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Fall 2017

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Gislason & Hunter was pleased to participate in numerous Ag events over the summer:

Minnesota Bankers Association Ag Conference
Duluth
June

Sponsor

National Pork Conference
Wisconsin Dells
June

Sponsor

ICBM AG Conference
Mankato
July

Sponsor

Pork Producers Education Day
Mankato
July

Presenter

The Financial Future of Agriculture with Green Seam, Eide Bailly and Profinium
Mankato
July

Ag Mafia Dinner
New Ulm

Door prize Sponsor

Meet and Greet with Sonny Purdue – US Secretary of Agriculture
August
Vernon Center

Gislason & Hunter Ag Lending Conference
Mankato
September 7

Host

AgriGrowth Regional Meeting
Mankato
September

Attendee

Upcoming Events:

Women in Agri Business National Conference
September
Minneapolis

Attendee

Minnesota Pork Producers 5k Run as part of the Mankato Marathon
G&H participated with a team of runners
Mankato
October

Agri-Growth Annual Meeting
November 9

Lunch Sponsor

Farm Bureau Annual Meeting Scholarship Awards
November 17 & 18
Bloomington

Sponsor

Farm Bureau Educational Conference on Water Quality
November 21

Speaker

Estate Planning Seminar for Agriculture
December 6
Courtyard Marriott, Mankato

Host

Rural Legislative Forum
December 19
Verizon Center, Mankato

Participant

MN Pork Producers Taste of Elegance
January 15, 2018
Minneapolis Hilton (I will send a photo)

Sponsor

Ag Expo
January 25 & 26, 2018
Verizon Center, Mankato

Farm Bureau Leadership Conference
January 26 & 27, 2018
Red Wing

Sponsor

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8

CONTENTS

02 **Sponsorships**

- Minnesota Bankers Association Ag Conference
- National Pork Conference
- ICBM AG Conference
- Pork Producers Education Day
- The Financial Future of Agriculture with Green Seam, Eide Bailly and Profinium
- Ag Mafia Dinner
- Meet and Greet with Sonny Purdue – US Secretary of Agriculture
- Gislason & Hunter Ag Lending Conference
- Attended AgriGrowth Regional Meeting
- Women in Agri Business National Conference
- Minnesota Pork Producers 5k run as part of the Mankato Marathon

04 **Upcoming Events**

- Agri-Growth Annual Meeting
- Farm Bureau Annual Meeting Scholarship Awards
- Farm Bureau Educational Conference on Water Quality
- Estate Planning Seminar for Agriculture
- Rural Legislative Forum
- MN Pork Producers Taste of Elegance
- Ag Expo
- Farm Bureau Leadership Conference

FALL 2017

08 **Minnesota Farm Bureau: Engagement beyond the Fence Rows**
by Kevin Paap
Farm Bureay Federation supports farmers' and ag businessmen's common interests.

14 **Minnesota FFA**
by Emily Pliscott
An overview of current and ongoing FFA activities.

16 **Minnesota Tax Update for Farmers**
by Kaitlin Pals
Some highlights from the 2017 Minnesota Omnibus Tax Bill.

20 **Tax Deferral and Accounting Methods**
by David C. Kim
Advantages and risks of "cash" and "accrual" accounting methods for tax reporting.

26 **Who Owns Your Data? Protecting Your Business's Most Important Asset in a Digital Age**
by Matthew Berger
Assessing the risks and advantages of having your equipment collect data on your operations.

32 **Social Media and Confidentiality Policies in the Workplace**
by Brittany King-Asamoa
Hiring and guarding trade secrets in compliance with laws regarding social media.

36 **Protecting Confidential Information: the Minnesota Uniform Trade Secrets Act**
by Mark S. Ullery
General definitions and business practices with respect to MUTSA statue.

40 **Managing Documents in an Agricultural Operation**
by Dean Zimmerli
Creating, implementing, and maintaining a document retention policy for your farm business.

46 **Case Law Update**
by Chris Kamath, Rick Halbur and Sara Wilson
Farmers Were Not "Farmers" for Purposes of Conservation Easement Charitable Deduction

Pink Slime Defamation Lawsuit Settlement Exceeds $177 Million

Utah's "Ag-Gag" Law Declared Unconstitutional

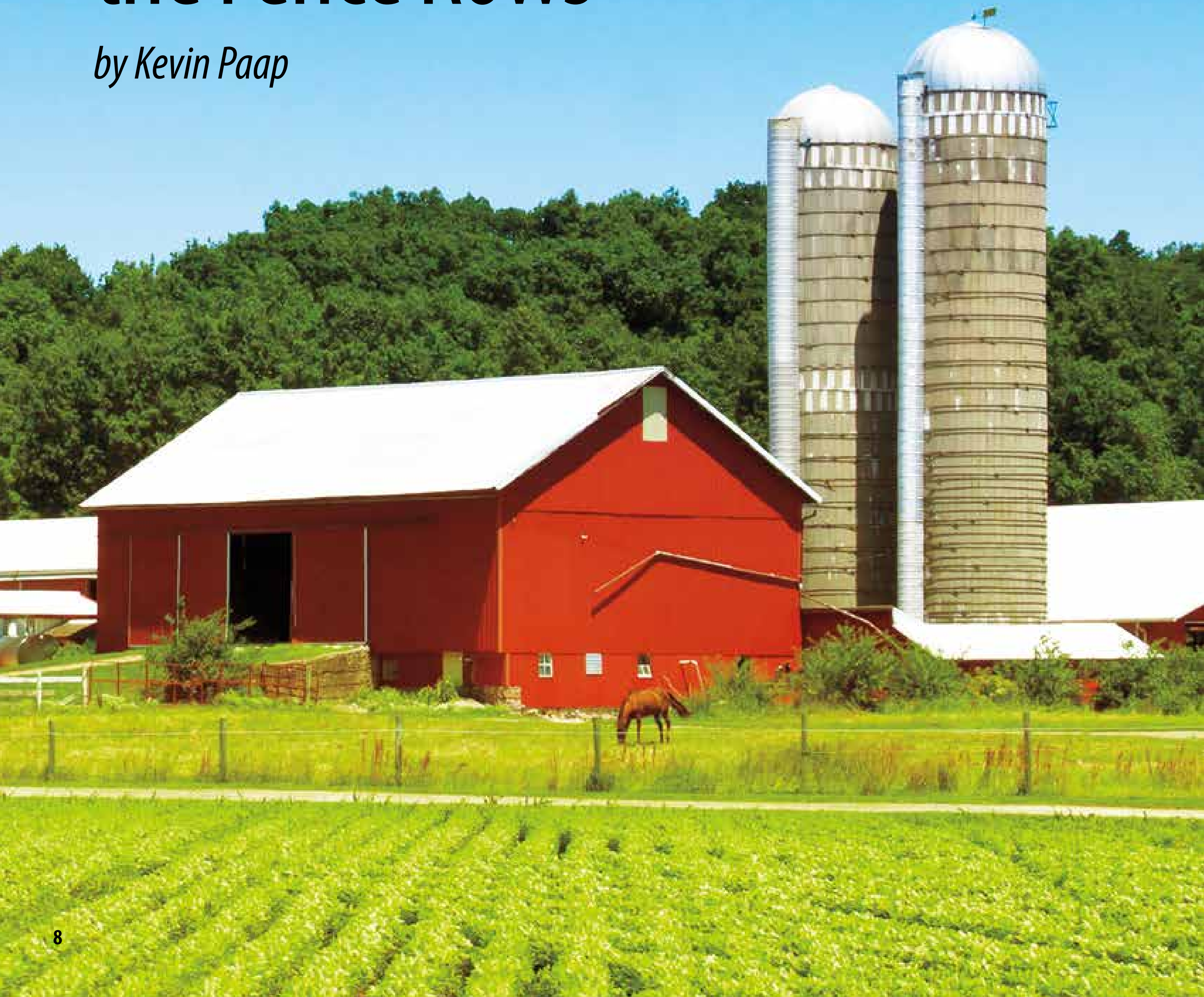
Syngenta Corn Litigation Settlement

Dairy Farmer Wins Jury Award Against Xcel Energy in Stray Voltage Case

Damages Awarded for Breach of Manure Easement Agreement

Minnesota Farm Bureau: Engagement beyond the Fence Rows

by Kevin Paap



You would be hard pressed to find anyone in the agricultural business in Minnesota who isn't familiar with the Minnesota Farm Bureau Federation. We'll be enjoying our 100th birthday in November 2018, and 15 of our 78 county Farm Bureau organizations have already crossed the century mark. The farming community realized long ago that for farmers to be successful, we need to engage beyond the fence rows to support our common interests.

The stated mission of the Farm Bureau is to promote the beliefs and policies of its members. With less than 1 percent of the population currently involved in agriculture, it's pretty clear that if we're not at the table, we're on the menu. That's why we believe we need a strong and united voice for the agricultural community to communicate and promote our priorities to the public and our elected officials.

Meshing all interests of the agricultural community is not always easy. We have associations in Minnesota for nearly every area of agriculture, including the largest state soybean and corn growers associations in the country. In fact, I'm fortunate to be a member of several of those associations, and they are all vital in serving the interests of their members.

But the unique mission of the Farm Bureau is to identify common interests across all of agriculture that we can unite behind and promote as a larger, stronger advocacy federation. As farmers, we've learned that by working together to carve out key issues vital to all of our best interests, we're able to have more influence in both Minnesota and Washington, D.C.

Here are some of the key issues the Minnesota Farm Bureau is currently addressing:

Risk management

The agricultural community faces an ever-present risk of falling commodity prices. We need a strong Farm Bill that provides a safety net for farmers who are subject to the constant volatility of commodity prices.

Technology access

Broadband is as important on the farm as it is in the corporate office. We need Internet speed adequate to run our combines and equipment. We also need it in our homes and offices – not just on the farm but throughout rural America.

Family estates

Family farm owners face a stiff burden of about 40 percent in capital gains taxes when they sell their property. To avoid that burden, many farmers hold on to their property and leave it to their heirs, who inherit it at a stepped-up value that enables them to avoid taxes on the sale of the property.

We believe that a more equitable capital gains tax for farm property sales would actually raise *more* revenue for the IRS because more farmers would be encouraged to sell their property while they are still living. It would also give farm families the chance to pass on the opportunity to the next generation without waiting years to realize that opportunity.

Fair taxes

The Farm Bureau supports a great education for our children, but we don't believe that we should bear an unfair tax burden to cover the cost of that education. In many counties in Minnesota, 60 percent to 80 percent of the tax base is from agriculture. With the number of farmers continuing to decline, the remaining farmers are left with a bigger and bigger portion of that tax bill.

Earning a consistent living in agriculture is difficult enough without shouldering the majority of the funding for our schools. That's why we have been advocating for property tax reform that ensures that our children get the education they deserve, but that farmers are not assessed a disproportionate share of the cost.

Strong trade relations

The easiest way to raise prices for our products is by raising demand. About one-third of our U.S. agricultural production is exported around the world. We would like to see global trade continue to increase.

The real safety net for U.S. farmers is the global market. Since we can grow more food than we can use in this country, the more products we can sell to markets like China that can't grow enough to feed their people, the more profitable our market. Expanding our international demand can help boost commodity prices and open the door to greater production.

