

# Workmen's Compensation, Minimum Wage, and the Farmworker

## I. INTRODUCTION

There is a large body of law, both federal and state, that is important to the working man. This legislation is collectively referred to as "workmen's laws", a tacit acknowledgement of its importance to the laborer. Included in this broad category are laws relating to social security, unemployment insurance, labor relations, wage collection, minimum wage, and workmen's compensation.

Minimum wage and workmen's compensation legislation provide fundamental protection to working men, assuring both a basic wage and compensation for work injuries. So basic are these laws that most people assume that every working man is protected. Universal coverage, however, is not the case, as the plight of the farm worker so aptly illustrates.

Workmen's compensation laws were a part of the early legislative programs enacted for the benefit of the working man.<sup>1</sup> In 1906 Congress enacted a national workmen's compensation law, The Employers' Liability Act.<sup>2</sup> However, this Act was struck down two years later in the famous *Employers' Liability Case*<sup>3</sup> as an unconstitutional regulation of commerce.<sup>4</sup> Those people who had supported this

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<sup>1</sup>See generally S. REP. NO. 167, 88th Cong., 1st Sess. 25 (1963); S. REP. NO. 1549, 89th Cong., 2d Sess. 41 (1966).

<sup>2</sup>34 Stat. 232 (1906).

<sup>3</sup>Howard v. Illinois Cent. R.R. Co., 207 U.S. 463 (1908).

<sup>4</sup>The Court stated that the statute "regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce." Thus, "[t]he act . . . includes subjects wholly outside the power of Congress to regulate commerce." 207 U.S. at 497—98.

early national legislation<sup>5</sup> then successfully sought enactment of state legislation to avoid the constitutional problem. Any doubts concerning the constitutionality of state workmen's compensation laws were erased in 1917 when the United States Supreme Court upheld the three then existing types of state compensation laws.<sup>6</sup> Although state workmen's compensation laws have been in existence for over 50 years, the farm worker still is excluded from coverage in most states.<sup>7</sup>

Minimum wage laws did not become established until workmen's compensation programs had been in existence for several years. The first national minimum wage law was the Fair Labor Standards Act of 1938 (FLSA).<sup>8</sup> The constitutionality of the FLSA was initially in doubt because a previous wage law enacted by Congress for the District of Columbia<sup>9</sup> had been declared unconstitutional by the United States Supreme Court.<sup>10</sup> The FLSA, however, was upheld as constitutional by the Court in *United States v. Darby*.<sup>11</sup>

<sup>5</sup>Advocates of workmen's compensation came from three principal groups: enlightened public officials, political leaders, and academic men. Men in the first group included Carrol D. Wright, the United States Commissioner of Labor, and J. Machin of the New York Bureau of Labor Standards. Theodore Roosevelt was the most active of the political leaders. Members of the academic group included Professors Henderson of the University of Chicago and Salger of Columbia University. See Riesenfeld, *Forty Years of American Workmen's Compensation*, 7 NACCA L. J. 15, 18 n22—24 (1952).

<sup>6</sup>*New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917) (upholding a compulsory workmen's compensation law); *Hawkins v. Bleakly*, 243 U.S. 210 (1917) (upholding an elective workmen's compensation law); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (upholding an exclusive state fund for financing workmen's compensation benefits).

<sup>7</sup>See text accompanying notes 65—98 *infra*.

<sup>8</sup>52 Stat. 1060 (1938), 29 U.S.C. §§ 201—19 (1964), *as amended* (Supp. III, 1967).

<sup>9</sup>Minimum Wage Act of 1918, 40 Stat. 960 (1918).

<sup>10</sup>The Minimum Wage Act of 1918, which authorized the setting of minimum wage standards for adult women in the District of Columbia, was held unconstitutional on the ground that it violated the Contract Clause. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

<sup>11</sup>312 U.S. 100 (1941). The FLSA was held to be a proper regulation under the Commerce Clause. The Court held that while the manufacture of goods is not by itself commerce, the shipment of manufactured goods in interstate commerce is subject to regulation. Thus, prohibition of such shipment unless the prescribed minimum wages are paid is a proper regulation of commerce. The Court stated: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." 312 U.S. at 118. See also *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941), which held that the wage and hour provisions of the FLSA as applied to manufacturers of textile goods for interstate commerce was within the commerce power of Congress and consistent with the Fifth and Tenth Amendments.

Although farmworkers were excluded under the original provisions of the FLSA,<sup>12</sup> the Act was amended in 1966 to provide partial coverage for farm labor.<sup>13</sup> Although most farm workers now receive the benefits of the FLSA, many remain unprotected by the Act.<sup>14</sup> Minimum wage standards are also established by state law. These provisions may afford coverage to many workers who are excluded by the FLSA. Farmworkers, however, are generally excluded from receiving benefits even under the state wage laws.<sup>15</sup>

This article will analyze the provisions of the workmen's compensation and minimum wage laws and their applicability to farm labor. It will probe the reasons why the farm worker has been, and continues to be, excluded from the full coverage of these two laws. Suggestions will be offered as to what may be done to improve the existing laws.

## II. WORKMEN'S COMPENSATION

### A. *The Law Prior to Workmen's Compensation*

Before the enactment of workmen's compensation legislation, an injured employee was required to bring a common law negligence suit against his employer in order to be compensated for his injuries. Thus, the employee, like any other plaintiff suing in negligence, had to prove by a preponderance of the evidence that the employer was negligent and that his negligence was the proximate cause of the employee's injury.<sup>16</sup> Even if the employee was successful in carrying the burden of proof this far, the employer could assert any one of three complete defenses to defeat the injured employee's claim.<sup>17</sup>

The first of these defenses was contributory negligence. If the employee had been negligent in any respect and his negligence was a proximate or contributing cause of the injury, the employee's claim could be completely defeated, even if the employer was also negligent. For example, in *Schlemmer v. Buffalo, R. & P. R. Co.*,<sup>18</sup> plaintiff's intestate was killed as a result of injuries suffered while in the employ of the defendant railroad. The injury occurred while the decedent was

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<sup>12</sup>29 U.S.C. § 213(a)(6) (1964).

<sup>13</sup>29 U.S.C. § 213(a)(6) (Supp. III, 1967).

<sup>14</sup>See text accompanying notes 124—35 *infra*.

<sup>15</sup>See text accompanying notes 156—201 *infra*.

<sup>16</sup>See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS 545 49 (3d ed. 1964).

<sup>17</sup>*Id.* at 549—54.

<sup>18</sup>220 U.S. 590 (1911).

attempting to couple two cars on defendant's train. The railroad was negligent by not equipping one of the cars with an automatic coupler as required by the Safety Appliance Act. Nevertheless, the United States Supreme Court affirmed a judgment *non obstante veredicto* in favor of the defendant since the decedent had been contributorily negligent in attempting to make the coupling in a dangerous manner after his attention had been called to a safer method. The Court also noted that the decedent had raised his head while between the two cars "with reckless disregard for his personal safety... though twice expressly cautioned at the time as to the danger of so doing."<sup>19</sup> The Court defined contributory negligence as "the omission of the employee to use those precautions for his own safety which ordinary prudence requires."<sup>20</sup> Thus, notwithstanding the fact that the employer was negligent in failing to comply with a safety statute, the employee was not absolved from the duty of exercising ordinary care. His failure to exercise such care, resulting in his death, barred any action against the employer.

The second defense available to the employer was assumption of risk. If it were shown that the employee knew of the dangers inherent in his employment, he could be held to have "assumed the risk" of injury caused by such known dangers. In effect, this defense completely exonerated the employer from liability for injuries caused by known hazards of employment. The harsh operation of this rule is illustrated by the case of *Wager v. White Star Candy Co.*<sup>21</sup> In that case a girl working for a candy company in a "damp, unsanitary, unventilated cellar"<sup>22</sup> contracted tuberculosis. In denying her claim for damages, a New York Court stated:

The plaintiff was fully aware of the conditions under which she worked, and continued in the employment...in spite of such knowledge. It is from her testimony that we learn that the walls of the cellar were wet to the touch; that a cesspool backed up liquids which wet the floor; that the cellar was devoid of windows to light or air it; that dead rats were left about; that the odors were vile; that no fires were kept in the upstairs room; that the plaintiff worked in a drafty place; that the upstairs room was damp. It is common knowledge that such conditions are deleterious to health. The plaintiff was chargeable with such knowledge. We think that the plaintiff, as a matter of law, assumed the risk attendant upon her remaining in the employment, and that the recovery may not stand.<sup>23</sup>

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<sup>19</sup>*Id.* at 595.

<sup>20</sup>*Id.* at 596.

<sup>21</sup>217 App. Div. 316, 217 N.Y.S. 173 (1926).

<sup>22</sup>*Id.* at 317, 217 N.Y.S. at 174 (1926).

<sup>23</sup>*Id.* at 318, 217 N.Y.S. at 175 (1926).

