code, it is illegal to fire an employee (or to terminate their group health insurance) if that employee has done any of the following:

- filed a workers’ compensation claim
- hired a lawyer regarding their claim
- begun a court proceeding under the Code
- has testified or is going to testify in any proceeding under the Code
- has chosen to participate or to not participate in a workplace medical plan under the Code<sup>86</sup>

Further, if an employee is on “temporary total disability” status – meaning that the worker is injured to an extent that prevents them from working at all for a limited period of time – it is illegal to fire that employee solely on the basis of their absence from work.<sup>87</sup> Violating these requirements gives the fired employee the right to bring a court case for their actual damages

(lost wages, etc.) as well as for up to \$100,000 in punitive damages.<sup>88</sup>

For an excellent summary of several aspects of the Oklahoma Workers’ Compensation Code, visit the Oklahoma Workers Compensation Court FAQ at [http://www.owcc.state.ok.us/employers\\_faq.htm](http://www.owcc.state.ok.us/employers_faq.htm).

#### I. The Family Medical Leave Act in Agriculture

The Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601, *et seq.*, allows employees of covered employers to unpaid leave from work to attend to specified medical and family matters. Under the FMLA, an “employer” is someone “who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”<sup>89</sup> As a result, only the largest agricultural employers are likely to be impacted by the FMLA.<sup>90</sup> Employers to whom FMLA applies must allow eligible employees a total of 12 workweeks of leave during any 12 month period for specific medical or family events.<sup>91</sup>

## VIII. EVALUATING EMPLOYEES’ PERFORMANCE

As employees settle into their new positions at the farm and ranch, it is critical that you provide timely and constructive feedback on their performance. This feedback is vital to maximizing human resource development for the enterprise, whether by rewarding excellent service, or disciplining (and in some case, dismissing) employees who fail to meet expectations.

#### A. Conducting Positive Evaluations

Performance evaluations are often viewed as a necessary evil. However, if the agricultural operation makes a large investment in human capital, it is important that managers take appropriate steps to make sure that their human assets are functioning well. Given that a core component of employee satisfaction is feedback, performance evaluation is an important management function.

A positive approach to performance evaluation starts with well established performance expectations. Present expectations frequently and plainly. When possible, establish expectations in writing. Then provide feedback relative to those expectations on an on-

going basis. Informal constant coaching and feedback increases communication and helps to clarify expectations. Good performance is reinforced and a spirit of cooperation and teamwork is fostered.

Avoid the mistake of only providing feedback when performance has fallen short of expectations or when the employee has made a mistake. Obviously, those situations need to be addressed, but putting a positive spin on such situations in the form of improved performance through change will more likely lead to long term improved performance. Supplement informal feedback with a formal performance review scheduled well ahead of time to discuss performance relative to previously established expectations, elicit feedback from the employee, and establish expectations for the future.

#### B. Discipline and Discharge

An inevitable fact of life for any manager is that sometimes it is necessary to discipline an employee and occasionally it may be necessary to terminate an employee. Remember, new employees may have inherited overly defensive and often unproductive habits from previous employment that need to be addressed. There may also be issues of inadequate skill or knowledge, or lack of motivation. Misconduct can be in the form of inadequate effort, inappropriate relations with co-workers, mishandling of company property, violence, or safety violations. When the need arises for discipline, following a few practical guidelines can smooth the often emotionally charged process.

- First, let the employee know of their specific deficiencies both verbally and in writing.
- Confirm that the rule violated, or the poor performance, is directly related to the operation of the business, and that the expected performance is well with reason.
- Be very clear about what must be done to improve.
- Provide the employee the opportunity to correct the problem, and inform of consequences if there is no improvement.
- Make sure that rules and expectations are applied fairly to all employees.

A four step process is often used involving (A) a verbal correction (B) a first written correction (C), a second written correction with perhaps a suspension or decision making leave time, and finally (D) termination of employment.

Keeping thorough employee records, conducting regular evaluations, providing feedback to employees, and applying disciplinary procedures fairly and consistently are all important steps both to avoid potential discrimination issues, and to facilitate the employer’s ability to discharge an employee when necessary.

Oklahoma is an employment at will state, which means that “an employer may discharge an employee

75 85 OKLA. STAT. § 311(2).

76 *Id.*

77 See *Sport O’ Kings v. Thomas*, 797 P.2d 1016, 1018 (Ok. Civ. App. 1990); *Whitworth v. Melvin West and West Dairy*, 798 P.2d 228, 231 (Okla. Civ. App. 1990).

78 See *Virginia Lay Lawn Service v. Cain*, 868 P.2d 1322, 1324 (Ok. Civ. App. 1994).

79 85 OKLA. STAT. § 311(5).

80 85 OKLA. STAT. § 310(A).

81 85 OKLA. STAT. Chapter 15. To view Chapter 15, go to <http://www.oscn.net/applications/oscn/index.asp?rel=1&ftdb=STOKST85&year=#CiteID463068>

82 85 OKLA. STAT. § 351(A)(3).

83 85 OKLA. STAT. § 351(B).

84 85 OKLA. STAT. §§ 360(A) (establishment of fund), 362(2) (contributions to be made until fund reaches \$2,000,000 or when fund falls below \$1,000,000).

85 85 OKLA. STAT. § 302(A).

86 85 OKLA. STAT. § 341(A).

87 85 OKLA. STAT. § 341(B).

88 85 OKLA. STAT. § 341(E).

89 29 U.S.C. § 2611(4)(A)(i).

90 See Jack Runyan, Summary of Federal Laws and Regulations Affecting Agricultural Employers (2000), available at <http://www.ers.usda.gov/Publications/AH719/>.

91 29 U.S.C. § 2612(a)(1).