

LABOR ADVISORY

THE FAMILY BUSINESS EXEMPTION TO THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) is a federal law that imposes many requirements on employers, including worker disclosures and housing requirements. *See* 29 U.S.C. 1801. An operation is exempt from the AWPA if the owner and immediate family members perform all labor contracting activities for the farm. Labor contracting activities are defined as *recruiting, soliciting, hiring, employing, furnishing, and transporting* of migrant or seasonal agricultural workers. If a non-family member performs any of these duties, the exemption is lost.

Rules for Preserving the Family Business Exemption

According to several courts, Congress intended the labor contracting activities listed above to be contractual in nature. They involve an offer by the employer, and acceptance of that offer by the worker. As long as the offer is being made by the owner or immediate family member, the exemption is generally preserved.

1. **Recruiting, soliciting, and hiring:** As long as the farmer or immediate family performs these hiring activities, the exemption should be preserved. The exemption is preserved if a manager, foreman, or other worker refers a friend to an open position, as long as the manager is not authorized to make a job offer. An employer could tell employees that the company is hiring, and ask that employees pass this on to friends who may be interested in the job, as long as it is clear that the farmer will interview workers and decide who is hired. A current employee could provide translation during the job interview, as long as the farmer or family member retains control over the hiring decision. **If the employer directs an employee to find workers or delegates the hiring decision, the exemption will be lost.** Word of mouth advertising, help wanted signs, and newspaper advertising are fine, as long as the candidate is directed to contact the farm, not some intermediary, to arrange an interview.
2. **Employing:** In order to claim the exemption, the family farm must be the employer for all workers who work on the farm. The exemption is lost if the farm uses contract labor or employees of another company.
3. **Furnishing:** Furnishing workers likewise refers to the use of an intermediary to provide workers. If a farmer hires a private employment firm to furnish workers, the exemption is probably lost. **Courts have held that a farmer may use the services of a state employment office without losing the exemption.** Prior to one of the court decisions, DOL issued an opinion letter stating that the exemption would be lost if a farmer used a state employment agency. Despite the fact that the DOL opinion letter has been rejected in other jurisdictions, DOL is still relying on this guidance in Washington.¹
4. **Transporting:** In order to best preserve the exemption, the farmer should merely direct workers to report to work, and should avoid providing buses to transport workers. If the operation requires buses to transport workers, the farmer or family member should purchase the tickets. It appears that workers can ride with each other to work without endangering the exemption, and workers can travel in farm vehicles like tractors without losing the exemption.

¹ The DOL opinion letter has been rejected by the Sixth Circuit court of appeals, *Flores v. Rios*, 36 F.3d 507, 128 Lab.Cas. P 33,143 (Sixth Circuit 1994), and by the Fifth Circuit court of appeals, *Malacara v. Garber*, 353 F.3d 393, (Fifth Circuit, 2003).