Since employees, at least nonunionized workers, had little influence over establishment of working conditions, there could hardly be a true "assumption of risk". The defense was quite illogical. The third defense available to the employer was the so-called "fellow servant" rule. This defense absolved the employer from liability for injury to one of his employees caused by the negligence of a second employee. Although an employer was generally liable for the negligence of his servants,<sup>24</sup> he was not liable if such negligence resulted in injury to another employee. Thus, the fellow servant rule was an exception to the common law doctrine of *respondeat superior*, that a master must answer for acts of his servants.<sup>25</sup>

The fellow servant doctrine originated in England in 1837 in the famous case of *Priestley v. Fowlerr*.<sup>26</sup> The plaintiff, Priestley, was an employee of Fowler. Fowler directed Priestley to deliver certain goods which had been loaded in a delivery van by another employee. During the course of the journey, the wagon, which had been negligently overloaded by the other employee, broke down, injuring Priestley. Priestley's action against Fowler was dismissed. The court held that an employer, who himself was not negligent, was not liable for injury to one of his employees caused by the negligence of a fellow employee. This theory was accepted and applied in a Massachusetts case a few years later. Thus, in *Farwell v. Boston & Worcester R.R.*,<sup>27</sup> the employer railroad was held not liable for injuries sustained by an engineer employee as a result of the negligence of a switchman, a "fellow servant" of the plaintiff.

The inadequate results achieved by actions at common law served to point out the need for statutory protection. It was not often that an employee could succeed in an action against his employer by proving the latter's negligence and proximate causation by a preponderance of the evidence and not be defeated by one of the three defenses. It was out of this situation that the workmen's compensation laws came into being.

Unfortunately, the same situation that existed before workmen's compensation laws were enacted exists today among some segments of the labor force. Those employees who are not covered by workmen's compensation laws (for example, most farmworkers) must sue their employers in common law negligence if they are to recover for their work injuries. Since these employees are not covered by workmen's compensation laws, they are not entitled to bring their actions

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<sup>24</sup>See PROSSER, *supra* note 16, at 477—80.

<sup>25</sup>For a discussion of *respondeat superior* and vicarious liability of an employer see *id.*, at 470—80.

<sup>26</sup>150 Eng. Rep. 1030 (Ex.1837).

<sup>27</sup>45 Mass. (4 Met.) 49 (1842).

under the liberalized procedural and substantive laws provided by a workmen's compensation act.<sup>28</sup> In bringing such an action they will be subjected to the inequities caused by the employers' defenses of contributory negligence, assumption of risk, and the fellow servant rule. Therefore, the discussion presented here concerning the law before workmen's compensation is not merely of historical interest. All of the obstacles present in the common law with respect to employee suits must be overcome today unless a worker is covered by a workmen's compensation law.

## *B. Present Workmen's Compensation Systems*

### *1. Characteristics of a Typical Act*

A workmen's compensation system has been defined as "a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product."<sup>29</sup>

State workmen's compensation laws typically have seven basic aspects.<sup>30</sup> First, an injured employee is entitled to benefits whenever his injury is the result of an accident "arising out of and in the course of employment."<sup>31</sup> This provision requires that the injury both occur while the employee is on the job or while he is involved in certain job-related activities and also be directly related to the work itself.<sup>32</sup> Most of the problems in applying this rule involve determining which activities are related to the employee's job and whether the injury arose from a related activity.<sup>33</sup>

A second aspect of a typical act is that concepts of fault and negligence are irrelevant to coverage. The fact that the employer was

<sup>28</sup>See text accompanying notes 30—47 *infra*.

<sup>29</sup>1 A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 1.00 (1968).

<sup>30</sup>See generally *id.*, at § 1.10.

<sup>31</sup>See, e.g., CAL. LABOR CODE § 3600 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW § 10 (McKinney 1965).

<sup>32</sup>The phrase "arising out of and in the course of employment" accounts for much litigation in workmen's compensation. Because of the volume of litigation and the vagueness of the phrase, the law in this area is very complex. For example, Arthur Larson, in his treatise on Workmen's Compensation Law, devotes about 600 pages, or one-third of his work, to this phrase. See 1 LARSON, *supra* note 29, at §§ 6.00—29.22.

<sup>33</sup>For example, an injury sustained while engaged in recreation in a night club has been held to be covered under workmen's compensation if the purpose of attendance was to meet prospective buyers. *Brown v. Weber Implement & Auto Co.*, 357 Mo. 1, 206 S.W.2d 350 (1947). If, however, no such business purpose is present, compensation will generally be denied. See, e.g., *Paulin v. Williams & Co.*, 327 Pa. 579, 195

free from fault or that the employee was contributorily negligent has no bearing on the payment of benefits.<sup>34</sup> Common law rules of negligence have no application to a workmen's compensation case and the employer is not allowed to assert his three common law defenses of contributory negligence, assumption of risk, and the fellow servant rule.<sup>35</sup>

Another feature of a typical act requires as a prerequisite to coverage that one be an "employee" as defined by statute in the particular jurisdiction. The requirement is primarily designed to exclude independent contractors<sup>36</sup> who, unlike an employee, are not subject to the day-to-day control of the employer and are relatively free to use their own ideas and methods. In his relations with the independent contractor, the employer is concerned primarily with the finished product of the work. Thus, for workmen's compensation purposes, an independent contractor is one who, in the exercise of independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to the end product or final result of such work.<sup>37</sup>

A fourth aspect of workmen's compensation laws concerns the payment of benefits for a work-connected injury. Benefits paid to injured employees consist of hospital and medical expenses incurred as a result of the accident<sup>38</sup> and cash-wage benefits, usually expressed

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Atl. 40 (1937). Assaults upon employees who are on the job are a fertile source of problems. If the injured employee was not the aggressor, an assault by a fellow employee has been held to be related to employment so as to constitute a compensable injury. *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940). However, an assault will not be attributable to the employment if the principle motive for the attack comes from circumstances or relationships unrelated to the employee's job. Thus, compensation was denied a claimant who suffered an injury while on the job as the result of an attack of a former suitor. *Bridges v. Elite, Inc.*, 212 S.C. 514, 48 S.E.2d 497 (1948). *See also* *Bluegrass Pastureland Dairies v. Meeker*, 268 Ky. 722, 105 S.W.2d 611 (1937), where compensation was denied a milkman who had been shot by a jealous husband. It was held that the injury in this case was not the result of activities "arising out of and in the course of employment."

<sup>34</sup>*See, e.g.*, CAL. LABOR CODE § 3600(c) (West Supp. 1968), § 3708 (West 1955); N.Y. WORKMEN'S COMP. LAW § 10 (McKinney 1965).

<sup>35</sup>For a discussion of the law before the advent of workmen's compensation, see text accompanying notes 21—27 *supra*.

<sup>36</sup>*See, e.g.*, CAL. LABOR CODE §§ 3351, 3353 (West 1955), § 3352 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW § 2 (McKinney Supp. 1968).

<sup>37</sup>*See* *Scammahorn v. Gibraltar Sav. & Loan Ass'n*, 197 Kan. 410, 416, 416 P.2d 771, 776 (1966). *See also* *Sparks v. L.D. Folsom Co.*, 217 C.A.2d 279, 284, 31 Cal. Rptr. 640, 643 (1963) which defines an independent contractor as "one who renders service in the course of an independent employment or occupation, following his employer's desires only as to the results of the work, and not as to the means whereby it is to be accomplished."

<sup>38</sup>*See, e.g.*, CAL. LABOR CODE § 4600 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW § 13 (McKinney 1965).

in some fraction of the employee's average wage.<sup>39</sup> Death benefits are paid to dependents in cases where an employee is killed.<sup>40</sup>

The fifth feature of a workmen's compensation law requires the employer to obtain insurance to cover his liability.<sup>41</sup> For example, in California the employer has three options with respect to obtaining the requisite insurance. He may obtain a policy from an approved private source, from a state fund, or, in some cases, he may be self-insured.<sup>42</sup>

Another aspect of a typical law concerns its administration. State workmen's compensation systems are administered by a governmental commission.<sup>43</sup> Such commissions hear claims under a relaxed system of procedure, not applying technical rules of evidence, and liberally applying the substantive law.<sup>44</sup>

A final aspect of a typical law requires the employee and his dependents, in exchange for workmen's compensation coverage, to forfeit their rights to sue the employer for damages incurred as a result of the injury.<sup>45</sup> Moreover, employees and dependents are foreclosed from suing fellow employees. They generally retain the right, however, to sue third persons.<sup>46</sup> Proceeds from any litigation against third persons must be first used to reimburse the employer for his cost of compensating the worker, with the balance being retained by the injured employee or his dependents.<sup>47</sup>

## *2. Types of Coverage Under Workmen's Compensation Laws*

Generally there are three types of coverage provided by workmen's compensation laws: compulsory, elective, and voluntary. Each

<sup>39</sup>See, e.g., CAL. LABOR CODE §§ 4650—63 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW §§ 14—15 (McKinney Supp. 1968).

<sup>40</sup>See, e.g., CAL. LABOR CODE §§ 4700—08 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW § 16 (McKinney Supp. 1968).

<sup>41</sup>See, e.g., CAL. LABOR CODE § 3700 (West 1955); N.Y. WORKMEN'S COMP. LAW § 50 (McKinney Supp. 1968).

<sup>42</sup>See CAL. CONST. art. XX, § 21; CAL. LABOR CODE § 3700 (West 1955).

<sup>43</sup>See, e.g. CAL. LABOR CODE §§ 5300—01 (West Supp. 1968) (Workman's Compensation Appeals Board of the Division of Industrial Accidents N.Y. WORKMEN'S COMP. LAW § 140 (McKinney 1965) (Workman's Compensation Board in the Department of Labor).

