

Migrant and Seasonal Agricultural Worker Protection Act: Forestry Contractors' Model Operating Plan

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Abstract: The Model Operating Plan for forestry contractors is a voluntary plan for compliance with the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) of 1983, with amendments passed in 1996 and 1997. This plan is designed as a guide for forestry contractors who wish to comply with all federal, state, and local rules and regulations that govern their employer/employee relationships.

Keywords: liability, licensing, sustainable workforce, industry standards

Introduction

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) was enacted in 1983. It was designed to provide migrant and seasonal farmworkers and forest workers with protections concerning transportation, housing, pay, working conditions, and work-related conditions. In 1996 and 1997, the MSPA was amended to include regulations regarding disclosure of workers' compensation information, reconsideration of the transportation liability insurance, and to include and clarify definitions of "independent contractor" and "joint employment" (USDA ERS 2006; USDA OCE 2006; USDL 2006).

AgWorks, Inc. has developed a Model Operating Plan (MOP) to aid forestry contractors to understand and comply with the rules and regulations as stated in the MSPA. The purposes of the plan include: (1) to give forestry contractors a guide for compliance with Federal labor laws; (2) to distinguish those who want to comply with these laws; (3) to establish proof that a forestry contractor is in compliance; and (4) to set industry standards for forestry contractors. Use of this plan could provide a number of benefits to forest owners and managers. The plan could assure a sustainable workforce for the future. In addition, it could create affirmative actions to determine compliance as well as foster the development of training opportunities.

This MOP is divided into the following categories: (1) Licenses, (2) Recruiting, (3) Disclosure, (4) Redisclosure, (5) Transportation, (6) Housing, (7) Field sanitation, (8) Wages, and (9) Record keeping. Each section will list the applicable rule, followed by a measurement of "proof," or verification, that demonstrates compliance. It should be noted that this plan outlines only minimum compliance, or the "must-do" activities as presently enforced by the US Department of Labor (USDOL). AgWorks Inc recommends that all contractors explore means of providing their workers with a higher level of protections and benefits than is stated in this paper.

Licenses

Anyone who hires workers to perform forestation activities, other than the landowner on his/her own land, must be currently registered with USDOL as a Farm Labor Contractor (FLC). An individual or business may be the FLC. Anyone, including subcontractors, who works for an FLC furnishing, recruiting, employing, soliciting, hiring, or transporting workers must be registered as an FLC or a Farm Labor Contractor Employee (FLCE). These licenses must be kept by and on the person whose name appears on the registration.

Any FLC/E who drives must be driving-authorized (DA) and must keep a copy of his doctor's certificate with him/her while operating the vehicle. Another copy should be kept on file at the office. In addition, any FLC/E who transports workers (TA [transport-authorized] and DA) must have all of the vehicles he/she drives listed on the FLC registration card. In addition, a copy of the vehicle inspection should be in the vehicle along with a copy of the current certification of Workers' Compensation

and insurance coverage. Depending on the size and type of vehicle, a commercial driver's license may be required.

If an FLC provides housing (HA [housing-authorized]), the particular housing must be listed on the card. A copy of the housing inspection/approval for that location should be posted in the housing and kept on file in the office.

Copies of all documents supplied to USDOL FLC Registration Section should be kept on file in your office and any changes to that information should be reported to them within 10 days. (Note: fingerprint cards are good for 3 years only.)

If a company or corporation is registered as a FLC, the owner plus any employee who performs any named activity (furnishing, recruiting, employing, soliciting, hiring, or transporting workers) must be registered as an FLCE. An FLCE can work only for the FLC with whom he/she is registered. FLCE registration is not transferable to other FLCs.

State and/or local law may require additional licensing as a farm labor contractor or business. When working a particular state or local municipality, the laws governing that area will apply to you. It is your responsibility to determine if and how to comply with state and local laws. Remember, whichever law gives the employee the most benefit is applicable. So if the local law gives the workers more benefits than the federal law, then the local law applies. Additionally, if you or your employees, as non-citizens, recruit in a foreign country, there may be visa and licensing requirements governing your business activities. Again, it is your responsibility to determine if any such law applies to your activities.

Verification

Forestry contractors will supply a copy of the FLC license, all FLCE licensees who are driving on timber land, state FLC/E license, and any notices to the USDOL of changes made to the current license. This will be furnished to all entities that use the services of the FLC.

