

# AGRITOURISM LIABILITY

– Module 5 –  
Extension Training to Support Agritourism  
Development in the Northeast

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## ***DISCLAIMER:***

*This information is shared for educational purposes only and does not constitute legal advice.*

*Additionally, visit*

*[www.nationalaglawcenter.org](http://www.nationalaglawcenter.org)*

*for a listing of states' agritourism statutes.*

**Each farm has its own unique circumstances: safety factors, possible legal liabilities, insurance requirements, and optimal business organization.**

**Anyone engaged in agritourism, or thinking of developing an agritourism enterprise, should obtain advice from qualified legal and insurance professionals.**

# AGRICULTURAL LIABILITY



- Farm owners, or those who lease land for a farming operation, **face liability issues**
- If someone enters your property, invited or not, the land owner has **some level of responsibility** for that person's safety
- Liability can apply to both the owner and the 'possessor' of the property.
  - Many states define 'possessor' as the party who is 'in control' of the property area where an injury occurred

# DETERMINING LIABILITY

- **Reasonable care approach**: Requires landowner to exercise reasonable care in any given situation
- **Status-equals-duty-approach**: Varies the duty of the landowner according to the status of the injured person and their relation to the landowner at the time of injury

## Categories of persons on land:

- **Trespasser** – neither invited nor permitted
- **Licensees** – not invited but permitted
- **Invitee** – comes by invitation, whether express or implied
- **Social guest** – invited onto property for mutual enjoyment of hospitality (e.g., party guest)
- **Recreational user** – visitor using nonresidential property for recreational purposes with permission from possessor/owner & without providing compensation.

Imposes the  
highest  
duty of care



Types of Visitors to Farm Property and the typical Duty of Care for Each		
Status of Visitor	Examples	Possessor's Duty
Invitee	Customers U-pick customers Clients Salespeople Delivery persons	Discover and eliminate all known and unknown dangerous conditions, or Warn of all known and unknown dangerous conditions.
Licensee	Firewood cutter, with permission	Eliminate known dangerous conditions, or Warn of known dangerous conditions.
Social guest	Guests at social gathering	Eliminate known dangerous conditions, or Warn of known dangerous conditions.
Recreational User	Hiker Hunter	No duty if meets the state's Recreational User's Statute.
Known Trespasser	Without permission, possessor aware of	Eliminate known dangerous conditions, or Warn of known dangerous conditions.
Unknown Trespasser	Without permission, possessor unaware of	Refrain from harming by willful conduct.
Child Trespasser	Without permission, presence foreseeable	Protect from actively dangerous instrumentalities.

# EXAMPLES OF LIABILITY EXPOSURE

## ■ Premises Liability

- Property owner fails to protect people from potentially hazardous conditions.
- Customer is injured on property or 'premises'
- Examples: slip and fall, equipment usage, contact with animals

## ■ Product Liability

- Injured by a product that was prepared and/or served to them.
- Examples: foreign object in food, becoming ill after consuming food

## ■ Property Damage

- Damage to property of customer by business/employee
- Example: employee hits a customer's car in the parking lot

# EXAMPLES OF LIABILITY EXPOSURE

## ■ Personal Liability

- For businesses that provide a service & service provided inadvertently causes personal harm
- Example: employee spills hot beverage on a customer & it causes a burn

## ■ Employees

- Employer is responsible for employee's actions ("vicarious liability")
- Know employment status – employee vs. independent contractors
- Provide proper employee training to recognize, mitigate, and report risks & hazards
- Vicarious liability – landowner responsible for his/her own actions & for those of people acting on the landowner's behalf (employees & independent contractors)



# POTENTIAL DEFENSES TO LIABILITY

- **Exceeding the Scope of the Invitation or Permission**
  - Example – Visitor enters door that is posted ‘Keep Out – Personnel Only’ & then is injured in the restricted area
  
- **Assumption of Risk**
  - Law does not impose liability on the owner/possessor if a visitor ignores or agrees to accept known risks
  
- **Contributory Negligence**
  - If a visitor’s own negligent act causes or contributes to the injury
  - State law apportions liability according to each party’s degree of negligence
  
- **Recreational User Statue** – owner/possessor has to prove:
  - Owner gave visitor permission to use the property
  - Owner did not receive a payment or any benefit for the visitor’s use of the property
  - Use of the property is “recreational”
  - Applies only to nonresidential property – raises a gray area for farmland that contains a residence
  - BUT, an owner is liable for willful failure to warn or guard against known dangers

