AGRITOURISM LIABILITY

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

Funded by the Northeast Sustainable Agriculture Research and Education program
Award No. ENE11-121
DISCLAIMER:

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

Additionally, visit 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.
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.

From ‘Understanding agricultural liability’ – Pennsylvania State University Cooperative Extension
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.

From ‘Understanding agricultural liability’ – Pennsylvania State University Cooperative Extension
<table>
<thead>
<tr>
<th>Status of Visitor</th>
<th>Examples</th>
<th>Possessor's Duty</th>
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</thead>
<tbody>
<tr>
<td>Invitee</td>
<td>Customers, U-pick customers, Clients, Salespeople, Delivery persons</td>
<td>Discover and eliminate all known and unknown dangerous conditions, or Warn of all known and unknown dangerous conditions.</td>
</tr>
<tr>
<td>Licensee</td>
<td>Firewood cutter, with permission</td>
<td>Eliminate known dangerous conditions, or Warn of known dangerous conditions.</td>
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<tr>
<td>Social guest</td>
<td>Guests at social gathering</td>
<td>Eliminate known dangerous conditions, or Warn of known dangerous conditions.</td>
</tr>
<tr>
<td>Recreational User</td>
<td>Hiker, Hunter</td>
<td>No duty if meets the state's Recreational User's Statute.</td>
</tr>
<tr>
<td>Known Trespasser</td>
<td>Without permission, possessor aware of</td>
<td>Eliminate known dangerous conditions, or Warn of known dangerous conditions.</td>
</tr>
<tr>
<td>Unknown Trespasser</td>
<td>Without permission, possessor unaware of</td>
<td>Refrain from harming by willful conduct.</td>
</tr>
<tr>
<td>Child Trespasser</td>
<td>Without permission, presence foreseeable</td>
<td>Protect from actively dangerous instrumentalities.</td>
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From PYO and agri-tourism liability and insurance issues for farmers. PickYourOwn.org
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
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

*From Liability for visitors to farm property. University of Kentucky Cooperative Extension Service.*
“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
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

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 viewpoint 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.*
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)

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
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

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Policy</td>
<td>Written contract for insurance coverage.</td>
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<tr>
<td>Coverage</td>
<td>The dollar amount available from the insurance company to meet liabilities or cover damages as defined in the policy.</td>
</tr>
<tr>
<td>Premium</td>
<td>The price paid to the insurance company for the policy.</td>
</tr>
<tr>
<td>Deductible</td>
<td>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.</td>
</tr>
<tr>
<td>Covered Peril</td>
<td>Something that imperils or causes risk of injury or loss that is eligible for coverage.</td>
</tr>
<tr>
<td>Excluded Peril</td>
<td>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.</td>
</tr>
<tr>
<td>Claim</td>
<td>A request for payment for damages or loss sustained.</td>
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<tr>
<td>Exposure</td>
<td>The potential for damages or loss.</td>
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AGRITOURISM LIABILITY & REGULATIONS

QUESTIONS?
COMMENTS?
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