Recruiting

Any person, whether a U.S. citizen or resident alien, who recruits workers, must be registered as an FLC or FLCE. Disclosure of wages, working conditions, benefits, and terms/conditions of employment must be made at the point of recruitment (also see Disclosure). The Wage and Hour Division of the USDOL is presently of the opinion that this includes recruitment in a foreign country.

Forestry contractors will not allow unreasonable charges to be made as a condition to be recruited for a forestation job. The government will usually allow a small fee to be paid to cover telephone charges, gas, and other costs to gather workers.

All Equal Employment Opportunity guidelines must be followed when recruiting and hiring U.S. workers.

Verification

Forestry contractors will supply an affidavit stating that, to the best of that forestry contractor's knowledge, either no workers were charged a fee to be recruited or, if a fee was charged, what the fee was to gather workers, and that the forestry contractor has complied with all EEOC laws in the recruitment of U.S. workers (table 1).

Disclosure

Disclosure must be made at the *point of recruitment*. For the purposes of this plan, point of recruitment is defined as the location in which you or your agent makes the first contact with the worker, either by mail, phone, fax, or in person.

Disclosure must be written in the language of the potential worker and must include the following: (1) location(s) of employment by county and state; (2) wage rates, whether

Table 1—Form MOP-01—Fees charged to workers.

To: _____
Name of Timber Company or Other Landowner

Fees Charged to Workers

___ To the best of our knowledge, no worker has been charged any fees to have his/her name placed on any recruitment list.

OR

___ A fee of U.S. \$ _____ was charged and that fee was paid to _____.

___ To the best of our knowledge, no worker has been charged a fee for assistance with paperwork for the U.S. Consulate.

OR

___ A fee of U.S. \$ _____ was charged and that fee was paid to _____.

Equal Employment Opportunity

To the best of our knowledge, we have complied with all applicable EEOC rules and regulations in our hiring. We are an equal employment opportunity employer.

Employer/Contractor Signature

Date

minimum, prevailing, and/or piece; (3) job duties and period of employment; (4) statement of any strikes or work stoppages; (5) other arrangements that may benefit the employer; (6) worker's compensation information; and (7) all costs to the worker.

Worker's compensation information includes the name of the carrier, name of the policyholder, name and phone number of the contact person, time frames for initial contact, and drug testing requirements, if any.

Costs to the worker may include the following:

1. Weekly transportation if provided by the forestry contractor. (Note: worker transportation between work sites can be affected in 3 ways: contractor-provided and charged; contractor-provided and not charged; none provided by the contractor. Charges must be disclosed, but you should also explain how the worker is to move from place to place if the contractor does not provide some sort of transportation.)

2. Transportation costs from home to starting work location.

3. Training costs.

4. Estimated costs of housing. (Note: worker housing at work sites can be affected in three ways: contractor-provided and charged; contractor-provided and not charged; none provided by the contractor. Charges must be disclosed, but you should also explain how the worker will be housed if the contractor does not provide some sort of assistance.)

5. Estimated food costs.

6. Taxes.

7. Equipment. (Note: workers must be told if they are to purchase any equipment, what type(s), and the costs. This includes replacement costs, if any.)

Verification

The forestry contractor will supply a copy of the disclosure form to the entity using the services of the FLC (table 2). The forestry contractor will also supply an affidavit that all workers are given this disclosure in writing at the time of recruitment.

Redisclosure

Any time there is a major change in itinerary, wage rates, or terms and conditions of employment, the change must be disclosed in writing to the worker prior to the commencement of the change.

Verification

If there is a change to the original disclosure, the FLC will give a copy of the redisclosure to the entity using the services of the FLC.

Transportation

Workers may carpool. For the purposes of this plan, carpooling is defined as voluntary arrangements between workers for transportation with/by other workers with no direction, involvement, or assistance from the employer or the employer's representative or agent, such as a FLC or FLCE.

If the contractor provides transportation, the FLC/E registration card must be TA and DA and the driver must have a current, applicable driver's license. (Note: a commercial driver's license (CDL) is required if driving a vehicle with 15 or more passenger capacity.) If neither Workers Compensation nor your insurance carrier had verified the driving record of any employee who may be transporting workers, the contractor should require that the driver/employee supply a copy of his driving record. It is recommended that you keep a copy of the FLCE driver's license. The vehicle must be inspected and a copy of that inspection report in the vehicle at all times, Proof of insurance (state minimum with Workers Compensation and U.S. \$50,000 property damage) must be in the vehicle at all times. If Workers Compensation is not carried by the forestry contractor, a minimum of U.S. \$100,000 per seat liability insurance with a maximum of U.S. \$5,000,000 is required. Overcrowding of the vehicle is not allowed.