# STRATEGIES FOR MANAGING & LIMITING LIABILITY

*“The responsibility to manage risk  
has been placed with the agricultural  
producer and it truly is that  
producer’s freedom to farm or fail.”*

*–Dennis A. Kaan*

# MANAGING LIABILITY

## A Perspective on Liability

- Liability exposure will always be present when there are employees or guests on the farm
- There is no single strategy for effectively protecting against liability
  - Approach liability management holistically, as a program or series of activities
  - Add “layers” of protection that demonstrate a proactive, responsible, and comprehensive approach to farm safety
- Analogy: Managing farm liability and dressing for a cold day...both require layers of protection



Photo: *A Christmas Story* (1983).

# MANAGING LIABILITY

- **Keep your farm safe for visitors and employees!**
  - Routine safety inspections
  - Farm safety plan detailing hazard mitigation strategies/plans of operation
  - Employee training
  - Appropriate communication with farm visitors
  - Response plan for emergencies
- **Organize the business under the appropriate legal structure**
- **Be a good neighbor**
- **Understand and be compliant with applicable federal, state and local laws/regulations/codes/permitting requirements**
  - Understand applicable Right to Farm protections (statute and/or ordinance)
- **Consider the use of waivers**
- **Keep good records**
- **Maintain appropriate insurance**

# ORGANIZE THE BUSINESS TO LIMIT LIABILITY

- Decide which business structure best meets the needs of the owner/operation (e.g., in terms of liability protection, taxes, etc.)
  - Consult, as needed, with legal/accounting/insurance professionals
  - May involve separating the “farm” and “agritourism” businesses

## Examples

- Sole Proprietorship (unincorporated)
- General Partnership
  
- Limited Liability Partnership
- Corporations (C- & S-Corps)

} Greater liability exposure

} Affords more liability protection

# BE A GOOD NEIGHBOR!

- **Recommended Reading:** New Jersey's State Agriculture Development Committee's "Farmer-to-Farmer Advice for Avoiding Conflict" booklet
- Many agritourism farmers acknowledge that "the best right-to-farm protection often amounts to just being a good neighbor."
  - *Get to know neighbors* – "People who know each other are more likely to approach each other when problems arise" (versus complaining to the township or filing a legal complaint)
  - *Help neighbors get to know you!* – Invite neighbors to tour the farm, educate them about what you do.
  - *Communicate* - Listen to neighbors when they express concerns and respect the view point of others. "Respect goes both ways"
  - *Use common courtesy* – Make efforts to minimize noise during certain hours; Promptly remove litter generated by farm/visitors
  - *Other farmer advice: Be involved in the community. Keep the farm clean and attractive. Make the farm an asset in the eyes of the community.*

# FEDERAL, STATE, & LOCAL REGULATIONS

- Identify applicable laws, regulations, codes, and permits **before** starting a project
  - What are they?
  - How long will it take to become compliant?
  - How much will it cost?

# EXAMPLES – REGULATIONS, PERMITS & LICENSES

## General Regulations

- Land Use and Development (county, city)
- Business License and Taxes (county, city)
- Lodging Taxes (county, city)
- Sales Tax Collection and Remittance (state, county, city)
- Americans with Disabilities Act (federal)

## Employment Regulations

- Fair Labor Standards Act (federal, state)
- Child Labor Act (federal, state)
- Occupational Safety and Health Act (federal, state)
- Workers' Compensation (federal, state)
- Unemployment Taxes (federal, state)
- Income Tax Withholding (federal)

## Permits and Licenses for Specific Enterprise Types

- Food Service Permits and Inspections (state, county)
- Retail Food Store Permits and Inspections (state)
- Animal Exhibitor Licensing (federal)
- Winery Licensing (state)
- Access to Public Lands & Wildlife Resources (federal, state, county)

From: [Agritourism in focus: A guide for Tennessee farmers.](#)  
Agricultural Extension Service – The University of Tennessee.



