

Slighting the Hands That Feed Us

How Labor Laws Leave Farmworkers in Left Field

By Teresa Hendricks-Pitsch

Case vignette: Julio and Clara picked blueberries in the hot sun alongside their father up to 10 hours a day, seven days each week. But they didn't receive a paycheck. Instead, their buckets were combined with their father's to help him meet mandatory production standards so he wouldn't be fired. Julio was six years old; his sister was four.



In Michigan, where 44 crops are hand-harvested, farmworkers have experienced systemic wage theft, labor trafficking, indentured servitude, child labor, squalid housing, dangerous working conditions, retaliation, and violence.

Migrant farmworkers provide fresh produce for our tables but lack the protections and safeguards other workers enjoy under state and federal laws. The case vignette on the facing page, handled by Michigan Migrant Legal Aid,¹ shows the potential for exploitation of our 94,000² farmworkers and family members. In Michigan, where 44 crops are hand-harvested,³ farmworkers have experienced systemic wage theft,⁴ labor trafficking,⁵ indentured servitude,⁶ child labor,⁷ squalid housing,⁸ dangerous working conditions,⁹ retaliation, and violence.¹⁰ State and federal laws that exempt agricultural workers only add to their vulnerability.

Most farmworkers live in isolated areas, travel often, and face language and cultural barriers. Many have immigration-related concerns and earn poverty wages. The average farmworker earns \$12,000 a year¹¹ while the crops they harvest bring billions of dollars to Michigan's economy.¹² Their employers have special legal exemptions and exceptions that erode worker protections. Today, migrant workers remain the poorest of the working poor.

Vulnerable by design

Cesar Chavez said: "The fight is never about grapes or lettuce. It is always about people." Since the 1930s, labor laws meant to protect low-wage workers have specifically excluded farmworkers from important protections.¹³ The statutory exclusions were rooted in racism and buried in laws with fair-sounding names like the Fair Labor Standards Act¹⁴ and the National Labor Relations Act,¹⁵ among others.

The National Labor Relations Act¹⁶ was passed to empower industrial workers to unionize and bargain without retaliation, but farmworkers were excluded entirely from the act's protections. Legal scholar Juan Perea called the exclusions discriminatory and "motivated by racial animus,"¹⁷ which he attributed to southern Democrats who were fond of their cheap African-American labor. Ironically, the U.S. Department of State has acknowledged that collective bargaining is a basic human right,¹⁸ yet the National Labor Relations Act excludes farmworkers.

Likewise, the Fair Labor Standards Act was intended to protect workers' rights, but farmworkers—mostly African Americans—were virtually excluded from overtime protections.¹⁹ Although the workforce has changed from African American to mostly Hispanic/Latino,²⁰ the statute's built-in bias still operates to deny equal protection to an entire class of workers. The overtime exclusion is particularly inhumane, given that farm work is heavy, repetitive labor performed for long hours under adverse conditions. Fieldworkers, for example, work up to 100 hours a week, but rarely qualify for overtime.

Underpayment is also a common problem when farmworkers pick by a piece rate (per bucket, bundle, box, or acre). The Fair Labor Standards Act requires employers to keep accurate records of all hours worked to ensure that piece-rate jobs are paying *at least* the minimum wage. Where poor recordkeeping exists, wage theft likely follows. Migrants working on small farms have no minimum wage or overtime protections.

Fast Facts:

Given the U.S. Department of Labor's chronic under-enforcement of the Migrant and Seasonal Agricultural Worker Protection Act, filing suit under the act's private right of action is the most critical protection for farmworkers.

Under the Fair Labor Standards Act, liquidated damages require payment of twice the unpaid wages, plus reasonable attorney fees and costs, which are often substantial.

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Child's pay

There are an estimated 500,000 child farmworkers in the U.S.²¹ Sadly, the Fair Labor Standards Act provides weaker protections for children employed in agriculture than in other types of jobs. Non-farmworker children must be 16 years of age to work, whereas farmworker children can legally work at 12 years old.²² “This inequity allows youth working on farms to perform back-breaking labor for long hours and in extreme conditions at ages less than 14, when the very same law forbids children this young from working in an air conditioned office.”²³

Forced production standards may signal abuse and deserve extra scrutiny. Employers who impose picking quotas create fertile ground for child labor. To keep parents from being fired, small children are brought to the field. This is especially true at the beginning or end of a crop's maturity, when produce is less abundant.

Penalties that protect

Arguably the strongest Fair Labor Standards Act protection—and perhaps the best deterrent to wage theft—is the act's liquidated damages provision. It provides a remedy of twice the unpaid minimum wage plus reasonable attorney fees and costs for violations. Attorney fees can be substantial, even when the clients' individual recoveries are small. Likewise, Michigan's Workforce Opportunity and Wage Act provides these liquidated damages as a penalty;²⁴ unfortunately, the 2014 act has also created new complications for hand harvesters in Michigan.

Michigan's minimum wage woes

Michigan's minimum wage lacks clear protections for fruit and vegetable pickers.²⁵ Historically, the 1964 Michigan Minimum Wage Law excluded them until 1981, when the Wage Deviation Board established a piecework scale for hand harvesters.²⁶ When the Workforce Opportunity and Wage Act was passed in 2014, it incorporated language from the old act—creating a new risk that Michigan harvesters may not be protected by the state minimum wage.

