



FELS[®]

KEY EMPLOYMENT
REQUIREMENTS FOR
AGRICULTURAL WORK PLACES IN
CALIFORNIA

Thursday, April 1, 2010
Rancho Nicasio

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California Farm Bureau Federation
and
Farm Employers Labor Service

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**Employment
Relationships**

- What does it mean for an *employer* to *employ* an *employee*?
- Different laws define the terms differently

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**Employment
Common Law**

- Common law definition
 - Common law is what courts say the law is in situations not covered by statutes (that is, laws passed by the legislature)
 - Context: Determination of master-servant relationship for master's (employer's) liability to 3rd parties
 - An employer has the **power** to **control** what an employee does and how the employee will do it
 - This is so even if the employer gives the employee freedom of action (that is, even where the employer does not exercise its power to control)
 - What matters is that the employer has the right to control the details of how the employee performs services

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Employment IRS Test

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- IRS 20 common-law factors test
- For distinguishing employees from ICs for federal income and employment tax purposes
- Instructive as to criteria indicating employment; for example:
 - Worker must follow hirer’s instructions
 - Hirer trains worker
 - Hirer sets worker’s hours of work
 - Worker works on hirer’s premises
 - Hirer sets order or sequence of work
 - Hirer furnishes worker with tools and materials
 - No investment in the facilities used
 - Either party may end the relationship at will

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Employment FLSA

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- Federal Fair Labor Standards Act (FLSA)
- Purpose: To protect employees from unscrupulous employers (and themselves)
- *Employ* includes to suffer of permit to work
- Courts have held that *employ* is broader under the FLSA than under the common law
- One’s knowledge that another did work for him can be enough to create employment under the FLSA

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Employment FLSA

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- FLSA “economic realities” test for distinguishing employees from ICs:
 - Extent to which the services rendered are an integral part of the hirer’s business
 - Permanency of the relationship
 - Amount of worker’s investment in facilities and equipment
 - Nature and degree of control by the hirer
 - Worker’s opportunities for profit and loss
 - Amount of initiative, judgment, or foresight in open market competition required for worker’s success

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Employment California Laws

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- Common law factors augmented by economic reality factors in *S. G. Borello & Sons v. DIR*
- Issue in Borello was whether cucumber pickers were employees under workers' compensation laws
- WC statute: "Employee" means every person in the service of an employer
- Presumption of employment

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Employment *Borello*

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- While **power to control** is still significant under *Borello*, it also considers these factors to indicate employment rather than IC:
 - Worker is not engaged in an occupation or business distinct from hirer's
 - Work is a part of hirer's regular business
 - Hirer supplies instrumentalities, tools, and workplace
 - Worker has little or no investment in required equipment or materials
 - Work requires little skill

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Employment *Borello*

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- Hirers in the locality usually direct the type of work the worker is doing
- Worker has no opportunity for profit or loss depending on his managerial skill
- Services are to be performed for a relatively long time
- The working relationship is relatively permanent
- The method of payment is by time, not by the job
- The parties believe they are creating an employment relationship

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Employment Borello

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Also following *Borello*:

- Division of Labor Standards Enforcement (DLSE); IWC definitions:
 - *Employ*: To engage, suffer or permit to work
 - *Employer*: Any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person
- Dept. of Fair Employment & Housing (DFEH)
- Agricultural Labor Relations Board (ALRB)
- Cal/OSHA

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Employment Other Relationships

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- These tests and factors are in the context of distinguishing employees from ICs
- But how about determining whether other “workers” are employees, namely:
 - Interns/Trainees?
 - Apprentices?
 - Volunteers?

