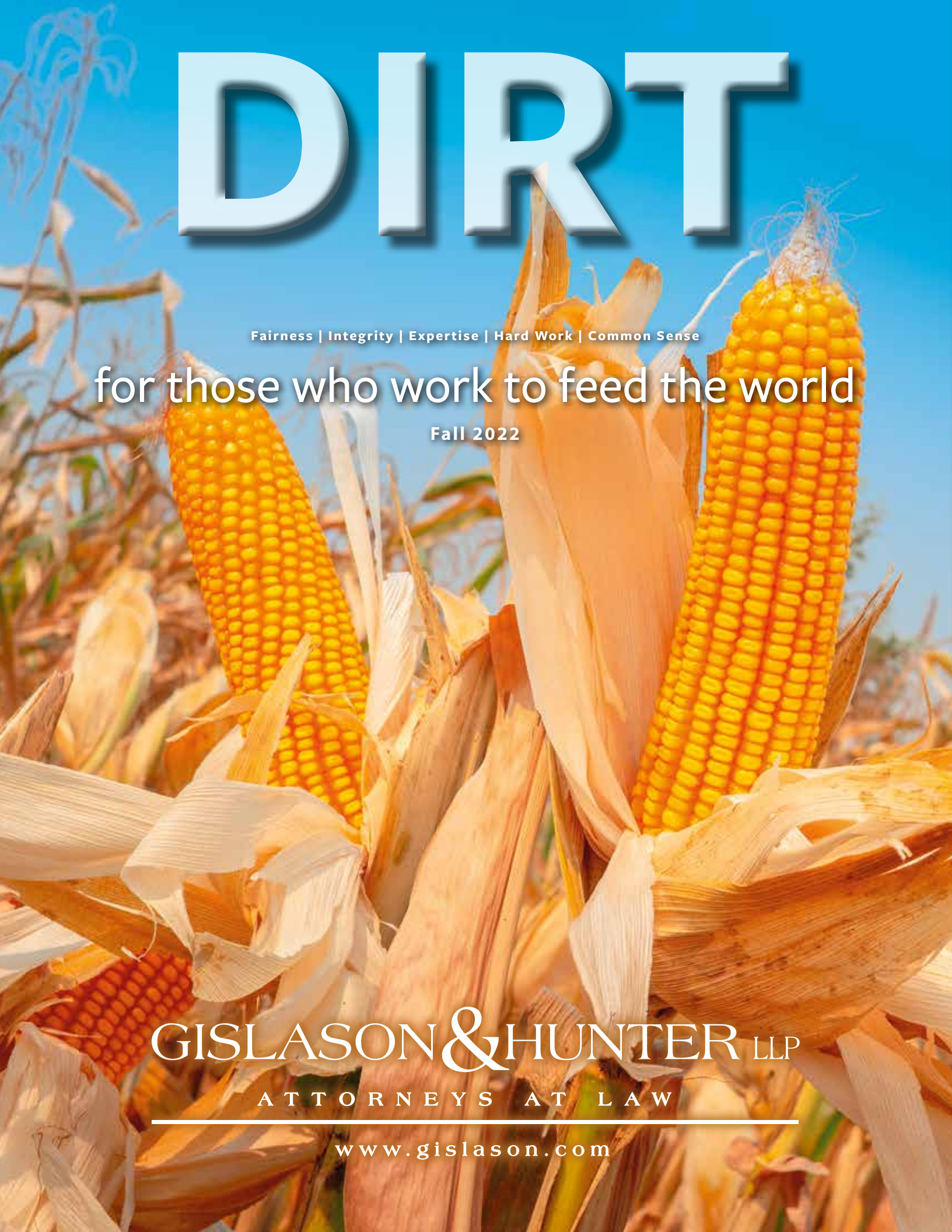


DIRT

Fairness | Integrity | Expertise | Hard Work | Common Sense

for those who work to feed the world

Fall 2022

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

www.gislason.com

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

LOCATIONS

MANKATO
111 South 2nd Street, Suite 500
Mankato, MN 56001
P 507-387-1115
F 507-387-4413

NEW ULM
2700 South Broadway
New Ulm, MN 56073
P 507-354-3111
F 507-354-8447

www.gislason.com

CONTENTS

FALL 2022

Understanding the Past in Order to Build the Future of Agriculture

by Daniel Schwartz

Daniel Schwartz
507-354-3111
dschwartz@gislason.com

George Will once famously stated, "The future has a way of arriving unannounced." Farmers and agricultural producers are keenly aware of this phenomenon. Indeed, with all the emphasis on foreign *animal* disease preparedness over the last several years, who would have predicted that a *human* disease could cause the unprecedented disruptions we saw in the livestock industry in the year 2020? Speaking of the year 2020, who then would have anticipated the $8 corn prices we experienced this year?

The truth is nobody has a crystal ball. But at Gislason & Hunter LLP we believe that our commitment and focus on the issues most important to the agricultural communities in which we live and work demand that we understand the past in order to help build and foster the future of agriculture. Thus, from recounting a century-old public drainage law to introducing the emerging "carbon market" to our readers, this edition of DIRT pays particular respect to both the historical and futuristic questions and issues facing agricultural businesses and communities.

Few individuals have a greater focus on what lies ahead than Jill Resler, the recently appointed CEO of the Minnesota Pork Producers Association and Minnesota Pork Board. We are honored to have Jill as a guest author in this edition of DIRT to reflect on the legacy of these organizations and to provide our readers with the strategic plan and priorities that will guide and focus these organizations under her leadership.

MN Pork will Continue to Look to its Strategic Plan to Focus its Priorities under New Leadership

by Jill Resler

Jill Resler

On June 6, 2022, I was humbled to be named the Chief Executive Officer of the Minnesota Pork Producers Association (MPPA) and the Minnesota Pork Board (MPB); this appointment marked only the fourth CEO in organizational history succeeding industry leaders like Don Paulsen, Pat McGonegle, and David Preisler. After serving Minnesota pig farmers for the past 13 years, I am simultaneously holding gratitude and excitement: gratitude for the opportunity to honor the legacy of our organization's past leaders and excitement to forge a new path forward as your next CEO.

I have a deep belief in the work our organizations do on behalf of Minnesota pig farmers, the people I have the privilege to work with and for, and the future. I recognize the opportunities and challenges facing our industry are numerous. It is critical that organizations like the MPPA and MPB efficiently and effectively invest producers' dollars to deliver the greatest return on investment as possible.

Our strategic plan outlines four foundational pillars that drive programmatic priorities for our organizations. The four foundational pillars include:

Build Trust

MN Pork will build trust with customers, consumers, and decision makers. We will advocate for our industry, our people, and our product. MN Pork is a voice for pork producers, working to ensure our image accurately reflects our industry, while striving to elevate pork as a protein of choice.