Table 2—Form MOP-02—Disclosure of working conditions.

To: _____
Name of Timber Company or Other Landowner

Disclosure of Working Conditions

All workers are given a written copy of the following terms and working conditions:

- Place of employment
- Wage rates
- Kinds of activities in employment
- Period of employment
- Transportation and any other employee benefits to be provided, if any, and any costs that may be charged for each
- Conditions of Workers Compensation Insurance provided
- Existence of any strikes, work stoppages
- Existence of any arrangements whereby the employer or employer's representative(s) makes a profit from the workers

Attached is a copy of the disclosure statement that was provided to potential employees at the time of recruitment. If any substantial changes are made to the terms and/or conditions of employment, a new disclosure document will be provided to the affected employees.

 Employer/Contractor Signature

 Date

Verification

The FLC will furnish a copy of the following for each and every vehicle used to transport workers to any entity using the services of the FLC:

- 1. Vehicle inspection report
- 2. Doctor's certificate for each driver
- 3. Copy of FLCE card for each driver
- 4. Copy of driver's license for each driver;
- 5. Copy of insurance, including Workers Compensation and property damage.

Housing

Any contractor who provides housing must comply with all OSHA regulations found at Title 29 Subtitle B Chapter XVII Part 1910 Subpart J Section 1910, which governs temporary labor camps.

Verification

The FLC will inform the entity that housing is being provided and furnish a copy of the inspection report and a copy of the certificate of occupancy to the entity. Or, the FLC will provide the entity with an affidavit stating that no housing is being provided and the workers are responsible for their own housing (table 3).

Field Sanitation

Field sanitation rules found at Title 29, Sec.1928.110 govern the provision of drinking water, hand washing, and toilet facilities while workers are in a field. Drinking water

must be sufficient for the number of workers, cool, potable, and available from single use drinking cups or fountains.

Hand-washing facilities must include water, soap, and single use, individual towels. Toilets must be available in numbers as described in the regulations listed above, and conforming to OSHA specifications. Toilet paper must be available in quantities sufficient to the number of workers who use the facility.

Verification

The FLC will give the entity a signed and dated copy of the "Field Sanitation Inspection Report" (table 4).

Wages

All contractors must pay no less than the Federal Minimum Wage or, if using the model, the USDOL-determined prevailing wages. Further, MSPA-covered contractors are obligated to pay the higher of:

- 1. The wage (hourly and/or piece rate) as disclosed to the worker;
- 2. The wage (hourly and/or piece rate) as advertised during domestic recruitment;
- 3. The wage(s) set forth in the contract under which the worker was employed (USDO-determined prevailing wage);
- 4. The Federal Minimum Wage.

All contractors must deduct and pay all applicable federal, state, and local taxes. Other deductions (such as transportation, tools, housing, and so on) may be made from employee's wages only if the deductions: 1) were disclosed; 2) are made only from the first 40 hours in a week; 3) do not bring the

Table 3—Form MOP-03—Housing provided to employees.

To: _____
Name of Timber Company or Other Landowner

Housing Provided to Employees

___ We have not provided housing to any employees nor have we arranged any housing for any employees.

OR

___ We have provided housing for employees or we have arranged housing for employees at the following address(es):

AND

This housing has been approved/certified by the US Department of Labor, Wage, and Hour Division for occupancy by migrant agricultural workers.

Employer/Contractor Signature Date

Table 4—Form MOP-04—Field sanitation inspection report.

To: _____
Name of Timber Company or Other Landowner

Field Sanitation Inspection Report

___ To the best of our knowledge, all workers are provided fresh, cool drinking water, in sufficient quantities, at all working times.

___ To the best of our knowledge, all workers are provided hand wash facilities within ¼ mile of their worksite, or at the nearest entrance to the worksite, or are provided transportation to such facility upon demand.

___ To the best of our knowledge, all workers are provided toilet facilities within ¼ mile of their worksite, or at the nearest entrance to the worksite, or are provided transportation to such facility upon demand.

