

Agricultural Law

The newsletter of the Illinois State Bar Association's Section on Agricultural Law

One Day Rest in Seven Act and 'Employees Employed in Agriculture'

BY JEFFREY A. MOLLET

As of January 1, 2023, the One Day Rest in Seven Act ("Act"), by its terms, applies to all "employers" in Illinois. In general, per the Act, all "employers" are now required to provide time for non-exempt employees to have a meal, to have 24-hour periods of "rest," and, by implication, to use "the restroom facilities." More specifically, the

Act provides for two new rules covered employers must follow:

1. "Every employer shall permit its employees who are to work for 7 1/2 continuous hours, except those specified in this Section, at least 20 minutes for a meal period

Continued on next page

One Day Rest in Seven Act and 'Employees Employed in Agriculture'

1

Food and Agricultural News Update

1

Food and Agricultural News Update

BY LYNNE R. OSTFELD

A new year always brings new laws and this year will bring attention to renewing the Farm Bill sometime this fall.

In the meantime, the following are of interest:

Working Farms Fund

The metro areas where sustainably grown food is sought is the same area where developers are looking to build. Acreage growing food in metro Chicago went from 11,000 acres in 1995 to 4,600 acres in the mid-2010s.

The Conservation Fund is chartered

for both land and water conservation and sustainable economic development. It recently received a grant from the U.S. Department of Agriculture to develop its new Working Farms Fund program. It is national but now active in metro Chicago.

They are trying to conserve farmland to prevent its loss and work to increase the supply of food in the region. They are trying to create affordability for farmers, particularly young and new farmers, to help them acquire farmland.

The program is a buy, support, protect

Continued on page 5

One Day Rest in Seven Act and ‘Employees Employed in Agriculture’

CONTINUED FROM PAGE 1

beginning no later than 5 hours after the start of the work period. An employee who works in excess of 7 1/2 continuous hours shall be entitled to an additional 20-minute meal period for every additional 4 1/2 continuous hours worked. For purposes of this Section, a meal period does not include reasonable time spent using the restroom facilities,”² and

2. Every employer must provide not less than 24 consecutive hours of “rest in every consecutive seven-day period³ or week⁴ in addition to the regular period of rest allowed at the close of each working day.”⁵

Interestingly, the Act does not define “rest” or “regular period,” an omission that is certain to provide legal fodder for the coming years. The Act does, however, define “employer” (which is the only definition in the statute) to “mean a person, partnership, joint stock company or corporation, which employs any person to work, labor or exercise skill in connection with the operation of any business, industry, vocation or occupation.”⁶ This appears to be a broad definition and is certainly intended to cover all employers and employees of any nature in Illinois (that is, no employers are exempt but some employees or jobs may be).

Thereafter, the Act sets forth various special rules as to various types of jobs and duties for which special rules apply, and lists certain employees (again, not employers) which are exempt. Note these exemptions only apply to the “consecutive hours” rules set forth in section 2 of the Act and not to the section 3 requirements as to meals and restroom facilities.

One such exemption to the 24-hour rest rule is for “[e]mployees employed in agriculture.”⁷ However, as mentioned earlier, the only definition in the Act is for “employers,” and thus what constitutes “employees employed in agriculture” is presumably left to we attorneys, and ultimately the courts. Most on-farm employees engaged in animal husbandry

and the growing and harvesting of crops would logically appear to be “employed in agriculture,” but what about some of the less clear job areas, such as working for the local cooperative grinding feed or as a fertilizer applicator, or those who work for franchisees as salespersons for seed? Or those employers, especially in agriculture, who also own a lumber yard, convenience stores, or seasonal businesses and share their employees across all types of jobs and duties?

Perhaps the term “agriculture” is not as clear as one might think,⁸ so what is “agriculture” for purposes of the Act? Other Illinois statutes appear to be of little help, although many municipalities have such a definition in their zoning code.⁹ The Agricultural Areas Conservation and Protection Act¹⁰ defines “agricultural production” and “active farmer,” from which we could deduce a reasonably sound definition of agriculture, but not the hard and fast definition we attorneys desire. Are we left with only the general rule that in the absence of a contrary definition, a word used in a statute is to be given its popularly understood meaning or commonly accepted dictionary definition?¹¹ Maybe so...