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Employment Interns/Trainees

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- Whether interns/trainees are employees depends on the circumstances
- Wage and Hour Division (WHD) of U.S. Dept. of Labor (DOL) says these 6 criteria must be met for a trainee not be an employee:
 - The training, even though it includes actual operation of the trainer’s facilities, is similar to that which would be given in a vocational school
 - The training is for the trainee’s benefit
 - The trainees do not displace regular employees, but work under close observation

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Employment Interns/Trainees

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- The trainer derives no immediate advantage from the activities of the trainees and on occasion the trainer's operations might be impeded
- The trainee is not necessarily entitled to a job when the training period ends
- The trainer and the trainee understand the trainee is not entitled to wages for the time spent in training
- Op. Ltr. FLSA2004-5NA May 17, 2004

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Employment Interns/Trainees

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- DLSE's policy is even more restrictive than WHD's
- For an intern to be exempt from the Industrial Welfare Commission (IWC) orders, DLSE says an intern's training:
 - Must be an essential part of an established course of an
 - Accredited school or
 - Institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession
 - Training program may not be for the benefit of any one employer

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Employment Interns/Trainees

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- DLSE policy continued
 - Intern may not displace a regular employee
 - Means intern may not perform work an employee would perform
 - Training must be supervised by the school or disinterested agency
 - DLSE Op. Ltr. 1996.12.30

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Employment Apprentices

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- According to WHD, apprentices in apprenticeship programs are employees
- Apprentices learn a trade
 - Through on-the-job training
 - Under the guidance of a skilled journeyman
 - Combined with related, supplemental classroom instruction usually held outside of working hours

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Employment Apprentices

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- Time spent working on the job is hours worked
- Time spent in related supplemental classroom instruction outside of working hours might not be hours worked, depending on the terms of the Apprenticeship Agreement

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Employment Apprentices

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- Under WHD policy, time spent in supplemental classroom instruction is **not** hours worked if:
 - The apprentice is employed under a written apprenticeship agreement or program that substantially meets the fundamental standards of DOL's Bureau of Apprenticeship and Training (BAT);
 - The training time does not involve productive work or performance of the apprentice's regular duties; and
 - The written apprenticeship agreement does not specifically provide it is hours worked.

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Employment Apprentices

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- CA Division of Apprenticeship Standards (DAS) administers CA apprenticeship law
- DAS enforces apprenticeship standards for wages, hours, working conditions and the specific skills required for state certification as a journey person in an apprenticeable occupation

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Employment Apprentices

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- DAS says apprenticeship is a system of learning while earning, and learning by doing
- It combines training on the job with related and supplemental instruction at school
- It is used chiefly in the skilled crafts

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Employment Volunteers

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- Persons volunteering or donating their services for public service or religious or humanitarian objectives are not employees of the religious, charitable or similar nonprofit organizations receiving their service
- Must be without contemplation of pay
- Persons may not volunteer services to for-profit private-sector employers
- Position of both WHD and DLSE

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Employment Learners

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- Employees learning how to do a job may be paid less than the CA minimum wage
- IWC orders let employers pay employees during their first 160 hours of employment in occupations in which they have no previous similar or related experience not less than 85% of the minimum wage rounded to the nearest nickel (\$6.80/hr)

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Employment Learners

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- But: Must observe FLSA MW of \$7.25/hr unless an FLSA MW exemption or exception applies; examples:
- An employer who did not use more than 500 man-days of ag labor in any quarter of the prior year is exempt from FLSA MW in the current year
- An employer may pay a youth MW of not less than \$4.25 an hour to employees under 20 years of age during the first 90 consecutive days after their initial employment
- An employer employing full-time students in ag may get a DOL certificate allowing payment at 85% of federal MW (\$6.15/hr)
- An employer employing high school students at least 16 years old and enrolled in vocational education (shop courses) may get a DOL certificate allowing payment at 75% of federal MW (\$5.45/hr)

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Unemployment Insurance

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- Employment Development Department registration number
- Withhold and pay employees' state income tax and SDI tax
- Pay UI tax

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Federal Taxes

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- Internal Revenue Service employer identification number
- Withhold and pay federal income tax, FICA, HI and FUTA taxes



