

# Farm Laborers Fair Labor Practices Act: A Comprehensive Review



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On July 17, 2019, Governor Cuomo signed into law the Farm Laborers Fair Labor Practices Act (“FLFLPA” “the Act”). The bill grant farm laborers overtime pay, a day of rest each week, disability and Paid Family Leave coverage, unemployment benefits, and other labor protections. It also provides for the creation of a Wage Board to examine the potential of lowering the overtime threshold.

All of the provisions went into effect January 1, 2020 except for the migrant housing permitting requirement which was effective January 1, 2021.

## **Coverage**

All farms in New York, regardless of size, are required to comply with the overtime and day of rest provisions. All farm laborers are covered by the day of rest provision of the FLFLPA, **except** for the foreman in charge (may be more than one) and members of the employer’s immediate family, including parent, child, or spouse. All farm laborers, including crew leader/chief and foremen in charge are covered by the overtime provisions of the Act except for members of the employer’s immediate family, including parent, child, or spouse.

## **LLCs, S-Corps, C-Corps, Partnerships**

Immediate family member, including parent, child, or spouse, of LLCs, S-Corporations, C-Corporations and partnerships are excluded from the day of rest and overtime provisions of the Act. However, the immediate family members of shareholders are not excluded from the day of rest and overtime provisions.

## **Foreign Guest Workers**

All foreign guest workers, H2-A, J-1, TN, etc., engaged in agricultural work are covered by the overtime and day of rest provisions. Overtime must be paid at 1 ½ times the AEWR, prevailing wage rate, or contract rate.

## **Interns and Apprentices**

Interns and apprentices are farm laborers and therefore covered by the FLFLPA.

## **Hours of Work**

Farm laborers may not work more than 60 hours per week unless they voluntarily agree to do so. If they do work more than 60 hours per week, then they must be paid an overtime at a rate of 1 ½ times their regular rate of pay for those hours.

## **Breaks and Meal Periods**

Meal breaks are required for all farm laborers and are unchanged by the Act. See form LS433 ([https://dol.ny.gov/system/files/documents/2021/02/ls443\\_guidelines\\_for\\_meal\\_periods.pdf](https://dol.ny.gov/system/files/documents/2021/02/ls443_guidelines_for_meal_periods.pdf)), Guidelines for Meal Periods, for more information.

## **Calendar Week**

For purposes of compliance with the overtime and day of rest, the term “calendar week” will mean an established, recurring, consecutive 7 days designated by the employer. However, a calendar week should not be changed from week to week.

## **Overtime Pay**

The overtime rate of pay is 1 ½ times the regular rate of pay. To calculate regular and overtime pay, an employer must use all hours worked in the employer’s calendar week. Hours of rest and meal breaks are not counted. A farm laborer may not take (or bank) time, often referred to as compensatory (“comp”) time off, instead of being paid overtime wages.

## **Overtime Pay for Piece Work or Salaried Employees**

Farm Laborers must be paid 1½ times their regular rate of pay for all overtime hours worked. The regular rate of pay cannot be less than the minimum wage. An employee’s regular rate is the amount that the farm laborer is regularly paid for each hour of work. When a farm laborer is paid on a non-hourly basis (e.g. piece work, salary), the regular hourly wage rate is found by dividing the total hours worked during the week into the farm laborer’s total earnings. Where a farm laborer has multiple rates of pay, the regular rate is the weighted average of the laborer’s multiple rates of pay for the week based on the number of hours worked at each rate. The weighted average is the total regular pay divided by the total hours worked in the week. The overtime rate may vary from week to week depending on how many hours the farm laborer worked at each rate of pay.

Certain payments are not part of the regular rate. They include: pay for expenses incurred on the employer's behalf; premium payments for overtime work; true premiums paid for work on Saturdays, Sundays, and holidays; discretionary bonuses; gifts; payments in the nature of gifts on special occasions; payments for occasional periods when no work is performed due to vacation, holidays, or illness.

