

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Chairman Tipton, Members, Subcommittee on Agriculture, Energy and Trade
From: Committee Staff
Date: February 2, 2012
Re: Hearing: The Future of the Family Farm: The Effects of DOL Regulations on Small Business Producers

On Thursday, February 2, 2012, in Room 2360 of the Rayburn House Office Building at 1:00 pm, the Subcommittee on Agriculture, Energy and Trade will meet for the propose of receiving testimony on Department of Labor (DOL) proposed rules concerning the ability of children to work on farms, particularly family farms.

The hearing is being conducted in response to small business concerns over the DOL's September 2, 2011 notice of proposed rulemaking¹ that would mark the most substantive changes in agriculture youth labor regulations since the 1970s² and may prevent youths from either working on family farms or participating in agricultural education and vocational training programs at school. At the hearing, the Subcommittee will hear from an official at the DOL concerning the proposed rule as well as stakeholders who have serious concerns about the proposed rule and its implications for the future of American agriculture.

I. Small Farms and the Role of Youth Labor

In order to grasp industry concerns with the NPRM, it is necessary to recognize the role that youth labor contributes to the family farm. This necessitates an examination of the changes in the agriculture industry, since Congress amended the Fair Labor Standards Act (FLSA) in the 1970s³ to make additional modifications to rules concerning employment of children in agriculture production.

¹ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, Proposed Rule, 76 Fed. Reg. 54,836 (September 2, 2011) (hereinafter "NPRM").

² David Bennett, *Agriculture Facing Major Changes in Child Labor Laws*, DELTA FARM PRESS (Sept. 19, 2011), available at <http://deltafarmpress.com/government/agriculture-facing-major-changes-child-labor-laws>.

³ Section 13 of the Fair Labor Standards Act, 29 U.S.C. § 213 was modified twice in the 1970s to address issues about youth employment on farms between the ages of 10 and 14. See 1 THE FAIR LABOR STANDARDS ACT 12-16-17 (Ellen Kearns ed.) (2d ed 2010)(hereinafter "FLSA Treatise").

According to the United States Department of Agriculture, 98 percent of domestic farms are defined as family farms⁴ and 96.7 percent of these are defined as small businesses according to the United States Small Business Administration's size standards.⁵

While the percentage of operations considered family owned has remained relatively constant over the decades, the total number of domestic farms has fallen and the size of remaining operations has increased. Many attribute this to consolidation, as families joined their operations to take advantage of greater economies of scale and new agriculture production methods and technologies.⁶ It has also resulted in more fractional ownership of family farm operations. In many cases, small family farms include multiple generations where individuals own shares in the enterprise and where the business could be structured as a corporation or a Limited Liability Company (LLC) for tax and legal reasons.⁷

In addition to the familial nature of most small business agriculture enterprises, the profession of farming and ranching involves many physical and non-physical tasks unique to the industry. While school-based instruction can be important in learning the profession, most successful operators have also benefited from a lifetime of practical experience working directly in production agriculture.

Advocates of small business farmers and ranchers believe that any rule that seeks to regulate employment on farm operations must also preserve the ability of youths to gain the knowledge and experience necessary to become successful agriculture producers.⁸ In addition, unlike other occupations, farming is seasonal and dependent on favorable weather during planting time. Rules that restrict youths from working during these periods could negatively affect a small business producer's access to needed labor. To understand the source of these concerns, it is first necessary to understand federal laws related to youth employment and how they interact with production agriculture.

II. The Fair Labor Standards Act⁹ and Youth Labor

Federal laws and regulations pertaining to youth labor trace their origins to the progressive era in the party of the 20th Century.¹⁰ These efforts resulted in the enactment of a national prohibition on child labor in the Keating-Owens bill of 1916 which was found unconstitutional by the Supreme Court in *Hammer v. Dagenhart*, 247 U.S. 51 (1918).¹¹ Ultimately, the conditions of workers during the Great Depression led to enactment of the Fair Labor Standards Act

⁴ R. HOPPE, P. KORB, E. O'DONOGHUE, & E. BAKER, STRUCTURE AND FINANCE OF U.S. FARMS: FAMILY FARM REPORT, 2007 EDITION iii, 41 (June 2007), available at <http://www.ers.usda.gov/publications/eib24/eib24.pdf>.

⁵ Compiled from USDA Agricultural Resource Management Survey (2010), Economic Research Services, United States Department of Agriculture.

⁶ C. DIMITRI, A. EFFLAND, & N. CONKLIN, UNITED STATES DEPARTMENT OF AGR, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY (2005), PAGE 12, available at <http://www.ers.usda.gov/publications/EIB3/eib3.pdf>.