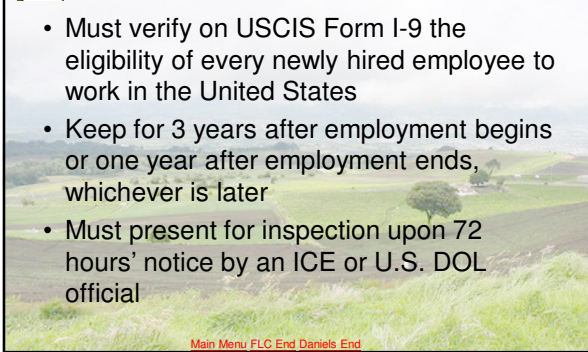
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Employment Eligibility Verification (Form I-9)

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- Must verify on USCIS Form I-9 the eligibility of every newly hired employee to work in the United States
- Keep for 3 years after employment begins or one year after employment ends, whichever is later
- Must present for inspection upon 72 hours' notice by an ICE or U.S. DOL official



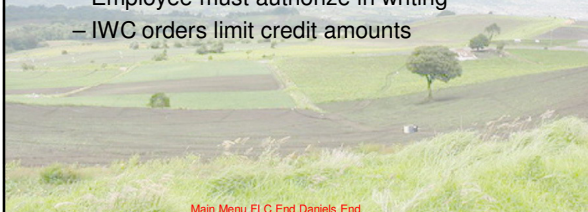
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Deductions & MW Credits

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- Employee must authorize in writing deductions not mandated by law
- Housing and meals credited against MW
 - Employee must authorize in writing
 - IWC orders limit credit amounts



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Posters and Notices



- Federal:
 - A) Minimum Wage
 - B) Employee Polygraph Protection
 - C) Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA)
 - D) MSAWPA Worker Information
 - E) MSAWPA Housing
 - F) Equal Employment Opportunity Is the Law
 - G) Family Medical Leave Act

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Posters and Notices



- Cal/OSHA:
 - A) Safety and Health Protection on the Job;
 - B) Form 300A (each 2/1 to 4/30)
 - C) Industrial Trucks (forklifts)
 - D) Access to Medical Records
 - E) Location of MSDSs
 - F) Tractor Safety
 - G) Field Sanitation

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Posters and Notices



- Industrial Welfare Commission (IWC)
 - A) Order 14 (agricultural occupations)
 - B) Other IWC orders as applicable
 - Order 4 (clericals)
 - Order 7 (mercantile)
 - Order 8 (post-harvest handling of commodities not produced by employer)
 - Order 13 (post-harvest handling of commodities produced by employer)

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Posters and Notices

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- State, other:
 - Payday Notice
 - Discrimination & Harassment
 - Minor Children Notice
 - Time Off to Vote
 - Whistleblower
 - Prop. 65
 - Workers' Compensation Notice
 - UI-SDI-PFL Notice

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Posters and Notices

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- State, other (continued):
 - Pesticide Safety Information Sheets - Field Workers & Handlers
 - Emergency Numbers
 - Pregnancy Leave Act
 - Family Rights Act

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Disclosures/Notices

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- MSPA Worker Information
- UI, SDI, PFL
- FMLA
- Access to Medical Records
- Good Hygiene Practices
- Mass Layoff, Plant Closure, Relocation or Termination

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Payment of Wages



- At least semimonthly
 - Within 7 days after end of payroll period
- Exceptions:
 - Boarded & lodged employees: at least monthly
 - FLC employees: at least weekly
 - Within 4 days after end of payroll period
- Immediately upon discharge or layoff
- Within 72 hours after voluntary quit
- Post notice of regular pay days & time and place of payment

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Other Records



- Migrant & Seasonal Worker Protection Act (MSPA)
 - Disclose to migrant workers, Worker Information ([Form WH 516](#))
 - Wage Statement ([Form WH 501](#))
- Field Sanitation – Title 8, CCR § 3467
 - Facility Maintenance Record

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Reporting-Time Pay



- Employee who reports for work as required but who is not put to work or is given less than 1/2 of the employee's usual or scheduled day's work must be paid
 - Half the employee's usual or scheduled hours at the employee's regular rate of pay
 - Minimum of 2 hours
 - Maximum of 4 hours
- Employee who reports a 2nd time & is furnished less than 2 hours on the 2nd reporting must be paid for 2 hours at the employee's regular rate

