



Agritourism

by Prof. Roger A. McEowen

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Roger A. McEowen is the Professor of Agricultural Law and Taxation at Washburn University School of Law in Topeka, KS. He also teaches an undergraduate course in agricultural law at Kansas State University. From 2004 through 2015, he was the Leonard Dolezal Professor in Agricultural Law at Iowa State University in Ames, Iowa, where he was also the Director of the ISU Center for Agricultural Law and

Taxation (CALT), which he founded. Before joining Iowa State in 2004, he was an associate professor of agricultural law and extension specialist in agricultural law and policy at Kansas State. From 1991-1993, McEowen was in the full-time practice of law with Kelley, Scritsmier and Byrne in North Platte, NE. He is the author of *Principles of Agricultural Law*, an 850-page textbook/casebook that is updated twice annually, and a second 300-page book on agricultural law. His *Agricultural Law and Taxation Blog* is the most widely read agricultural law and taxation blog online. Prof. McEowen conducts approximately 80-100 seminars annually across the U.S. for farmers, agricultural business professionals, lawyers, and other tax professionals. He also conducts two radio programs each airing twice monthly heard across the Midwest and on the web. In addition, his two-minute radio program, *The Agricultural Law and Tax Report*, is heard each weekday by over 2 million listeners on farm radio stations from NY to CA as well as SiriusXM 147. He also can be seen as a weekly guest on RFD-TV where he discusses various agricultural law and tax topics. He is a member of the Iowa and Kansas Bar Associations and is admitted to practice in Nebraska.

Overview

Agritourism activities have expanded in recent years as an additional income stream for some farming and ranching operations and rural landowners in general, generating about \$1 billion nationwide. But, engaging in an agritourism activity (or activities) on the premises means that members of the public will be invited to be present upon paying a fee. That raises the prospect of injury and potential liability.

The liability issue is a major concern for landowners. In the U.S., about 80% of respondents to a survey listed concerns about liability as a limiting factor of engaging in agritourism activities.¹ Also, about that same percentage were worried about the cost and availability of insurance.² To address landowner liability and other concerns, and incentivize agritourism activities, many states have enacted agritourism statutes. What does such legislation do? What liability protection is provided?

In General

Agritourism generally includes numerous activities on a rural property associated with either entertainment, recreational, educational, and even commercial activities. The USDA defines agritourism (and recreational) activities generally as “hunting, fishing, farm or wine tours, hayrides, etc.”³ Also commonly treated as agritourism are farmers markets, roadside farm stands and “U-Pick” operations, but a permit may be required.⁴ It is also possible that the definition of “agritourism” could be statutorily defined to include certain types of overnight accommodations, hayrides, corn mazes, riding on tractors and other farm equipment, riding on horses, playing around or climbing on hay bales, and weddings.⁵ The definition may also include camping and tours of the property. But some states



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exclude some of these activities from the definition of agritourism. The key is to always check the specifics of state law.

Federal Law

In early 2022, H.R. 6408 was introduced into the U.S. House of Representatives. The bill would create a Department of Agritourism. The bill defines “agritourism” to include education, outdoor recreation, entertainment, direct sales, the provision of certain types of accommodations, and dining on a farm. The bill was introduced into the House Agriculture Committee on January 13, 2022, where it presently remains.

State Laws

Liability

In recent years, numerous states have enacted agritourism legislation designed to limit landowner liability to those persons engaging in an “agritourism activity.” A majority of states now have enacted such laws. Typically, the legislation protects the landowner (commonly defined as a “person who is engaged in the business of farming or ranching and [who] provides one or more agritourism activities, whether or not for compensation”) from liability for injuries to participants or spectators associated with the inherent risks of a covered activity.⁶ Without such liability protection a landowner is generally held liable for an injury to an invited guest under a high standard of care that requires the landowner to make sure the premises is safe, exercise reasonable care under the circumstances, and warn of hidden dangers.

The statutes tend to be written very broadly and have various standards of care that might apply to a landowner. For instance, legislation introduced into the Illinois legislature in early 2022 would grant liability protection to landowners for claims arising from participation in broadly defined agritourism activities.⁷ If the “agritourism operator” posts the statutorily required warning notice, the operator is not liable for the injury or death of a participant resulting from the inherent risks of participating in an agritourism activity. The operator is not protected, however, if the operator acts with willful or wanton disregard for the participant’s safety and the operator’s conduct

is causally related to the participant’s injury or death. The same is true if the operator fails to disclose known inherent risks.

Note: Many states have statutory provisions similar to what Illinois is considering. For instance, with many state statutes, the landowner must post warning signs to receive the protection of the statute.⁸ Nebraska law requires the warning to be in any “agritourism activity contract.”⁹ In some states the landowner must register their property with the state.¹⁰

This modification in the standard of care under an agritourism statute is common among the states with an agritourism statute.¹¹ Under these state statutes, liability is limited in situations where the landowner acted wantonly or with willful negligence, and liability is excluded for injury arising from the inherent risks associated with an active farming operation. In many of the states that have agritourism statutes, the posting of specific signage is required to get the liability protection and, of course, the person claiming the protection of the statute must meet the definition of a covered person and the activity that gave rise to the liability claim must be a statutorily covered activity.