## **Working for Two Different Employers on a Joint H2-A Order**

The H-2A worker is entitled to overtime when the total hours worked exceed 60 in a calendar week. H-2A foreign guest workers and domestic farm laborers employed under the joint H-2A job order agree to work for both employers for the number of days and hours detailed in the contract. Joint employers agree to adhere to the terms and conditions of the certified job order and are jointly liable for any violations.

## **Processing Another Farm’s Food**

Employees whose work includes processing, handling, or packaging other farms’ agricultural products are covered by the Miscellaneous Wage Order for that work and must be paid overtime after 40 hours worked in a week.

## **Working on the Day of Rest**

Employees who voluntarily agree to work on their day of rest must be paid time and a half the regular rate for the hours worked on that day, even if they have not worked more than 60 hours in that calendar week. If farm laborers work more than 60 hours in a calendar week, they must be compensated at 1½ times their regular rate for hours worked (“standard OT”). Farm Laborers are also entitled to the OT rate (“premium OT”) for any hours voluntarily worked during their day of rest. However, no additional payment of premium OT is required if the worker’s hours has already exceeded 60 hours for the calendar week.

## **Housing and Meal Allowances**

The regular rate and overtime rates are calculated before allowances are taken.

## **Bonuses**

Regarding bonuses, like a milk quality bonus, being included in the regular rate calculation for overtime purposes, non-discretionary bonuses must be factored into the regular rate calculation for overtime purposes.

## **Day of Rest**

A farm laborer must receive 24 consecutive hours of rest once per calendar week. The law does not require that the day of rest be scheduled in advance. The day of rest can be designated and recurring, or it can vary, and should occur at the latest on the 7th day of the employer's calendar week. An employee may not waive their day of rest, but an employee may voluntarily agree to work on their day of rest and must be paid overtime for doing so.

Employers must keep records of daily and weekly hours worked, including the day of rest. Employers should document that an employee voluntarily agreed to work on their day of rest so overtime wages may be paid accordingly for that pay period.

Twenty-four (24) consecutive hours of rest due to weather or other circumstances may count as a weekly day of rest. The day of rest must be 24 consecutive hours of rest in a calendar week and may not be taken in increments or part days.

To provide relief to an employer who is experiencing practical difficulties or unnecessary hardship in carrying out provisions of Section 161 of the New York State Labor Law, an employer may apply for a variance by completing Form LS137 (<https://dol.ny.gov/system/files/documents/2021/03/variation-day-of-rest-ls137.pdf>). The variance permits employees to work seven days in a calendar week without taking off 24 consecutive hours.

## **Employer Record Keeping**

No new record keeping requirements have resulted from the FLFLPA. However, employers must provide Form LS309 (<https://dol.ny.gov/system/files/documents/2021/03/pay-notice-and-acknowledgement-for-farm-workers-ls309-english.pdf>) to farm laborers which explains they are entitled to a day of rest and overtime pay.

## **Wage Board**

The Wage Board consists of three individuals: one representative of New York Farm Bureau, one representative of state AFL-CIO, and one representative (the Chairperson) chosen by the Commissioner of Labor. The Wage Board will conducted public hearings in 2020 and made a report to the Governor and Legislature including its recommendations at the end of 2020. The Board's overall recommendations cannot decrease protections or benefits for workers.

## **Enforcement**

Farmers were required to be in compliance with all the provisions of the FLFLPA starting on January 1, 2020 and with the migrant housing permit requirements on January 1, 2021. Violations for failure to pay the Minimum Wage, agreed wages, or failure to keep required records have always been subject to civil penalties.

## **Insurance**

As of January 1, 2020, farm employers were required to register for **unemployment insurance** when they have paid at least \$300.00 in quarterly wages or have purchased the business of another liable employer. This also applies to certified crew leaders who employ agricultural workers. <https://labor.ny.gov/ui/employer.shtm>.

All farm employers are required to provide **workers' compensation coverage** for their employees. For more information see <https://dol.ny.gov/services-agricultural-employers-0>.

Farm employers are required to provide New York's **disability benefits** and **Paid Family Leave insurance** coverage to eligible farm laborers. See <https://paidfamilyleave.ny.gov/> for information on Paid Family Leave employee eligibility and opt out waivers that employers must give to those who qualify.