⁷ Letter from Agriculture Coalition to Wage and Hour Division, U.S. Department of Labor, Comment Proposed Rule: Proposed Rule: Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations – Civil Money Penalties (Sept. 2, 2011) available at <http://www.regulations.gov#!documentDetail:D=WHD-2011-0001-8885>, Document ID: WHD-2011-0001-9120 (hereinafter "Agriculture Coalition").

⁸ *Id.*

⁹ 29 U.S.C. § 201-19.

¹⁰ See P. DAY, A NEW HISTORY OF SOCIAL WELFARE 262 (6th ed. 2009).

¹¹ For a complete discussion of the *Hammer v. Dagenhart* decision, see 1 THE FAIR LABOR STANDARDS ACT 12-7-12-8 (ed. Ellen Kearns) (2d ed. 2010).

(FLSA)¹² which established a national minimum wage applicable to all non-exempt industries and persons, mandated overtime pay for all non-exempt persons, and required equal pay regardless of sex.¹³

In addition to addressing the employment situation of adults, the law sought to address concerns about child exploitation in the workplace. Many labor reform advocates opposed the presence of child labor as a matter of principle, believing that work interfered with a child's opportunity to obtain an education thus relegating them to a lifetime of menial employment. Others argued that an outright prohibition on the employment of youths could be similarly detrimental to a youth's development and that distinctions should be drawn between bad work experiences and good work experiences.¹⁴

The FLSA tries to make reasonable accommodations to these apparently diametrically opposed goals. The law does not outright prohibit all youth labor participation, but generally restricts youth employment if it interferes with a child's education¹⁵ or if the Secretary determines the employment of youth of a certain age poses a particular danger to their well-being.¹⁶

III. Youth Labor in Agriculture

While protecting children from economic exploitation and physical harm are the purposes of the FLSA's youth provisions, federal and state governments have recognized that agriculture professions have their own unique needs with respect to youth labor. The law provides certain exemptions to FLSA for youths employed in agriculture occupations¹⁷ that are generally more permissive than those available for other occupations and industries.

a. FLSA Parental Exemption for Agriculture

The FLSA establishes exemptions to wage and hour requirements for occupations in agriculture,¹⁸ including those that involve youths under 16 years of age who are working on an agriculture operation owned or operated by their parent or person standing in place of their parent.¹⁹ The family exemption also permits youths under age 16, but at least age 14, to perform occupations the Secretary determines are particularly hazardous to youths,²⁰ provided the employment takes place outside of school hours for the school district in which the child lives.²¹ These hazardous occupations will be discussed in greater detail later in this memorandum.

¹² See A. BARUSCH, FOUNDATIONS OF SOCIAL POLICY 158, 426-27 (2d ed. 2006).

¹³ The FLSA separates occupations, industries and individuals that are considered exempt from coverage under wage and overtime requirements and those that are covered by wage and overtime requirements. These statutory exemptions can be found at 29 U.S.C. § 213.

¹⁴ COMMITTEE ON THE HEALTH AND SAFETY IMPLICATIONS OF CHILD LABOR, INSTITUTE OF MEDICINE, PROTECTING YOUTH AT WORK: HEALTH, SAFETY AND DEVELOPMENT OF WORKING CHILDREN AND ADOLESCENTS IN THE UNITED STATES 17 (1998).

¹⁵ 29 C.F.R. § 570.35. Technically, child labor is not prohibited at all only that which is considered to be "oppressive." See FLSA TREATISE, *supra* note 11, at 12-19-12-21.

¹⁶ 29 C.F.R. §§ 570.2,31. The regulations permit certain levels of work for teens between 14 and 16 years of age. Children younger than 14 generally are prohibited from working. *Id.* at § 570.2(a). One relevant exception, concerning employment by parents, will be discussed in greater detail in this memorandum.

¹⁷ *Id.* at § 570.31. The regulations specifying which activities are considered permitted or too dangerous for 14 to 16 year olds are set forth at 29 C.F.R. §§ 570.33-.34 and those prohibited for 16 to 18 year olds are specified in 29 C.F.R. §§ 570.50-68.

¹⁸ 29 U.S.C. § 213(a)(6).

¹⁹ *Id.* at § 213(c)(1)(A)(i).

²⁰ *Id.* at § 213(c)(2).

²¹ *Id.* at § 213(c)(1).