Invest in People

MN Pork will build on existing efforts and create new programming that develops stakeholders of the MN pork industry. Programming will focus on the leadership life cycle of our stakeholders, prioritizing training, leadership development, and the investment in and development of rural communities. Investing in our people today ensures opportunities for future generations tomorrow.

Impact through Influence

MN Pork will leverage our reputation and exert our influence on decision makers to impact local, state, and federal policy decisions, regulatory standards, rule-making, and national priorities on research and policy issues. We will build relationships, collaborate with partners and states, develop coalitions, and leverage our value propositions.

Protect Our Freedom to Operate

MN Pork will proactively engage to protect our freedom to operate and enable producers to profitably and successfully produce a sustainable, safe, and healthy protein to feed others. We will focus on understanding the impact of policy and regulatory changes, prioritizing industry profitability for all operational structures, driving efforts to promote social, environmental, and economic sustainability, and ensuring opportunities for the next generation.

These pillars provide the foundation on which our action orientated strategic plan is built upon. The added clarity and accountability allow our staff and boards to identify and execute programming that addresses stakeholder's greatest needs efficiently and effectively.

As we forge a new path forward, the following are examples of areas we will prioritize:

1. **Sustainability** – Living in the Land of 10,000 Lakes, we know Minnesotans care about the environment. As consumer preferences and regulations continue to evolve, we know sustainability is here to stay. It's critical Minnesota pig farmers engage with both consumers and policy makers to share our past, present, and future commitment to continuous improvement. Our approach to sustainability is wholistic, encompassing people, pigs, and the planet. We will continue to move away from models and towards real, on-farm data. Our work in sustainability is two-fold, first to build trust with consumers that pork is a safe and nutritious choice for their families and second, to protect our stakeholder's freedom to operate – both now and in the future.

2. **FAD Preparedness and Response** – The number one priority consistently identified by our stakeholders is ASF Preparedness and Response. Minnesota will continue to be an industry leader in driving forward our industry's foreign animal disease (FAD) preparedness and response efforts. We will push for a coordinated national approach to FAD preparedness and response efforts. I encourage producers to control the controllable – become engaged in the US Swine Health Improvement Plan, Secure Pork Supply Plan, and establish a platform for traceability - don't wait!

3. **Stakeholder Relationships** – Building and strengthening relationships with stakeholders is critical to the long-term success of Minnesota Pork. Engaging with producers across the state ensures that our organizational priorities are aligned with producer needs. We will also continue to cultivate relationships with legislators and agencies to influence policy and rulemaking in St. Paul and Washington, D.C. Additionally, we will continue to strengthen our relationships with other Minnesota based commodity groups, the National Pork Board and National Pork Producers Council, reasonable NGOs, and groups like the Minnesota Chamber of Commerce and the Ronald McDonald House – Upper Midwest. Each of these groups provides a unique opportunity to build trust and grow both understanding and advocacy for Minnesota pig farmers.

I am honored to serve as the next CEO of Minnesota Pork; working on behalf of Minnesota pig farmers is a privilege. As CEO, I will work alongside a dedicated staff and tremendous producer leaders to move our industry forward.

GREENSEAM

SAVE THE DATE

FOLLOW US:
Facebook: @GreenSeam
Instagram: @GreenSeamRegion

RURAL FORUM EVENT PAGE

THE 39TH ANNUAL
RURAL FORUM

DECEMBER 1, 2022
4 - 8 pm

MAYO CLINIC HEALTH SYSTEM EVENT CENTER

The 39th annual Rural Forum is a premium event that connects public leaders and a wide range of attendees from the agricultural sector, such as producers, manufacturers, educators, researches, and more. Rural Forum presents a great opportunity for conversations about key issues facing the rural economy, as well as brainstorming potential solutions.

SPONSORSHIP OPPORTUNITIES:
Contact Liz Sharp at lsharp@greatermankato.org / 507.385.6641 to take advantage of the sponsorship opportunity that fits your business or organization.

PRESENTING SPONSOR

GISLASON & HUNTER LLP
ATTORNEYS AT LAW

Insurance Basics: Moving Toward a Greater Understanding of the Role of Commercial Insurance in the Agricutural Industry

by Daniel Schwartz

Throughout my nearly 15 years of practicing law, I have observed a wide range of perspectives, understandings, and tolerances from agricultural producers and other businesses regarding the topic of insurance. Some find insurance a combination of overwhelming, confusing, and boring. If given the choice, they would prefer watching endless streams of YouTube videos seeking to revive the lost art of sock darning over any insurance seminar.[1] Others understand insurance at a general level but view it with considerable cynicism and distrust. These folks have perhaps been on the receiving end of an adverse coverage determination from one of their insurers or are just plain old worn down by years of paying insurance premiums without any tangible benefit to show for it. Still others view insurance as a black-and-white proposition. Posing to their attorneys and brokers various "what if" scenarios, those in this group cannot accept that, while the availability of insurance coverage may be reasonably expressed in greater or lesser degrees of probability, it is near impossible to predict with certainty.

Representing, advising, and consulting with individuals and businesses over the years in a wide range of insurance matters has allowed me to gain empathy for those holding negative or indifferent opinions and perspectives on insurance matters. Commercial insurance policies are long, dense, confusing, and ever-changing; insurance companies sometimes wrongfully deny coverage to their insureds; and the number of exceptions and exclusions to the availability of insurance coverage that may be found in a given policy is beyond frustrating to those of us seeking to evaluate, measure, and express the gravity, likelihood – and *insurability* – of a given business risk.

My experience, though, is that the confusion and frustration experienced by my clients in insurance matters oftentimes exists because nobody ever explained to them how commercial insurance works. And this may be easily rectified. Certain fundamental concepts permeating all types of commercial insurance, when properly understood, arm and equip agricultural producers with the knowledge necessary to evaluate different insurance alternatives and make informed decisions concerning insurance-coverage matters.

The Insurance Policy

On more than one occasion I have requested a copy of a relevant insurance policy from a client or opposing counsel only to receive some other, insurance-like document that, while perhaps referencing, discussing, or summarizing insurance terms, is most certainly not an insurance policy. Thus, the first step toward a greater understanding of insurance is to know what a commercial insurance policy looks like.

A standard commercial insurance policy will almost always include at its beginning what is referred to as a declarations page. The declarations page serves as a road map for the entire policy and includes critical information, such as the person(s) named as insured(s) under the policy; the insurance company issuing the policy; the type of insurance coverage

[1] My apologies to any of our readers who are sock-darning enthusiasts. For those of you who would like to learn more about sock darning, please see the following link: https://ourgabledhome.com/the-lost-art-of-darning-socks-tutorial/.

provided; the dollar amount of coverage or policy limits; the coverage or policy period; and a list of endorsements supplementing or amending the base policy.