Definitions of ‘Agriculture’ in Illinois Law

To that end, the term “agriculture” (in a municipal annexation case) was long ago defined by the Illinois Supreme Court as:

[the] art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man’s use. In this broad use it includes farming, horticulture and forestry, together with such subjects as butter and cheese making, sugar making, etc.’ Unless restricted by the context, the words ‘agricultural purposes’ have generally been

Agricultural Law

This is the newsletter of the ISBA’s Section on Agricultural Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year.

To join a section, visit www.isba.org/sections or call 217-525-1760.

OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS

Jeffrey A. Mollet

PUBLICATIONS MANAGER

Sara Anderson

✉ sanderson@isba.org

AGRICULTURAL LAW SECTION COUNCIL

Christopher W. Byron, Chair
Rick R. Myers, Vice-Chair
Alan E. Stumpf, Secretary
Keith W. Casteel, Ex-Officio
Jody L. Beilke
Adam Benjamin Bourdette
Charles G. Brown
Brandon Clark
Jonathan William Coppess
John W. Damisch
Darrell E. Dies
James S. Dunn
Jim R. Grebe
Laurie A. Harmon
Thomas F. Hartzell
Barry O. Hines
James F. Kane
Michael A. Mattingly
Nancy Metsker-Handegan
Jeffrey A. Mollet, Newsletter Editor
Lynne R. Ostfeld
William A. Peithmann
Jerry W. Quick
Ruth E. Robinson
Charles B. Rudolph
Craig J. Sondgeroth
Jeffrey L. Terry
Garrett WilksThalgott
Tiffany Gorman Thompson
Kyle M. Tompkins
Carolann Wackerlin-Temple
Andrew G. White, Member/CLE Coordinator
Randy Randall Cox, Board Liaison
Kimberly A. Furr, Staff Liaison

DISCLAIMER: This newsletter is for subscribers’ personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

given this comprehensive meaning by the courts of the country. * * *¹²

Using this definition, which by its specific terms, is “broad” in its scope, leaving open the possibility that (as we all know) some who do not physically work “on farm” may also be agricultural employees, especially as to those employees working in jobs that, “to a variable extent [include] the preparation of these products for man’s use.” But again, what is the breadth and scope of the “variable extent” such that we can have some degree of security that the advice we are providing to a client that the Act would include/exclude any employee from the definition? In other words, are there perhaps other examples or regulations upon which we could rely upon for direction?

Definition of ‘Agriculture’ in Federal Law

Labor rules have long been a source of definition and explanation. The Fair Labor Standards Act (“FLSA”)¹³ defines “agriculture” as follows:

“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, ... 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 an 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.¹⁴

This definition, on its face, certainly encompasses many activities commonly understood as “farming,” and “includes farming in all its branches,” and otherwise limits any other potential agricultural activities to only those “performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.” But arguably this language is narrow and would not include any activity that is not in some manner “farming” or performed on a farm. It may be hard to argue, under

this definition, that employees of a local cooperative, while performing activities related to farming and agriculture, are actually “farming” as contemplated by this FLSA definition.

Perhaps this approach makes sense for the DOL as the intent of this definition is only of direct import as to whether overtime pay is due to an employee because employees engaged in “agriculture” are generally exempt. This definition narrows the applicability of the overtime rules so fewer employees are exempt and are thus paid in accordance with the FLSA. To contrary, the Act is likely seeking to be as inclusive as possible, perhaps making the DOL and FLSA definitions less useful.

Definition of ‘Agricultural Employee’ in Federal Regulations

The US Department of Labor (“DOL”) has adopted a broad interpretation, indicating that “[v]irtually all employees engaged in agriculture are covered by the Act in that they produce goods for interstate commerce.¹⁵ However, to limit the exemption, the DOL has indicated that “agriculture does not include work performed on a farm which is not incidental to or in conjunction with such farmer’s farming operation. It also does not include operations performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on.”¹⁶

In addition, the Code of Federal Regulations contains a definition of “agricultural employee” which is as follows:

An “agricultural employee,” for purposes of [the overtime exemption rules], may be defined as an employee employed in activities which are included in the definition of “agriculture” in [29 U.S.C. § 203(f)], and who is employed in these activities with sufficient regularity or continuity to characterize him as a person who engages in them as an occupation. Isolated or sporadic instances of engagement by an employee in activities defined as “agriculture” would not ordinarily establish that he is an “agricultural employee.” His engagement in

agriculture should be sufficiently substantial to demonstrate some dedication to agricultural work as a means of livelihood.¹⁷