<sup>44</sup>See, e.g., CAL. LABOR CODE § 5708, 3202 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW, Rule 9 of General Rules and Procedure of Workmen's Compensation Board (McKinney 1965). For a detailed discussion of how workmen's compensation cases are processed, see U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, THE PROCESSING OF WORKMEN'S COMPENSATION CASES (BULL. NO. 310, 1967).

<sup>45</sup>See, e.g., CAL. LABOR CODE § 3601 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965).

<sup>46</sup>See, e.g., CAL. LABOR CODE § 3852 (West 1955); N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1968).

<sup>47</sup>See, e.g., CAL. LABOR CODE §§ 3856, 3858, 3861 (West Supp. 1968); N.Y. WORKMEN'S COMP. LAW § 29 (McKinney Supp. 1968).



type of coverage has its own distinct characteristics and is entirely different from the others.

### *a. Compulsory Coverage*

A workmen's compensation law is classified as compulsory if upon the commencement of the employment relationship the various statutory rights of the employee (and the corresponding duties of the employer) are created automatically.<sup>48</sup> That is, when the employment contract is entered into, the employee is automatically entitled to receive the benefits of workmen's compensation, and the employer is automatically obligated to provide them. The rights or benefits afforded the employee are generally the rights to compensation for injuries resulting from an "accident arising out of and in the course of his employment"<sup>49</sup> and to receive benefits to compensate him for hospital and medical care and for lost wages.<sup>50</sup> The main duties imposed on the employer are to procure and continue to carry insurance that will compensate the employee for such an injury and provide benefits for medical care and loss of wages.<sup>51</sup> A compulsory act will typically provide for various sanctions, both civil and criminal, if the employer does not fulfill his duties under the law.<sup>52</sup>

### *b. Elective Coverage*

A workmen's compensation law is elective when either the employer or the employee, or both, are free to reject coverage of the act.<sup>53</sup> However, this type of law discourages such rejection by providing that if the employer refuses to obtain coverage for his employees under the act, the employees may sue him at law and he will not be able to assert the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule.<sup>54</sup> Should the employer accept and the employee reject coverage, the latter will have no

<sup>48</sup>For an example of a compulsory law, see the California Workmen's Compensation Act, CAL. LABOR CODE §§ 3201—6149 (West 1955).

<sup>49</sup>See text accompanying notes 31—32 *supra*.

<sup>50</sup>See text accompanying notes 38—40 *supra*.

<sup>51</sup>See text accompanying notes 41—42 *supra*.

<sup>52</sup>In California, for example, if an employer fails to obtain the required insurance, fails to continue carrying it, or otherwise fails to carry out his obligations under the act, he may be charged with a misdemeanor, his business may be abated as a nuisance, and he may be liable to his injured employee in a civil action in which both negligence and causation are presumed and the defenses of contributory negligence, assumption of risk, and the fellow servant rule are barred. CAL. LABOR CODE §§ 3710.2, 3712, 3706, 3708 (West 1955).

<sup>53</sup>For an example of an elective type law, see The Workmen's Compensation Law of Missouri, MO. ANN. STAT. §§ 287.010—287.800 (Supp. 1968).

<sup>54</sup>See, e.g. MO. ANN. STAT. § 287.080(1) (Supp. 1968).

remedy against his employer other than a suit at law in which the employer will be able to assert his three common law defenses.<sup>55</sup>

Some states have a hybrid form of compulsory and elective coverage. For example, the statute may provide that the act is compulsory for one class of employees and elective as to another.<sup>56</sup> Under most laws, however, those excluded from both of these categories may be voluntarily covered at the option of the employer.<sup>57</sup>

### *c. Voluntary Coverage*

Nearly all workmen's compensation laws<sup>58</sup> have provisions for voluntary coverage of those workers who are otherwise excluded from coverage.<sup>59</sup> Through the use of voluntary coverage provisions an employer may cover excluded employees if he so desires but no disadvantages are attached to him if he decides not to provide coverage. Thus there is generally nothing in the law to induce an employer to voluntarily provide coverage. Obtaining such coverage, however, is not always a simple matter. Even though the compensation laws are to be liberally construed and applied,<sup>60</sup> something more than partial compliance with the provisions concerning voluntary coverage is required if the employee is to come under the protection of the workmen's compensation law. For example, in *Roe v. Roe*,<sup>61</sup> a widow was awarded benefits for the death of her husband while he was engaged in farm labor. The Iowa trial court affirmed the Industrial Commissioner's award of compensation benefits but the Iowa Supreme Court reversed the decision on appeal. That court held that the employer had not substantially complied with the act in purchasing workmen's compensation coverage for his employees. The applicable statute required that notice by registered mail must be served on the Industrial Commissioner if an employer was to volunteer coverage; the required notice was not sent. The court stated:

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<sup>55</sup>*See, e.g., id.*

<sup>56</sup>For example, IOWA CODE ANN. § 85.2 (Supp. 1968), provides that the act is compulsory as to public employees, while indicating that it is elective to all other workers except those completely excluded.

<sup>57</sup>*See, e.g.,* IOWA CODE ANN. § 85.1(5) (Supp. 1968).

<sup>58</sup>District of Columbia's Workmen's Compensation Law is an exception. That law contains no provision concerning voluntary coverage. *See* D.C. CODE ANN. § 36—501 — 36—502 (Supp. I, 1968).

<sup>59</sup>*See e.g.,* N.Y. WORKMEN'S COMP. LAW § 3(1) Group 19 (McKinney 1965); IOWA CODE ANN. § 85.1(5) (Supp. 1968).

<sup>60</sup>For example, CAL. LABOR CODE § 3202 (West 1955) provides that compensation laws "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Most state statutes have a similar provision.

<sup>61</sup>259 Iowa 1229, 146 N.W.2d 236 (1966).

Notwithstanding our well settled rule [that] the workmen's compensation law is to be liberally construed in favor of the employee... we hold taking out insurance only was not substantial compliance with the then existing statute.<sup>62</sup>

Thus, the fact that the employer, acting on his own initiative, procures insurance from private companies to provide workmen's compensation coverage for his employees does not necessarily mean that his employees and their dependents will receive the intended coverage. Under the holding of the *Roe* case, the only way in which the widow could obtain compensation for the on-the-job death of her husband would be to bring a common law negligence suit against the employer. Such a suit subjects the plaintiff to both the difficulties of proof,<sup>63</sup> and the employer's defenses of contributory negligence, assumption of risk, and the fellow servant rule.<sup>64</sup> That she could not proceed under the workmen's compensation act, and thus avoid these difficulties, after the employer voluntarily procured insurance coverage, seems most unjust.

### *C. Workmen's Compensation and the Farm Worker<sup>65</sup>*

#### *1. The Coverage of Farm Labor*

In thirty-seven of the fifty states plus the District of Columbia, the general rule, subject to a few exceptions, is that farm workers are excluded from coverage under workmen's compensation laws. The remaining thirteen states have compensation laws that cover a majority of those employees engaged in farm labor. Compensation laws fall

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<sup>62</sup>*Id.* at 1237, 146 N.W.2d at 240 (1966).

<sup>63</sup>See text accompanying notes 16—17 *supra*.

<sup>64</sup>See text accompanying notes 18—27 *supra*.

<sup>65</sup>Many problems arise with respect to the exclusion of agricultural labor from workmen's compensation laws. The employee may be involved in both agricultural work and some other work during the same period of time. For example, he may work part time in the fields and part time as a carpenter. The question then becomes whether or not he will be totally excluded from coverage. Also, there is often difficulty in determining whether or not a particular employment is agricultural work. For example, does working in a nursery constitute agricultural employment? (held to be "agricultural labor" in *Dills v. Tennessee Nursery Co.*, 188 Tenn. 241, 218 S.W.2d 992 (1949)). This discussion is limited to farm laborers, *i.e.*, those people who labor on farms picking and planting crops and engaging in related activities. Thus, this article will not attempt to decide whether certain activities are excluded from, or included in, the definition of agricultural labor. Nor will it deal with the problems raised when an employee spends part of his time engaged in agricultural work, and part of his time in other activities. For a discussion of these problems, see 1A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 53.30 - 53.40 (1968); Davis, *Death of a Hired Man—Agricultural Employees and Workmen's Compensation in the North Central States*, 13 S.D.L. REV. 1, 11—28 (1968).

into three general categories as concerns their coverage of agricultural labor. Such laws either fully cover, partially cover, or completely exclude farmworkers. What follows is a further classification and analysis of each of these three categories.