## **Talking Points for Farmers on Unions**

Following is some guidance on speaking with your employees about the changes in labor law. Be sure to review this information thoroughly to be sure it applies to your specific operation.

### **What Can You Say If Your Employee Asks About a Union?**

Be sure to provide factual information. Explain the collective bargaining process, and encourage your employees to make an informed decision. You may explain the disadvantages of unionization: payment of dues, a seniority-based system instead of a merit-based one. If an employee talks about a promise that a union representative has made, it is acceptable to tell the employee that there is no guarantee the union can deliver on the promise.

### **Do Not Remain Silent**

Employees may look to supervisors for information and advice, so silence on the issue of unionism is not in your best interests. If an employee asks a question, try to answer it or find out the answer.

### **TIPS For Employers: Do Not Threaten, Interrogate, Promise, Surveillance**

Be sure not to threaten your employees by predicting something bad will happen if they unionize. Do not question (interrogate) them about their union sympathy or activity. Do not promise that something good will happen if they reject a union. Do not spy on union meetings or eavesdrop on union conversations (surveillance).

Do listen and communicate. Do not threaten, interrogate, promise, or spy.

Discrimination is also prohibited. Do not treat any employee better or worse because the employee is for or against a union.

### **The Collective Bargaining Process**

Be aware of what unions cannot do for employees so you can have meaningful conversations with your employees

- Unions cannot guarantee wage increases;
- Unions cannot guarantee benefit improvements;
- Unions cannot guarantee job security in difficult economic times;
- Unions cannot prevent discipline or discharge where there is just cause.

### **Sample Responses to Your Employees**

If your employee says to you, "We need a voice, the union will provide that for us" you may respond that they already have a voice, they can always bring any concerns to you, that a union may not necessarily use its voice in the employee's best interests, and using an outside third party is not the best way to communicate.

If your employee says to you that the union states they will get more of the salary going to the senior

team, you may respond that it is possible collective bargaining may result in the same or lower wages or benefits; nothing can be guaranteed.

If your employee says to you that the union will guarantee job security and prevent layoffs, you may respond that even union employees are sometimes laid off during difficult economic times. Again, nothing can be guaranteed.

### **Other Things an Employee May Do**

As a rule of thumb, do not make predictions. Do not talk about what will happen if a union gets in. Instead, discuss the facts about what has happened at other locations and at other workplaces. Maintain positive employee relations. Develop strong and open communications, foster a respectful work environment, and treat employees fairly. Apply standards and policies consistently, be responsive to employee questions and concerns, and show appreciation and give positive feedback when appropriate.

### **Solicitation Rules**

Off duty employees (including those working at other locations) have a legal right to solicit only outside the farm. Non-employee outsiders are not allowed on private property. Employees have a legal right to solicit one another only during non-work time, i.e. breaks, meal periods, before/after shift. Employees have a legal right to distribute union literature only during non-work time, and only in non-work areas. It is essential that an employer be consistent in enforcing these rules.

### **Unfair Labor Practices**

Employees cannot strike/cause a work slowdown.

### **Employers Cannot:**

- Lockout employees;
- Refuse to continue all the terms of an expired agreement;
- Discourage union organization or discourage an employee from participating in a union organizing drive or from participating in protected concerted activity;
- Blacklist an employee because of his/her participation in the union;
- Require, as a condition of employment, employees to refrain from joining a union;
- Refuse to bargain in good faith;
- Refuse to discuss grievances with the employee.

### **Collective Bargaining Process**

Employers are required to negotiate in good faith with employees who have organized over “rates of pay wages, hours of employment and other conditions of employment.” “Good faith” contemplates that parties will approach negotiations with an open and fair mind and with a sincere resolve to make an effort to arrive at an agreement. Good faith does not require employers to enter into agreement or accept conditions/proposals it finds unacceptable.

Employers must send to the bargaining table representatives who have authority to reach agreement on mandatory subjects. Employers have a duty to provide information. They must produce (at the request of the Union) information they possess that is relevant to the bargaining process.