To minimize this risk, Governor Snyder signed an executive order²⁷ abolishing the Wage Deviation Board and clarifying that the Department of Licensing and Regulatory Affairs has the power to issue rules to protect hand harvesters. Whether this achieves the desired effect is debatable, potentially leaving a class of Hispanic workers without equal protection under the Workforce Opportunity and Wage Act. This opens up monetary and civil rights liabilities for employers who believe they are exempt from the act's protections. It also sends a very unwelcoming message to migrant workers, chilling the ability of agriculture to recruit labor. As if the act were not incentive enough for farmworkers to avoid Michigan, the state also denies unemployment benefits to seasonal workers.²⁸

Agricultural Worker Protection Act

Where other laws specifically exclude farmworkers, the federal Migrant and Seasonal Agricultural Worker Protection Act of 1983²⁹ provides them with special protections not available to others. The act creates joint liability for multiple employers; establishes standards related to wages, housing,



transportation, disclosures, and recordkeeping; and mandates actual or statutory damages for violations. It protects promises made in the “working arrangement,”³⁰ which includes *any* requirement of law applicable to the employment relationship, such as the field sanitation requirements of the Occupational Safety and Health Administration.³¹ The Department of Labor is charged with enforcing the act, but the act also provides a private right of action. Because of chronic under-enforcement by the U.S. Department of Labor,³² the private right may be the most substantial protection for farmworkers.

Increasingly, employers in Michigan have been replacing their longtime, U.S.-based farmworkers with more exploitable foreign guest workers holding temporary H-2A visas.³³ These guest workers are entirely excluded from the Migrant and Seasonal Worker Protection Act safeguards. Although the U.S. Department of Labor has authority to protect guest workers and preserve U.S.-based farmworkers’ jobs, worker abuse is rampant. The agency’s lax vigilance and enforcement is widely ridiculed.³⁴

The Fair Labor Standards Act and the Migrant and Seasonal Worker Protection Act work together to protect farmworkers from common independent contractor schemes. Both laws share the same intentionally broad definition of employment—to “suffer or permit to work”³⁵—and both include joint employment in their definition. Thus, a worker employed by two (or more) joint employers can hold both responsible for compliance.

The Migrant and Seasonal Worker Protection Act should be strengthened to include liquidated damages and attorney fees, a clear right to a jury, and increased statutory damages (consistent with inflation). Ideally, it should also apply to dairy and temporary foreign guest workers.

To offer pro bono or co-counseling assistance, contact thendricks@migrantlegalaid.com. To donate, see <http://www.facebook.com/MigrantLegalAid/>. ■



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the Michigan Bar Journal, which have been cited by the U.S. Court of Appeals for the Sixth Circuit.

ENDNOTES

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3. Pure Michigan, *Crop List* <http://www.michaglabor.org/crops/Crop_List.jsp>.
4. *Martinez v Blue Star Farms, Inc.*, ___ F Supp ___ (WD Mich, 2016) (Docket No. 1:16-cv-00681).
5. Testimony of Luis Ramirez Roque, Harvest of Justice, in Grand Rapids, MI (September 19, 2012).
6. *United States v Ramos-Ramos*, unpublished opinion of the US District Court for the Western District of Michigan, issued May 18, 2007 (Docket No. 1:07-cr-08).
7. National Farm Worker Ministry, *Children in the Fields* <<http://nfwm.org/education-center/farm-worker-issues/children-in-the-fields/>>.
8. *Mendez v Brady*, 618 F Supp 579 (WD Mich, 1985).
9. Pesticide Project Report: Robertson Crop Dusting, MDARD Investigation, issued April 8, 2015 (Case No. UI-15-257-02).
10. See Bensinger & Garrison, *The Pushovers* <https://www.buzzfeed.com/kenbensinger/the-pushovers?utm_term=.bwx1P4Ejv#.tjXejDVn>.
11. National Farm Worker Ministry, *Low Wages* <<http://nfwm.org/education-center/farm-worker-issues/low-wages/>>.
12. MDARD, *Facts About Michigan Agriculture* <<http://www.michigan.gov/mdard/0,4610,7-125-1572-7775--,00.html>>.
13. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St LJ 98 (2011).
14. 29 USC 201 *et seq.*
15. 29 USC 151 *et seq.*
16. *Id.*
17. *Echoes of Slavery*, 72 Ohio St LJ at 99.
18. *Id.*
19. 29 USC 213.
20. *Echoes of Slavery*, 72 Ohio St LJ at 99.
21. National Farm Worker Ministry, *Children in the Fields*.
22. 29 USC 213 (children must have parental permission and must not work during school hours).
23. National Farm Worker Ministry, *Children in the Fields*.
24. MCL 408.419(1)(a).
25. MCL 408.420(4).
26. MCL 408.394, as amended by 2014 PA 138.
27. Executive Order No. 2016-13.
28. MDARD Bulletin, *Denial of Unemployment Benefits for Seasonal Workers* (June 2015) <http://www.michigan.gov/documents/uia/Seasonal_Worker_for_Employers_373485_7.pdf>.
29. 29 USC 1801 *et seq.*
30. 29 USC 1822(c).
31. 29 USC 1823.
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33. Farmworker Justice, *No Way to Treat a Guest* <<https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>>.
34. See Bensinger & Garrison, *The Pushovers*.
35. 29 USC 203(g); 29 USC 1802(5).