*a. Farm Labor Excluded*

The farmworker is completely excluded from the compensation laws of thirty states<sup>66</sup> plus the District of Columbia. These laws provide neither compulsory nor elective coverage of any person who is engaged in farm labor. Most of these acts, however, provide that the employer may voluntarily cover his employees, and thus bring them under the compensation act, if he so desires. Three workmen's compensation laws bar even voluntary coverage. The compensation acts of Alabama<sup>67</sup> and the District of Columbia<sup>68</sup> do not permit voluntary coverage of employees who are engaged in farm labor. Thus, even though an employer desires to bring his farm labor employees under the protection of these compensation acts, he is precluded from doing so by specific statutory prohibition. The third exception, Texas, does not provide for the voluntary coverage of farm labor, although there is no specific prohibition of coverage. Since the act specifically excludes farm workers from coverage,<sup>69</sup> and contains no provision allowing them to come under the act, it would appear that voluntary coverage would be impossible.<sup>70</sup> However, as noted above, the other twenty-eight states allow coverage of the farm worker at the option of the employer, even though they are otherwise excluded from the protection afforded by the law.<sup>71</sup> There are no recent statistical studies

<sup>66</sup>The states are: Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

<sup>67</sup>ALA. CODE tit. 26, § 262 (1958), provides that the act "shall not be construed or held to apply to...farm laborers.... In no event nor under any circumstances shall...[the act] apply to farmers and their employees."

<sup>68</sup>D.C. CODE ANN. § 36—502(4) (Supp. I, 1968). There is no provision in the act for voluntary coverage. It should be noted, however, that there is little agricultural activity in the District.

<sup>69</sup>TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (1967).

<sup>70</sup>The workmen's compensation laws of Oklahoma and Tennessee may be considered by some to be the same as that of Texas in this respect. See note 71 *infra*.

<sup>71</sup>ARK. STAT. ANN. §§ 81—1302(c)(1), 81—1307 (1960); COLO. REV. STAT. ANN. § 81—2—6(4) (1963); DEL. CODE ANN. tit. 19, § 2307 (Supp. 1968); FLA. STAT. ANN. §§ 440.02(c)(3), 440.04(2) (1966); GA. CODE ANN. § 114—107 (1956); IDAHO CODE ANN. §§ 72—105A(1), 72—105B (Supp. 1967); ILL. ANN. STAT. ch. 48, §§ 138.3(15), 138.4(a) (Smith-Hurd Supp. 1968); IND. ANN. STAT. §§ 40—1209 (1965); IOWA CODE ANN. § 85.1(3) (Supp. 1968); KAN.

available to indicate the extent of election by farmers in these states, but it is doubted that many farm workers are given coverage.<sup>72</sup> In effect, farmworkers are completely excluded from the benefits of workmen's compensation in thirty-one of the fifty-one compensation laws unless they are fortunate enough to work for an employer who will voluntarily provide coverage.

### *b. Farm Labor Partially Covered*

In seven states farmworkers are covered under limited circumstances.<sup>73</sup> For example, a farm laborer may be covered while operat-

STAT. ANN. § 44—505 (1964); ME. REV. STAT. ANN. tit. 39, § 4 (Supp. 1968) (This section excludes "seasonal or casual farm laborers." The term "seasonal" is defined as referring to "farm laborers engaged in agricultural employment beginning at or after the commencement of the planting season and terminating at or before the completion of the harvest season." The term "casual" is defined as "occasional, irregular, or incidental." If a farmworker is classified as neither seasonal nor casual and the employer hires at least four employees, the worker will be covered. If, however, the farm employee meets all of the tests for coverage he still will not be covered by the act if the employer secures a liability policy with limits of not less than \$25,000 and a medical payment coverage of at least \$1,000.); MINN. STAT. ANN. §§ 176.041 (1) (Supp. 1968), 176.051 (1966); MISS. CODE ANN. § 6998—03 (Supp. 1968); MO. ANN. STAT. § 287.090(1, 2) (Supp. 1968); MONT. REV. CODES ANN. §§ 92—301, 92—201 to 92—211 (1964); NEB. REV. STAT. § 48—106(2) (1968); NEV. REV. STAT. §§ 616.060(3), 616.315 (1967); N.M. STAT. ANN. §§ 59—10—10, 59—10—4(B) (1960); N.C. GEN. STAT. § 97—13(b) (1965); N.D. CENT. CODE §§ 65—01—02(4)(a) (Supp. 1967), 65—04—29 (1960); OKLA. STAT. ANN. tit. 85, §§ 2, 3(1) (Supp. 1968), § 65.2 (1952) (Section 65.2 does not expressly permit voluntary coverage, but it does provide that if the employer obtains, and the insurance company issues, a policy covering any employee, both the employer and the insurance company are estopped from asserting that the employee was not engaged in a hazardous employment entitled to coverage under the act.); PA. STAT. ANN. tit. 77, § 1a (1952); S.C. CODE ANN. §§ 72—107, 72—109 (1962); TENN. CODE ANN. § 50—906(c) (1966) (Although the statute reads as though the employer is precluded from obtaining coverage for his farm employees, it has been held that the securing of a workmen's compensation policy providing coverage for farm workers entitled them to compensation for injuries under the provisions of the act. *Eidson v. Hardware Mut. Cas. Co.*, 191 Tenn. 430, 234 S.W.2d 836 (1950).); UTAH CODE ANN. § 35—1—42(2) (1966); VA. CODE ANN. § 65.1—28 (1968); WASH. REV. CODE ANN. §§ 51.12.010, 51.12.110 (1962); W. VA. CODE ANN. § 23—2—1 (Supp. 1968).

<sup>72</sup>Since most growers are reluctant to pay wages that are comparable to those paid workers in other industries (*see* text accompanying notes 202—26 *infra*), it may be assumed that they would be equally reluctant to voluntarily pay the expense of insurance to provide coverage to their employees.

<sup>73</sup>ARIZ. REV. STAT. ANN. § 23—902(A) (1956); KY. REV. STAT. ANN. § 342.005(1) (Supp. 1968); LA. REV. STAT. ANN. § 23:1035 (1964); MD. ANN. CODE art. 101, § 21(41), (50) (1957) (It appears that farm laborers will be covered under these subsections although subsection 42 specifically excludes farm workers from coverage.); R.I. GEN. LAWS ANN. § 28—29—5 (1968); S.D. CODE § 64.0201 (1939); and WYO. STAT. ANN. §§ 27—50, 27—56 [*See definition of "power farming" § 27—49 [1.](i) (1967).*]

ing dangerous machinery, such as a threshing machine or corn sheller<sup>74</sup> but is otherwise not covered. Thus when he has completed the particular job that involves the use of the dangerous machine, he will return to his former status as an excluded employee. Several states provide compulsory coverage for all workers only when they are engaged in hazardous employment.<sup>75</sup> The legislature determines which employments are hazardous and lists them in the statute.<sup>76</sup> With the exception of New York,<sup>77</sup> no state legislature has deemed farm work hazardous other than when that work requires the use of dangerous machinery. An interesting example of a statute that lists the hazardous employments covered is the compensation law of Maryland.<sup>78</sup> That law includes the following occupations in the list of hazardous employments: musicians, barbers, bellhops, insurance agents, bartenders, waitresses, bus boys, embalmers, and all employees of county boards of education.<sup>79</sup> Farm labor, however, is not listed. Although current campus strife and unrest may cause one to include membership on a board of education in the list of hazardous employments, it is doubtful that such an occupation is more hazardous than farm work.<sup>80</sup>

<sup>74</sup>See, e.g., ARIZ. REV. STAT. ANN. § 23—902(A) (1956); KY. REV. STAT. ANN. § 342.005(1) (Supp. 1968); LA. REV. STAT. ANN. § 23:1035 (1964); S.D. CODE § 64.0201 (1939).

<sup>75</sup>See, e.g., KAN. STAT. ANN. § 44—505 (1964); KY. REV. STAT. ANN. § 342.005 (Supp. 1968); LA. REV. STAT. ANN. § 23:1035 (1964); MD. ANN. CODE art. 101, § 21 (1957); N.M. STAT. ANN. §§ 59—10—2, 59—10—10 (1960); OKLA. STAT. ANN. tit. 85, § 2 (Supp. 1968); R.I. GEN. LAWS ANN. § 28—29—5 (1968); WASH. REV. CODE ANN. § 51.12.010 (1962); WYO. STAT. ANN. §§ 27—50, 27—56 (1967).

<sup>76</sup>See, e.g., MD. ANN. CODE art. 101, § 21 (1957); N.M. STAT. ANN. § 59—10—10 (1960); OKLA. STAT. ANN. tit. 85, § 2 (Supp. 1968); WASH. REV. CODE ANN. § 51.12.010 (1962).

<sup>77</sup>The New York Legislature included employment on a farm in the category of hazardous employments in 1966. N.Y. WORKMEN'S COMP LAW § 3(1) (group 14-b) (McKinney Supp. 1968). This section applies to those farmworkers whose employer had paid at least \$1,200 in cash wages to his hired farmworkers during the preceding calendar year. Although this amendment gave the farmworker added coverage, it may have deprived him of coverage enjoyed prior to the amendment. That is, section 2 of the current law states that the term "employee" does not "include farm laborers except as provided in group fourteen-b of section three." N.Y. WORKMEN'S COMP LAW § 2(4) (McKinney Supp. 1968). The prior law exempted farmworkers except as provided in all of section three. N.Y. WORKMEN'S COMP. LAW § 2 (McKinney 1965). Those farmworkers who would not qualify under N.Y. WORKMEN'S COMP. LAW § 3(1) (group 14-b) (McKinney Supp. 1968) but would qualify under the rest of section three (such as in group 7: operation of vehicles, hand trucks, threshing machines, wagons, etc.) were covered before the 1966 amendments, but are now totally excluded.