Employers must deal directly with the Union and not circumvent the Union in an attempt to negotiate directly with any groups of employees. This includes, but is not limited to, communications, oral or

written, with employees about bargaining positions not previously advanced to the Union; or the advocacy of positions to bargaining unit members whether or not those positions have been previously advanced to the Union. There must be no communications without prior legal review and approval.

## **Dos and Don'ts for Speaking With Your Employees**

### **The Don'ts:**

- **The basic rule is: Don't give a Union any "TIPS" (No Threats, Interrogation, Promises, or Surveillance)**

### **Don't Threaten Any Adverse Consequences if an Employee Supports the Union**

Don't make any threatening statements or use any intimidating language which might influence an employee's decision on whether to join or support a union. Don't make general threats of adverse actions if an employee signs a union's authorization card. Remember that implied threats are also prohibited – even innocuous comments may be considered an implied threat (e.g., “We are going to have layoffs if the union is certified”; “We will likely have to reduce the number of hours our employees work if a union is certified”).

### **Don't Interrogate Employees about Union Activity**

Don't ask employees what they think about unions, if they intend to support the union, whether they have signed union authorization cards, the identity of other employees who support the union and/or have signed a card, the identity of instigators or leaders of the union organizing drive, or other questions about the union's internal affairs or about union meetings, etc. If an employee volunteers such information of his own accord, you are permitted to listen, but don't ask questions to obtain additional information.

Don't ask applicants for employment whether they belong to a union, whether they have signed an authorization card, or what their general attitude is toward labor unions.

### **Don't Promise Favorable Consequences if Employees Do Not Sign Union Authorization Cards**

Don't promise employees any reward or future benefit, such as promotions, pay increases, or other benefits or special favors, if they do not sign a union authorization card. Likewise, don't make general promises of favorable consequences if a majority of employees do not sign the union authorization cards. (e.g., “In the past we have always given wage increases each year without a union, and employees will continue to receive wage increases each year, as they always have” – Statements like this could be seen as a promise of future salary increases or prediction of pay increases and should not be made). Remember that implied promises are also prohibited.

### **Don't Engage in Surveillance of Union Meetings or Activity**

Don't spy or eavesdrop on union meetings. Don't act as though you are watching employees to determine whether they are participating in union activities.

### **Don't Discriminate Against Employees Based on Union Activity**

Don't discriminate against union activists or known union supporters based on their union activity. For example, union supporters should not be given undesirable work assignments, undesirable work schedules, or discipline while anti-union employees receive more favorable treatment when engaging in the same or similar conduct.

### **Miscellaneous**

Don't state, or imply, that you or management will not deal with the union if it is certified as the

employees' bargaining representative.

Don't forbid employees from soliciting or encouraging one another to support the union during their free time (meal or other break times), unless they are interfering with the work being performed by others.

Don't speak to individual employees about the union activity or urge them to not sign a union authorization card in a coercive environment such as your office or the office of another management official. The best place to talk to employees about a union is how you would typically communicate with them. Don't visit the homes of employees for the purpose of discussing the union.

### **The Do's:**

**The below rules are simple to state, but often difficult to apply, particularly in the area of "implied" threats or promises. All information provided to employees should be factual, accurate, and free from any suggestion of threats or promises of future changes or predictions in employee benefits or working conditions.**

1. Inform your employees that it is their choice whether to sign a union authorization card.
2. Encourage your employees to make informed decisions.
3. Explain the collective bargaining process:
  - a. If a union is certified, all future potential salary increases or benefits that they receive or any other term and conditions of employment, will be subject to collective bargaining negotiations. Nothing is guaranteed in collective bargaining, and the salary and benefits that they have now could get worse, better, or stay the same.
  - b. If a union is certified, the employer cannot directly deal with employees; therefore, any requests that employees have related to salary or other benefits or other terms and conditions of employment must go through the union and cannot be directly negotiated with the employer.
4. Inform your employees that if a union is certified, the union may require that the employees pay union dues for their services. Employees should find out whether they will still be required to pay union dues even if the union does not attain more desirable wages and benefits for the employees.
5. Inform your employees that the union is not required to fulfill any promises that it has made to the employees.
6. Inform your employees that it is unlikely that unions can guarantee job security in difficult economic times or that they can prevent discipline or discharge, where there is just cause for the employer to take such action.
7. Remind employees of the benefits they presently enjoy and of recent wage increases and/or benefit improvements (but do not make promises or predictions about future wage increases or benefit improvements or make predictions about what wage increases or benefits they may receive if a union is certified).