We're particularly interested in continuing a strong trade alliance in North America with Canada and Mexico. We realize that NAFTA was created about a quarter of a century ago, and that the agreement could be improved with some modifications, but the agreement has worked well for U.S. farmers. Our exports have tripled since the NAFTA agreement was signed.

As a result, North America has melded into one large economy, and we need to continue to work together for our common interests. We rely on our neighbors in many ways, just as they rely on us. For instance, it's no secret to the Minnesota agricultural community that many of our pigs come from Canada. By working together with our neighbors in Canada and Mexico, we can continue to build a stronger presence in the global market.

Available labor

An adequate labor force, including workers from outside the U.S., is essential for the success of Minnesota farmers. The fact is, we either must import our labor or import our food.

We need a skilled, experienced, reliable labor force to harvest our crops and help care for our animals – and that means the ready availability of outside workers to handle many of our daily chores.

If we were to lose that labor force in Minnesota, half of our cows wouldn't get milked, and, in many cases, we wouldn't be able to raise our pigs or harvest our crops.

The Minnesota Farm Bureau advocates for agricultural labor reform that insures that we'll have the work force available as we need it to operate our farms and harvest our crops.

Who is the Minnesota Farm Bureau Federation?

The Minnesota Farm Bureau is a federation run by the Farm Bureau that serves as an advocate for agriculture. The organization is made up of farmers and those interested in agriculture, and driven by the beliefs and policies of its members.

The first county Farm Bureau on record in Minnesota was organized in 1913. Minnesota Farm Bureau Federation was officially born in November of 1919 as a general farm organization of affiliated county Farm Bureaus. Within four months of its incorporation, the Minnesota Farm Bureau Federation joined the newly formed American Farm Bureau Federation.

Issues championed by the Farm Bureau arise from our members at the local grassroots level and rise to the national level. By working together, sharing ideas, seeking common wisdom, and developing solid solutions, the Farm Bureau seeks to improve the quality of life of everyone serving in the agricultural community in a spirit of voluntary cooperation.

Today, with 78 county Farm Bureaus and nearly 30,000 member families, the Minnesota Farm Bureau Federation continues to follow the ideals of its creators by promoting the beliefs and policies of its members. Nationwide, there are Farm Bureaus in all 50 states and Puerto Rico.

What does Farm Bureau do for its members?

The Minnesota Farm Bureau Federation advocates the policies developed by our members.

- Members are engaged by surfacing ideas and identifying actionable policy proposals.
- Members are involved to accomplish issue focus areas.
- Members are instrumental in the successful election of farm-friendly government leaders.

The Minnesota Farm Bureau Federation recognizes, empowers and engages our members.

- Members are provided opportunities for leadership development and growth.
- Members' strengths are identified and utilized.

The Minnesota Farm Bureau Federation enhances and strengthens its profile.

- Members strengthen the Farm Bureau brand.
- Members earn trust from key influencers.

Future Farmers of America

The young people in our communities are the ones who will determine the future not only of the agricultural industry but also of our communities. We need to invest in the development of their skills and their ability to be strong leaders. We need for them to understand the importance of agriculture in their community and their country, and to develop the leadership abilities they need to advocate effectively for the issues that are important to the future of agriculture.

Conveying our message

Since the very beginning, the Farm Bureau has been here to help farmers in a variety of ways, including education, advocacy and access to insurance. Our role as advocate for farmers has become more important than ever as the size of the farming community has continued to shrink. With fewer voices, we need to be smarter and more effective in getting our message out to both our elected officials and the consumers who eat our foods.

A recent statewide survey in Minnesota showed that 58 percent of Minnesotans couldn't identify a farmer that they know personally. That percentage was even higher in Minneapolis and St. Paul – and among Minnesotans in the 18- to 35-year-old age group.

That's a reality in our culture today that is not going to change, so we need to find other ways to connect with consumers.

The Farm Bureau has always put an emphasis on conveying our priorities to our elected officials, but we've become increasingly aware that engaging with the general public is just as important. It's our job to open the channels of engagement between the farmers who raise the food and the consumers who eat it.

We need to take every opportunity to connect consumers with the business of agriculture, because if consumers don't understand our issues, they're unlikely to support us – and we need their support to keep agriculture vibrant and successful in Minnesota.

One way we've been able to stay in front of consumers in Minnesota is through the nation's largest state fair. Half of the nearly two million annual Minnesota State Fair attendees take a stroll through the agricultural buildings to see the crops and the livestock. That's the perfect environment for the farming community to connect with about a million consumers in one setting.

But we need to find ways to promote our industry through other channels, and to help consumers understand the huge impact farming has on the state's economy. The success of Minnesota's farmers contributes to the success of the entire state economy and everyone in Minnesota.

It's our job at the Minnesota Farm Bureau Federation to do all we can to encourage all Minnesotans to support the issues that help our state's farmers continue their tradition of success for many generations to come.

Kevin Paap
President of the Minnesota Farm Bureau Federation

Kevin Paap has served as president of the Minnesota Farm Bureau Federation since his election in 2005 – and he plans to run for his seventh two-year term in 2018. He is currently serving on the American Farm Bureau Federation board of directors, having first been elected in 2012. Kevin and his wife Julie own and operate a fourth-generation family farm in Blue Earth County near Garden City. They have two sons and one daughter-in-law. The Paaps raise corn and soybeans. Kevin has been a lifelong Farm Bureau member. Before his election as Farm Bureau president, Kevin served as vice president from 1997 to 2005.

MINNESOTA FFA

by Emily Pliscott

After the gavel dropped at state convention for the very last time of the year this April, Minnesota FFA launched into a busy summer.With renewed vigor, the organization is working with nearly 11,000 FFA members and over 20,000 high school agriculture students to develop the next generations of leaders in agriculture.

To prepare for a new school year, 350 members explored their opportunities in agriculture and honed their leadership skills at State Greenhand Leadership Conference and State Leadership Conference for Chapter Leaders. This conference took place in Hackensack, Minnesota at Deep Portage Conservation Center, where the state officers led workshops devoted to personal growth, connecting with communities, and each part of the program of activities. New members discovered Supervised Agriculture Experience opportunities and focused on Career Development Events and the paths they can travel within FFA.

Also in Hackensack, 64 region officers from all around the state attend the POWER (Providing Officers With Essential Resources) conference. There, officers developed the skills they need to serve thousands of members in each of their respective regions. Using this training, each team will put on numerous events for area students.

Focusing on career success, the Minnesota FFA Association piloted a conference called InTENse this year. Over the course of of five days, twenty-two students visited six college campuses and explored opportunities in companies they could someday work for–from exploring an organic farm and hearing about the day-to-day responsibilities of a zoologist to learning about the importance of communication specialists. Cannon Falls FFA member Jeremy Soine reflected, “My experience at InTENse helped show that there is a career for anyone and if you are passionate about something, not to let anything get in the way of achieving your dreams. ”Today, he and many other members are excited to pursue careers in agriculture and check out more options at both two and four year schools, as well as various trade programs.

As August and September approached, FFA was well represented at the Minnesota State Fair this year. Throughout all twelve days of the fair, FFA members and staff ran the CHS Miracle of Birth Center and the FFA Chapter Leadership House on the grounds and shared an experience with livestock with over one million consumers. Other FFA members were busy caring for and showing livestock during the last four days as well as displaying welding and other skills. It was a great end to a summer of growth and allowed hardworking students from each part of the state to be recognized for their dedication.

Heading into the school year, members are placing a huge focus on advocacy. The state officer team challenged each of the eight geographical regions of Minnesota to put together a social media and advocacy plan to better equip each of the members to share positive messages of agriculture and encourage others to learn more and share true stories in ag. FFA is excited to continue to provide numerous opportunities for youth in agriculture.

2016 National FFA Convention

CAREER DEVELOPMENT EVENTS

- **Gold Ranking**: 12 teams – Ag Comm, Agronomy, Dairy Cattle Evaluation, Environmental & Natural Resources Farm Business Mgmt, Floriculture, Food Science, Horse Evaluation, Livestock Evaluation, Meats Evaluation, Nursery/Landscape & Parliamentary Procedure
- **Silver Ranking:** 7 events – Ag Issues, Ag Sales, Ag Technology & Mechanical Systems, Dairy Handling, Extemporaneous Speaking, Poultry, Prepared Speaking
- **Bronze Ranking:** 2 events – Creed Speaking, Veterinary Science
- **Highlights:** Food Science – National 1st Place Team (Windom), 2nd place individuals in both Ag Comm and Floriculture). Top five teams: Floriculture, Food Science & Nursery/Landscape. 33 Gold Ranked individual students.

SUPERVISED AGRICULTURAL EXPERIENCES

- **105 American Degree Recipients**
- **13 student finalists in Agriscience Fair –** 3 Gold Ranked projects, 2 students 2nd nationally.
- **12 Proficiency Award Finalists –** 5 National Winners!
    - **Ag Mech Design & Fabrication –** Spencer Wolter, Windom
    - **Ag Mech Repair & Maintenance –** Alex Warmka, USC
    - **Dairy Production –** Sabrina Portner, Sleepy Eye
    - **Diversified Crop Production –** Colin Wegner, USC
    - **Fiber & Oil Crop Production –** Elizabeth Wilts, KMS
- **2 Finalists for American Star**
    - **Finalist for Star in Agribusiness –** David Stenzel, USC
    - **Winner in Ag Placement –** Brett Petersen, KMS

LEADERSHIP RECOGNITION

- **18 National Chapter Award Winners:** 4 Three-Star Chapters
    - Rockford Middle School was a Model of Innovation finalist
- **15 students represented MN onstage** in band, chorus and talent
- **Nominating Committee Member –** Mariah Daninger, Forest Lake
- **National FFA Officer –** Valerie Earley, Spring Valley-Wykoff

Emily Pliscott, currently serving as the Minnesota State FFA Vice President, hails from Kenyon, Minnesota. She is the daughter of Duane Pliscott, an agriculture educator and FFA advisor, and Kathryn Johnson. She has been a member of the Kenyon-Wanamingo FFA chapter since 2011 and began raising and showing market goats that year, going on to complete independent soybean research and be employed by Monsanto for corn pollination. Through her FFA experiences, she discovered a passion for sharing about agriculture, and chose to make this passion her vocation. Pliscott is now a freshman pursuing a degree in Agricultural Communications and Marketing at the University of Minnesota.

MINNESOTA TAX UPDATE FOR FARMERS

by Kaitlin Pals

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The Omnibus Tax Bill, passed by the Minnesota Legislature and signed into law amid some controversy this summer, contains several changes and new provisions that impact farmers. Below are some of the highlights:

- **Beginning Farmer Program.** The Beginning Farmer Program is a particularly exciting new tax law. Though it shares some similarities with programs in Iowa and Nebraska, it is the first in the nation to incentivize selling farmland to young farmers. The program is available starting January 1, 2018, and sunsets at the end of 2023.

  The program has two main components: a tax credit available to qualified owners who sell or lease to a beginning farmer, and a tax credit for the beginning farmer himself or herself.