<sup>78</sup>MD. ANN. CODE art. 101, §§ 1—84 (1964).

<sup>79</sup>MD. ANN. CODE art. 101, § 21(46), (48), (49) (1957).

<sup>80</sup>For a discussion of the hazardous nature of farm work, see text accompanying notes 93—98 *infra*.

### c. Farm Labor Covered

Thirteen state compensation laws provide coverage most farm workers.<sup>81</sup> Substantially all farm employees are covered in six states,<sup>82</sup> while in the other seven a probable majority of farm workers receive the benefits of a compensation law.<sup>83</sup> Of these thirteen states, at least five (Alaska, Connecticut, Massachusetts, New Hampshire, and Vermont) employ few farmworkers. Thus, most farmworkers can expect to receive workmen's compensation coverage in only eight states. Of these eight, only four (California, Hawaii, New Jersey, and Ohio) provide full coverage; that is, coverage that is on a par with that afforded workers in other industries.

### 2. Reasons for Excluding Farm Labor

Both political and economic reasons have been used over the years to justify the exclusion of agricultural labor. A primary reason for exclusion was no doubt the political influence of the farmers. Rural support was necessary for passage of workmen's compensation laws. In exchange for this support, proponents of the legislation often dropped farm labor from the list of covered employments.<sup>84</sup> The victims of such political compromises are, of course, the farmworkers. These political pressures still exist. A recent example of such pressure is found by examining the 1965 Oregon workman's compensation

<sup>81</sup>These states are: Alaska, California, Connecticut, Hawaii, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Vermont, and Wisconsin.

<sup>82</sup>ALASKA STAT. §§ 23.30.265(12) (Supp. 1968), 23.30.230 (1962) (covered unless deemed to be temporary or part time "harvest help."); CAL. LABOR CODE § 3352 (West Supp. 1968); CONN. GEN. STAT. ANN. § 31—275 (Supp. 1968); HAWAII REV. STAT. § 386—1 (1968); MASS. GEN. LAWS ANN. ch. 152, § 1(4) (Supp. 1968); and N.J. REV. STAT. § 34:15—36 (1959).

<sup>83</sup>MICH. STAT. ANN. § 17.142(1)(d) (1968) (covered if employer regularly hires three or more workers paid on an hourly basis (thus piece-workers are not counted) for at least 35 hours per week for thirteen consecutive weeks. Section 17.142(1)(e) requires an agricultural employer to provide medical insurance for an employee who has worked for him at least five weeks.); N.H. REV. STAT. ANN. § 281:2(I.) (Supp. 1967) (covered if the employer regularly hires five or more workers.); N.Y. WORKMEN'S COMP. LAW § 3(1) (group 14-b) (McKinney Supp. 1968) (covered if employer has paid at least \$1,200 in cash wages to hired farmworkers during the preceding calendar year.); OHIO REV. CODE ANN. § 4123.01(A)(2) (Page 1965) (covered if employer hires at least three workers on a regular basis.); ORE. REV. STAT. § 656.027(5) (1967) (covered if employer had a payroll of \$1,500 for farm labor, excluding board, lodging, and exchange labor, during the last preceding year.); VT. STAT. ANN. tit. 21, § 616 (Supp. 1968) (covered if the employer has hired at least three employees.); and WIS. STAT. ANN. § 102.04(1)(c) (Supp. 1969) (covered ten days after employer has employed six or more workers for at least twenty consecutive days.).

<sup>84</sup>See generally Davis, *supra* note 65, at 4.

law.<sup>85</sup> The 1965 Oregon act added many previously excluded occupations and employments to workmen's compensation coverage, yet it postponed the inclusion of farm laborers until January 1, 1968.<sup>86</sup> According to one writer, the "temporary exclusion of farm employees was a political compromise to keep farm groups from opposing passage of the bill."<sup>87</sup> Because of this political compromise the farm worker who was injured on the job any time before January 1, 1968 was not entitled to receive compensation benefits, while every other worker to whom coverage was extended by this act was entitled to immediate benefits. Thus it is evident that discrimination against the farm laborer still exists, even if he is finally to be afforded coverage.

A second reason used to justify the exclusion of farmworkers from compensation laws is based on an economic theory. Under this theory it is insisted that the farmer, unlike the manufacturer, cannot add the cost of workmen's compensation coverage to the price of his goods. He is unable to do so, the argument continues, because he cannot pass these additional costs on to the consumer. If he tries to increase his prices to cover additional costs, the consumer will buy agricultural goods from growers in a neighboring state who are not paying for workmen's compensation coverage. If State *A* were to adopt coverage of the farm worker while neighboring State *B* did not, State *A*'s agricultural goods would be at a disadvantage in competing with those of State *B* because State *B* presumably would produce its goods at a lower cost and could sell for less in the market. An obvious solution to the problem would be to require coverage of the farmworker by both states. Since the vast majority of states exclude farmworkers from coverage,<sup>88</sup> however, it would be overly optimistic to expect that these same states would immediately extend coverage. Another solution would be to require workmen's compensation coverage for farmworkers by federal law.<sup>89</sup> Under such a law all farmworkers, regardless of the state of employment, would be entitled to receive workmen's compensation coverage.

A third justification for excluding farm workers from coverage under workmen's compensation laws is that they do not need the protection of such laws. In the early days of workmen's compensation it was thought that farm laborers did not need the coverage afforded other workers because agricultural work was not a dangerous

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<sup>85</sup>Ore. Laws 1965, ch. 285, § 1, ORE. REV. STATS. §§ 656.001 — 656.794 (1967).

<sup>86</sup>Ore. Laws 1965, ch. 285, § 9b.

<sup>87</sup>Skelton, *The 1965 Oregon Workmen's Compensation Law: A New Model for the States*, 45 ORE. L. REV. 40, 45 (1965).

<sup>88</sup>See text accompanying notes 65—72 *supra*.

<sup>89</sup>See text accompanying notes 100—15 *infra*.



employment. These beliefs were reflected in court decisions. For example, an Indiana court, in upholding the denial of workmen's compensation benefits to an agricultural employee, stated that "[i]t is apparent that farm laborers, like domestic employees, were excluded from...[workmen's compensation coverage] because such labor is less hazardous; being less hazardous, there is less need of protection."<sup>90</sup>

The validity of the assumption that farm work is less hazardous than other work is dubious. In 1964 more workers were killed while engaged in agricultural work than in any other industry.<sup>91</sup> Today, agriculture is the third most hazardous industry in the United States, with a fatality rate that is exceeded only by mining and construction.<sup>92</sup> Not only do workers engaged in agriculture have a high accident and fatality rate, but they also suffer from occupational diseases. In 1965 California agricultural workers had the highest rate of occupational disease in the state.<sup>93</sup> Moreover, these workers had more severe cases of occupational diseases than did other workers.<sup>94</sup> Furthermore, men employed in California agriculture had the third highest rate of disabling work injuries, exceeded only by workers in the construction and mining industries,<sup>95</sup> the same ranking that exists on a national scale.<sup>96</sup> Although these statistics are derived from the agricultural industry of California, a state that provides workmen's compensation coverage for the farm worker, it would not be unwarranted to assume that these figures are representative of the situation across the United States since employee injuries and occupational diseases are not limited by state lines. It is clear that farm workers do need the protection and benefits of workmen's compensation laws.

#### *D. Suggestions for Reform*

The society surrounding the disabled man can do one of three things. First, it can refuse all aid, and let him starve in the street, or let

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<sup>90</sup>Dowery v. State, 84 Ind. App. 37, 40, 149 N.E. 922, 923 (1925).

<sup>91</sup>NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 23 (1965) (3200 people lost their lives in 1964 while engaged in agricultural work.).

<sup>92</sup>S. REP. NO. 1006, 90th Cong., 2d Sess. 53 (1968).

<sup>93</sup>BUREAU OF OCCUPATIONAL HEALTH, CAL. DEPT. OF PUBLIC HEALTH, OCCUPATIONAL HEALTH OF AGRICULTURAL WORKERS IN CALIFORNIA 2 (1965). Agricultural workers reported 12.4 cases of occupational disease per 1,000 workers in 1963. This compares to construction workers who reported 5.8 cases per 1,000 and manufacturing workers who reported 4.6 cases per 1,000.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* In 1963 there were 68.7 disabling work injuries in agriculture per 1,000 workers. Construction workers suffered 81.9 disabling work injuries per 1,000. Mineral extraction workers had a rate of 70.2.

<sup>96</sup>See text accompanying note 94 *supra*.

him squat on the sidewalk with a few yellow pencils and beg for pennies from those who were yesterday his equals. Since the reign of Queen Elizabeth, no Anglo-American community has considered this a morally acceptable solution.

Second, it can put him on county relief, or some other form of direct handout. This, while being better than the first, is a poor solution in at least two ways: It stigmatizes the man as a pauper, and it places the cost on the political or geographical subdivision where he happens to have his residence, although that subdivision had no connection with the injury.

