
Risk Management Practices: Avoid Employment Pitfalls on the Dairy Farm

Ag Decision Maker

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The cost of labor is one of the highest expense categories on the dairy farm – just behind feed costs. For that reason alone, human resource risk management is key to a successful dairy operation. Five particular areas or “potential pitfalls” should be given consideration by the dairy producer.

Potential Pitfall #1: Worker Misclassification

The misclassification of workers as “independent contractors” rather than “employees” is viewed as a significant problem by federal and state agencies with oversight over labor, employment, and taxation issues. If a worker is classified as an employee, an employer must generally report wages to state authorities, pay unemployment insurance tax on wages paid, withhold state and federal income taxes, and withhold and pay Social Security and Medicare taxes. If a worker is classified as an independent contractor, these requirements are avoided. However, misclassifying a worker could later subject the business to back taxes and penalties.

Determination of whether a worker should properly be classified as an employee or an independent contractor is subject to an analysis based on a number of factors. For example, what degree of control or independence is present? Is there a supervisor who controls the worker’s duties and performance? Financially, is the worker paid a set dollar amount, are expenses reimbursed, and who provides tools and supplies? On the dairy farm, an example might be an individual who provides hoof-trimming services. Is that person operating an independent business that requires travel to a variety of dairies to provide the services; or does that person perform these services for one dairy at set times and the tools and equipment



are provided by the dairy owner? The first is more likely to be an independent contractor, and the second situation more likely describes an employee.

There are a variety of resources available to assist the dairy producer in conducting an analysis and making the correct determination. These would include the following:

US Department of Labor – Misclassification Initiative Resources:

www.dol.gov/whd/workers/misclassification/

Internal Revenue Service (IRS) – Guidelines and Form SS8:

www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

www.irs.gov/pub/irs-pdf/fss8.pdf

Iowa Workforce Development – Misclassification Resources:

www.iowaworkforcedevelopment.gov/misclassification-workers-iowa

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Potential Pitfall #2: Fair Labor Standards Act (FLSA) and Farm Workers

The Fair Labor Standards Act (FLSA) is a federal law which sets forth rules on minimum wage, overtime, and child labor standards. Employers should assume the provisions of the FLSA apply to all employees unless they fall into an area of exceptions. One major area of exception is agriculture. Employees who are employed in agriculture (as that term is defined in the FLSA) are exempt from overtime pay provisions and do not have to be paid time and one half their regular rates of pay for hours worked in excess of forty hours per week. Dairying is included in the FLSA definition of agriculture, which may include milking and handling of milk, raising livestock, and cropping and forage operations. However, there may be employees on the dairy who are not involved in dairying – such as bookkeepers, human resource managers, or others who are not directly involved in the dairy farm operation. These employees do not fall into the exemption and must be paid overtime. The U.S. Department of Labor provides resources including a fact sheet on the FLSA and agriculture:

www.dol.gov/whd/regs/compliance/whdfs12.htm.

Potential Pitfall #3: Wage and Hour Claims

Wage and hour claims have been on the rise as employees allege that they have not been paid for all the hours they work for an employer. If an employer directs or allows an employee to work, performing duties on behalf of the employer, they must be paid for that work time. Some employers require employees to report early (before a scheduled shift) for preparation time; or stay beyond a work shift for clean-up duties – but they do not pay the employees for that time. This is work time, and the employees must be paid. Failure to do so may result in assessment of back wages and penalties.

Technology has also made it easier to contact employees who are away from the work site. Employees are contacted by cellphone, social media, or e-mail to respond to questions and situations in the workplace while they are supposed to be off-duty and not paid. This time can add up, and the employee should be paid for it. The U.S. Department of Labor provides resources related to wage and hour complaints, and employers should be familiar with these resources:

www.dol.gov/whd/howtofilecomplaint.htm.

Potential Pitfall #4: Employee Handbook or Policy Documents and the Employment-at-Will Doctrine

Whether a dairy farm is large or small, it is vital to have consistent communication with workers about expectations and conditions of employment. A written employee handbook or policy document can assist with this good practice. A handbook may be short and simple or highly detailed, depending on the needs of the dairy operation. Dairy producers should be aware that the handbook can be much like a contract with employees, and expect to be held to the language within the handbook. Employers should not simply use a template or copy another handbook.