Sometimes people think the declarations page alone is the insurance policy. It is not. While the declarations page is a fundamental component of any insurance policy, the insuring agreements, clauses, and endorsements[2] describing with specificity which liabilities and perils are insured – and, perhaps more importantly, those that are *not* insured – follow the declarations page.

To be sure, unless you are currently suffering from insomnia, I am not suggesting that it is useful or advisable to read your insurance policies from front to back without a specific purpose or question in mind. But agricultural producers should have some people – or at least someone – within their organizations familiar with the location and general content and purpose of their several insurance policies so that they may be accessed, reviewed, and scrutinized as and when questions arise.

First-Party and Third-Party Coverage

You may have heard your lawyer or insurance broker refer to insurance coverage offered on a "first-party" or "third-party" basis and asked yourself: What on earth do they mean? That is okay. Many (including me) have had the same reaction when first encountering these jargony insurance terms.

First-party insurance means simply that the insured has a direct claim, or a direct right to coverage, under the insured's own insurance policy for losses or damages to the policyholder's property. A typical first-party coverage in the agricultural sector is property insurance. In the event of a peril, such as a tornado or fire, commercial property insurance will usually allow the insured producer to be paid under the policy for the damages and losses incurred from physical damage to the policyholder's own property. Less common forms of commercial first-party insurance -- and which are somewhat unique to the agricultural sector -- include policies providing coverage to producers for losses sustained as result of certain diseases, such as Porcine Reproductive and Respiratory Syndrome (PRRS), Porcine Epidemic Diarrhea (PED), and other diseases.[3]

As the name suggests, third-party insurance protects policyholders against liabilities for injury, loss, or damage suffered by someone other than the policyholder – that is, a third party. Put another way, third-party insurance is intended to protect insureds from monetary loss when they are sued. Coverage typically includes the cost of defending claims and indemnifying the insured in the event the insured is ultimately found liable for the claims asserted by the third-party.

Commercial General Liability (CGL) insurance is the most common type of third-party insurance purchased by agricultural producers and other commercial enterprises. It protects policyholders from losses associated with claims arising from the company's ordinary business operations, including third-party claims of bodily injury and property damage. Other common types of third-party insurance coverage include Directors & Officers Liability Insurance and Employment Practices Liability Insurance.

Finally, it should be noted that certain commercial policies may provide a combination of first-party and third-party coverage. An example of this is so-called cyber insurance for data breaches. Depending on the insurer or policy, a cyber insurance policy may include insurance coverage for both first-party losses sustained by the insured as a result of a data breach (e.g., the cost of notifying affected persons that their information was compromised or of restoring lost data) as well as third-party claims resulting from the data breach (e.g., regulatory defense costs, fines, and civil lawsuits).

Claims-Made and Occurrence-Based Liability Coverage

Third-party liability insurance is typically provided on a "claims-made" or "occurrence" basis. This is an important distinction. Occurrence-based policies, in theory, provide unlimited prospective coverage because the coverage trigger is the date of the act or omission giving rise to a third-party claim against an insured. This is so regardless of when a third-party asserts a claim against the insured. A standard CGL insurance policy will typically provide coverage on an occurrence basis.

By comparison, a claims-made policy generally provides coverage only for claims that were made and reported to the insurer within the policy period. The event that triggers coverage is the date the insured becomes aware of the third-party claim against it, regardless of whether the act or omission giving rise to the claim occurred before or during the policy period. Under claims-made policies, insurers, in theory, provide coverage even for acts or omissions that occurred before the policy's inception. But, in practice, insurers often limit this exposure by modifying claims-made policies to exclude coverage for prior acts or omissions. Most Directors & Officers Liability Insurance and Employment Practices Lability Insurance is provided on a claims-made (versus occurrence) basis.

---

[2] An "endorsement" is a broad term for an insurance policy form that either changes or adds to the provisions of the base insurance policy. Depending on the circumstances, endorsements could serve to broaden or limit the scope of coverage otherwise available under the policy.

[3] *See,* e.g., https://jamesalleninsurance.com/coverage/agriculture/foreign-animal-disease/

The Additional Insured

Last, but certainly not least, is the concept of the additional insured. Independent contractor agreements, lease agreements, and other commercial contracts almost always include additional-insured requirements for one or both of the contracting parties. Many if not most agricultural producers have probably accommodated a request to include a contracting party as an additional insured under their CGL policy or have even asked another party to include them as an additional insured under that party's CGL policy.

Requiring a contracting party to name you as an additional insured is but one method of contractual risk allocation. The overarching purpose behind the requirement to be named additional insured is this: If one party's acts or omissions cause or result in the imposition of liability against the other party to the contract, that party's insurance company should be primarily responsible for defending and indemnifying the other (and perhaps innocent) party to the contract.

Commercial contracts will also sometimes require that a party not only be added as additional insured, but that the party be so added on a "primary and noncontributory" basis. The "primary" part means that the named insured's[4] policy will be triggered and have to pay out *first* in the event of a claim. The "noncontributory" part means that the named insured's policy may not seek contribution from the additional insured's separate policy in order to cover the claim.

Conclusion

Knowing what an insurance policy looks like, or the differences between third-party and first-party coverage and claim-made and occurrence-based insurance, or what it means to be an additional insured, will not make you an insurance expert. However, having a basic understanding of commercial insurance will make you adept enough to know what questions to ask your attorney and broker when deciding between insurance coverage alternatives or when presented with a commercial contract with exacting or unusual insurance requirements. Thus, competence (and not expertise) should be the goal for most agricultural producers when it comes to insurance matters.

---

[4] The "named insured" is the person or business who is specifically designated by name on the insurance policy as an "insured" and is paying the premium for the insurance coverage.

Terms to Consider as You Renegotiate Your Farm Lease

by Rick Halbur

Rick Halbur
507-354-3111
rhalbur@gislason.com

A number of recent economic developments will likely impact the negotiation of farmland leases following the 2022 crop year. For example, landlords may want to increase rent because commodity prices are generally rising, and farmland values are going up across the Midwest. On the other hand, tenants may be reluctant to pay more rent because many input costs have dramatically increased. Thus, it seems likely that both farmland landlords and tenants will want to review and renegotiate their current leases when they expire. This article aims to provide a "refresher" regarding some of the basic requirements and essential terms of a standard farm lease.

There are certain considerations that individuals should be mindful of when negotiating and drafting any farmland lease.

- Reduce Your Rental Agreement to Writing. Non-written, "oral" leases can be enforceable on a year-to-year basis, but it is certainly a "best practice" to memorialize a rental agreement with a written lease that is signed by the landlord and tenant. This reduces the likelihood of misunderstandings between the parties and provides the parties with express written terms that will control a rental relationship. Further, pursuant to Minn. Stat. § 513.05, if landlords and tenants want to establish an enforceable rental agreement covering a period longer than one year, then a written lease – or some note or memorandum thereof – is required.