  - **Tax Credit for Sales and Leases to Beginning Farmers.** A taxpayer can claim a nonrefundable credit against Minnesota income tax for selling or leasing agricultural land, buildings, machinery or livestock to a beginning farmer:

    - The credit for <u>selling</u> property is 5% of the sale price or fair market value of the property, whichever is less, capped at $32,000.

    - The credit for <u>cash renting</u> property is 10% of the gross rental income for three years, capped at $7,000 per year.

    - The credit for <u>sharecropping</u> is 15% of the cash equivalent of the gross rental income for three years, capped at $10,000 per year.

    Rental agreements must be for the "prevailing community rate" and approved by RFA.

The beginning farmer must be a Minnesota resident, intending to farm in Minnesota, who is just starting out or has been farming for ten years or less. He or she must also meet several other requirements established by law and the Rural Finance Authority, including having a net worth of $800,000 or less and providing the majority of the physical labor and management for the farming operation. The beginning farmer must also enroll in a farm financial management program approved by RFA.

The person selling or leasing the property to the beginning farmer must not be a family member of the beginning farmer or his or her spouse. However, leases or sales between cousins or between aunts/uncles and nieces/nephews are eligible.

The owner and the beginning farmer must apply to RFA, which will certify beginning farmers and owners for the tax credits. RFA is capped at certifying $5 million in tax credits for 2018 and $6 million for 2019 and each year thereafter through 2023. Credits are awarded on a first-come, first-served basis, so it is important to apply early.

- o **Beginning Farmer Financial Management Tax Credit.** A beginning farmer who is certified for the program can also claim a Minnesota income tax credit equal to the cost of participating in an approved farm financial management program, capped at $1,500 per year for three years.

- **School Building Bond Agricultural Credit.** The Omnibus Tax Bill provides some relief to agricultural land owners for school building bonds.

The credit is equal to 40% of the tax that would have been assessed to the real estate on account of a school building bond. The amount will instead be paid out of the state's general fund.

The credit applies to real estate classified as "Class 2" for property tax purposes–which includes land in agricultural production, land enrolled in CRP or a similar conservation program, pasture and rural woodlands–except for the actual house, garage and surrounding one acre of rural homesteads.

This law goes into effect for taxes payable in 2018 and after.

- **Estate Tax Changes.** Minnesota's Estate Tax also has significant changes. Minnesota raised the exemption for estates of persons dying in 2017 and increased the amount of property that can pass free of Minnesota Estate Tax over the next three years. (see table below)

The Omnibus Tax Bill also included technical fixes to the Qualified Farm Property Deduction. The Qualified Farm Property Deduction is a special, extra deduction from Minnesota Estate Tax available to certain homesteaded agricultural real estate. The heirs to qualifying land must agree not to sell the land for three years, and to keep the land in agricultural production–whether by farming it themselves or renting to a non-family member–during the three-year period.

The technical amendments to the law ensure that certain changes to the land's property tax classification outside the heirs' control do not make the land ineligible for the Qualified Farm Property Deduction.

Land still qualifies if the County Assessor re-classifies up to 20% of the parcel as "Class 2b" land (woodlands, pasture and waste) during the three-year period, as long as the heirs didn't substantially alter the property.

Similarly, the tax classification of a house on farm property often changes when an owner dies if a family member does not move in. The new law clarifies that the Deduction is not destroyed if a farmhouse's classification changes from homestead to residential non-homestead within the three-year period.

These changes are effective retroactively, all the way back to estates of decedents dying after June 30, 2011.

- **Residency Factors.** Many retirees attempt to move out of Minnesota to avoid Minnesota income taxation, but still return frequently to the state for visits. Taxing authorities often challenge whether a former Minnesotan has truly given up their Minnesota domicile, based on their continued personal and business connections in the state.

The new law makes certain business and advisory relationships "off limits" when Minnesota Revenue or a court determines whether a person is domiciled in Minnesota for income tax purposes.

Year of Death	Old Law	New Law
2017	$1.8 Million Basic Exemption Tax Rate 10%–16%	$2.1 Million Basic Exemption Tax Rate 12%–16%
2018	$2.0 Million Basic Exemption Tax Rate 10%–16%	$2.4 Million Basic Exemption Tax Rate 13%–16%
2019	$2.0 Million Basic Exemption Tax Rate 10%–16%	$2.7 Million Basic Exemption Tax Rate 13%–16%
2020	$2.0 Million Basic Exemption Tax Rate 10%–16%	$3.0 Million Basic Exemption Tax Rate 13%–16%

The following cannot be considered as factors in determining if you are domiciled in Minnesota:

- o You make charitable donations to nonprofits or churches in Minnesota;
- o You use a Minnesota attorney, CPA, financial planner or adviser, insurance agent or investment broker;
- o You bank at or use trust services provided by a bank or credit union located in Minnesota.

- **Early Termination of Agricultural Preserve.** Agricultural Preserve is a property tax program that allows agricultural land owners in the Metro Counties (Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington) to pay a lower tax rate. and for their land to be valued based solely on its agricultural use, not its potential for development.

  Applicants must agree to keep the land in agricultural production. In order to get out of the program, the taxpayer or the County must provide the other party notice at least eight years in advance.

  The Omnibus Tax Bill gives Agricultural Preserve enrollees a way of getting out of the program upon the death of an owner. Now, if an owner or spouse of an owner of Agricultural Preserve property dies, the deceased's Personal Representative or Trustee can elect to terminate the Agricultural Preserve enrollment within one year of date of death. The land is assessed an additional tax equal to 50% of the taxes actually charged against the real estate in the year enrollment is terminated.

  This provision went into effect on July 1, 2017.

- **529 College Savings Plan Credits and Subtractions.** Looking for an easy end-of-year tax planning tool? Section 529 Plans have always had significant tax advantages for the plan beneficiaries. Minnesota is now giving tax incentives to contributors to Section 529 Plans, too.

Contributions made to a Section 529 Plan investment account grow tax-free. The beneficiary can withdraw the funds tax-free, as long as they are used for qualifying education expenses like tuition, books, and room and board.

Now, there are two new tax-saving opportunities for contributors to Section 529 Plans, available in 2017:

- o **Tax Subtraction.** A taxpayer can subtract up to $1,500 in contributions to a 529 Plan ($3,000 for married joint filers) from Minnesota taxable income;

  OR

- o **Tax Credit.** A taxpayer can claim a tax credit for 50% of their contributions to a 529 Plan, up to a maximum credit of $500. The credit begins to phase out for individual and joint married filers with adjusted gross incomes over $75,000.

There are no restrictions on whom you can name as the beneficiary of a Section 529 Plan in order to qualify for the tax subtraction or credit.

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Tax Deferral and Accounting Methods

by David C. Kim

Among the tax accounting methods allowed under the Internal Revenue Code, farmers' favorable choice has been cash (as compared to "accrual") method of tax accounting and reporting. Obviously, the predominant benefit of the cash-basis accounting is that it allows farmers to defer otherwise taxable income accrued during the current tax year to the subsequent tax year, and to further reduce the taxable income of the current tax year by making prepayments of expenses for the trade or business expense items of the following tax year. On the other hand, the accrual-basis tax accounting may not necessarily allow this tax planning opportunity because, under the accrual method, taxpayers are required to recognize taxable income when it is "accrued" regardless of its cash receipt. However, accumulation of tax deferral has been causing different headaches to farmers, mainly due to the "snowball" effect of the size of deferral growing bigger every year and thus requiring tax planning or deferral in earlier months or bigger size every year. In theory, a farmer may encounter a situation where he or she may have to start tax deferral as early as in the month of January to achieve the same tax planning goal. If so, the potential benefit of such tax planning may be outweighed by many other costs or problems. One noticeable issue is the adequacy of the working capital to support the farming operation. Another problem is that the accounts receivable or prepaid expenses are typically "unsecured" and are subject to a possibility of forfeiture in case of any bankruptcy or insolvency of the counterparts of the transactions. Also, the Internal Revenue Code requires certain corporations and partnerships to change to accrual accounting under certain circumstances, requiring the farmer to pay all deferred taxes in a short time period. This article is to discuss, in general, how the tax law allows or disallows cash method of tax accounting to certain taxpayers, how the method may be changed voluntarily or involuntarily by a taxpayer, and what other factors should be considered in conjunction with a tax planning strategy.

I. Cash Accounting Eligibility.

a. In General. Section 446 of the Internal Revenue Code recognizes both "cash receipts and disbursements method" and "accrual method" as permissible methods of tax accounting. However, certain provisions of the Internal Revenue Code and the IRS Regulations expressly provide for certain special rules and exceptions. So, in general, a taxpayer may use the cash method of tax accounting unless the taxpayer is either expressly prohibited to use the cash method or expressly required to use the accrual method under any applicable provisions of the Internal Revenue Code or the IRS Regulations. The Internal Revenue Service (the "IRS") takes the position that a taxpayer engaged in the trade or business of farming generally is allowed to use the cash method for any farming business, unless the taxpayer is required to use an accrual method under Section 447 or is prohibited from using the cash method under Section 448.

b. Special Rules. There are a couple of noteworthy special rules applicable to farmers.

(i) **Non-Family Farm C Corporations with More than $1 Million of Gross Receipt**. Section 448 of the Internal Revenue Code generally prohibits a C corporation that is not a "farming business" from using the cash receipts and disbursements method of accounting. Under the statute, the "farming business" means the trade or business of farming. Further, Under Section 447 of the Internal Revenue Code, the taxable income from farming of a C corporation engaged in the trade or business of farming shall be computed on an accrual method of accounting unless the gross receipt of the C corporation and its related corporate entities in every prior tax year stayed at or under $1 million. For calculating the $1 million gross receipt test, all corporations which are members of the same controlled group of corporations (within the meaning of Section 1563(a) of the Internal Revenue Code) shall be treated as one corporation.

(ii) **Non-Family Farm C Corporations with $1 Million or Less of Gross Receipt**. Under Sections 446, 447 and 448 of the Internal Revenue Code, a C corporation engaged in the trade or business of farming whose gross receipt (as aggregated with all other corporations within the same controlled group of corporations) does not exceed $1 million is eligible for the cash accounting method.

(iii) **<u>Family Farm C Corporations with $25 Million or Less of Gross Receipt</u>**. Section 447(d)(2)(A)(ii) expands the eligibility for cash accounting method to "family corporations" engaged in the trade or business of farming. Accordingly, any family corporation engaged in the trade or business of farming is eligible for the cash method of accounting so long as its gross receipt (as aggregated with all other corporations within the same controlled group of corporations) does not exceed $25 million. For family corporations, the following special rules apply:

(A) **<u>Special Aggregation Rule</u>**. The aggregation rule for determining the gross receipt of all corporations within the same controlled group where a corporation is a family corporation also has a special exception. So, in the case of a family corporation, only the applicable percentage (as compared to the entire 100%, which is the case for other non-family corporations) of gross receipts of any other member of any controlled group of corporations of which such corporation is a member shall be taken into account, and gross receipts of such corporation or of another member of such group shall not be taken into account by such corporation more than once. "Applicable percentage" means the percentage equal to a fraction where (i) the numerator is the fair market value of the stock of another corporation held directly or indirectly as of the close of the taxable year by the family corporation, and (ii) the denominator is the fair market value of all stock of such corporation as of such time. If a family corporation holds directly or indirectly any interest in a partnership, estate, trust or other pass-thru entity, such corporation shall take into account its proportionate share of the gross receipts of such entity.