Again, language which is intended to narrow and control the overtime pay exemption for agricultural employees. This definition does, however, provide some possible guidance on the “jack of all trades” employee in the early questions above, and suggest that any employee, to be engaged in agriculture, may need to prove the agricultural portion of their work is “sufficiently substantial to demonstrate some dedication to agricultural work as a means of livelihood.” This would seem to weigh against the ability of an employer to classify any employee as being “employed in agriculture” as required by the Act unless employee’s time and efforts are sufficiently devoted to agricultural activities (perhaps as opposed to selling seed or delivering lumber?)

Definition of ‘Agricultural Employee’ According to the IRS

Last but not least, and as usual, the IRS has opined on matters related to this subject. While not providing a definition of “agriculture,” the IRS has defined both “agricultural employee” and “farm.” For IRS purposes:

“agricultural employees” “includes farm workers that raise or harvest agricultural or horticultural products *on a farm*, including raising livestock. It also includes those who work in connection with the operation, management, conservation, improvement, or maintenance of a farm and its tools and equipment *if the major part of such service is performed on a farm.*”¹⁸

“[T]he term “farm” includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, as well as plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the *raising* of agricultural or horticultural commodities, and orchards.

Farm work does not include reselling activities that do not involve any substantial activity of

raising agricultural or horticultural commodities, such as a retail store or a greenhouse used primarily for display or storage. It also does not include processing services which change a commodity from its raw or natural state, or services performed after a commodity has been changed from its raw or natural state.¹⁹ (emphasis added)

Again, as with the DOL statutes and regulations, the IRS has, with purpose, narrowly tailored its rules and interpretation so as to prevent an exemption or exception, making the IRS interpretations less attractive in our quest to determine the scope of the act with respect to “employees employed in agriculture.”

Can We Draw Any Conclusions?

The obvious conclusion is that unless we get amendments to or regulations explaining the statute, attorneys and courts appear to have a lot of work to do. It certainly appears that any reference of the various federal definitions and interpretations may not be helpful in the development of understanding exemptions under the Act—and perhaps such reference is unnecessary.

The Illinois Supreme Court’s long-standing definition forms at least a sufficient foundation for the Act’s interpretation. As mentioned earlier, a “broad use” rule, coupled with the inclusion of employees engaged in “the preparation of these products for man’s use,” at least leaves open the possibility that some employees who are not “on farm” may still nonetheless be agricultural employees for purposes of the Act. This may be especially true in today’s world of agriculture where technological advances make it possible to watch livestock “from your couch”²⁰, or perhaps anywhere cell service²¹ is available.

A somewhat flexible interpretation will certainly be necessary. There are no doubt employees of non-farmers, working off-farm, who are essential to and form part of the very fabric of “agriculture”—and without whom farming would be nearly impossible today. Fertilizer, fuel, seed, and chemical delivery, equipment repair and maintenance activities, animal care and veterinary

services, are just a few of the time sensitive, weather driven, or emergency circumstances which are somewhat unique to the business of production agriculture, working full time, and would appear to be “employees employed in agriculture.” Shared employees, those whose rolls are not time sensitive, weather driven, or created by emergency circumstances, would not be exempt under the Act. Time will tell what facts and circumstances arise to further define these boundaries.■

1. 820 ILCS 140/0.01.

2. 820 ILCS 140/3.

3. 820 ILCS 140/2 per P.A. 102-828.

4. 820 ILCS 140/2 per P.A. 102-1012.

5. 820 ILCS 140/2.

6. 820 ILCS 140/1.

7. 820 ILCS 140/2(b)(3) (as to both P.A. 102-828 and P.A. 101-1012).

8. <https://wiuag.wordpress.com/2016/11/08/agriculture-defined-by-non-aggies/>.

9. For example, see, *LeCompte v. Zoning Bd. of Appeals For the Village of Barrington Hills*, 2011 IL App (1st) 100423, 354 Ill.Dec. 869, 958 N.E.2d 1065 (Ill. App. 2011).

10. 505 ILCS 5.