As noted in the NPRM, the basis of FLSA parental exemptions are in recognition of a parent's natural and overriding concern for the welfare of their child.²² The DOL interprets the exemption to apply to a child working on a farm when the parent is the sole employer of the child and when the agriculture operation is owned or controlled by their natural parent or "any other person, where the relationship between the person and a child is such that the person may be said to stand in place of a parent, such as when someone takes a youth into their home and treats them as if it were a member of their own family, educating and supporting the child as if it were their own."²³

In addition to interpreting the definition of parent, DOL has interpreted "owned by" the parent or person standing in place of a parent to include "a parent's part ownership as a partner in a partnership or an officer of a corporation which owns the farm if the ownership interest in the partnership or corporation is substantial."²⁴ This interpretation appears to be in keeping with the DOL's broader interpretation of the definition of "person" contained in Section 203(a) of the Act.

The NPRM seeks to narrow the parental exemption in several ways. First, it defines "person standing in place of a parent" to mean a person, such as grandparent, who assumes total responsibility of a child for a minimum period of time, generally for greater than 60 days.²⁵ The NPRM further limits the applicability of the exemption to cases where a parent or person standing in place of a parent wholly owns²⁶ or is in day-to-day control of the operation.²⁷ Finally, the rule prohibits youths from working on agriculture operations where ownership is vested in someone other than, or in addition to, a parent or person, such as a business entity unless the entity is wholly owned by the parent.²⁸ It further defines a parent as a natural person, and not an institution or facility.²⁹

The proposed changes to the parental exemption fail to take into account certain realities in modern agriculture. As previously mentioned, family farm operations have experienced a great deal of consolidation in recent decades. The ownership of the operation is often vested among several family members and the business may be structured as a corporation or LLC as a result of the operation's ownership pattern. In these instances, the rule conflicts with existing DOL interpretive guidance and could result in youths who work on a family-owned operation losing their exempt status if their parents are not controlling shareholders or in charge of day-to-day operation of the farm.

In addition, the NPRM's requiring a total transfer of parental responsibility in order for a youth to maintain their exempt status raises questions about DOL's intrusion into the practicalities of family life. The DOL notes that the parental exemption is granted in recognition of a parent's natural concern for the safety and well-being of their child. It could also be argued that blood relatives, such as grandparents or an aunt or uncle is similarly concerned (or in many cases may be concerned) about the welfare of a youth under their care in a way that cannot reasonably be comparable to a typical employer-employee relationship.

²² 76 Fed. Reg. at 54,841.

²³ 29 C.F.R. § 570.126.

²⁴ DEPARTMENT OF LABOR FIELD OPERATIONS HANDBOOK, 33d03(d) (2002), available at http://www.dol.gov/whd/FOH/FOH_Ch33.pdf.

²⁵ Proposed 29 C.F.R. § 570.123(a)(2) 76 Fed. Reg. 54,880.

²⁶ *Id.* proposed 29 C.F.R. § 570.123 (a)(1).

²⁷ *Id.* proposed 29 C.F.R. § 570.123 (a)(4).

²⁸ *Id.* proposed 29 C.F.R. § 570.123 (a)(1).

²⁹ *Id.* proposed 29 C.F.R. § 570.123 (a)(3).

b. Youth Employment in Agriculture and Hazardous Occupation Orders

The FLSA authorizes the Secretary to preclude employment of youths in occupations the Secretary deems are particularly hazardous for youth. To accomplish this goal, the Secretary issues hazardous occupation order (H.O.s)³⁰ that cover employment in non-agriculture occupations, and Agriculture Hazardous Occupation Orders (Ag H.O.s)³¹ that cover the employment of non-exempt youth in farming and ranching.

As one may expect, the Ag H.O.s are specific to youth employment in agriculture and generally cover the types of hazards that are present on a farm or ranch. These hazards can include work with or around certain types of machinery, buildings, agriculture chemicals, and livestock.

Current regulations permit certain limited exemptions³² to the Ag H.O.s for student learners, those participating in vocational and education programs and those who have successfully completed safety training through Federal Extension Services program, provided the work is incidental to a youth's training, it is intermittent, that safety instruction is provided by the school and correlated by the employer with on-the-job training, and it is done under the supervision and direction of qualified and experienced persons.³³

The NPRM proposes a number of changes to safety program training and certification requirements, as well as amendments to certain Ag H.O.s that some fear may inhibit a youth's ability to participate in occupations important to their training and education as future farmers. Of particular concern are the NPRM's proposed changes to eliminate the safety and training certification programs offered by Federal Extension Services and vocational education programs and amendments to Ag H.O.s involving power-driven equipment, including tractors, and work with livestock.