(B) **<u>"Family Corporation" Defined.</u>** For the purposes of Section 447 of the Internal Revenue Code, the term "family corporation" means:

(i) any corporation if at least 50 percent of the total combined voting power of all classes of stock entitled to vote, and at least 50 percent of all other classes of stock of the corporation, are owned by members of the same family;

(ii) any corporation in which members of 2 families have owned at least 65 percent of the total combined voting power of all classes of stock of such corporation entitled to vote, and at least 65 percent of the total number of shares of all other classes of stock of such corporation; and

(iii) any corporation in which members of 3 families have owned at least 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote, and at least 50 percent of the total number of shares of all other classes of stock of such corporation and substantially all of the stock of such corporation which is not so owned by members of such 3 families is owned directly: (A) by employees of the corporation or members of their families, or (B) by a trust for the benefit of the employees of such corporation which is described in Section 401(a) of the Internal Revenue Code and which is exempt from taxation under Section 501(a) of the Internal Revenue Code .

In applying above principles, the "members of the same family" are an individual, such individual's brothers and sisters, the brothers and sisters of such individual's parents and grandparents, the ancestors and lineal descendants or any of the foregoing, a spouse of any of the foregoing, and the estate of any of the foregoing.

(iv) **<u>Farming Partnership with C Corporation Partners.</u>** Above described special rules allowing or disallowing cash method accounting applies to any partnership engaged in the trade or business of farming if a C corporation is a partner in such partnership. So, for instance, if a partner inside of a partnership engaged in the trade or business of farming is a Corporation and the Corporation is not a family corporation and its gross receipt exceeds $1 million, then the partnership is not eligible for a cash-basis tax accounting. On the other hand, if the C Corporation which is a partner of the partnership engaged in the trade or business of farming is a family corporation, the partnership may not be denied cash accounting method so long as the C Corporation's gross receipt does not exceed $25 million.

c. <u>Other Farming Entities.</u> Considering the above general and special rules, the following types of taxpayers engaged in the trade or business of farming are eligible for cash basis tax accounting:

(i) S corporations;

(ii) Limited liability companies electing to be taxed as an S corporation;

(iii) Limited liability companies electing to be taxed as a partnership so long as it does not have a C corporation member who violates the gross receipt test discussed above;

(iv) Partnerships so long as it does not have a C corporation partner who violates the gross receipt test discussed above; and

(v) Sole proprietorships.

II. **Changing Accounting Methods.**

a. **IRS Consent Requirement.** In case a taxpayer wishes or has to change from the cash method accounting to the accrual method of accounting or vice versa, the Internal Revenue Code and the IRS Regulations require the taxpayer to obtain consent from the IRS prior to such change. Such consent should be secured whether or not the accounting method switched to is proper or is permitted under the Internal Revenue Code or the IRS Regulations. The process should begin by preparing the IRS Form 3115 "Application for Change in Accounting Method" and filing it with the IRS during the taxable year for which the taxpayer desires to make the proposed change in method of accounting. In Revenue Procedure 97-27, the IRS says a taxpayer generally receives more favorable terms and conditions if the taxpayer files its request for a change in accounting method before the IRS contacts the taxpayer for examination. It further says that a taxpayer contacted for examination and required to change its method of accounting by the IRS generally receives less favorable terms and conditions and may also be subject to penalties.

b. **Tax Adjustments Triggered by Accounting Method Change.** When the taxpayer's accounting method is changed, in computing the taxpayer's taxable income, Section 481(a) of the Internal Revenue Code requires those adjustments necessary to prevent amounts from being duplicated or omitted to be taken into account. Taxable income for the taxable year preceding the year of change should be determined under the method of accounting that was then employed, and taxable income for the year of change and the following taxable years should be determined under the method of accounting for which the IRS's consent is granted as if that method of accounting had always been used. For instance, in the case of a taxpayer who used cash method accounting for its tax year 2016 in which the taxpayer's taxable income was $100,000 with a deferred income of $1 million, if the taxpayer voluntarily changes its accounting method to accrual method under the IRS consent in its tax year 2017 in which the accrued taxable income (without considering the Section 481(a) adjustment) is $1.5 million, the taxpayer will have net positive Section 481(a) adjustment of $1 million, which needs to be taken into account in determining the taxable income for the taxpayer's 2017 tax.

c. **Time of Adjustment.** In the event of any positive (i.e., taxpayer owes more tax) or negative (i.e., taxpayer overpaid tax) Section 481(a) adjustment results due to accounting method change, Rev. Proc. 2015-13 provides for the guidelines as to how soon such amount should be included in the taxable income for the taxpayer.Under Rev. Proc. 2015-13, the "§ 481(a) adjustment period" is the applicable number of taxable years that the taxpayer takes into account the § 481(a) adjustment required as a result of the change in method of accounting, beginning with the year of change. Consistent with the IRS's previous position, Rev. Proc. 2015-13 creates a system where a taxpayer who is forced to change its accounting method by the IRS through an audit (as compared to a taxpayer who voluntarily initiated such change prior to an audit) has to pay any positive tax adjustments resulting from such change in a shorter time period.

(i) **Taxpayers Initiating Accounting Change**. In general, the § 481(a) adjustment period is one taxable year (year of change) for a negative § 481(a) adjustment and four taxable years (year of change and next three taxable years) for a positive § 481(a) adjustment. As an example, the taxpayer illustrated above should recognize $250,000 as taxable income in each tax year 2017, 2018, 2019, and 2020.

(ii) **Taxpayers under Audit with Positive 481(a) Adjustments.** The four-year rule described above does not apply to a taxpayer who is under the IRS audit. Instead, the § 481(a) adjustment period is two taxable years (year of change and next taxable year) for a positive § 481(a) adjustment for a change in method of accounting requested when a taxpayer is under examination by the IRS.

III. Planning Ahead

In the previous portion of this article, we have identified certain events that may trigger "ineligibility" of a farming entity to keep books for tax accounting under the cash method. Those involve situations where a C corporation is the taxpayer or where a C corporation is a partner of a taxpayer which is taxed as a partnership under the Internal Revenue Code. As we discussed above, depending on whether the C corporation is a family corporation or not, the level of gross receipt allowed may differ. On the other hand, when or if any event occurs to a taxpayer disqualifying its eligibility for the cash method accounting in any given year, it is the taxpayer's affirmative duty to timely and properly file application for change with the IRS and to make adequate adjustments to its tax reporting and payment. In case such duty is neglected, the penalty could be significant, as we observed above. On the other hand, any disqualifying event may not be so obvious to a taxpayer. For instance, unbeknown to a taxpayer farm partnership, a partner of it may either volitionally elect to be taxed as a C corporation, or, as would often be the case, inadvertently terminate its S status in any tax year. In other examples, a farming corporation may lose its qualification and may become a non-farming corporation causing the drop down of the $25 million gross receipt tolerance level to $1 million. In choosing and maintaining a tax accounting method, farming taxpayers may want to consider the following factors:

a. **C Corporation Tax Rate**. Currently, the top tax rate applicable to C corporations is 35% under the Internal Revenue Code. Under the Unified Tax Reform Framework announced by the Trump administration on September 27, 2017 (the "Trump Tax Plan"), the top corporate tax rate will drop down to 20%. Under the Trump Tax Plan, the current top individual tax rate, which is 39.6% may drop down to 35%. So, the gap between the corporate rate and individual rate, which is merely 4.6% today, may be widened to 15% under the Trump Tax Plan. For certain farming entities, then, there may be noticeable advantage in considering C corporation as its tax type in coming years. Unless the rules that we have discussed above also change under the Trump Tax Plan (as to which, no change has been indicated under the Trump Tax Plan), switching over to a C corporation from any pass-thru tax entity would require careful financial and fiscal planning to manage the increased tax liabilities that may result as a part of the change in tax accounting method (i.e., any positive Section 481 adjustments). As we observed, the IRS has clearly created a system which encourages and rewards taxpayers making changes toward accrual accounting method.

b. **Cost of Tax Deferral**. Tax planning-driven deferral is not free of cost. It requires sizable working capital reserve in order to be able to finance the cash needs while no revenue is received during the tax deferral season. In the event the taxpayer does not have enough cash, then such cash need has to be satisfied by borrowing, though the taxpayer will incur interest, loan fees, and various transaction costs. On the other hand, any revenue withheld during the tax deferral season does not necessarily generate any interest income or other economic benefit to the taxpayer. Assuming tax deferral as purely a postponement of tax (as compared to a discharge of forgiveness), meaning, it will be paid to the IRS in later years, especially when the taxpayer goes through extra ordinary events such as the sale of business, it is a possibility that the benefit of the tax deferral may be outweighed by those additional interests, loan fees, and other costs.

c. **Risk of Tax Deferral**. Any account receivable created by a taxpayer's deferral of revenue receipt bears the counter party credit risk. Apparently, the taxpayer's account receivable is an unsecured credit which could be crammed down in case of a bankruptcy or insolvency of the payor. Credit enhancement (i.e., letter of credit or surety bonds) is not popular and often is rejected by the payors/buyers. Credit enhancement tools are not free of cost to the payors/buyers where the deferral is desired by the payee/seller's (and not the payor/buyer's) tax planning needs. When taxpayers start having tens of millions of dollars in tax deferral – in other words, sizable amount of unsecured account receivable during unconventionally long period – it not only could be a basis for a loan covenant violation under a credit facility that the payee/seller may have with its working capital lender, but also threatens the financial stability of the payee/seller.

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Who Owns Your Data? Protecting Your Business's Proprietary Information in a Digital Age

by Matthew Berger

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Successful leaders have long recognized the importance of accumulating, processing, and understanding information to the success of a wide variety of enterprises. Napoleon Bonaparte is famously quoted as saying, "War is ninety percent information." Carly Fiorina, the former Chief Executive Officer of Hewlett-Packard and presidential candidate, stated that "[t]he goal is to turn data into information, and information into insight."Even more succinctly, more than 400 years ago, Sir Francis Bacon wrote, "Knowledge itself is power."

The last few years have seen an explosion of business applications for "analytics" or "big data." Earlier this year, Facebook's market valuation exceeded $500 billion, with a significant portion of this value attributed to the information about its more than 2 billion monthly active users that Facebook collects, aggregates, analyzes, and markets for commercial purposes. Moreover, many of us constantly carry and use smartphones that are continuously collecting information about our location,

communications, and other personal and business activities. Such data presents a virtual treasure trove of business opportunities for those with the ability to effectively store and efficiently analyze this data. Indeed, since it famously unveiled its Watson computer system in 2001 via a commanding victory against two past champions on the gameshow "Jeopardy!", IBM has refined, marketed, and used the Watson computing system to analyze massive data sets for a wide variety of business and scientific applications. These examples—as well as countless others—demonstrate the increasing value of "big data" to modern business.

Agriculture businesses are not immune from these trends. Modern crop farming equipment contain complex computer systems and software that are able to track, collect, and store data regarding planting, fertilizer applications, harvest yields, and other pertinent information regarding farming activities on specific areas of each field. Modern dairy operations use RFID readers and other computer systems and software to collect and store information about feed consumption and milk production of each particular cow. And many modern livestock operations use computer systems and software to store detailed information about breeding, litter size, food consumption, meat quality, and other details that allow farmers and ranchers to more efficiently and consistently raise animals that will produce more and better meat.