- Include the Purpose. It is good practice to include a "purpose" statement in a lease. For example, a purpose statement can delineate whether the lease is for crop production only, or whether it may be used for other purposes (e.g., hunting, crop storage, etc.).

- Identify the Proper Parties to the Lease. The names and contact information of the proper parties should be included in the lease. For example, if the landlord is "John Doe, as Trustee of the John Doe Trust, dated May 1, 2022," then the lease should specifically identify this landlord as such and the landlord should sign the lease as "John Doe, as Trustee of the John Doe Trust, dated May 1, 2022." Sometimes, the parties to the lease sign in their individual capacities instead of, as in the above hypothetical, the relevant trustee of a trust. This can potentially cause problems down the road.

- Real Estate Description. The lease should be specific enough to identify the land subject to the lease. It is generally advisable to use a formal legal description for the leased farmland, but it is not required. That said, if a legal description is not used the parties should consider using the applicable parcel ID number(s) and/or attaching a map depicting the leased land. It is also a good idea to specify whether the real estate being leased is all acres of a given parcel or only the tillable acres thereof.

- Lease Term/Renewal. A provision in the lease should specifically state the exact term of the lease and how renewals, if any, will be handled. With respect to lease renewals, the lease should spell out whether the lease will automatically renew after its initial term, and if so for how long, along with an additional provision providing for how the parties can terminate a lease.

- Rental Amount and Method of Payment. The lease should clearly identify the rental amounts and payment terms for the farmland being rented. This part of the lease should delineate whether the lease is for "cash rent," a "crop

share" arrangement, or some sort of "flexible cash rent." The lease should also state the specific date(s) on which any rent payments are due.

- Allowed/Prohibited Uses. Both the landlord and the tenant should desire provisions outlining allowed and prohibited uses of the farmland subject to the lease (e.g., permitted and prohibited herbicide and pesticide applications, prohibitions on farming CRP acres, etc.).

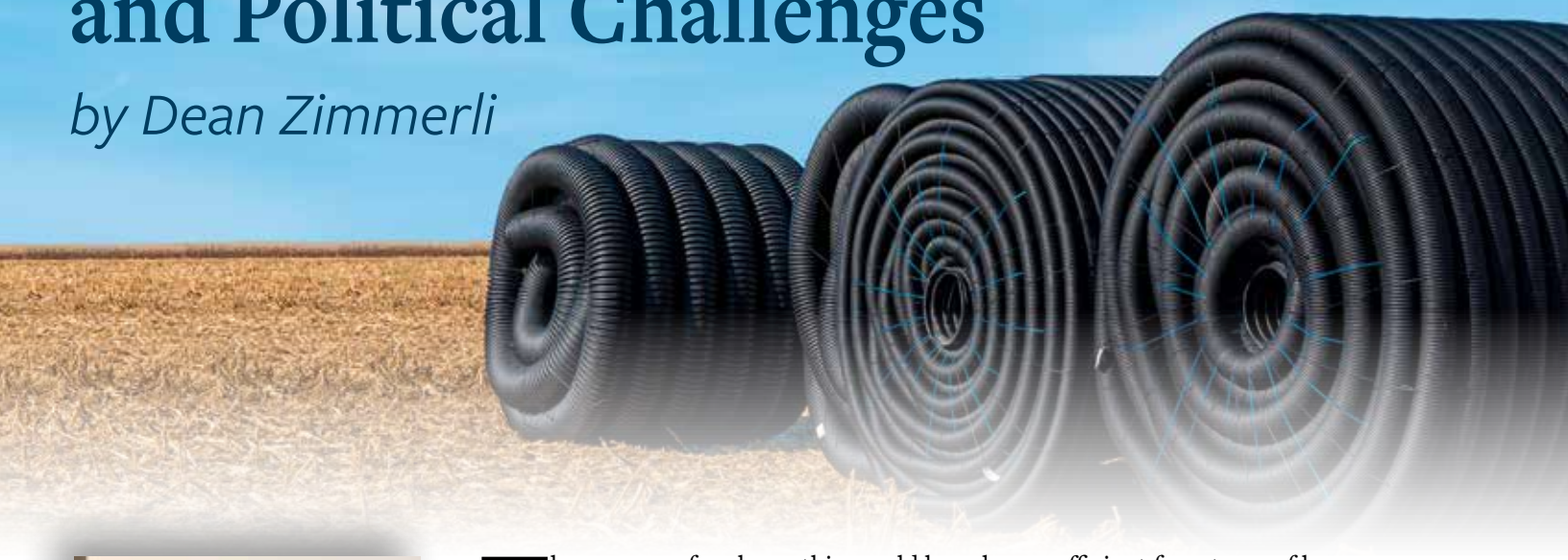
- Transfer of a Tenant's Interest. Most landowners will want a lease to restrict his or her tenant from assigning the tenant's interest in the real estate without the landlord's prior, written consent. Absent such a provision, a landlord may not be able to prevent an unreliable tenant from renting the farmland for the remaining term of a lease.

- Remedies Upon Default. Finally, some of the most critical terms in a farmland lease – and any lease for that matter – are provisions that specifically identify the parties' respective remedies in case of a default (e.g., nonpayment of rent, a failure to plowback the farmland in the fall, etc.). These possible remedies include the landlord's right to re-enter the property without causing forfeiture of tenant's obligation to pay rent; the landlord's right to re-enter the property to care for and harvest the crops; and the right of a landlord to sue a tenant and collect the landlord's attorneys' fees incurred in enforcing the lease, etc.

In closing, given the changing agricultural economy, in the upcoming months landlords and tenants may be interested in reassessing their current rental arrangements to determine what changes, if any, may be appropriate moving forward. Admittedly most, if not all, of the above-referenced lease terms are probably familiar to experienced landlords and tenants. And certain provisions will be given more priority in the lease negotiation process than others (i.e., rental amounts, payment terms, and default remedies are generally the highest priority for landlords and tenants). Nonetheless, when evaluating whether or not to continue a current lease or enter into a new one, landlords and tenants should carefully consider what lease terms should be included (or omitted) from their leases to maximize profits, continue or develop favorable rental arrangements, and successfully navigate our ever-changing agricultural economy.

Public Drainage Projects: Navigating the Legal, Environmental, and Political Challenges

by Dean Zimmerli



Dean M. Zimmerli
507-354-3111
dzimmerli@gislason.com

The success of cash crop farming in Minnesota is due in large part to the work our ancestors in this state did to convert wet and even flooded property into dry farmland. Through systems of open ditches and buried pipe, land was made farmable by quickly draining water from the landscape allowing it to be tilled and planted. The backbone of this agricultural drainage system is a network of public ditches and public tile systems administered by public drainage authorities, who are usually county boards or watershed districts. In turn, private landowners add their own tile which relies on the public systems as an outlet.