The Nebraska provision says that the limited liability protection of the statute can be lost (in addition to failing to post or include in contract language the required warning) if the owner doesn’t exercise reasonable care to guard against dangers of structure or equipment on the premises; fails to train or supervise employees engaged in agritourism activities; violates a state or local law related to an agritourism activity; fails to disclose known dangerous conditions on the property; or commits a willful or wanton act or omission that proximately causes injury or death of a participant or damages the participant’s property.¹²

Note: Further, in some states liability release forms, at least with respect to minors, may be deemed to be unenforceable.¹³

Exclusions

Some activities may be excluded from the definition of “agritourism” under a state’s statute. Common activities that might be excluded are roadside stands for fruits and vegetables; operations that are solely for the purpose of selling or merchandising food; medical or retail marijuana activities; rodeos; diving; paintball; various types of bicycling; activities in structures primarily intended for use by the general public; and equine therapy. Again, the point is that each state statute is unique to that particular state and before starting an agritourism activity, the landowner/operator must be familiar with the applicable rules.

Compensation

There are also differences among state agritourism statutes as to whether charging participants a fee changes the landowner/operator’s duty of care. In most of the states with an agritourism statute, the liability protection of the statute applies if the landowner charges a fee. That is the case in AR, CO, DE, FL, KS, KY, ME, MN, MO, NC, ND, OK, OR, SD, TN, TX, VA

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and WI. But, in Alaska, no heightened liability protection is provided by the agritourism statute if a fee must be paid to access the land at issue to engage in an agritourism activity.¹⁴

Other states with an agritourism statute do not mention the issue of compensation and whether charging a fee changes the liability protection of the statute.

Financial Incentives

Some state laws related to agritourism relate to financial incentives via tax credits or cost-sharing, promotion, exemption from permits, protecting the ag real property tax classification of the property involved or providing special classification for structures used for agritourism activities.¹⁵

Some states address agritourism activities either via laws governing agriculture in general or via land-use/zoning laws. This is particularly true for activities that are “events.” For example, Pennsylvania law doesn’t provide any liability protection for injuries occurring during weddings or concerts on the premises.¹⁶


On the tax classification issue, Ohio law includes agritourism in the definition of “land exclusively used devoted to agriculture” for tax assessment purposes.¹⁷ Thus, the definition of “agritourism” is critical in receiving ag classification. On that issue, the Ohio Supreme Court, in *Columbia Township Board of Zoning v. Otis*,¹⁸ held that haunted hay rides on farm property did not constitute the use of land for agricultural purposes because the addition of a Halloween theme with shrieks and flashing lights was completely inconsistent with traditional agricultural activity. Similarly, in *Shore v. Maple Lane Farms, LLC*,¹⁹ the Tennessee Supreme Court reversed a determination by the court of appeals that music concerts on a farm were within the definition of farm activities within the scope of the agritourism statute and were exempt from a county zoning provision. The Tennessee Supreme Court said the activity was not “agriculture” as defined by the statute. Likewise, in *Forster v. Town of Henniker*,²⁰ the court held that the use of a Christmas tree farm for weddings did not meet the definition of agritourism and, as a result, was not “agriculture” for zoning purposes.

Note: On the tax classification/zoning issue, a state agritourism statute may define an agritourism activity involving an event (such as a wedding, concert or festival, etc.) by reference to local zoning rules and ordinances. Such local rules and ordinances may set size limitations, require certain permits, set operational standards and address issues involving sound and light, and restrict the number of guests/participants based on local conditions.

Insurance

Any landowner conducting an agritourism activity on their property should make sure insurance coverage is adequate. It is not likely that a comprehensive farm/ranch liability policy will cover any claims arising from the activity. That’s because an agritourism activity will likely be classified as a non-farm business pursuit of the insured that is excluded from policy coverage. Thus, a separate rider (or policy) may be necessary to provide adequate insurance coverage.

Conclusion

Agritourism activities on a farm or ranch or other rural land can provide an additional income stream for the landowner. For farmers and ranchers, that may be particularly important if current ag markets in Russia, China or Ukraine become lost in the long-term. 

Endnotes

- 1 Chase, et al., *Agritourism and On-Farm Direct Sales Survey: Results for Vermont*, University of Vermont extension (2021).
- 2 *Id.*
- 3 USDA National Agricultural Statistics Service (NASS), 2017 Census of Agriculture, Explanation and Census of Agricultural Report Form, B-24 Appendix B (2019).
- 4 *See e.g.*, Utah Code Ann. §26-15B-105.
- 5 *See e.g.*, Va. Code Ann. §3-2-6400.
- 6 *See e.g.*, Neb. Rev. Stat. §82-604; Tenn. Code Ann. §43-39-103 (requiring posting of warning signs informing of no liability for injury or death arising from inherent risks).
- 7 IL H.B. 5487.
- 8 (*See e.g.*, Neb. Rev. Stat. §82-606(1)(a)).
- 9 Neb. Rev. Stat. §82-606(1)(b).
- 10 *See e.g.*, 3 Pa. Stat. §2604.
- 11 *See e.g.*, N.C. Gen. Stat. §99E-1(a); 4 Tex. Admin. Code §75A.002(a)(1)-(2).
- 12 Neb. Rev. Stat. §82-605.
- 13 *See e.g.*, *Galloway v. State*, 790 N.W.2d 252 (Iowa 2010).
- 14 Alaska Stat. §09.65.202(c)(1).
- 15 *See e.g.*, Md. Code Pub. Safety §12-508 (exempting buildings used for agritourism from performance standards and building permit requirements); Neb. Rev. Stat. §75-303(3)(exempting motor carriers from certain requirements if engaged in transportation related to agritourism); S.C. Code Ann. §6-9-67 (classifying certain structures without a commercial kitchen used in agritourism activity as ag and removes sprinkler system requirement).
- 16 3 Pa. Stat. §§2603(c)(2)-(3) et seq.
- 17 Ohio Rev. Code. §5713.30(A)(4).
- 18 663 N.E.2d 377, 104 Ohio App. 3d 756 (Ohio 1995).
- 19 411 S.W.3d 405 (Tenn. Sup. Ct. 2013).
- 20 167 N.H. 745 (2015).