But while the business benefits of "big data" are readily apparent, the threats that this data may pose to our businesses are often overlooked until it is too late. Target, Sony, and several other major businesses have experienced data breaches that exposed confidential information in the last few years. Most recently, Equifax—one of the three main consumer credit reporting agencies that collects and aggregates information on more than 800 million individual consumers and more than 88 million businesses – announced a massive breach a few months ago that exposed private information of up to 145 million consumers in the United States to hackers and potential identity thieves.

These incidents illustrate significant legal issues surrounding "big data" that we often ignore when implementing new technologies. Who owns the "data" that is collected and stored by modern farm equipment and software applications? What restrictions exist on the dissemination

and use of the information that is collected? And what measure have been (or will be) implemented to protect our information from exposure or misuse?

The answer to these questions begins with a relatively simple premise – generally speaking, the owner of a device that "creates" data is the owner of that data. Thus, if a combine generates crop yield data as it is used to harvest crops, the owner of the combine will generally be the owner of the data. This general rule, however, may be modified by contract. Thus, if a farmer leases a combine to harvest his crops, or hires a custom operator to harvest the farmer's crops, the contracts may provide that the farmer who owns the field – rather than the owner of the combine or the custom operator – will own any data that is generated from the use of the combine on the farmer's fields.

But most devices that generate data utilize software to control the collection, aggregation, storage, and display of the data. Software is also used to allow livestock farmers and ranchers to input, aggregate, store, and display data regarding their farming operations. The use of this software is generally governed by a licensing agreement that grants the user the right to use the software.In many cases, the licensing agreement may be contained in terms of use that a user must accept – often with a simple click of a mouse or press of a button on a touch screen – with pages and pages of "fine print." These licensing agreements, however, often include provisions that authorize the owner of the software to collect data from individual users, aggregate the data of individual users with that of other users, use this data for any purpose that the owner deems appropriate, and market the data to other businesses (either in a format that allows other businesses to identify the particular user that generated the data or in an aggregate format that is not personally identifiable). In other words, these licensing agreements – which many of us accept without reading or understanding – may effectively give control of our confidential, proprietary, or personal information to third parties over whom we have no control.

Given the importance of farm data – and the protection of farm data against disclosure to suppliers, competitors, and customers who may gain a competitive advantage in business dealings or activists who may use farm data to pursue radical political agendas – farmers should undertake a number of steps to responsibly use and protect their data:

1. **Assess Devices that Generate Farm Data** – The first step that farmers should take is to conduct an inventory of devices that generate or store our business data and assess the types of data that are created. In conducting this analysis, farmers should consider whether the data generated by a particular device is confidential or proprietary, the value of the data to the farmer (or suppliers, competitors, or customers), and the harm that could occur of the data were disclosed to third parties.

2. **Review Licensing Agreements** – After conducting the inventory of data that is created in the farm operation, farmers should review the licensing agreements or terms of use for devices or software that generate and collect data, beginning with the data that is most proprietary and most important to the farm operation. In reviewing the contract, farmers should focus on the following questions:

- Who owns data that is generated by the device or collected and stored by the software?
- What restrictions are placed on the right of third parties to use data that is generated by the device or collected and stored by the software for their own business purposes?
- What restrictions are placed on the right of third parties to sell, license, or disseminate data that is generated by the device or collected and stored by the software to other persons?
- What protections will be implemented by the third party to protect the data that is generated by the device or collected and stored by the software against unauthorized access or dissemination?
- What legal rights and remedies does the farmer have if data that is generated by the device or collected and stored by the software is improperly used or disseminated?

3. **Balance Benefits and Costs** – In some cases, farmers may be able to negotiate the terms of contracts or license agreements to specifically address these issues. In most cases, however, the license agreements or terms of use are standardized and are offered on a take-it-or-leave-it basis. In such cases, farmers must assess the benefits that will be derived from the use of the device or software and weigh those benefits against the risks that may arise from the dissemination of confidential or proprietary business information. In many cases, the benefits may outweigh the costs – but farmers should make an informed decision about this issue on a case-by-case basis.

Many agricultural trade groups – including the American Farm Bureau Federation, the American Soybean Association, and the National Corn Growers Association – have developed policy statements regarding "big data." These policies generally focus on requiring full disclosure by companies regarding the collection and use of farm data, the right of farmers to opt-in or opt-out of data collection and aggregation systems and to access current and historical farm data, and the protection of private and proprietary data against unauthorized disclosure. These policies allow the trade groups to work with companies on behalf of all of their member-farmers to attempt to influence the standardized terms of license agreements or terms of use where individual farmers may have limited ability to negotiate terms. Nonetheless, because the degree to which these efforts are successful will vary from company to company, farmers must remain vigilant to understand and protect their own data.

In summary, the continued development of "big data" offers immense opportunities for farmers to improve the efficiency of their operations and identify market opportunities. But "big data" also poses new risks that farmers must manage to protect their business. Thus, farmers should actively consider the benefits that are derived from new technologies against the potential risks of unauthorized use or dissemination of personal or proprietary data that may be generated in order to truly harness the benefits of these technological advances.

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SOCIAL MEDIA AND CONFIDENTIALITY POLICIES IN THE WORKPLACE

by Brittany King-Asamoa

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Many individuals use at least one social media platform every day. These may include Facebook™, YouTube®, Instagram™, LinkedIn®, Twitter™, and many more. Although these services appear to multiply overnight, solutions to the problems their use in the workplace may create have not developed as quickly. The use of technology in general can lead to major issues in the workplace regarding confidentiality, data breaches, employee loyalty issues, and unlawful employment practices. This article provides a few quick tips for dealing with technology in your workplace.

Social Media and Hiring. Social media can be an excellent tool during the hiring process. Employers often utilize the services to advertise job vacancies and vet potential candidates. But these activities can get employers in trouble.

1. Know the Law. Title VII of the Civil Rights Act of 1964 and many state laws prohibit employers from making employment decisions, including hiring, based on protected classes and certain activities. All individuals involved in the hiring process should know these laws. If anyone doesn't know what they cannot base a hiring decision on, they should not be a member of the company's hiring committee.

2. Be Consistent. If you review the social media profile of one candidate, review the pages for all candidates for that same position. Employers should treat all candidates the same. Ideally, the individual performing the review should be the same individual for each candidate for the position and should perform the review at the same point in the hiring process for every candidate. It is recommended that the individual reviewing social media pages not be the hiring manager or ultimate decision maker.

SOCIAL MEDIA

3. Limit to Public Information. Employers should not ask candidates to relinquish or disclose their passwords to social media accounts. If an employer has established a practice of reviewing social media profiles, reviews should be limited to only the information available to the public. Asking a potential candidate (or employee) to relinquish his password or demand for the individual to open their profile in your presence can lead to liability issues and may be illegal in the employer's state.

4. Communicate Relevant Information. The individual tasked with reviewing social media pages should only communicate relevant information to the hiring committee. Relevant information is that which addresses whether the candidate is qualified and appropriate for the position. Examples of information that should be shared are the following:

   a. Inconsistencies – Candidate applied for a herdsperson position, but photos on her Instagram™ page show her abusing animals.

   b. Inappropriate Behavior – A candidate that applied for an outside sales position with a company car, has vlogs posted that were clearly recorded while she was driving.

In each example, this information should raise eyebrows questioning whether the candidates are appropriate for the open positions. If the hiring manager decides to keep candidates in the running for a position, despite the information discovered, he will at least have the opportunity to question the candidates about the inconsistent, concerning, or inappropriate information found on their social media profiles. Preferably, each candidate should be questioned in person.

Employee's Right to Engage in Concerted Activities. Under the National Labor Relations Act (NLRA), employees have the right to discuss their wages and terms and conditions of employment. This right is commonly referred to as "Section 7 rights" or the right to engage in "concerted activity." Employers should also review applicable state laws for expanded protections. Minnesota Statute § 181.172 extends the discussion right to all employees, including supervisors – individuals otherwise not provided Section 7 rights under the NLRA. Employers must be mindful of these rights when creating Internet policies, for they may unknowingly infringe upon these rights. For example, the policy: "Do not disclose confidential information online," is unlawful because employees may construe the policy as preventing them from discussing conditions of their employment with other employees. The National Labor Relations Board, the federal agency authorized to enforce the NLRA, issued guidelines for social media policies in 2012 that outline unlawful social media and Internet policies that many employers currently have. *Report of the Acting General Counsel Concerning Social Media Cases*, MEMORANDUM OM 12-59 (May 30, 2012). Employers should reevaluate their policies in light of these guidelines. Policies should be drafted in a manner that clearly informs the employee that he is always allowed to discuss and disclose information regarding the terms and conditions of employment at his workplace.

Confidentiality. An obvious question prompted by the reality of Section 7 rights protection is: How can employers protect their confidential and proprietary information without violating an employee's right to discuss the terms and conditions of his employment?

1. Confidentiality Policy. If you don't have one, develop a confidentiality policy and have all employees sign it. This policy should enumerate a

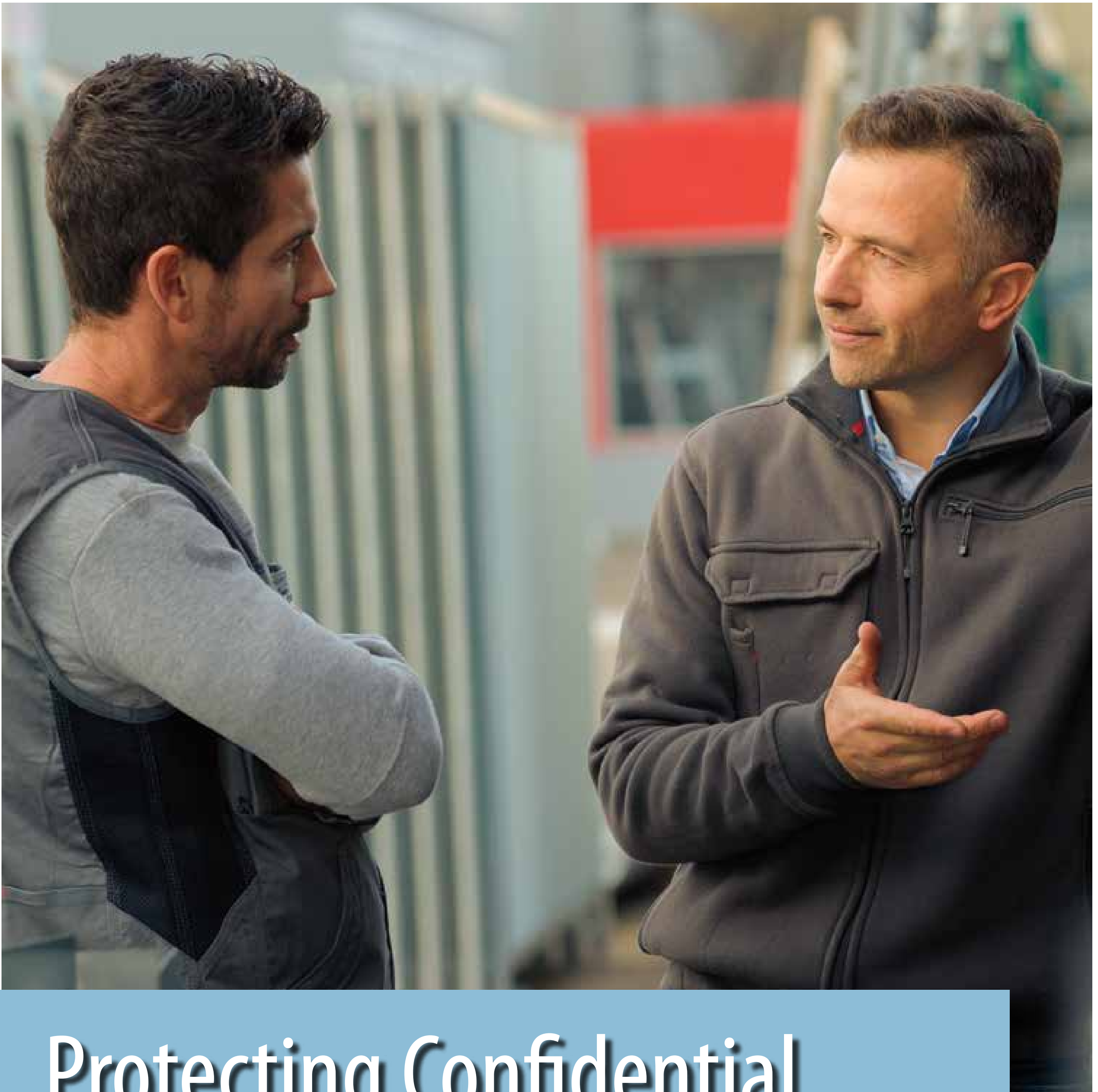
non-exhaustive list of the information, products, and documents the employer deems to be confidential information. To ensure all confidential information is included, it is recommended that employers include "all documents and communications identified as confidential, whether verbal or written," in their definition of "confidential information."