Many public drainage systems were installed a century or more ago. Though these systems provided a major upgrade from the natural drainage in the area, in many cases they are inadequate for modern farming practices. In many cases, public drainage tile may be too small to drain the land efficiently, leading to extended ponding and resulting crop losses. As more land is pattern-tiled, the impact of undersized county tile lines is more noticeable. Historically, tile lines were buried much shallower, as little as two feet deep. While this would have been sufficient for a team of horses or a Model B, it risks crushing and collapse from large modern machinery. And while some drainage systems installed a century ago are in remarkably good condition, others have succumb to wear and tear over the years, becoming filled with sediment, being crushed, collapsed, or damaged, leading to even more restricted drainage capacity. On top of these problems, recent years with heavy rains (2021 excluded) have highlighted the need for good drainage.

Facing these issues, producers and landowners may be interested in improving or expanding an existing public drainage system to provide better drainage or to extend the drainage system to land not previously served. While Minnesota law does provide a petition process to have the drainage authority improve or expand a drainage system, it is important to plan your project carefully to limit costs, minimize objections, and provide the greatest chance of success.

As an important first step, you should get the lay of the land, so to speak, with your potential project. First, this involves getting an understanding of the current system. For open ditches, this is often straightforward. But for buried tile, reference to maps or drawings of the system may be required. Luckily, many counties or other drainage authorities have drainage maps that can be downloaded or may be displayed on County GIS programs.

These maps will show where the system and its branches run and who is served and benefitted by the system. Because it is likely that others benefitted by the system will be affected or may have to contribute to the cost of the project, knowing

who is involved allows up front outreach. In addition, obtaining a list of the benefitted landowners on a system from the county auditor can also help identify those involved. Talking with neighbors about your project to build support or learn of any concerns allows for an early evaluation of potential local political risks a project may face.

As part of this evaluation process, engaging a drainage engineer earlier to provide an initial feasibility study concerning a project is often a good idea. This feasibility study can identify areas of concern such as environmental issues. For example, if the outlet for a drainage system is a public water, minimizing the impact may be an important step to satisfy the Minnesota DNR or other regulators. This may inform whether the project is cost-effective in the first place. While not required, a pre-petition landowner meeting led by the engineer can help neighbors understand the project and ultimately lead to their support on a petition.

Once a desired scope of the project is identified, the landowner can petition the drainage authority to commence the process. Drainage petitions can involve improving an existing system (for example, by deepening or enlarging tile or ditches), adding a new lateral that will contribute to an existing system, or establishing a new system entirely. Often, a petition to establish a new system is used to convert a private shared-drainage ditch into a public system if the landowners served by the private system can no longer agree or cooperate on maintenance.

While a drainage petition is not extraordinarily complex, it must include several specific allegations set forth in statute. Further, the drainage project process can be a daunting mix of notices, hearings, reports, and orders. For this reason, landowners often hire legal counsel to assist in preparing a petition that meets the requirements of the statute and guide them through the process. Generally, the petition must describe the project, who is affected, and how it will benefit landowners. In addition, it must be signed by landowners representing at least 26% of either the land or individuals affected by the project. Importantly, any person who signs on as a petitioner necessarily agrees to repay the drainage authority all of the costs incurred in pursuing the drainage project in the event the petition is dismissed or a contract for construction is ultimately not awarded. Because engineering fees can exceed $100,000 and legal and administrative costs can add thousands on top, joining a petition can be a significant risk.

After the petition is submitted, an engineer is appointed by the drainage authority (often it makes sense to appoint the engineer who completed the feasibility study) to prepare a preliminary and later a final report of the project. As part of this, the engineering report will include construction drawings depicting the project, describe the environmental impact of the project, provide a cost estimate of the project, and address other important requirements.

Before the project may be approved, the engineering report must be provided to the DNR so it can provide advisory comments. While the DNR does not have the power to approve or deny a drainage project (unless a public waters works permit is required), reviewing and addressing the DNR's concerns early on is important. Recently, both the DNR and other environmental groups have begun to very carefully scrutinize drainage projects and object on the grounds that additional water will negatively impact downstream environments by contributing to pollution, stream bank erosion, and flooding.

A strategy to address these objections and concerns has been to implement water storage features such as retention ponds or water and sediment control basins (WASCOBs). These water storage features work by collecting water and filling up quickly after rain events and then slowly metering the water out downstream through a small outlet pipe or other control structure. While they can add significant cost to a project, they also provide important environmental benefits, and can help alleviate objections that might otherwise serve as a roadblock to a project.

After the engineering work is completed, a group of three specialized appraisers known as "viewers" are appointed to evaluate the land affected by the project and make a report on the amount of benefits that will be provided to land served by the project. The viewers also determine the amount of damages that might be suffered by land as a result of the project; for example, land might need to be taken out of production to construct a ditch or retention pond and the landowner would be entitled to be paid damages for the lost acreage. The viewers' work and determination of benefits is particularly important because in order for a project to ultimately be approved, the benefits accruing to landowners must exceed all of the project costs, including the construction, engineering, and administrative costs.

A useful component of this cost-benefit analysis in drainage improvement projects involves a concept known as "separable maintenance." The concept is essentially this: suppose a drainage tile system is in need of replacement because the tiles have deteriorated and collapsed, but before the work can be completed, a petition for improvement is filed to increase the tile size from 12-inch tile to 18-inch tile. Because this improvement will avoid necessary repair costs, those hypothetical repair costs to replace the existing 12-inch tile will be deducted from the total cost of the improvement. The avoided repair costs are known as separable maintenance and are assessed to landowners as a repair. The cost of the improvement that is weighed in the cost-benefit test will only be the *additional* cost that it takes to install the larger tile rather than replacing the tile with the same size. Separable maintenance can become quite controversial, because

expensive projects with relatively little benefits can be approved, and landowners who may not benefit at all from the improvement may be billed for part of the project as repair costs.

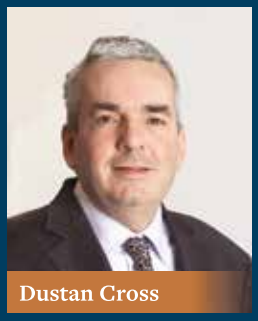
After the drainage design is finalized and environmental permitting is complete, the project is set for a final hearing before the drainage authority. Though considered by county boards or other political bodies, the decision is supposed to be a fact-based process, not based on what a majority of landowners necessarily desire. Specifically, if the six statutory criteria are satisfied—(a) the process followed the drainage code, (b) the viewers' and engineer's reports are complete and correct, (c) the benefits and damages of the project are properly determined, (d) the benefits of the project exceed the costs, (e) the project will be of public utility, and (f) the project is practicable—then the drainage authority is supposed to approve the project. That being said, this decision can be significantly influenced by opposition from landowners or environmental groups. Thus, it is beneficial to address as many concerns as possible before the final hearing.