___ All workers are provided with training in the use of and importance of using these “Field Sanitation Facilities.”

Employer/Contractor Signature _____ Date _____

worker’s hourly rate below the Federal Minimum Wage or the prevailing wage, whichever is applicable; and 4) are at actual cost. The employer is not allowed to make a profit on employee deductions.

Overtime must be paid at time-and-a-half the employee’s regular rate after 40 hours have been worked during the work week. Hours worked/paid include:

1. Total of all hours between the start and stop time. Lunch can be subtracted from total hours worked if the period lasts one-half hour or more, but breaks cannot be subtracted unless each is one-half hour or more.
2. Time spent loading tools, water, equipment, trees, and so on. If this type of activity starts the workday, all subsequent riding and waiting time is compensable.
3. Time spent sharpening tools, filling gas tanks/motors.
4. Time spent riding and/or waiting if workday has begun.
5. For drivers, the workday begins when he/she performs the daily vehicle inspection and includes all time spent transporting workers to and from their destination, as well as all time spent waiting.

All contractors will pay all compensable hours during the week the hours were earned.

Verification

Each week, the FLC will give a copy of the payroll for each worker to the entity.

Record Keeping and Reporting ___

The contractor will ensure that all required posters are displayed in the language and size required by the appropriate regulations (table 5).

All new hires of U.S. workers shall be reported in the method required by the state in which the hire occurred.

Actual hours worked must be recorded on a daily basis for each employee. (Note: you must have some standard method in place for the worker and/or supervisor to record actual start and stop times each day.) Stop and start times, total hours worked each day, units/pieces produced, and basis of pay (hourly or piece rate) shall be computed and posted daily for each worker and kept available for 3 years. Total hours/pieces, wage or piece rates, gross pay, itemized deductions, net pay, employee’s name, permanent address, and Social Security Number shall be recorded weekly for each worker and kept available for 3 years. In addition, each worker shall be provided a pay stub containing all of the previously mentioned items and the employer’s name, permanent address, and EIN/IRS number(s). All forestry contractors must furnish their clients all payroll records as required by MSPA regulations.

Verification

The FLC will furnish a copy of the “Records Required Verification Report” to the entity (table 6).

Table 5—Posters required for display to all workers in appropriate languages.

Poster	Possible Source
Fair Labor Standards Act (FLSA)	www.dol.gov/esa
Migrant and Seasonal Agricultural Workers Protection Act (MSPA)	www.dol.gov/esa
Family Medical Leave Act (FMLA) (<i>if over 50 employees</i>)	www.dol.gov/esa
Equal Employment Opportunity (EEO)	www.dol.gov/esa
Occupational Safety and Health Act (OSHA)	www.osha.gov
Workers Compensation Information	Check State websites
Environmental Protection Agency (EPA) required posters	www.epa.gov
State-required posters, such as Unemployment Insurance	Check State websites

Table 6—Form MOP-05—Required records verification report.

To: _____
Name of Timber Company or Other Landowner

Required Records Verification Report

This is to certify that we will prepare payroll records containing the following information. Additionally, we will furnish a copy of these records to the timber company or other landowner at the conclusion of the contract period or within thirty (30) days following the completion of the contract.

- Basis on which wages are paid
- Number of piecework units earned, if paid on a piece rate
- Number of hours worked
- Total of pay period earnings
- Specific sums withheld and the purpose of each sum withheld
- Net pay
- Name, permanent address, and Social Security Number of each employee who is employed on the contract

This is also to certify that each worker employed on this contract will receive a wage statement at the time of payment which includes the above information plus the employer's name, address, and employer identification number assigned by the IRS.

 Employer/Contractor Signature

 Date

Implementation _____

Implementation of the Model Operating Plan will provide the user with a number of benefits. It will aid in the development of an industry standard that requires use of the MOP to demonstrate compliance. The result could be contracting only with businesses that use the MOP compliance program, and will allow for follow-up with these certified MOP contractors during the year-end closeout. However, the primary reason for using the MOP would be the ability to limit your liability.

Disclaimer _____

This plan is, and always will be, a work-in-progress. It is supported by an ongoing effort to ensure that every aspect of labor law compliance will be included, clarified, and measured by this plan. This document is only an attempt

to provide guidance, and AgWorks, Inc. is not responsible for any omissions or errors. You should consult the U.S. Department of Labor for official information.

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