2. Provide the Defend Trade Secrets Act Immunity Notice. The Defend Trade Secrets Act provides employers with the right to bring a civil lawsuit against employees that disclose trade secrets. The Act authorizes employers to obtain ex parte seizure orders, attorney's fees, and punitive damages for the unauthorized disclosure of trade secrets. However, employers must provide employees with the following immunity notice (similar to anti-retaliation notices associated with discrimination and harassment policies):

   An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that is made in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and solely for the purpose of reporting or investigating a suspected violation of law; or is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual files any document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.

   18 U.S.C. § 1833. This notice should be in the confidentiality policy and employee handbook.

Social media and the Internet are dangerous tools in the workplace. Employers should regularly reevaluate their policies and practices governing the use of these tools to ensure they avoid the pitfalls discussed above.



Protecting Confidential Information: the Minnesota Uniform Trade Secrets Act

by Mark S. Ullery

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Minnesota law provides for the protection of certain information that an individual or business has created or acquired that is considered to be a "trade secret" under the Minnesota Uniform Trade Secrets Act ("MUTSA"). Enacted in 1980, MUTSA, which is codified at Minn. Stat. Sections 325C.01 – 325C.08, can be a helpful tool in protecting trade secret information where there has been an actual or threatened breach of secrecy.

Trade secret information can include a formula, pattern, compilation, program, device, method, technique, or process. However, in order to qualify as a trade secret, the information (1) must not be generally known or readily ascertainable by other persons; (2) must derive independent economic value from its secrecy; and (3) must be subject to reasonable efforts to maintain its secrecy.

MUTSA allows a party to obtain a court injunction in appropriate circumstances where there has been an actual or threatened "misappropriation" of a trade secret. A misappropriation can occur in a number of circumstances as described in the Act, including where a person has used improper means to acquire a trade secret of another and then uses or discloses it without consent, or where a person obtains a trade secret of another while knowing or having reason to know the trade secret was acquired by improper means. "Improper means" is defined to include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. A misappropriation can also occur where a person knows or has reason to know that information the person has disclosed or used without consent is a trade secret and was acquired by accident or mistake, as long as that knowledge (or reason to know) exists before there is a material change in the person's position.

The Act also generally allows for the recovery of monetary damages where the misappropriation of a trade secret has occurred. The damages which may be awarded include both the actual loss to the party owning the trade secret and any separate unjust enrichment resulting from

the misappropriation (with unjust enrichment typically measured as profits from the sale of products which utilize the trade secret). In the case of a willful and malicious misappropriation, the court is authorized to award exemplary damages up to twice the amount of the actual loss and unjust enrichment award, as well as attorney's fees.

An action for misappropriation must be brought within three years after the misappropriation is or should have been discovered. In a misappropriation action, the court is required to preserve the secrecy of an alleged trade secret by reasonable means. This can include sealing court records, ordering any person involved in the action not to disclose an alleged trade secret, and taking other similar steps.

Much of the litigation involving the application of MUTSA centers on the question of whether the information at issue actually qualifies as a trade secret. The party claiming misappropriation has the burden of establishing that the information is not generally known or readily ascertainable, derives independent economic value from its secrecy, and has been subject to reasonable efforts to maintain its secrecy. Unless all of these factors are established, a claim does not exist under MUTSA, even if the accused party's actions were wrongful.

With respect to the question of whether the information is not generally known or readily ascertainable, a novel or unique combination of otherwise generally known or widely used data may constitute a trade secret, but a mere variation of such data is unlikely to qualify. Likewise, a customer list might be deemed a trade secret in some situations, but not where a competitor is able to compile such a list on its own through information that is publicly available. With regard to whether the information derives independent economic value from its secrecy, the courts look to whether or not the information in fact provides some demonstrable competitive advantage; for example, information that has or will soon become obsolete is not considered to have independent economic value.

Perhaps the most litigated aspect of whether information constitutes a trade secret is whether the information has been subject to reasonable efforts to maintain its secrecy. To meet this requirement, the party claiming a trade secret must establish that it took reasonable precautions to protect the confidentiality of the information; the mere intention to keep information secret is not enough. Reasonable precautions may include instructing employees, both orally and through employee policy manuals, that information which the employer deems to constitute trade secrets is to be kept confidential; requiring employees to sign confidentiality/non-disclosure agreements in which the employees acknowledge an understanding of the confidential nature of the information and agree not to disclose it other than as may be specifically allowed or directed by the employer; and undertaking efforts to physically secure the information (electronic data should be password protected or otherwise secured, and physical documents should be kept in locked areas).

It is important to keep in mind that even if information does not technically qualify as a trade secret under MUTSA, it can still be subject to protection from disclosure or use by others. For example, a contractual confidentiality/non-disclosure agreement, if properly drafted, can be used to protect such information. In addition, there are certain common law duties that may provide protection; for example, Minnesota law provides that employees have a duty of confidentiality with respect to information which their employers have treated as secret. In certain situations, the disclosure or use of information may also be subject to criminal penalties.

If your business has, or intends to, acquire or develop information which might be considered a "trade secret" or which otherwise could be used advantageously by a competitor, it is important to keep the requirements of MUTSA in mind, as well as contractual or other approaches which can be taken to protect the information from improper use or disclosure. This article is intended only to provide a broad overview of this topic. We recommend that you consult with an attorney who can provide you with advice and recommendations specific to your particular situation and consistent with the current state of the law.

Managing Documents in an Agricultural Operation

by Dean Zimmerli

As farming businesses grow, so do the mounds of documents produced each day. Everything from receipts from a farm supply store to text messages sent to employees comprises the universe of records that might be produced in a farming operation.

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Most producers recognize the need to keep certain records as part of their operation – for example, saving receipts for tax purposes – but a sporadic and unorganized approach to how records are kept and handled can have sometimes serious consequences for an operation. A document retention policy is one solution.

In short, a document retention policy is simply a plan regarding how business records will be kept, stored, and eventually destroyed. As an operation grows, implementing a formal document retention policy is often essential. This article will discuss some of the matters to consider in creating and implementing a document retention policy.

Why have a document retention policy?

The phrase evokes corporate bureaucracy and red tape, but a document retention policy provides business benefits and minimizes legal and financial risks.

Document retention policies are especially important in the event an operation is sued, or must sue someone else due to a disagreement or accident. For example, an email from another person admitting that they owe money or were at fault in an accident may be critical to winning in a lawsuit. Similarly, receipts or invoices could be necessary to establish the extent of damages or other issues. A good document retention policy should ensure important documents are available in litigation when necessary.

At the same time, document retention policies can be important to protecting a person or entity when documents cannot be found any longer. If a document has been intentionally destroyed and cannot be found during a subsequent lawsuit, the "spoliation doctrine" can allow a judge or jury to conclude that the document would have been harmful to that party's case. However, an exception to this spoliation doctrine exists when the destruction of documents is reasonable; courts will typically conclude that if a document was destroyed in accordance with an established document retention policy, the destruction would be reasonable.

A word of caution, however, with respect to the destruction of records: the exception to the spoliation doctrine discussed above will not typically apply after a person or company knows of potential litigation. Thus, even if documents are scheduled to be destroyed in accordance with a document retention policy, if they are related to threatened or pending litigation, those documents should be preserved for litigation.

Further, document retention is often required by law in certain cases. For example, certain wage and payment records for employees must be retained for two or three years. IRS authorities can typically audit returns and tax records up to six years old, so documents related to tax returns should be kept for at least that long, lest a business be unable to prove expenses or other deductions in the face of an audit.

Finally, a document retention policy can improve business operations. Normally, a document retention policy would require some thought on the types of documents being retained for some period or immediately tossed, and thus would require some sort of organization and separation of documents. If documents are better organized, the business can spend less time searching through mounds of mismanaged paper. Moreover, document retention polices ensure that unnecessary documents are destroyed on a routine basis, minimizing the space and cost of storing excessive documents.

What documents should be included?

The first step in establishing a document retention policy is identifying what documents should be considered, which essentially includes all documents created or received by an operation. "Documents" include much more than a physical piece of paper. Each email communication or text message relating to the business is a "document" that should be considered in the context of a document retention policy. Similarly, electronic files such as spreadsheets, Word documents, PDFs, or the output from proprietary software can all be considered "documents" that should be considered in creating a retention policy.

How should documents be stored?

How documents will be stored is the next question to answer in creating a document retention policy. Electronic or paper or both? On-site or off-site? "Cloud" storage or magnetic tapes? Options for storing documents can become overwhelming, and are outside of the scope of this article. In many cases, keeping the original paper copy of a document is cumbersome and unnecessary; many documents can simply be scanned or otherwise converted to an electronic record and afterward exist solely as an electronic document. But for some operations, having paper copies on hand, instead of or in addition to electronic, may be preferable or required for one reason or another – even if that reason is simply the preference of the owner.

How long should documents be kept?

Of course the most critical part of any document retention policy is determining how long a particular type of document should be kept before it is destroyed, if it is destroyed at all. This article is not intended to be a comprehensive guide, but instead highlights aspects to consider in determining the timeframes for retaining documents.