The most important aspect to a successful drainage project is planning and attempting to address problems early. The alternative may lead to wasted costs in redesigning a project halfway through or attempting to pursue an unpopular project that is subject to appeals, delays, and ultimately more expense. With planning, coordination with the engineers and attorneys, and engagement with neighbors, improvements and drainage upgrades can be approved, with better drainage soon to follow.

Meet Your Experts in Agricultural Law & Agribusiness


Matthew Berger


Christopher Bowler


Dustan Cross


Michael Dove


Rick Halbur


Christopher Kamath


David Kim


Brittany King-Asamoa


Kaitlin Pals


Daniel Schwartz


Mark Ullery


Andrew Willaert


Dean Zimmerli

We understand that modern agriculture is large-scale, sophisticated and competitive, requiring solid legal counsel and strategies.

Call 507-354-3111 to schedule a meeting.

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

gislason.com

Carbon Contract Basics

by Matthew Berger

Matthew Berger
507-354-3111
mberger@gislason.com

Carbon markets (either voluntary or mandatory through government regulation) have emerged in recent years as a practical means to use free-market economic principles to reduce greenhouse gas emissions and mitigate global climate change. In carbon markets, businesses or individuals who reduce greenhouse gas emissions or sequester carbon in the soil can sell "credits" to other businesses or individuals who generate carbon emissions to offset those emissions. For example, a utility that burns coal to generate electricity can calculate the amount of greenhouse gases it emits and purchase credits representing the same amount of carbon dioxide equivalent to offset its emissions to satisfy regulatory requirements, consumer demands, or voluntary sustainability initiatives.

As part of the natural carbon cycle, growing plants absorb carbon dioxide from the atmosphere and store the carbon in their roots and plant matter. When the plants die, the carbon is deposited in the soil or released back into the atmosphere as the plant matter decays. By implementing certain conservation practices (e.g., planting cover crops, reducing tillage, or managing nitrogen fertilizer applications), farmers can reduce the amount of greenhouse gases they emit and increase the amount of carbon they sequester in the soil. Carbon markets provide farmers an opportunity to receive additional compensation for implementing these practices.

But as with most things in life, this money does not come without obligations. In order to monetize carbon offsets, the emission reductions or carbon sequestration on which a carbon credit is based, must be quantifiable (i.e., the amount of carbon mitigation is reliably calculated), verifiable (i.e., sufficient data is collected to confirm the amount of carbon mitigation), and enforceable (i.e., future obligations to implement mitigation practices are legally binding). The organizations that administer carbon marketplaces where carbon credits are bought and sold impose specific requirements to create and verify the carbon mitigation.

Most farmers do not market carbon credits directly. Instead, farmers who wish to participate in carbon markets generally enter into contracts with third-party developers to implement conservation practices on their farms. These third-party developers take the necessary steps to document and verify carbon mitigation to create the carbon credits and then sell those credits in the carbon marketplaces. This article will highlight key contract terms that farmers should be sure to understand in deciding whether to enter into a particular carbon contract.

Producer Requirements – The first, and most basic, contract terms a farmer should understand is the specific obligations that the contract imposes on the farmer. These requirements may fall within several categories.

- Carbon Mitigation – Some carbon contracts identify specific production practices (e.g., planting cover crops or using specific tillage practices) that a farmer must implement on particular fields. In other words, these contracts specify the particular means a farmer must use to achieve carbon mitigation. Other contracts merely require a farmer to sequester a specific quantity of carbon or reduce greenhouse gas emissions by a specific amount over a period of time and allow the farmer to choose from a menu of practices to achieve these reductions.

Each structure has its advantages and disadvantages that should be considered with the other contract terms. In either case, however, a farmer should understand the specific requirements that the contract imposes.

- New or Existing Practices – Many carbon contracts will require a farmer to implement new conservation practices and will not count any existing practices that a farmer already uses toward the carbon mitigation requirements. In some cases, however, carbon contracts will allow farmers to count existing practices that a farmer has previously implemented as long as those practices are voluntary (i.e., are not already required by existing laws, regulations, permits, or contracts). Before entering into a contract, farmers should make sure they understand whether or not any existing practices are included in the contract.

- Restrictions on Enrolling in Other Programs – In some cases, the conservation practices required under a carbon contract may also qualify for other programs. For example, a carbon contract may provide payments for removing land from row crop production and converting the land to grassland, which may also qualify for the Conservation Reserve Program. In addition to excluding land that was already converted and enrolled in these programs (as described above), a contract may also prohibit a farmer from enrolling covered land in other programs after the contract requirements are implemented.

- Land Use Restrictions – Most carbon contracts will require farmers to implement conservation practices on farmland for a specified period of time. And in many cases, the contract will identify the specific land on which these practices must be implemented. If a farmer leases crop ground, a farmer should confirm that the contract allows leased ground to be included in the contract and make sure that the lease extends for the duration of the contract (i.e., that the farmer will have the right to farm the ground for the duration of the contract). A farmer should also understand whether the contract imposes or requires a restrictive covenant, easement, or lien that attaches to the land and may restrict the farmer's ability to sell or use the land in the future.

- Verification – Most carbon contracts will include some verification requirements. These contract terms may require farmers to create and maintain certain records related to their farming practices, collect certain measurements, or make their property and records available for inspection. Farmers should understand both the requirements they are required to perform and the rights they are granting to third parties with respect to verification and inspection.

Payment Terms – Farmers should also understand the payment terms of a carbon contract. This begins with the manner in which payments are calculated. In this regard, some contracts calculate payments based on the number of acres on which the required conservation practices will be implemented, while other contracts calculate payments based on the amount of carbon sequestered (or amount of carbon emissions reduced) or on the market price of the carbon credits generated from the conservation practices. Farmers should also understand whether the payments are guaranteed or instead are contingent on some future event (such as the sale of the carbon credits generated) and whether there are penalties imposed if required future practices cannot be implemented or the amount of carbon actually sequestered is less than anticipated. Finally, farmers should understand how the payments are structured (i.e., how many payments will be made and when will they be made during the term of the contract).

Contract Duration – Another basic term a farmer should understand before entering into a carbon contract is how long the contract lasts. In other words, a farmer should understand how long they will be required to implement the specified conservation practices and whether the contract allows either party to terminate the agreement early (and if so, under what conditions or at what cost).

