Who Is A Farm Worker Under The ESA?



Are you an Ontario farmer employer navigating the complexity of the special farm worker rules? The second blog post in this series will outline who qualifies as a 'farm worker' for the purpose of farm worker exemptions.

Although the Employment Standards Act ("**ESA**") outlines standards of protection for workers, there are some industries wherein workers are exempt from these protections. ESA farming exemptions, for example, recognize that employers in farming and food production have unique demands from their workers because of variabilities such as weather conditions, the time of year, the availability of workers, or the amount of daylight available, among other things.

So, who does the ESA recognize as a farm worker? Under the ESA and its regulations, a farm worker is defined as *"a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish."*

There are three elements to this definition:

- **A Person Employed on a Farm…**

A person falls under the definition of a 'farm worker' if they are employed on a farm. The first step to determining whether your employees fall under the farming exemptions is to determine if your enterprise is, in fact, a farm. This definition has expanded over the years and may even include work related to the farm enterprise, regardless of where the work is performed.

Recent case law has also established that being employed "on" a farm does not require an employee to be employed "by" a farm. This advancement expands the farm worker exemptions to capture temporary help agencies that supply farm workers to more than one farm at a time.

- **Whose Employment is Directly Related…**

This may seem straightforward – if an employee is farming, they're a farm worker, right? But what is 'farming'? Is a tank truck operator on a milk farm, whose primary duties include transporting milk, and farming? What about a shipping/receiving department worker at a tomato-growing facility? A water quality specialist at a grain growing facility?

Typically, the interpretation of direct relation constitutes ‘work at the physical location where growing occurs and involves immediate “hands-on” contact with the agricultural product’.

- **To The Primary Production of a listed Commodity.**

If a farm’s commodities do not fall under those listed in the ESA’s definition, then the workers of the farming operation will likely not qualify under the farming exemptions. This is not always the case – for instance, mushrooms are recognized as a commodity though they are not directly listed. Most recently, cannabis has also been recognized as a herb, not a flower, thus including it within the commodities listed and allowing cannabis farmers to benefit from the farming exemptions.

Special Note on Harvesters

Now that you’ve established whether your workers fall within the three elements of the ESA definition of ‘farm worker’ as outlined above, you must next consider whether the majority of that worker’s time is spent harvesting. If so, harvesters fall under a narrower set of exemptions and may not avail themselves to all of the farming exemptions available.

Conclusion

For more information on the type of farm worker exemptions available, please refer to the first blog post in our series here.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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