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Reporting-Time Pay



- Exceptions
 - Operations can't start or continue due to
 - Threats to employees or property or
 - Civil authorities' recommendation
 - Public utility failure
 - An Act of God or other cause beyond employer's control (e.g., rain)
 - Employer hasn't employed 5 or more employees at any time in the calendar year
 - Employee on paid standby status is called to work at a time other than the employee's scheduled reporting time

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Tools and Equipment



- Employer must provide and maintain required or necessary tools and equipment for employees earning less than twice the MW
- Funds securing return of equipment must be deposited in a joint bank savings account

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Meal Periods



- Allow a 30-minute unpaid meal period in a 5-hour work period
- Employer and employee may agree to waive meal period if a work period of 6 or fewer hours will complete day's work
- Employer and employee may agree to an on-duty paid meal period if task requires it
- An employee not provided one or more meal periods must be paid for that workday 1 hour of additional wages at the employee's regular pay rate

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Rest Periods



- Allow a 10-minute paid rest period per 4 hours of work or major fraction of 4 hours, based on total workday hours
- None required if employee works fewer than 3½ hours in a workday
- An employee not provided one or more rest periods must be paid for that workday 1 hour of additional wages at the employee's regular pay rate

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Housing



- Inspections and permits under CA Employee Housing Act if 5 or more employees are housed
- Comply with federal housing standards for migrant agricultural workers
- Federal migrant agricultural worker housing poster

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Field Sanitation (Hand-Labor Operations)



- Toilet Facilities
 - Crew with 1-4 employees:
 - 1 toilet, even if a mixed-sex crew
 - Crew with 5 or more employees:
 - 1 toilet per 20 employees of each sex or fraction of 20
 - Toilet paper in suitable holder
 - Screened
 - Chemical toilet waste water tank must:
 - Be able to hold at least 40 gallons
 - Contain effective odor-control and solid-liquefying chemicals
 - Keep service & maintenance records for at least 2 years

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Field Sanitation

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- Handwashing Facilities
 - 1 per each 20 employees or fraction of 20
 - Water tank must be able to hold at least 15 gallons and be refilled with potable water as necessary
 - Soap
 - Single-use towels
 - Post sign stating:
This water is for handwashing only.

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Toilet & Handwashing Facilities

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- Located near each other
- Within a ¼ mile or 5-minute walk of employees, whichever is shorter
 - Where terrain prevents this, then at the point closest to vehicular access
- Ventilated and rigidly constructed, with self-closing doors, lockable from inside
- Inside surfaces must be nonabsorbent, smooth, readily cleanable, and light-colored
- Clean and sanitary

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Toilet & Handwashing Facilities

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- **Alternative compliance:** May provide transportation to facilities if:
 - Employees are performing fieldwork for under 2 hours (including transportation time) or
 - 4 or fewer employees are engaged in hand-labor operations on a given day

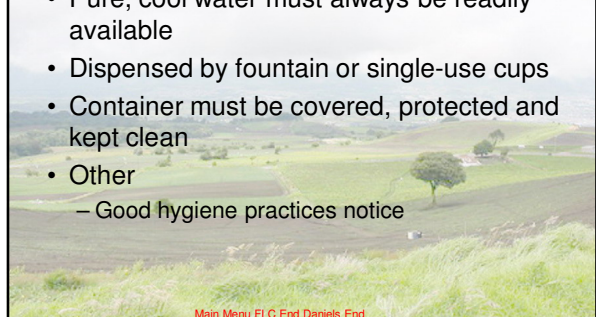
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Drinking Water



- Pure, cool water must always be readily available
- Dispensed by fountain or single-use cups
- Container must be covered, protected and kept clean
- Other
 - Good hygiene practices notice