Third, it can grant him workmen's compensation, thus preserving his dignity and self-respect as an injured veteran of industry. . . .<sup>97</sup>

Assuming the validity of choosing the third alternative above, there yet remains the problem of selecting the means of instituting workmen's compensation. A viable solution to the problem of non-coverage of the farmworker in most states would be to enact a national workmen's compensation law which would provide coverage for farmworkers now excluded by state laws. This national law would not supersede state workmen's compensation laws; rather, it would merely provide for compensation coverage of farmworkers who are now excluded by state law. Realistically, this may be the only way in which compulsory coverage of all farm workers can be achieved because of the reluctance of the states to take action. Congress has indicated that it is at least considering such a proposal. A 1968 Senate report<sup>98</sup> noted the desirability of a national law. The report concluded:

Compulsory workmen's compensation laws should be extended so as to provide coverage for all agricultural workers. While such laws traditionally have been within the province of State governments, the interstate recruitment and employment of migratory farmworkers and the continued lack of adequate coverage at the State level strongly suggests the desirability of federal action in this area. . . .<sup>99</sup>

Two major problems in initiating such a federal program would be its administration and financing. With respect to administration, utilization of present methods currently employed in related programs could be used as guidelines in inaugurating a national farm labor workmen's compensation law. For example, the national law could be established on a federal-state cooperative basis, such as the categorical assistance programs of the Social Security Act<sup>100</sup> or the

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<sup>97</sup>1 LARSON, *supra* note 29, § 2.20, at 6.

<sup>98</sup>S. REP. NO. 1006, 90th Cong., 2d Sess. (1968).

<sup>99</sup>*Id.* at 52.

<sup>100</sup>42 U.S.C. §§ 301 — 1394 (1964), *as amended*, (Supp. III, 1967). Examples of the categorical assistance programs are Old Age Assistance, 42 U.S.C. §§ 301—06

Unemployment Insurance system.<sup>101</sup> That is, the state would handle the administration of the program, while the federal government would provide guidelines and financing. Each state would be required to comply with federally established standards as a prerequisite to federal financial participation, as is done in social security public assistance programs.<sup>102</sup> Under such a plan at least minimum coverage could be assured all farmworkers, leaving the states free to provide supplementary coverage as they see fit.

The national program could be financed by one of three methods. First, federal funds needed to finance a farm worker compensation system could be appropriated from general revenue sources as is done in the public assistance programs.<sup>103</sup> Under such a method, the money would ultimately come from the general taxpayers. Since everyone consumes agricultural goods, appropriation from general revenue sources may be an equitable method of financing. However, a tax increase, if needed, would be unpopular and difficult to obtain. Hence, this method of financing, although fair and equitable, may not be practical.

A second method of financing a federal program would be to enact a national tax on employers of farm workers. Such a tax would be similar to the social security tax in that it would be levied on employers. It would not, unlike social security, also be levied on employees. The costs of providing workmen's compensation coverage under present state systems are always borne by the employer who is in a position to pass the cost to the consumer.<sup>104</sup> The program, as noted above, could be administered by the states subject to federal guidelines, as is done with unemployment insurance<sup>105</sup> and social security public assistance programs.<sup>106</sup> There would be no constitutional problems with the suggested tax scheme since the national tax is merely an exercise by Congress of its power to regulate interstate commerce.<sup>107</sup> That is, because both farmworkers and agricultural goods move in, or affect, interstate commerce, Congress has the con-

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(1964), *as amended*, (Supp. III, 1967); Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601—44 (Supp. III, 1967); and Aid to the Blind, 42 U.S.C. §§ 201—06 (1964), *as amended*, (Supp. III, 1967).

<sup>101</sup>For the provisions concerning grants to the states for unemployment insurance administration, see 42 U.S.C. §§ 501—03 (1964).

<sup>102</sup>*See, e.g.*, 42 U.S.C. § 302 (1964) which sets forth the standards of a "state plan" for Old Age Assistance. The requirements imposed by this section must be complied with completely before the state is eligible to receive federal funds.

<sup>103</sup>*See, e.g.*, 42 U.S.C. § 301 (1964) (appropriations for the program).

<sup>104</sup>*See generally* 1 LARSON, *supra* note 29, at § 3.20.

<sup>105</sup>*See* 42 U.S.C. § 503 (1964).

<sup>106</sup>*See* 42 U.S.C. § 302 (1964).

<sup>107</sup>U.S. CONST. art. I, § 8(3).

stitutional authority to regulate the workmen's compensation coverage of farm workers.<sup>108</sup> The suggested method of financing should cause no appreciable increase in the price of agricultural commodities. Instead of each grower being forced to obtain an individual policy providing compensation coverage for his employees, the entire program would be financed by a nationally imposed tax. Because of the economies of a large-scale program and the elimination of needless duplication that results from the use of individual insurance policies, the national program would probably cost less. The grower would then have a smaller cost to pass along to the consumer in the form of increased prices. Moreover, since everyone consumes agricultural goods, a national tax scheme is an equitable way to apportion the added costs of including the farm worker in a workmen's compensation system.<sup>109</sup>

The third method of financing a federal compensation system for farm workers is, in reality, an alternative to federal financial participation. Instead of the federal government having to appropriate funds from general revenue sources or impose a tax on employers, the financial burden could be borne directly by individual growers. The Federal program could be organized on a basis similar to current state compensation laws whereby growers would be required by federal law to purchase compensation insurance to cover their employees. Such a law would provide sanctions against defaulting growers. For example, in order to ensure compliance with the requirements of the law, the grower could be made liable to his injured employee in a civil action with both negligence and causation presumed and the defenses of contributory negligence, assumption of risk, and the fellow servant rule barred.<sup>110</sup> Faced with this alternative to workmen's compensation coverage, the growers would likely comply with the law and procure the necessary insurance. This proposed method of financing a compensation system may be preferable to the other two alternatives. There would be no need for federal funds. A strain on the federal budget, with the possibility of a tax increase, would be avoided. Any complications connected with the imposition of a tax on employers would also be circumvented. Since this plan is similar to

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<sup>108</sup>See generally S. REP. NO. 1006, 90th Cong., 2d Sess. 52—53 (1968); S. REP. NO. 1549, 89th Cong., 2d Sess. 42 (1966). "The view favoring state regulation (of workmen's compensation coverage of farmworkers) fails to consider the fact that the large farm hires most of... [ts farm laborers from the stream of] interstate commerce and that he operates a small plant rather than a farm." Kovarsky, *Congress and Migrant Labor*, 9 ST. LOUIS U.L.J. 293, 347 (1965).

<sup>109</sup>See generally Davis, *supra* note 65, at 10.

<sup>110</sup>This sanction is modeled on an identical provision in the California compensation law. CAL. LABOR CODE § 3708 (West 1955).

state laws,<sup>111</sup> this type of financing of workmen's compensation benefits could utilize the experience gained by the states.

Some form of national legislation is needed to correct the existing inequities in state law. A national system could fully cover those farmworkers who are now excluded by state laws. There would be no problems of hampered competition because of differences in coverage of farmworkers among neighboring agricultural states. Although a few states have included farm labor within the coverage of the law,<sup>112</sup> whether a farm laborer will receive coverage today depends upon the law of the state in which he is working. Serious consideration should be given to the adoption of a federal system of compensation for farmworkers. It is apparent that the states are reluctant to take positive steps to cover the farmworker by their compensation laws.<sup>113</sup> If the states fear federal intervention in this area, they should render such action unnecessary by enacting appropriate workmen's compensation laws to cover the now excluded farm worker.

### III. MINIMUM WAGE

#### *A. Federal Legislation*

##### *1. Coverage of Farmworkers Under the Fair Labor Standards Act*

The basic federal statute governing minimum wages is the Fair Labor Standards Act of 1938 (FLSA).<sup>114</sup> The FLSA, enacted during a long and severe economic depression, had three main objectives.

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<sup>111</sup>*E.g.*, California Workmen Compensation Law, CAL. LABOR CODE §§ 3201—6149 (West Supp. 1968).

<sup>112</sup>See text accompanying notes 83—85 *supra*.

<sup>113</sup>See text accompanying notes 65—72 *supra*.

<sup>114</sup>Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201—19 (1964), *as amended*, (Supp. III, 1967) (hereinafter cited as FLSA). The Sugar Act of 1948, 61 Stat. 922 (1947), 7 U.S.C. §§ 1100—61 (1964), *as amended*, (Supp. III, 1967), is also an important federal wage law. This law, however, applies only to laborers harvesting sugar beets. Wages for such workers are set by the Secretary of Agriculture after annual regional hearings are held. 7 U.S.C. § 1131(c)(1)(1964). The hearing mechanism for setting wage rates is open to criticism because it is dominated by the producers. Laborers have few, if any, powerful spokesmen for their interests at the hearings. See Chase, *The Migrant Farm Worker in Colorado—The Life and the Law*, 40 U. COLO. L. REV. 45, 64 (1967). Since 1967 the minimum wage for sugar beet laborers has been \$ 1.50 per hour unless payment is made on a piece-work basis. See 7 C.F.R. § 862.8(a)(1) (1969). The prescribed minimum wage rates are enforced by the threat of withholding a producer's government subsidy for any failure to present evidence of compliance with the act. 7 U.S.C. § 1131(c)(1) (1964).