In some cases, regulations require a document be retained for a particular amount of time, and often the failure to do so can result in civil penalties and fines. For example, Food and Drug Administration rules that require a veterinary feed directive (VFD) be issued before using certain antibiotics in feed also require that records of the VFD be retained for a minimum of two years. Records related to the application of restricted-use pesticides must be kept for a minimum of two years. Certain records

related to employees, such as payroll records, must be kept for three years under the Fair Labor Standards Act, and underlying records, such as time cards, must be kept for at least two years. Thus, in determining the time frames applicable to record retention, a critical step is working with your legal team in determining what laws and regulations related to record retention could apply to your operation.

In other cases, "statutes of limitation" might dictate how long a particular record is kept. Statutes of limitation are laws that prohibit a person from bringing a lawsuit after a certain amount of time. For example, in Minnesota, a lawsuit based on a breach of contract must be brought within six years of the breach. Thus, documents relating to the performance of a contract ordinarily should be kept for at least 6 years after the contract has concluded.

Some documents should never be destroyed. Corporate record books which contain articles, bylaws, minutes, resolutions, and the like typically should be maintained indefinitely. Many experts recommend keeping copies of state and federal tax returns permanently.

For other categories of documents, particularly routine communications, it may be preferable to eliminate those documents on a more frequent basis. For example, routine email communications typically can be deleted after one or two years unless they fall into another category.

How should documents be destroyed?

The final part of creating a document retention policy is implementing and following a destruction policy. The responsibility for destroying documents after their retention period is up should be delegated to a responsible person and routinely followed. Part of the destruction policy should have exceptions in the case of documents that are related to potential or threatened litigation.

Summary

A document retention policy can be an important tool to implement as an agricultural operation expands. It can help to improve business efficiency in some cases and can help avoid significant legal risks. Despite the work or cost involved in creating and implementing a document retention policy, the dividends may well pay off down the road in increased efficiency, cost savings, or even winning an important lawsuit.

CASE LAW UPDATE

Farmers Were Not “Farmers” for Purposes of Conservation Easement Charitable Deduction

Rutkoski v. Comissioner, 149 T.C. 6 (August 7, 2017).

THE PARTIES: Mark Rutkoske and Felix Rutkoske are brothers who engaged in a farming operation through various business entities on land leased by Browning Creek, LLC, a limited liability company, also owned by the brothers. The Commissioner of Internal Revenue is the head of the Internal Revenue Service, an agency within the United States Department of Treasury.

THE FACTS: In 2009, the brothers, through Browning Creek, LLC (hereafter “Company”), conveyed a conservation easement restricting the development of a 355-acre tract of land to Eastern Shore Land Conservancy, Inc. (the “Charity”). The Charity purchased the conservation easement below the land’s fair market value, which resulted in a non-cash charitable contribution of $1,504,960. That same day, the brothers sold their remaining interest in the property. As a result of these transactions, each brother earned approximately $800,000 in gross income. To offset their potential tax burden, the brothers each claimed a noncash charitable deduction in the amount of $667,520 for their share of the Company’s contribution of the conservation easement.

THE DISPUTE: The Commissioner challenged the brothers’ charitable deduction, arguing that it should have been limited to 50% of their contribution base. Generally, charitable deductions from gross income are capped at fifty percent of a taxpayer’s contribution base. A taxpayer’s contribution base is defined as that person’s adjusted gross income, calculated without regard to any net operating loss carryback, less the value of other charitable contributions for the year. A

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special exception exists for “qualified farmers or ranchers,” which allows those qualified individuals to deduct up to 100% of the value of certain charitable contributions, such as conservation easements, from their adjusted gross income.

LEGAL ISSUES: In carving out a special charitable deduction for conservation easements under IRC § 170(b)(1)(E), Congress limited the deduction to “qualified farmers and ranchers” whose gross income from the “trade or business of farming” is more than fifty percent of their gross income. At trial, the Commissioner asserted that the brothers were not “qualified farmers” entitled to deduct 100% of the donation because the majority of their income that year came from the sale of real estate. The brothers argued that the sale of a farm asset constitutes income from the business of farming.

CONCLUSIONS: The court held that the brothers were not qualified farmers under Section 170 of the Internal Revenue Code and that they were not entitled to a full deduction of the contribution. According to the court, neither the sale of real property nor the sale of development rights results in income from a farming activity. The fact that the brothers invested most of the proceeds in their farming operation did not matter. As a practical matter, farmers looking to donate a charitable conservation easement may lose out on the associated tax benefits if they sell a portion of their property in the same year. The brothers were also disqualified from deducting the full value of the charitable contribution because the brothers made the donation through their company, which was engaged in the business of leasing real estate and not farming.

Pink Slime Defamation Lawsuit Settlement Exceeds $177 Million

Beef Prod., Inc. v. Am. Broad. Companies. Inc., No. 12-292 (S.D. Cir. Ct. 2017).

THE PARTIES: Beef Products Incorporated ("BPI") is a South Dakota corporation engaged in the production and sale of lean, finely textured beef. ABC, Inc. ("ABC") is a commercial broadcasting television network headquartered in New York and owned by The Walt Disney Company.

THE FACTS: In 2012, ABC ran a multi-part month-long exposé on BPI and its process for producing lean, finely textured beef. Lean, finely textured beef is commonly added to ground beef to reduce the overall fat content. The product is made by separating the fat from trimmings left after beef cattle are butchered and then applying ammonia gas to kill bacteria. ABC claimed that seventy percent of supermarket beef contained the product, broadcasted unappetizing images of the product, and referred to the product throughout its coverage as "pink slime." Following ABC's exposé, BPI closed three of its four factories and laid off approximately 750 employees. According to BPI, sales dropped from five million pounds per week to less than 2 million pounds per week. BPI filed lawsuits in state and federal court against ABC, alleging product disparagement and defamation. The trial began on June 5, 2017, and was scheduled to last a full two months before the parties reach a settlement.

THE DISPUTE: BPI brought suit against ABC for defamation and product disparagement and sought damages in the amount of $1.9 billion. Under South Dakota's Agricultural Food Products Disparagement Act, ABC could have been liable for treble damages—almost $6 billion.

LEGAL ISSUES: BPI accused ABC of knowingly publishing false and misleading information that caused consumers to believe lean, finely textured beef is unsafe and that the product was not actually meat. ABC argued that it reported the facts accurately, that it presented the views of people knowledgeable about the product, and that it was not liable for any damages to BPI.

CONCLUSION: In late June, after three weeks of trial but before presenting its defense, ABC entered into a settlement agreement with BPI. The details of the settlement are private, but Disney, the parent company of ABC, Inc., reported a $177 million settlement on its quarterly filings with the U.S. Securities and Exchange Commission. The settlement is believed to exceed $177 million, with the remainder of the funds coming from insurance. BPI subsequently created a $10 million fund for the benefit of former employees who lost their jobs when BPI closed three of its four production facilities.

Utah's Law Against Agricultural Operation Interference Declared Unconstitutional

Animal Legal Defense Fund v. Herbert ,13-cv-00679 (D. Utah, July 21, 2017).

THE PARTIES: The parties to this case included Plaintiffs Amy Meyer, an animal rights activist, Animal Legal Defense Fund (ALDF), and People for the Ethical Treatment of Animals (PETA), against Defendants Gary Hooper in his official capacity as Governor of Utah and Sean Reyes in his official capacity as Attorney General of Utah.

THE FACTS: In the early 1990s, animal rights advocates increasingly began conducting "undercover investigations" to expose alleged animal abuse at various agricultural facilities across the United States. These "investigations" often involve activists improperly gaining access to private farms and making audio or video recordings or taking photographs of farmers and facilities without permission. A number of States, including Kansas, Montana and North Dakota, responded to these initial covert investigations by enacting laws that criminalized entering an animal facility and filming the same without consent.

On February 8, 2013, Amy Meyer became the first person to be charged under Utah's agricultural operation interference law (hereinafter the "Act"), which was signed into law on March 20, 2012. Meyer also appears to be the only person in the country to ever be charged pursuant to any such laws. Meyer was arrested while filming what appeared to be a bulldozer moving a sick cow at a slaughterhouse in Draper City, Utah. The State of Utah brought charges against Meyer pursuant to the Act, but ultimately dismissed its case against her without prejudice.

THE DISPUTE: The primary dispute between the parties was whether the Act was constitutional. The Plaintiffs argued that the Act was unconstitutional because it was an impermissible restriction on free speech in violation of the First Amendment of the United States Constitution. The Plaintiffs raised a Fourteenth Amendment challenge to the Act as well, but the Court declined to address that argument raised by Plaintiffs.

The State of Utah argued that the Act was constitutional primarily because it was tailored to achieve four discrete government interests. The State argued that those four interests were: (1) the protection of animals from diseases brought into facilities by workers; (2) the protection of animals from injury resulting from unqualified or inattentive workers; (3) the protection of workers from exposure to zoonotic diseases; and (4) the protection of workers from injury resulting from unqualified or inattentive workers.

LEGAL ISSUES: After the Court determined that the Plaintiffs had standing to bring this case, the primary issues addressed by the court were whether (1) Plaintiffs' actions were protected by the First Amendment, and (2) if Plaintiffs' actions were protected by the First Amendment, what level of judicial "scrutiny" must be applied to the Act.

CONCLUSIONS: The United States District Court for the District of Utah declared the Act an unconstitutional violation of the First Amendment. The Act's provisions prohibited (1) obtaining access to an agricultural operation under false pretenses (hereinafter the "Lying Provision"),(2) bugging an agricultural operation,(3) filming an agricultural operation after applying for a position with the intent to film, and (4) filming an agricultural operation while trespassing (hereinafter the "Recording Provisions").

The Court determined that the Lying Provision and the Recording Provisions all regulated "speech" protected by the First Amendment. Because of this, the Court applied what is called "strict scrutiny" to the Act to review whether or not the Act was constitutional. Strict scrutiny means that the State had the burden of showing that the Act's restrictions furthered "a compelling interest" and that the restrictions were "narrowly tailored to achieve that interest."In the end, the Court determined that the Act was unconstitutional because it was not "narrowly tailored" to achieve any of the four government interests set forth above.

In September 2017, the State of Utah declined to appeal the District Court's ruling holding that the Act was unconstitutional.This may embolden challenges to similar laws in other states, as well as signal to states that may be otherwise inclined to enact such laws in the future that such laws may not withstand legal challenges.

Syngenta Corn Litigation Settlement

In re Syngenta AG MIR 162 Corn Litigation, 14-md-02591 (D. Kan.)*;* *In re Syngenta Litigation,* 27-cv-15-3785 (D. Minn.).

THE PARTIES: The parties to this case include thousands of United States corn farmers, among others, and Syngenta, a Swiss agribusiness company, and the third largest seed company in the world.

THE FACTS: Syngenta created the GMO Agrisure Viptera MIR162 (MIR162) seed. In November 2013, China detected MIR 162 in corn shipments from the United States. China had not yet approved MIR 162 and rejected shipments of corn from the United States and canceled certain contracts because of the presence of the unapproved MIR 162 trait.

Corn prices in the United States – and corn farmers' revenues – plummeted drastically. Various plaintiffs, including corn farmers and producers, grain elevators, ethanol producers, Cargill and ADM all brought lawsuits against Syngenta on a number of legal theories and in several different U.S. courts. The first of these lawsuits to reach trial was in the United States District Court for the District of Kansas. The second was in the United States District Court for the District of Minnesota.