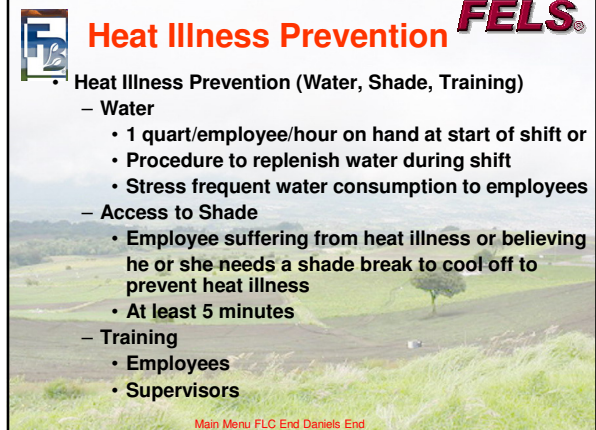
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Heat Illness Prevention



- Heat Illness Prevention (Water, Shade, Training)
 - Water
 - 1 quart/employee/hour on hand at start of shift or
 - Procedure to replenish water during shift
 - Stress frequent water consumption to employees
 - Access to Shade
 - Employee suffering from heat illness or believing he or she needs a shade break to cool off to prevent heat illness
 - At least 5 minutes
 - Training
 - Employees
 - Supervisors



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Heat Illness Prevention



- Heat Illness Prevention
 - DOSH Interpretation
 - www.dir.ca.gov/DOSH/heatIllnessQA.html
 - Outside vs. Inside
 - Defines “Environmental Risk Factors”
 - Heat Index www.wrh.noaa.gov/sto/heatindex.php

Relative Humidity (%)		Heat Index (Apparent Temperature)	With Prolonged Exposure and/or Physical Activity
95	80		
100	95	100	Extreme Danger
100	80	95	Heat stroke or sunstroke likely
95	95	95	Danger
95	80	90	Sunstroke, muscle cramps, and/or heat exhaustion likely
90	95	90	Extreme Caution
90	80	85	Sunstroke, muscle cramps, and/or heat exhaustion possible
85	95	85	Caution
85	80	80	Fatigue possible

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Heat Illness Prevention **FELS**

- Heat Illness Prevention
 - DOSH Interpretation
 - “Effective Procedures for Replenishment”
 - Sufficient Shade
 - Preventive Recovery Periods
 - Procedures to identify, evaluate and control personal risk factors
 - How training will be evaluated

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Weeding (plus thinning & hot-capping) **FELS**

- May not weed* in a stooped position using a short-handled tool (less than 48 inches)
- May not hand weed* in a stooped position unless:
 - There is no readily available reasonable alternative means suitable and appropriate to the production of the commodity
 - Hand weeding* is only occasional or intermittent and incidental
 - Occasional or intermittent: limited to 20% of an employee’s weekly work time

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Weeding* **FELS**

- May not hand weed* in a stooped position unless (continued):
 - Plants being weeded*
 - were spaced less than 2 inches apart when planted;
 - are registered as organic;
 - are seedlings; or
 - are horticultural plants growing in containers with openings of 15
 - *Includes thinning or hot-capping

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Weeding*



- Employees engaged in hand weeding* that's not "occasional or intermittent" get additional 5 minutes added to 10-minute rest period
- Employees engaged in hand weeding* must be supplied with gloves and kneepads as necessary and with training

• *(Includes , thinning or hot-capping)

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Other Safety and Health Requirements



- Written Injury and Illness Prevention Program
- Written Hazard Communication Program
- First-aid kit and person trained in its use

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MSPA Disclosure



- Disclosure in writing to:
 - Migrant or seasonal day-haul agricultural worker
 - When the worker is recruited
 - Seasonal agricultural worker upon the worker's request

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MSPA Disclosure



- Worker Information:
 - Place of employment,
 - Wage rates
 - Crops and activities
 - Period of employment
 - Any transportation, housing and other benefit
 - Workers' compensation and unemployment insurance
 - Existence of any strike or other stoppage
 - Existence of any arrangement
 - Workers' compensation

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Thank you! FELS®

Farm Employers Labor Service
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