First, it was designed to establish a minimum wage level so that a complete wage collapse would be prevented in the event of another depression.<sup>115</sup> Second, the law sought to encourage the spreading of available work among as many employees as possible by requiring a penalty or overtime rate for work exceeding the maximum hours per day or week.<sup>116</sup> Third, it sought to end “oppressive child labor practices.”<sup>117</sup>

The provisions of the FLSA apply to employees not otherwise excluded<sup>118</sup> who are (1) engaged in interstate commerce, (2) engaged in the production of goods for commerce, or (3) employed in “an enterprise engaged in commerce or in the production of goods for commerce.”<sup>119</sup>

All farmworkers were specifically excluded from coverage under the minimum wage provisions of the FLSA<sup>120</sup> until 1966.<sup>121</sup> The 1966 amendments to the FLSA extended coverage to farmworkers, but required two conditions for eligibility.<sup>122</sup> First, a farmworker must be employed by a grower or an agricultural enterprise that used 500 man-days<sup>123</sup> of agricultural labor in at least one quarter of the preceding calendar year.<sup>124</sup> Thus, for example, the employer must have hired 50 men for 10 days or 10 men for 50 days, or some other combination resulting in 500 man-days. The 500 man-day requirement must be

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<sup>115</sup>EDITORIAL STAFF OF LABOR RELATIONS REPORTER, THE NEW WAGE AND HOUR LAW 33 (Rev. ed. 1967).

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>A worker is an “employee” under the act whether paid by the piece or by the hour. The time or mode of compensation does not control the determination of employee status. *United States v. Rosenwasser*, 323 U.S. 360 (1945). The act applies to employees who are paid by the week, as well as those who are paid by the hour. *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U.S. 572 (1942), *reh. denied* 317 U.S. 706 (1942).

<sup>119</sup>FLSA § 6(a), 29 U.S.C. § 206(a) (Supp. III, 1967). Before the 1966 amendments, the law’s test of coverage was concerned with the particular employee’s activities, *i.e.*, he had to be engaged in interstate commerce or in the production of goods for commerce in order to be covered. Thus, there could be situations in which two workers, under the same employer, would be treated differently by the law. The statute as presently amended covers a worker if he is employed in “an enterprise engaged in commerce or in the production of goods for commerce,” regardless of the character of his own work assignment.

<sup>120</sup>Act of June 25, 1938, ch. 676, §§ 13(a)(6), (10), 52 Stat. 1067, (1938).

<sup>121</sup>80 Stat. 833 (1966), 29 U.S.C. § 213(a)(6) (Supp. III, 1967).

<sup>122</sup>FLSA § 13(a)(6), 29 U.S.C. § 213(a)(6) (Supp. III, 1967).

<sup>123</sup>The statute defines a “man-day” as “any day during which an employee performs any agricultural labor for not less than one hour.” FLSA § 3(u), 29 U.S.C. § 203(u) (Supp. III, 1967). Thus, if five farm laborers worked at least one hour on a given day, the result would be five man-days. The same result would occur if one man worked at least one hour for five days.

<sup>124</sup>FLSA § 13(a)(6)(A), 29 U.S.C. § 213(a)(6)(A) (Supp. III, 1967).

fulfilled in a single quarter of the preceding calendar year; that is, a ninety day period. Assume a grower hired eight farm workers on a full time basis, five days a week, in each calendar quarter of 1968. Since there are approximately 62 working days in the average calendar quarter, the result would be 496 man-days of agricultural labor. Assume further that in 1969 this grower expands his operations and hires 50 farm workers. These employees are not entitled to a minimum wage under the FLSA because the grower did not meet the 500 man-day requirement in "any calendar quarter during the preceding calendar year."<sup>125</sup>

The second requirement is the commerce test. The law requires that either the farmworker be engaged in interstate commerce or in the production of goods for commerce, or that he be employed by "an enterprise engaged in commerce or in the production of goods for commerce."<sup>126</sup> This latter phrase is defined to mean:

an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—(1)...beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than \$250,000....<sup>127</sup>

Although the commerce test does not seem to impose significant restrictions on the coverage of farmworkers, it does limit their coverage in two respects. First, a grower whose business does not exceed \$250,000 a year in gross sales will not be covered by the FLSA no matter how many farm laborers he employed during the preceding calendar quarter. Second, either the grower or the worker must be engaged in commerce or in the production of goods for commerce. The fact that the enterprise affects commerce will not by itself bring it within the coverage of the act. Thus, a grower doing a wholly intrastate business and contemplating that the end result of his product will not enter the stream of commerce will be exempt from complying with the minimum wage provisions of the FLSA.

The effect of both the man-day and commerce requirements is to extend coverage only to those workers employed by large agricultural businesses. Only those operations which both hire enough farm workers to meet the man-day requirement and have gross sales in a sufficient amount to meet the dollar volume will be subject to the FLSA. Moreover, even if a farmworker and his employer satisfy both the

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<sup>125</sup>*Id.*

<sup>126</sup>FLSA § 6(a), 29 U.S.C. § 206(a) (Supp. III, 1967).

<sup>127</sup>FLSA § 3(s), 29 U.S.C. § 203(s) (Supp. III, 1967).

man-day and commerce requirements, the worker may still be precluded from receiving the statutory minimum wage. The FLSA completely excludes the following classes of workers, although all other requirements are satisfied.<sup>128</sup> First, members of the grower's immediate family are excluded from the coverage of the act.<sup>129</sup> Second, those laborers who are paid piece-rates<sup>130</sup> for work generally recognized as piece-work in the area, as hand harvest helpers, are excluded from coverage under the FLSA<sup>131</sup> providing two conditions are met. The workers must commute each day to the farm from their permanent residence, and they must have been employed in agriculture less than thirteen weeks in the preceeding calendar year.<sup>132</sup> The effect of this provision is to exclude from coverage non-migrant seasonal farm labor; i.e., those workers who have their permanent residence in an agricultural area, and perform only seasonal work (less than thirteen weeks a year).

A third group of farmworkers completely excluded from the FLSA are piece-workers under seventeen years of age who are employed as hand harvest helpers on the same farm as their parents.<sup>133</sup> For the grower to be exempt from the minimum wage requirement, however, he must pay these younge workers piece-rates for labor generally considered to be piece-work in the region. The piece-rate must be equal to that paid workers seventeen years old and over.

Although none of these three additional limitations are particularly significant as far as the general coverage of farm labor is concerned, they do illustrate the fact that farmworkers are treated differently by the act than are workers in other industries. There are no equivalent provisions in the FLSA that affect employees not engaged in agriculture.

Although the 1966 amendments have given the farmworker at least partial coverage under the minimum wage provisions of the FLSA, the benefits he receives are diluted as compared to those received by other workers. To illustrate, although those farmworkers

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<sup>128</sup>However, the burden of establishing exemptions from the provisions of the FLSA is placed upon the employer. *Coast Van Lines v. Armstrong*, 167 F.2d 705 (9th Cir. 1948). In addition, all of the exemptions of the FLSA are subject to a rule of "strict construction", and any doubt must be resolved in favor of the employee's coverage under the law. *Calaf v. Gonzales*, 127 F.2d 934 (1st Cir. 1942).

<sup>129</sup>FLSA § 13(a)(6)(B), 29 U.S.C. § 213(a)(6)(B) (Supp. III, 1967).

<sup>130</sup>Piece-rates are wages paid on the basis of the quantity of work done by the laborer, rather than on the basis of the time spent. For example, a piece-worker will be paid on the basis of how many crates of tomatoes he picks, rather than on how much time he spent in picking them.

<sup>131</sup>FLSA § 13(a)(6)(C), 29 U.S.C. § 213(a)(6)(C) (Supp. III, 1967).

<sup>132</sup>FLSA § 13(a)(6)(C)(i), (ii), 29 U.S.C. § 213(a)(6)(C)(i), (ii) (Supp. III, 1967).

<sup>133</sup>FLSA § 13(a)(6)(D), 29 U.S.C. § 213(a)(6)(D) (Supp. III, 1967).



who work for growers who meet the 500 man-day and commerce tests<sup>134</sup> are now covered by the minimum wage provisions of the FLSA, they are entitled to a lesser wage than other covered workers. Most employees who were covered by the FLSA before the 1966 amendments were to be paid a minimum wage of \$1.40 per hour during 1967,<sup>135</sup> and were entitled to an increase to \$1.60 per hour as of February 1, 1968.<sup>136</sup> The farmworker, on the other hand, was entitled to be paid only \$1.00 per hour during 1967; \$1.15 per hour during 1968; and \$1.30 per hour as of February 1, 1969.<sup>137</sup> Moreover, those employees who, like the farm laborer, were covered for the first time by the 1966 amendments<sup>138</sup> are entitled to receive a higher wage than the farmworkers. The wage rate for the newly covered employees is the same as that for the agricultural laborer for the years 1967, 1968, and 1969, however, for the years after 1969, these employees alone are entitled to wage increases.<sup>139</sup> For example, all newly covered employees other than farmworkers are entitled to receive \$1.45 per hour on February 1, 1970<sup>140</sup> and an increase to \$1.60 per hour on February 1, 1971.<sup>141</sup> The farmworker, on the other hand, is entitled to receive only \$1.30 per hour for these same years. Such minimum wage differences clearly illustrate the discrimination practiced against the farmworker. A farm laborer is not a second class citizen and should not be treated as such under the auspices of federal law.