## ADDITIONAL RESOURCES

NYFB presented webinars for members on farm labor topics. Recordings may be accessed in the Members-Only section of our website at: <https://www.nyfb.org/resources/farm-labor>

## ADDENDUM

### Minimum Wage in New York

#### *What is the current minimum wage?*

As of 12/31/2021, the New York State minimum wage in “upstate” counties is \$13.20 per hour, except for fast food and tipped employees. Following is the schedule by region:

NYC - Big Employers (of 11 or more)	\$15.00
NYC - Small Employers (10 or less)	\$15.00
Long Island & Westchester	\$15.00
Remainder of New York State Workers	\$13.20*

\*Future increases will be based on an indexed schedule to be set by the Director of the Division of the Budget in consultation with the Department of Labor following an annual review of the impact.

The New York minimum wage requirements apply to agricultural employers if they have paid wages for farm labor in excess of \$3,000 in the prior year and applies to all employees unless they fall into an exemption. The Fair Labor Standards Act (FLSA) applies to all employees of a covered agricultural employer unless they fall within one of the exemptions described below.

#### *When is an agricultural employee exempt from the FLSA’s minimum wage provisions?*

An agricultural employee is exempt from the FLSA’s minimum wage requirements if **any** of the following circumstances apply:

- 1) The employee is employed in a bona fide executive, administrative or professional capacity, or is employed as an outside salesperson (as defined by the U.S. Department of Labor). To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week.\* Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department’s regulations. More information on the duties test may be found at [https://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](https://www.dol.gov/whd/overtime/fs17b_executive.pdf)
- 2) The employee’s employer did not use more than 500 “man-days” of agricultural labor during any calendar quarter of the preceding calendar year. A “man-day” is defined as any day during which an employee performs agricultural work for at least one hour.
- 3) The employee is the parent, spouse, child, or other member of the employer’s immediate family.
- 4) The employee (a) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which is recognized as generally paying on a piece rate basis in the region of employment; (b) commutes daily from his or her permanent residence to the employer’s farm; and (c) the employee has been employed in agriculture less than 13 weeks during the preceding calendar year. (See additional state requirements under Section 1.2 - Piece Rates).



- 5) The employee (a) is 16 years of age or under and is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been and is recognized as generally paying on a piece rate basis in the region of employment; (b) is employed on the same farm as his or her parent or person standing in the place of his or her parent; AND (c) is paid at the same piece rate as employees over age 16 are paid on the same farm.
- 6) The employee is principally engaged in the range production of livestock.

**IMPORTANT NOTE: An employee who is exempt from the Fair Labor Standards Act minimum wage requirements may still be subject to the New York minimum wage requirements.**

***When is an employee exempt from New York's minimum wage provisions?***

An agricultural employee is exempt from New York's minimum wage requirements if **any** of the following circumstances apply:

The employee is employed in a bona fide executive, administrative or professional capacity, or is employed as an outside salesperson (as defined by the New York State Department of Labor). To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis **at not less than \$937.50 per week** for parts of New York outside of New York City, Long Island, and Westchester. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. More information on the duties test may be found at <https://labor.ny.gov/legal/counsel/pdf/administrative-employee-overtime-exemption-frequently-asked-questions.pdf>.

- 1) The employee is employed in domestic service in the home of the employer.
- 2) The employee is the parent, spouse, child or other member of the employer's immediate family.
- 3) The employee is a minor under 17 years of age employed as a hand harvest worker on the same farm as his parent or guardian and who is paid on a piece rate basis at the same piece rate as employees 17 years of age and over.
- 4) The employee is an individual employed by/permitted to work for a federal/state/municipal government or political subdivision thereof.
- 5) The employee is an individual who is otherwise subject to the provisions of the New York Minimum Wage Act.

*NYFB gratefully acknowledges the work of Bond, Schoeneck & King Attorneys in the preparation of this Fact Sheet.*

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