11. See, e.g., *Bowman v. Armour & Co.*, (1959), 17 Ill.2d 43, 160 N.E.2d 753; *Tuftee v. Kane County*, 394 N.E.2d 896, 76 Ill.App.3d 128, 31 Ill.Dec. 694 (Ill. App. 1979).

12. *People ex rel. Pletcher v. Joliet*, 321 Ill. 385, 388--389, 152 N.E. 159, 160 (1926); see, e.g., *People ex rel. Pletcher v. Joliet*, 328 Ill. 126, at 132, 133, 159 N.E. 206 (1927); *County of Grundy v. Soil Enrichment Materials Corp.*, 9 Ill.App.3d 746, 292 N.E.2d 755 (1973). Even the Illinois Attorney General has adopted this definition. See, *IL Opinion 99-011 Counties: Lot Size for Residence on Land Used for Agricultural Purposes (Illinois Attorney General Opinions)*.

13. 29 U.S.C. § 203.

14. 29 U.S.C. § 203(f).

15. <https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture>.

16. *Id.*

17. 29 CFR § 780.511.

18. See <https://www.irs.gov/publications/p51>.

19. *Id.*

20. <http://rancheyes.com/>.

21. <https://reolink.com/blog/barn-security-cameras/>.

Food and Agricultural News Update

CONTINUED FROM PAGE 1

and sell model. The Conservation Fund purchases 20- to 500-acre farms facing development and then gives farmers immediate access to the land under a flexible lease with the exclusive option to buy the farm from the fund in three to five years.

From an article written by Martha Blum in Illinois AgriNews, 12/23/2022.

Large Grocer Mergers

Bruce Shultz, Vice president of the National Farmers Organization published his opposition to the mergers of large grocers in the December 23, 2022 issue of Illinois AgriNews.

He contends that it takes away profit from farmers because of the control that just a few entities can have over inputs, production, and sale.

A potential merger of Kroger and Albertsons is envisioned by their CEOs as being a means to save the combined companies over \$1 billion in administration and distribution costs. They believe that this will allow them to lower the prices they are paying distributors because this means that more products will be sold to a single and larger retailer.

For Shultz, it means that they will keep the newest and better performing stores and sell the underperforming stores. Local jobs will be lost. If they combine, they would control 15 percent of the grocery marketplace. Agricultural producers have been dealing with consolidation in input costs and markets such that three companies control 62 percent of the export market in grains. The big four meatpackers control more than 80 percent of the market.

Shultz hopes that the Federal Trade Commission denies this merger. Five state attorneys general plus the District of Columbia are currently suing to stop this merger. Sens. Amy Klobuchar (D MN) and Mike Lee (R UT) the chairwoman and ranking member, respectively, of the U. S. Senate Judiciary Sub-committee on Competition Policy, Antitrust and Consumer Rights have stated to have serious concerns about the proposed transaction.

From a column written by Bruce Shulta,

V.P. of the Nat'l Farmers Org., in Illinois AgriNews 12/23/2022.

Asian Carp

Sorce Enterprises, a food distribution and trucking company for quick service restaurants in East Peoria is now focusing on the Asian carp business. It is now known as Sorce Freshwater Co. and teams up with local fishermen and nets to take in about 150,000 pounds of Asian carp per week.

It processes about 4,000 pounds weekly into finished goods for human consumption. The most popular are minced products and strips which can be utilized in many recipes including chili, fish tacos, or as fried or baked items. The fish has been renamed Copi as part of the rebranding effort unveiled by the Illinois Department of Natural Resources this past June. The name Copi comes from "copious" because each female Asian carp can produce 2-5 million eggs per year.

Copi/Asian carp is the most consumed fish in the world, except in the US. The President of Sorce Freshwater says that it is a very mild, odor-free white fish which is quite versatile in a number of recipes and is the second-healthiest fish behind only wild-caught salmon.

Individual retail sale is done through the online farmers market - Market Wagon (MarketWagon.com).

From an article written by Daniel Grant, in FarmWeek, 12/19/2022.

Ag Provisions in the Federal Budget

There are a number of items in the recently approved \$1.7 trillion year-end spending bill which affect agriculture.

It provides \$25.5 billion in discretionary funds for USDA and FDA.