# AGRITOURISM AND RIGHT TO FARM

- All 50 states have right to farm laws that protect farmers engaged in responsible farming practices from nuisance complaints and, potentially, unduly restrictive local regulations
- While right to farm laws may recognize agritourism as a protected activity, the guidelines for what constitutes good or accepted agricultural practices are evolving with the industry
- Know the provisions and extent of protection afforded by your right to farm statute

# NOTICES & LIABILITY WAIVERS

- Have visitors sign a **liability waiver** before entering the farm or engaging in an agritourism activity
  - A document whereby a farm guest “agrees to indemnify and hold harmless the landowner from any claims made by the user or third parties arising from the use of the land or activities”
  - *Waivers do not remove landowner responsibility for the safety of farm visitors...but they are legal documents in the eyes of the court system*
- **Post rules and warnings** regarding known safety hazards.  
Examples:
  - “No consumption of alcoholic beverages allowed”
  - “No smoking on farm”
  - “This is a working farm”
  - “Caution electric fence”
  - “No swimming in pond”
  - “Do not touch animals – they may bite”

# KEEP GOOD RECORDS

- Document all property inspections (e.g., what was done, when, and by whom)
- Record each repair & safety practices installed
- Document all steps & procedures taken to ensure safety
  - Training, emergency plans, signage, fences, etc.
  - Consider taking photos/video to document the condition of the premises and actions to protect visitors
- Keep records of accidents (e.g., incident report forms)
- Make sure important documents can be easily found

# INSURANCE

- An agritourism business should NOT operate without insurance
- Discuss in detail all aspects of a planned agritourism enterprise with an insurance provider
  - Some insurance providers may not accept the risks of an agritourism enterprise
  - Discuss types of coverage appropriate for the operations (e.g., general business liability, umbrella policy, etc.)
  - Understand what is included/covered by each policy.
  - Understand what is specifically excluded by each policy (e.g., the policy's exclusions section)
  - Obtain quotes for various levels of coverage (Considerations: What can the farm afford? What level of risk is the farm willing to accept?)
  - Decide on an insurance strategy (e.g., insure as a single company with multiple policies or separate companies and policies)
- Review insurance policies regularly (at least annually) with an attorney and insurance provider

# INSURANCE

- **Consult with the insurance provider before changing the type(s) or extent of activities offered**
  - Avoid the risk of having a claim denied because an activity is not specifically included in the farm's insurance policy
- **Consult with an insurance provider if visitation levels change**
- **Understand strategies to transfer risk to other parties**
  - E.g., If a third party offers a service or activity on the farm (for example, a food vendor or pony ride operator), be sure they demonstrate proof of appropriate insurance and name the farm/operator as an additional insured
  - Have a written agreement detailing each party's responsibilities

# COMMON INSURANCE TERMS & DEFINITIONS

Common Insurance Terms and Definitions	
Term	Definition
Policy	Written contract for insurance coverage.
Coverage	The dollar amount available from the insurance company to meet liabilities or cover damages as defined in the policy.
Premium	The price paid to the insurance company for the policy.
Deductible	The amount specified in an insurance policy that the insured party must pay out of pocket. It relieves the insurer of responsibility for an initial specified loss.
Covered Peril	Something that imperils or causes risk of injury or loss that is eligible for coverage.
Excluded Peril	Something that causes risk of injury or loss that is not eligible for coverage. Usually, perils not specifically listed as covered are assumed to be excluded.
Claim	A request for payment for damages or loss sustained.
Exposure	The potential for damages or loss.

# **AGRITOURISM LIABILITY & REGULATIONS**

**QUESTIONS?  
COMMENTS?**

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# PROJECT TEAM

## Project Director

- Brian Schilling, Rutgers University

## Co-Project Directors

- Lisa Chase, University of Vermont
- Stephen Komar, Rutgers University
- Lucas Marxen, Rutgers University

## Program Development Team

- William Bamka, Rutgers University
- Richard Brzozowski, University of Maine
- Michelle Infante-Casella, Rutgers University
- Meredith Melendez, Rutgers University
- Samantha Rozier-Rich, EnRiched Consulting
- Kevin Sullivan, Rutgers University
- Laurie Wolinski, University of Delaware

# CONTACTS

## Project Director

### **Brian Schilling**

Assistant Extension Specialist

Rutgers Cooperative Extension

Rutgers, The State University of New Jersey

Cook Office Building, Room 108

55 Dudley Road

New Brunswick, NJ 08901

Tel: (848) 932-9127

[schilling@aesop.rutgers.edu](mailto:schilling@aesop.rutgers.edu)