LEGAL ISSUES: The primary legal issues in this case were (1) whether Syngenta's actions made it liable to plaintiffs for the plaintiffs' damages and (2) if Syngenta was liable, what were the plaintiffs' damages resulting from Syngenta's introduction of the MIR162 seed into the Unites States corn supply prior to its approval in China. Syngenta argued that good weather and bumper crops depressed corn prices, not the loss of the Chinese export market.

CONCLUSIONS: In June, a jury awarded Kansas farmers $217.7 million in damages against Syngenta. Syngenta decided to appeal this award, and additional trials were scheduled. However, during the middle of a multi-week trial in Hennepin County, Minnesota, Syngenta agreed to settle claims brought by United States farmers on account of Syngenta's allegedly premature introduction of MIR 162.

The details of the settlement have not been released, and the settlement must be approved by the Court. A Syngenta representative stated that the settlement amount would be made public once approved by the Court. In addition, this settlement does not affect the claims that Cargill and ADM brought against Syngenta. Thus, this litigation will continue and shall be addressed in future DIRT articles.

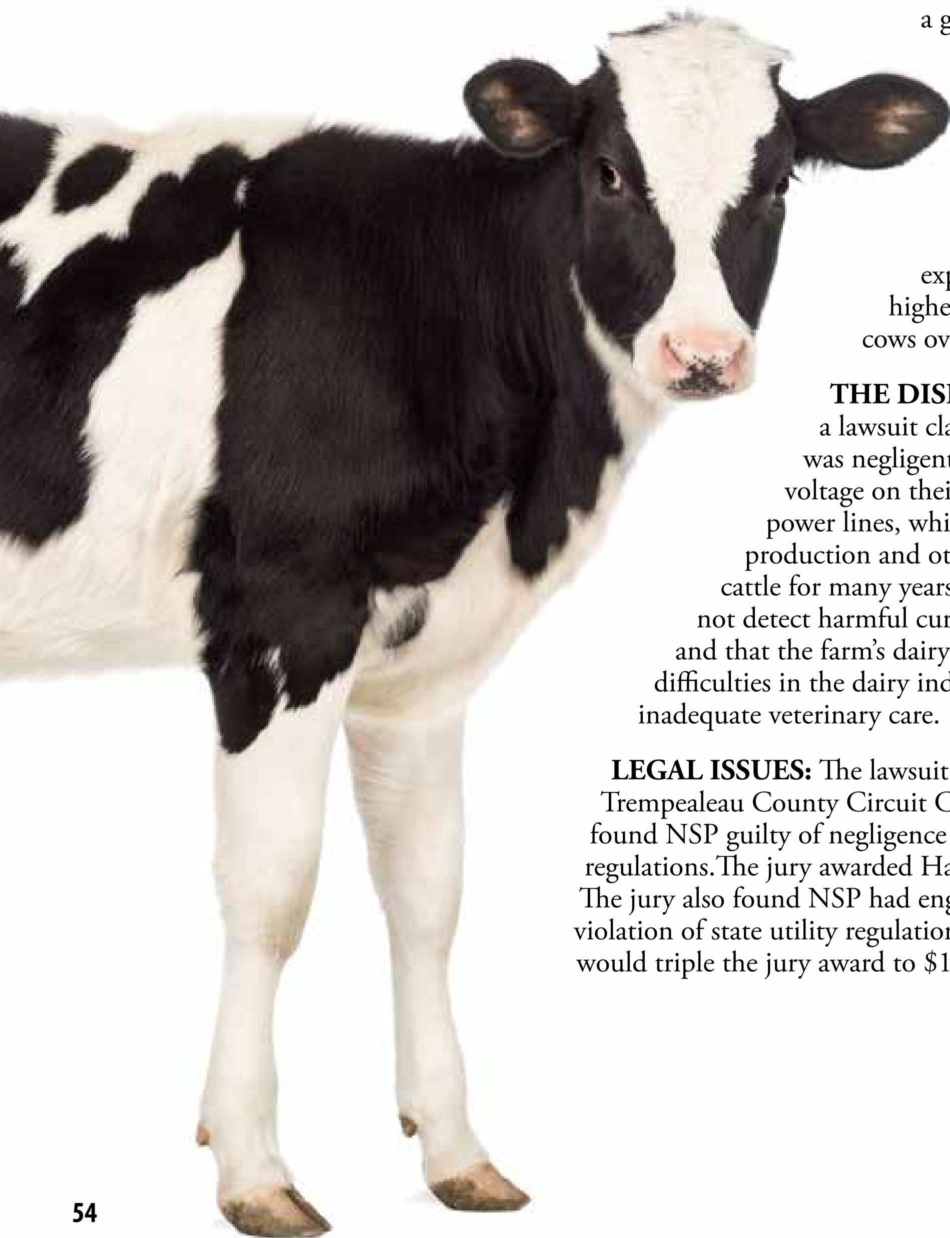
Dairy Farmer Wins Jury Award Against Xcel Energy in Stray Voltage Case

***Paul Halderson, Lyn M. Halderson and Arctic View Farms, LLC, v. Northern States Power Company d/b/a Xcel Energy Services, Inc., et al,* Cir. Ct. File No. 2012CV74, Circuit Court for Trempealeau County, Wisconsin (2017).**

THE PARTIES: Spouses Paul Halderson and Lyn M. Halderson own Arctic Farms, LLC (collectively "Halderson"), and collectively own and operate a dairy farm in Galesville, Wisconsin. Northern States Power Company d/b/a Xcel Energy Services, Inc. ("NSP") provided electrical services to the dairy farm owned by Halderson.

THE FACTS: For over a decade, Halderson's herd of nearly 1,000 dairy cows struggled with illness and decreased milk production. It was asserted that in 1996 NSP discovered but failed to report excessive voltage in one of Halderson's barns, and Halderson repeatedly requested that NSP check its electrical services in the years thereafter. An independent consultant hired by Halderson in 2011 identified and reported high levels of electricity coming from NSP's distribution system.

Current that leaks from neutral wire into the earth is referred to as stray voltage. Animals can receive small shocks when they come into contact with a grounded object, such as a watering trough. Research from the USDA has found that stray voltage can cause cows to avoid eating, become stressed, and produce less milk. After identification and correction of the stray voltage, Halderson's dairy herd experienced increased production, higher reproduction rates, and healthier cows overall.



THE DISPUTE: In 2012, Halderson filed a lawsuit claiming, in relevant part, that NSP was negligent in its failure to prevent stray voltage on their property by improperly grounding power lines, which directly caused decreased milk production and other injuries to their herd of dairy cattle for many years. In response, NSP claimed it did not detect harmful currents where the cows were located and that the farm's dairy production issues were a result of difficulties in the dairy industry such as bad feed, disease and inadequate veterinary care.

LEGAL ISSUES: The lawsuit went to trial in July of 2017 in Trempealeau County Circuit Court, and on August 1, 2017, a jury found NSP guilty of negligence and failure to comply with state regulations.The jury awarded Halderson $4,500,000 in damages. The jury also found NSP had engaged in a willful, wanton or reckless violation of state utility regulations, which, if awarded by the Court, would triple the jury award to $13,500,000.

CONCLUSIONS: There is not yet a decision by the Circuit Court as to whether it will award treble damages. NSP currently has pending a motion for a new trial. It also has the ability to appeal the verdict to the Wisconsin Court of Appeals.

Stray voltage cases are familiar to those involved in agriculture. Farmers in Minnesota have also recently seen a large award in a stray voltage case, perhaps indicating a current willingness of juries to make such awards.

Damages Awarded for Breach of Manure Easement Agreement

Thompson v. JTTR Environ, L.L.C., No. 16-1610, 2017 WL 3065159 (Iowa Ct. App. July 19, 2017).

THE PARTIES: Tommy Thompson ("Thompson") is an owner of farmland in Iowa. JJTR Environ, L.L.C. ("JJTR") is an owner of a hog facility adjoining Thompson's property.

THE FACTS: In the spring of 2012, Thompson purchased approximately 146 acres of farmland (the "Property") from Ricke and Marian Langel. The Langels retained a 10.25 acre parcel upon which a hog farrowing facility was located. A condition to closing was that Thompson and the Langels would enter into a Manure Easement Agreement (the "Agreement"), which they did.The Agreement granted Langels and all future owners of the hog facility a permanent easement and the right to apply manure generated by the hog facility onto the Property. Under the Agreement, Thompson is allowed as much manure as needed to cover the Property.

In August of 2012, the hog farrowing facility was sold to JTTR, who converted it into a hog finishing facility, which was placed into production in the spring of 2013. In the fall of 2013 Thompson requested enough manure to apply on the entirety of his Property consistent with the Agreement. Due to the corn/soybean crop rotation on the Property, JTTR demanded that either manure from its facility be applied every other year or that only 73 acres of manure would be provided annually from its facility. Thompson accepted 73 acres of manure in the fall of 2013 and received no manure thereafter.

THE DISPUTE: In May of 2014 Thompson filed suit against JTTR for its breach of the Agreement. A bench trial was held, and in August of 2016, the district court returned a verdict in favor of Thompson, awarding damages in the amount of $70,433.93, plus $15,451.81 in attorneys' fees. JTTR appealed the verdict.

LEGAL ISSUES: JTTR first argued that it had not breached the Agreement because the easement only created a burden for Thompson to accept the manure. The District Court held that the Agreement explicitly imposed a burden upon JTTR to place manure on the Property annually and that such express terms of the Agreement were controlling. JTTR next argued that its manure was more valuable as being part of a finishing facility rather than the Langels' prior farrowing facility and, accordingly, it was subject to a greater burden than was originally intended by the Agreement. This argument was not found to be credible by the Iowa Court of Appeals, after not being considered by the District Court. Finally, JTTR argued the Agreement imposed a duty upon Thompson to rotate his crops, therefore entitling him to manure only every other year, which the District Court also rejected based on the clear and unambiguous language of the Agreement.

CONCLUSIONS: The Iowa Court of Appeals affirmed the District Court's rulings with regard to the legal analysis of the Agreement, but did reduce the amount of Thompson's award by $26,523.93 because Thompson failed to prove that he incurred damage in a year that he would not have applied manure in any event.

This ruling enforces the fact that words matter. Courts will first and foremost look to the express language of any agreement when interpreting the intent of such agreement in a contract dispute.

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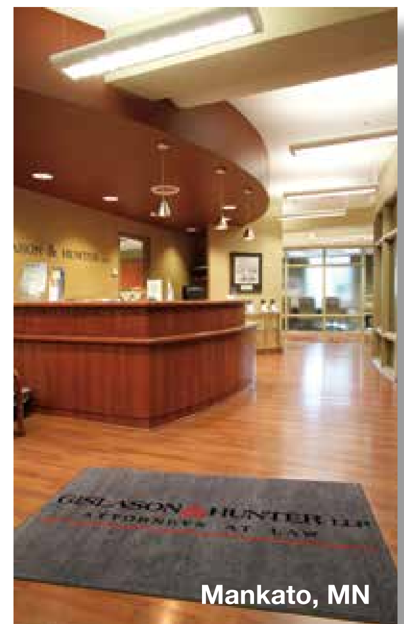

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