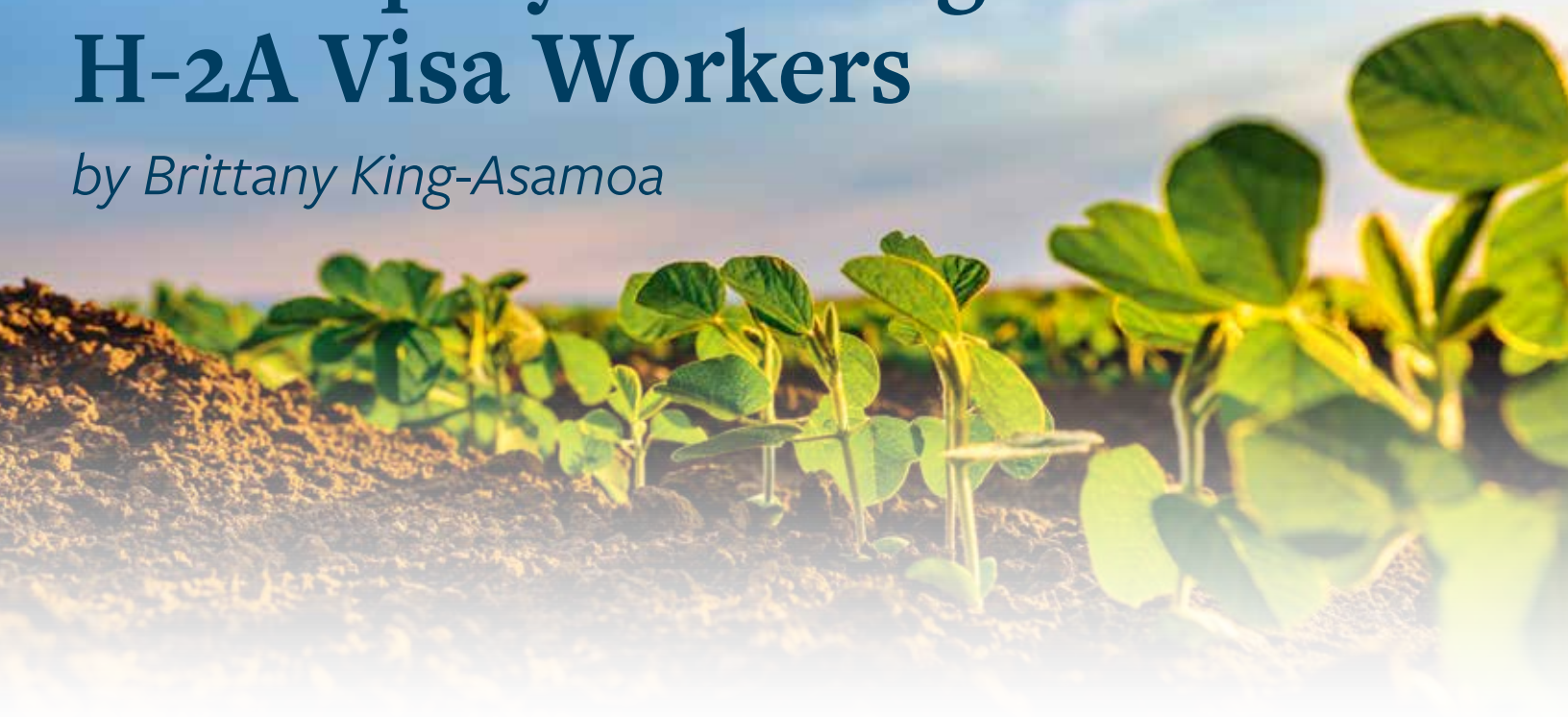
Control of Data – As noted above, most carbon contracts impose verification requirements to document and measure the amount of carbon emissions that are mitigated or the amount of carbon that is sequestered in the soil. These verification requirements will generate significant data about the land and farming practices. Farmers should understand who owns this data, who will have access to this data, and how this data may be used in the future.

Who Are You Dealing With? – Finally, farmers should understand who they are dealing with before entering into a carbon contract. Because many of these contracts impose obligations and payment rights that may extend for many years in the future, farmers should understand whether the other party is an established company that has a long track record or is a start-up who may not have the resources to make payments in the future. A farmer should also know any third parties who will be involved in collecting measurements or data relating to their farm.

In summary, carbon contracts may provide many farmers with supplemental compensation to implement production practices that are good for the environment and their farming operation. However, these contracts may also impose obligations that extend for a long time in the future and restrict future opportunities. Farmers should therefore make sure to fully understand the terms of a contract, and carefully weigh the benefits and costs, before entering into these contracts.

Top 5 Compliance Issues for Employers Using H-2A Visa Workers

by Brittany King-Asamoa



Brittany King-Asamoa
507-387-1115
bking-asamoa@gislason.com

The H-2A program allows foreign workers to perform agricultural labor or services of a temporary or seasonal nature in the United States. This program, however, has stringent rules carrying substantial civil and criminal penalties for employers violating the program. Five common employer compliance issues are reviewed below.

1. H-2A Workers Should Only Perform Work Identified on the Job Offer.

Only agricultural work of a temporary or seasonal nature qualifies for the H-2A program. While agricultural work encompasses many farm duties, not all agricultural work is of a temporary or seasonal nature. Work of a seasonal nature "is tied to a certain time of year by an event or pattern . . . and requires labor levels far above those necessary for ongoing operations."[1] Work of a temporary nature is work the employer needs performed for no longer than one year, absent extraordinary circumstances. The U.S. Department of Labor (DOL) recognizes that the majority of activities encompassed in milk production and livestock production "are year-round activities and therefore cannot be classified as temporary" or seasonal.[2] Thus, many positions in these industries do not qualify for the H-2A program.

Job offers are the employers' statement to the DOL, United States Citizenship and Immigration Services, and H-2A workers "describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits."[3] The specific job duties offered

[1] 29 CFR § 501.3(c).
[2] *See Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010).
[3] 20 C.F.R. § 655.103(b).

to H-2A workers must be provided in the job offer and Form ETA-790A: H-2A Agricultural Clearance Orders (job order). A common mistake employers make is having H-2A workers perform (1) work not identified on the job offer or order; and (2) agricultural work that is not seasonal or of a temporary nature, such as livestock and milk production.[4] This can be an expensive mistake resulting in civil penalties up to $6,386 per violation (each day is a separate violation). Employers can avoid this common mistake by ensuring H-2A workers are performing only those duties on their job offer and order.

2. The H-2A Program Requires Maintenance of Accurate and Extensive Earning Records.

Employers must maintain accurate records of H-2A worker earnings for three years. These records are extensive and include, but are not limited to:

> [F]ield tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of [20 C.F.R. § 655.122]); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

20 C.F.R. § 655.122(j)(1). Failure to maintain these records may result in civil penalties equivalent to those noted above.