In most states, the employment-at-will doctrine is the standard. This means that termination can occur at the will of either the employee or the employer – for good cause, no cause, or bad cause (as long as it does not violate applicable employment discrimination laws). However, an employer can inadvertently take themselves out of the employment-at-will realm by (for example) enumerating disciplinary procedures that must be followed prior to termination. This could make an employer subject to a wrongful termination claim. Courts have held that a correctly-worded disclaimer in a handbook can prevent the formation of a contract. The money spent having a competent employment lawyer review handbooks or policy documents is a smart investment.

Several resources regarding employee handbooks and employee termination can be found here:

<https://www.extension.iastate.edu/dairyteam/files/page/files/Dairy%20Newsletter%20-%20Employee%20Mgt%203%20-%20Handbook%20Need.pdf>

www.extension.iastate.edu/agdm/wholefarm/pdf/c1-72.pdf

www.extension.iastate.edu/agdm/wholefarm/pdf/c1-81.pdf

Potential Pitfall #5: Employment Verification and the USCIS I-9 Form

Since 1986, federal law has required that within three days of any new employee's start date, all employers must complete a Form I-9 - Employment Eligibility Verification. The Form I-9 is not to be completed during the employment selection (application or interview) phase - only at the actual beginning of employment. As stated in the USCIS M-274 Handbook for Employers: "You may not begin the Form I-9 process until you offer an individual a job and he or she accepts your offer."

The Form I-9 must be completed for all new employees, regardless of national origin. Employers should take heed of the notice found on both the form itself as well as the instructions - it is illegal to use the form to discriminate against individuals, and employers cannot specify which

document(s) they will accept from an employee. The refusal to hire individuals because documents provided have a future expiration date may also constitute illegal discrimination.

A common question is whether the employer should make copies of documents presented by employees. There is no reason to do so, and this practice only serves to increase the burden on the employer. If the employer chooses to copy documents, this must be done for each and every employee; and then the copies must be stored with the Form I-9 documents. Since there is no purpose or advantage to making copies of documents presented, many employers do not engage in this practice.

The Form I-9s are not an employment record - they are an immigration law compliance form. Therefore, the Form I-9s should be filed and stored separately from other employment-related documents. One methodology for the typical farm employer is to maintain two folders or three-ring binders. In the first binder, maintain the Form I-9s for all current employees. In the second binder, maintain Form I-9s for past employees which must be retained for either three years after the date of hire, or one year after the date employment is terminated - whichever is later. To facilitate the disposal of these past-employee Form I-9s, this second binder should have a series of tabs for the years and months. When employment is terminated, move that employee's



Further information on **avoiding employment pitfalls on the dairy farm** can be viewed in the accompanying video, <https://vimeo.com/287706873>

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Form I-9 from the first binder to the second binder. When the appropriate amount of time has passed as described by the above rule, dispose of the former employee's Form I-9. With this simple methodology, the employer always has a properly-maintained Form I-9 file on hand. The USCIS has an on-line Form I-9 Retention Calculator which makes it easy to determine the date on which the Form I-9 may be disposed.

Additional resources regarding employment eligibility verification can be found here:

ISU Extension article on Form I-9 Employment Eligibility Verification:

www.extension.iastate.edu/agdm/wholefarm/pdf/c1-77.pdf

USCIS Resources regarding Form I-9:

www.uscis.gov/i-9

Form I-9 Retention Calculator:

www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9

USCIS Handbook for Employers on Form I-9:

www.uscis.gov/i-9-central/handbook-employers-m-274

More Information

For more on this topic, view the accompanying video at: <https://vimeo.com/287706873>. Also see the complete series on Risk Management Practices, www.extension.iastate.edu/agdm/wdothier.html.

A related series on Human Resources is also available on the Ag Decision Maker website, www.extension.iastate.edu/agdm/wdhumanresources.html.

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