1. Power-Driven Equipment and Tractor Ag H.O.s

Current Ag H.O.s generally prohibit youths from operating or assisting in the operation of tractors and certain types of power-driven machinery.³⁴ As mentioned above, the law provides exceptions for student learners, those who received safety instructions through Federal Extension Services or those participating in vocational agriculture training programs.

The NPRM proposes to narrow these student learner exemptions and expand the list of occupations and activities included in Ag H.O.s. As part of its justification for the changes, the DOL claims it is implementing recommendations made in a 2002 report by the National Institute for Occupational Safety and Health (NIOSH).³⁵

Specifically, the proposal would eliminate exemptions for youths that received safety training through Federal Extension Services and vocational agriculture farm safety programs³⁶ and would instead require that safety training be provided through a state or local education authority.³⁷ The rule expands the list of Ag H.O.s applicable to power-

³⁰ 29 C.F.R. § 570.50.68.

³¹ 20 C.F.R. § 570.70 .71.

³² 29 C.F.R. § 570.72.

³³ 29 C.F.R. § 570.72.

³⁴ 29 C.F.R. § 570.71.

³⁵ NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, RECOMMENDATIONS TO THE UNITED STATES DEPARTMENT OF LABOR FOR CHANGES TO HAZARDOUS ORDERS (2002) (hereinafter "NIOSH Report") available at http://youthrules.dol.gov/niosh_recs_to_dol_050302.pdf.

³⁶ 76 Fed. Reg. at 54,851.

³⁷ Proposed 29 C.F.R. § 570.98 (1), 76 Fed. Reg. at 54,876.

driven equipment to include any tool or device powered by anything other than a human hand and specifically precludes youths from operating lawn mowers on a farm.³⁸

Some fear that these proposed rules are overly broad and could preclude youths from participating in several activities important to assisting them gain experience on the farm.³⁹ In comments submitted to the DOL, a number of agriculture stakeholders questioned the data and analysis DOL utilized to justify the revisions. Others questioned the decision to eliminate Federal Extension Services and vocational education programs as approved safety instruction providers noting that the NIOSH report on which the DOL bases its rule noted that Federal Extension Services safety programs have had a positive influence on safety.⁴⁰

2. Livestock Ag H.O.s

Current Ag H.O.s generally prohibit youths under 16 from working in a yard or pen occupied by a bull, boar, stud horse maintained for breeding purposes, sows with suckling pigs or a cow with newborn calf when the umbilical cord is present.⁴¹ Like the power-driven Ag H.O.s, exemptions are provided for student learners and participants in vocational programs that have received safety instruction through a Federal Extension Services program.⁴²

The NPRM proposes to limit exemptions and prohibit children from working with certain livestock older than 6 months of age, engaging in any activity that causes pain to livestock, or herding animals in confined spaces or on horseback.⁴³ Some have questioned the data and analysis DOL cites in the rule as justification for the revisions and have expressed concern that the proposed rule is overly broad and may preclude youths from engaging in certain activities that can be safely handled under proper supervision.⁴⁴

3. Additional Ag and Non-Ag H.O.s Impacting Farms and Ranches

While the power-driven equipment and livestock Ag H.O.s have drawn the most concern and would affect a more diverse group of agriculture stakeholders, this memorandum would be remiss if it did not include a mention of the additional proposed revisions to Ag H.O. and Non-Ag H.O.s the DOL has proposed in its NPRM. Like the above mentioned Ag H.O.s, these revisions could preclude youths from occupations important to their educational development. The specific Ag H.O.s that will be discussed are those involving the handling of pesticides, and the maximum permitted elevation for youths working on ladders or scaffolding, and the two new Non-Ag H.O. covering occupations in farm-product raw materials wholesale trade industries and a ban on the use of electronic devices when operating machinery.

³⁸ *Id.* proposed 29 C.F.R. § 570.99.

³⁹ Letter from Agriculture Coalition, *supra* note 7.

⁴⁰ LETTER FROM UNITED STATES SENATORS TO SECRETARY OF LABOR (Dec. 19, 2011).

⁴¹ 29 C.F.R. § 570.71.

⁴² 29 C.F.R. § 570.72.

⁴³ *Id.* proposed 29 C.F.R. § 570.99(a)(4)(54,879).

⁴⁴ Letter from Bill Donald, President, National Cattleman's Beef Association to Wage and Hour Division, U. S. Department of Labor, Comment Proposed Rule: Proposed Rule: Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations – Civil Money Penalties, available at <http://www.regulations.gov/#!documentDetail;D=WHD-2011-0001-6152>. Document ID: WHD-2011-0001-6152.