3. Employers Must Provide H-2A Workers Daily Meals or Access to a Free Kitchen.

H-2A workers must receive at least three meals per day or free access to a furnished kitchen to prepare their own meals. Employers opting to provide meals may charge workers for these meals, but the charge cannot be greater than the amount allowed by the DOL. The current maximum charge is $14 per day for three meals.[5] Employers cannot charge an H-2A worker more without express authorization from the Office of Foreign Labor Certification. Employers providing meals must identify the meal charge in the H-2A worker's job offer and (if prepared) work contract. Failure to provide the meals or kitchen as identified can result in civil penalties up to $6,386 per violation. Each day, meal, or inappropriate charge could be assessed as a separate violation.

4. Free Housing and Transportation Must be Provided to H-2A Workers.

The H-2A program requires employers to provide workers free housing that meets applicable OSHA, state, and local standards. Employers cannot charge H-2A workers for this housing or require the worker to pay a deposit, even if the employer does not own the housing facilities. H-2A workers responsible for damage beyond normal wear and tear related to habitation, however, can be charged for such damage.

Like housing, employers must also provide H-2A workers with free transportation from their living quarters to job site(s). Such transportation must meet all applicable federal, state, or local laws and regulations, and safety, licensure, and insurance standards identified at 20 C.F.R. § 655.122(h)(4). Employers

---

[4] Herders and livestock production on a range requiring workers to be on call 24 hours a day, 7 days a week are exceptions to this limitation. 20 C.F.R. § 655.20.

[5] 86 Fed. Reg. 10246 (Feb. 23, 2022). This rate is reevaluated annually. 20 C.F.R. § 655.173(a).

have obligations to pay for arriving and (potentially) departing transportation costs as well pursuant to 20 C.F.R. § 655.122(h)(1)-(2).

Housing and transportation arrangements are information that must be included in the H-2A workers' job offer. Thus, if the employer fails to provide the housing or transportation identified in the offer the employer can be assessed a civil penalty up to $6,386 per violation. Moreover, the DOL can assess additional civil penalties up to $63,232 or $126,463 (repeat or willful violation) per worker for violations of housing or transportation safety or health requirements.

5. H-2A Workers Cannot Displace U.S. Workers.

Federal law prohibits employers from favoring the employment of foreign workers or otherwise discriminating against qualified U.S. workers because of their citizenship. Before employers even submit a Form ETA-9142A: H-2A Application for Temporary Employment Certification (application), employers must contact those U.S. workers they employed the previous year (whose employment was terminated without cause) and offer the former employees the job opportunity to be contained in the job order. By submitting the application and job order, an employer asserts under penalty of perjury that U.S. workers qualified and able to perform the work for which H-2A workers are sought to perform are not available.

In the application, the employer also promises to continue recruiting and hiring qualified U.S. workers for the described employment opportunities. The employer has an affirmative obligation to engage in such recruitment efforts through 50% of the work contract period.[6] An employer found to have rejected, laid off, or otherwise displaced a qualified U.S. worker to employ an H-2A worker may be assessed a civil penalty up to $18,970 per rejected, laid off, or displaced U.S. worker and liable for back wages to make that U.S. worker whole.

The civil penalties detailed in this article are reevaluated, and typically increase, annually by the DOL. Employers are encouraged to view the most up-to-date penalty assessments at https://www.dol.gov/agencies/whd/agriculture/h2a. It is further imperative that employers recognize the documents filed with federal agencies for the H-2A program (e.g. application, I-129 petition) are submitted under penalty of perjury. This means in additional to civil penalties, there may be criminal penalties. Indeed, any person submitting information, statements, or data for the H-2A program that said person "knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both." 29 C.F.R. § 501.8 (emphasis added).

This article does not constitute legal advice. Employers are encouraged to consult with an attorney for advice and counsel on complying with the H-2A laws and regulations.

[6] 20 CFR § 655.135(d).

Ag Practice Services

Gislason & Hunter is well-recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agricultural industry. Our attorneys represent and advise a broad spectrum of national, regional, and local agribusiness clients – including livestock producers, packers, input suppliers, agricultural lenders, and individual farmers – in all aspects of their operations. Our work in agricultural matters includes both transactional advice and litigation in the following areas:

- Bankruptcy
- Business Formation and Restructuring
- Commercial Transactions
- Employment Issues
- Environmental Regulations
- Estate and Succession Planning
- Financing and Debt Restructuring
- Foreclosure and Debt Collection
- Governmental Regulations and Program Payments
- Insurance Disputes
- Intellectual Property Rights
- Manufacturing and Distribution
- Marketing and Production Contracts
- Personal Injury Claims
- Zoning and Permitting Issues

REPRESENTATIVE MATTERS

- Negotiated and drafted long-term marketing agreements for large, multi-state swine producers
- Drafted both turn-by-turn and long-term independent grower agreements for swine producers
- Drafted credit agreements, forbearance agreements, and other loan documents for loans to agricultural producers
- Structured multi-state production and distribution systems
- Negotiated and drafted asset acquisition and disposition agreements of all sizes
- Provided advice and representation for banks, bank participations, and bank syndications related to agricultural loans
- Litigated commercial and corporate disputes in state and federal courts throughout the Midwest
- Represented agricultural producers and allied industries before local, state, and federal regulatory agencies

This publication is not intended to be responsive to any individual situation or concerns as the contents of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.

Gislason & Hunter
AGRICULTURE PRACTICE GROUP

Matthew C. Berger	mberger@gislason.com
Christopher E. Bowler	cbowler@gislason.com
Dustan J. Cross	dcross@gislason.com
Michael S. Dove	mdove@gislason.com
Rick J. Halbur	rhalbur@gislason.com
Christopher J. Kamath	ckamath@gislason.com
David C. Kim	dkim@gislason.com
Brittany R. King-Asamoa	bking-asamoa@gislason.com
Kaitlin M. Pals	kpals@gislason.com
Daniel J. Schwartz	dschwartz@gislason.com
Mark S. Ullery	mullery@gislason.com
Andrew A. Willaert	awillaert@gislason.com
Dean M. Zimmerli	dzimmerli@gislason.com

LOCATIONS

Mankato Office
111 South 2nd Street, Suite 500
Mankato, MN 56001
507–387–1115

New Ulm Office
2700 South Broadway
New Ulm, MN 56073
507–354–3111

www.gislason.com

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

VITAL EXPERTISE FOR WHAT MATTERS

For more than 80 years, Gislason & Hunter has been delivering the very best in service and results. Our accomplished attorneys bring substantial trial experience and industry-specific knowledge, making us a leader in a variety of practice areas to serve the Upper Midwest.

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

www.gislason.com