Approximately \$3.74 billion goes to USDA to assist farmers who had losses on crops, dairy products, on-farm stored commodities and crops which prevented them from planting in 2022. Up to \$494.5 million is set aside for livestock producers who suffered losses.

The Supplemental Nutrition Assistance Program (SNAP) will receive \$153 billion

to cover the expansion of recipients' SNAP benefits first authorized during the coronavirus pandemic. Various nutrition programs aimed at helping low-income families will receive \$34.6 billion. Another \$2.2 billion will go to international food aid efforts, with \$1.75 billion for Food for Peace grants and \$243 million for the McGovern-Dole International Food for Education and Child Nutrition program.

The bill also contains provisions allowing USDA to establish standards and verification rules for agricultural carbon market programs.

Nearly \$4 billion is allocated for rural development programs. This includes \$455 million for broadband expansion and \$4.3 billion in guaranteed underwriting loans for the Rural Electric Program.

The Farm Service Agency will distribute \$2.19 billion in guaranteed operating loans and \$1.64 billion in direct ownership loans.

From an article written by Timothy Eggert in FarmWeek, 1/2/2023.

Ukraine and Ag Losses

Andriy Chrikov, manager of a giant chicken farm on Ukraine's Black Sea Coast reported almost total devastation of the farm when the Ukrainians took it back from the Russians. The Avangard Group's Chornobaivske chicken farm used to export a billion eggs a year. It was one of the largest exporters of these bird's eggs.

The Russian soldiers slaughtered over 4 million chickens. The farm was essentially a highly automated factory with the birds being fed, watered and having eggs collected by automated machinery. What was not stolen by the Russians was destroyed or made inoperable.

Ukraine's agricultural sector accounted for 20 percent of Ukraine's gross domestic product and more than 40 percent of all exports. Almost a quarter of this sector has now been lost or damaged.

From an article written by Alistair MacDonald for the Wall St. Journal, 1/8/2023.

Unregulated Spices Can Cause Lead Poisoning

Contaminated spices were found to be the second-leading cause of lead poisoning in Douglas County (i.e., Omaha, NE) children in 2021. Medical testing by the Douglas County Health Department found it to be due to families fleeing war-torn Afghanistan who were using spices purchased in their home countries. This was also true of families coming from India, Myanmar and other areas of South Asia.

Refugee/Asian immigrant children made up 25 percent of lead poisoning cases in Douglas County in 2021.

The broader community could also be exposed because testing has found lead and other contaminants in spices sold at grocery stores around the world, including under major brand names in the U.S.

The spices most likely to contain lead include cumin, curry powder, masala, paprika, turmeric and chili powder. Herbs most likely to contain lead include oregano and bay leaves. Lead has also been found in some tea leaves and dark chocolate.

No limits on heavy metals have been placed by the U. S. Food and Drug

Administration. It is in talks with the American Spice Trade Association to learn more about contaminants in spices and options for working together to help reduce levels.

Consumer Reports tested 126 herbs and spices in 2021 and found that almost one-third contained heavy metals at levels high enough to raise health concerns.

The American Spice Trade Association said that it supports FDA limits on heavy metals in spices. It noted that the European Commission has set limits and that the World Health organization is studying the issue.

Lead gets into the spices generally during manufacturing, but it can also come from the environment during cultivation or from cookware during food preparation. In some cases lead is intentionally added to spices. Researchers have found that some manufacturers will add lead chromate to turmeric to give it a brighter yellow color or increase the weight and, therefore, profitability.

From an article by Nancy Gaarder in the Omaha World-Herald, 1/7/2023. ■

Lynne Ostfeld is a solo practitioner with her primary office in Chicago. She has a second office on a family farm in Peoria County, Illinois, and is associated with the law firm DMALEX Avocats in Paris, France. Ostfeld has a general civil practice and concentrates on legal assistance to small and medium sized companies and individuals, in the US and in France. In 2017, Ostfeld was awarded the Medal of Knight of the French National Order of Merit for her work for the French in the Midwest, as legal advisor to the Consulate of France in Chicago.

AGRICULTURAL APPRAISALS OF ILLINOIS, INC.

Farm Equipment and Livestock Appraisals

Personal property appraiser for farm equipment & livestock. Thirty years' experience as a licensed insurance agent. Also available for insurance policy review.



Marshall Eccher | (618) 444-4273 | ag.appraisalsofillinois@gmail.com