Current Ag H.O.s prohibit youths from working in occupations that involve pesticides classified by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) as having Category I or Category II levels of toxicity.⁴⁵ They also limit to 20 feet the height at which a youth may work when working from a ladder or scaffolding.⁴⁶

The NPRM amends the pesticide Ag H.O. to prohibit youths from performing any task in which they handle pesticides, regardless of the pesticides toxicity.⁴⁷ Like the power-driven equipment and livestock H.O.s, the DOL justifies these revisions based on findings in the 2002 NIOSH⁴⁸ report that recommended amending the pesticide Ag H.O. to take into account other potential pesticide exposure hazards.⁴⁹ As drafted, this rule could preclude a youth from handling common, non-toxic pesticides on a farm that the youth can purchase in any hardware store and use at home.⁵⁰

The NPRM would also amend Ag H.O.s to limit to 6 feet the maximum elevation at which a youth can work on a ladder or scaffolding and expands the Ag H.O. to cover work performed on roofs or with machinery.⁵¹ The DOL claims that it is following a recommendation made in the 2002 NIOSH Report⁵² that not only recommended lower the maximum elevation, but including an occupation where a youth may work at elevations higher than 6 feet.⁵³ The rule provides exemptions for student learners operating tractors,⁵⁴ but appears to exclude other types of power-driven machinery.

Finally, the rule proposes two new Non-Agriculture H.O.s that would affect youth employment in agriculture. The first is a rule to ban the use of electronic devices when operating machinery.⁵⁵ In its justification for the rule, DOL noted numerous studies and reports on accidents resulting from machine operators becoming distracted by electronic devices, such as cellular phones.⁵⁶ However, the rule, as drafted, precludes the use of any electronic devices. This could preclude youths from operating farm equipment with integrated electronic systems, including those that enhance the safety of the equipment.

The second the Non-Ag H.O. would prohibit youths from working in occupations in farm-product raw materials wholesale trade industries, such as grain elevator, feed lots, stockyards, and livestock auctions.⁵⁷ The rule makes no distinction between occupations that are particularly hazardous and those non-office occupations that are not. Some have criticized this rule as overly broad and may make it more difficult for these employers to meet seasonal employment needs.⁵⁸

⁴⁵ 29 C.F.R. § 570.71(a)(9).

⁴⁶ *Id.* at § 570.71(a)(6).

⁴⁷ *Id.* proposed 29 C.F.R. § 570.99(a)(10) Fed. Reg. at 54,879.

⁴⁸ NIOSH Report, Page 90, *supra* note 35.

⁴⁹ 76 Fed. Reg. 54,863.

⁵⁰ Letter from 30 United States Senators, *supra* note 40.

⁵¹ Proposed 29 C.F.R. § 570.99(a)(7) Fed. Reg. 54,879.

⁵² NIOSH Report, Page 81, *supra* note 35.

⁵³ 76 Fed. Reg. 54,863.

⁵⁴ Proposed 29 C.F.R. § 570.99(7)(ii) Fed. Reg. 54,879.

⁵⁵ *Id.* proposed § 570.70.

⁵⁶ 76 Fed. Reg. 54,848.

⁵⁷ *Id.* proposed § 570.69. Fed. Reg. 54,875.

⁵⁸ Letter from 30 United States Senators, *supra* note 40.

IV. Conclusion

The NPRM has generated a lot of concern in the agriculture community and is the subject of great interest in the United States Congress. The purpose of the agriculture exemptions to the FLSA are to provide youth an opportunity to work on their family's farm, participate in bona fide educational and vocational programs or to simply provide an opportunity for youth to work in seasonal agriculture employment.

At the same time, the FLSA requires the DOL to protect the occupational health and welfare of youths and to prevent their exploitation. The NPRM notes that significant technological changes have taken place in agriculture since DOL last addressed the youth agriculture labor provisions and that it is incumbent upon the agency to periodically review its rules and enact adjustments when necessary to carry out its responsibilities to protect youth.

Unfortunately, the rule, as currently drafted, suffers from a number of previously noted deficiencies and represents a significant departure from decades of practice and precedent. The proposed revisions to the parental exemptions and the Ag and Non-Ag H.O.s could preclude youths from working on family-owned small business farms and could negatively affect their ability to participate in important agricultural education and training programs. This is contrary to the purposes of the agriculture exemptions and the intent of Congress in authorizing them.

Instead of pursuing this particular rule, the DOL should withdraw it and submit a new proposal that better addresses the concerns and comments of agriculture stakeholders and Members of Congress or allow stakeholders to comment on any revisions it makes to the current rule before moving to final rule making. The Congress may also need to pursue a legislative remedy to this issue.