## 2. *Reasons for Discriminatory Treatment of Farmworkers*

There are several reasons why farmworkers were completely excluded from federal minimum wage coverage until 1966, and then extended only limited coverage. First, it has been argued that agricultural labor, unlike industrial labor, "was not subject to the usual evils of sweatshop conditions of long hours indoors at low wages."<sup>142</sup>

<sup>134</sup>See text accompanying notes 125—28 *supra*.

<sup>135</sup>FLSA § 6(a)(1), 29 U.S.C. § 206(a)(1) (Supp. III, 1967).

<sup>136</sup>*Id.*

<sup>137</sup>FLSA § 6(a)(5), 29 U.S.C. § 206(a)(5) (Supp. III, 1967).

<sup>138</sup>The 1966 amendments expanded the coverage of the law to include those workers who were employed in "an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 206(a) (Supp. III, 1967). The prior law required that the particular employee be engaged in commerce or in the production of goods for commerce before he would be covered. Act of June 25, 1938, ch. 676, § 6(a), 52 Stat. 1062.

<sup>139</sup>Compare FLSA § 6(a)(5), 29 U.S.C. § 206(a)(5) (Supp. III, 1967) with FLSA § 6(b), 29 U.S.C. § 206(b) (Supp. III, 1967).

<sup>140</sup>FLSA § 6(b)(4), 29 U.S.C. § 206(b)(4) (Supp. III, 1967).

<sup>141</sup>FLSA § 6(b)(5), 29 U.S.C. § 206(b)(5) (Supp. III, 1967).

<sup>142</sup>*Bowie v. Gonzales*, 117 F.2d 11, 18 (1st Cir., 1941).

Granted, farmworkers do not usually work indoors, but low wages, long hours, and poor working conditions are synonymous with agricultural labor.<sup>143</sup> Thus, if the criteria for applying a minimum wage law to a group of employees are long hours, low wages, and poor working conditions, then the full minimum wage coverage should be extended to farmworkers.

A second reason advanced for the discriminatory treatment of the farmworker is that complete coverage would burden the grower with record keeping.<sup>144</sup> Clearly, however, the benefits of a minimum wage to the farmworker outweigh any burden imposed on the grower. The records that are required are not complicated nor are they overly burdensome. For example, a grower would be required to maintain the following records:<sup>145</sup> (1) the name of the employee, with identifying number or symbol, if one is used in the place of the name on any time, work, or payroll records; (2) the employee's home address; (3) his date of birth if he is under nineteen; (4) the occupation in which he is employed; (5) the time of day and the name of the day on which the employee's workweek begins (*e.g.*, Monday at 8 a.m.); (6) the regular hourly rate of pay and basis on which wages are paid; (7) hours worked each workday and total hours worked each workweek; (8) total daily or weekly straight-time earnings or wages; (9) total additions to or deductions from wages paid each pay period; and (10) the date of payment and the pay period covered by the payment. Since the grower would be likely to have most, if not all, of this information for his own payroll records, there would be slight, if any, inconvenience in meeting the record requirements imposed by the regulations.

Third, it is argued that any minimum wage guarantee would eliminate a worker's incentive.<sup>146</sup> Since farmworkers were not covered by any state or federal wage legislation before 1966, there is no factual basis for this argument. No one knows whether a farmworker's incentive will drop if he receives a wage increase. On the contrary, it would seem that minimum wage coverage would have an opposite effect. It would be plausible to assume that if farmworkers were being paid a reasonable amount they would be willing to work harder.

A fourth argument advanced for limiting the coverage of farmworkers is an assertion that if wages are increased, the expense of

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<sup>143</sup>See generally Chase, *supra* note 116; Note, *Migrant Farm Labor in Upstate New York*, 4 COLUM. J. OF LAW AND SOCIAL PROB. 1 (1968); Kovarsky, *supra* note 110; S. REP. NO. 1549, 89th Cong., 1st Sess. (1966); *Hearings on S. 1864—1868 Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st & 2d Sess. (1965—66).

<sup>144</sup>See Kovarsky, *supra* note 110, at 349.

<sup>145</sup>29 C.F.R. § 516.2(a) (1969).

<sup>146</sup>See Kovarsky, *supra* note 110, at 349.

harvesting the crop may exceed the value of the crop itself, thus making it economically unfeasible to harvest many crops.<sup>147</sup> However, the facts indicate that growers would not be seriously burdened by being forced to pay a minimum wage. The cost of labor is a minor item in the production expenses of most growers. Wages represent only a small part of production costs, and their proportion to overall expenses have actually declined in recent years.<sup>148</sup> For example, in 1949 labor expenses were sixteen percent of production costs, but by 1966 the figure had decreased to less than nine percent.<sup>149</sup> These figures indicate that few crops will go unharvested because of the cost of labor.

Finally, it is argued that if higher wages are paid, the consumer will have to pay higher prices for his food. Although some growers may not be able to completely absorb the cost of a wage increase, any increase in the price of agricultural goods is likely to be slight because the cost of field labor is only a small part of the retail price of goods purchased by the consumer.<sup>150</sup> The total cost of farm labor paid by the consumer generally represents from one to five percent of the products' price.<sup>151</sup> The American consumer spends a smaller percentage of his income on food today than in the past. For example, an average family spent 26 percent of its income for food in 1947—49.<sup>152</sup> In the years 1964—65 this figure had declined to only 18.5 percent.<sup>153</sup>

The facts presented here indicate that there is no reason to believe the consumer will be unable to cope with any increase in price caused by minimum wage laws.

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<sup>147</sup>*Id.* (citing *Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 2d Sess., pt. 2, at 926 (1960).

<sup>148</sup>*Hearings on H.R. 10509 Before the Subcomm. of the Senate Comm. on Appropriations*, 90th Cong., 1st Sess., pt. 4, at 12 (1967). See also S. REP. NO. 1549, 89th Cong., 2d Sess. 23 (1966).

<sup>149</sup>*Hearings on H.R. 10509 Before the Subcomm. of the Senate Comm. on Appropriations*, 90th Cong., 1st Sess., pt. 4, at 12 (1967). See also S. REP. NO. 1549, 89th Cong., 2d Sess. 23 (1966).

<sup>150</sup>See *Hearings on H.R. 10509 Before the Subcomm. of the Senate Comm. on Appropriations*, 90th Cong., 1st Sess., pt. 4, at 12 (1967); S. REP. NO. 1549, 89th Cong., 2d Sess. 23 (1966).

<sup>151</sup>See S. REP. NO. 1549, 89th Cong., 2d Sess. 23 (1966) citing the following figures: "On a head of lettuce which has a retail price of 21 cents, the field labor cost is one to 1.3 cent. On a pound of celery retailing at 15 cents per pound, the cost of field labor is 0.3 to 0.5 of a cent. On lemons retailing at 24 cents per pound, the field labor costs are 0.6 to 1 cent. On dates retailing at 49 cents per pound, the field labor comes to 1 cent per pound. On oranges retailing at 50 to 72 cents per dozen, the field labor costs are 1 to 2 cents. And on grapefruits having a retail price of 8 to 10 cents each, the field labor costs are 0.2 to 0.4 of a cent."

<sup>152</sup>S. REP. NO. 1549, 89th Cong., 2d Sess. 19 (1966).

<sup>153</sup>*Id.*

It is apparent that the arguments for the exclusion or continued limitation of coverage of the farmworkers from the minimum wage provisions of the FLSA no longer have validity. However, a possible justification for limiting the coverage of the farmworker under federal law is that farmworkers are adequately covered by state minimum wage laws.

### *B. State Legislation*

The minimum wage provisions of the various state laws,<sup>154</sup> as a general rule, completely exclude the farmworker from coverage. State minimum wage laws may be grouped into four classifications with respect to their coverage of agricultural labor. First, some states have no minimum wage laws at all, thus no coverage is provided to farm laborers. Second, other states have such laws but completely exclude all farmworkers. Third, several states have wage laws that are applicable to agricultural labor, but these laws cover only females and minors. Finally, a few states provide coverage, in varying degrees, for both male and female farmworkers.

#### *1. States That Have No Wage Laws*

Eleven states have no minimum wage laws or orders at all.<sup>155</sup> All of these states, with the exception of Montana, may be considered agricultural states. This category of state minimum wage provisions is significant to farmworkers because many of them will be employed in these states. Since there are no minimum wage laws, *ipso facto* farm laborers receive no minimum wage protection when employed in these states.

#### *2. States With Wage Laws That Exclude All Farm Workers*

A second classification of state minimum wage provisions are those which have minimum wage laws or orders, but expressly exclude those employees who are engaged in agricultural labor. Twenty-six states have wage laws of this type.<sup>156</sup> The exclusion is

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<sup>154</sup>This discussion includes those states which have wage orders; that is, regulations governing minimum wages issued by an administrative body authorized by statute. *See, e.g.*, CAL. LABOR CODE §§ 1171—1204 (West 1955).

<sup>155</sup>The states are: Alabama, Florida, Georgia, Iowa, Mississippi, Missouri, Montana, South Carolina, Tennessee, Texas, and Virginia.

<sup>156</sup>ALASKA STAT. § 23.10.055(1) (1962); ARIZ. REV. STAT. ANN. § 23—311(8) (1956); CONN. GEN. STAT. ANN. § 31—58(f) (Supp. 1969); DEL. CODE ANN. tit. 19, § 901(e)(1) (Supp. 1968); IDAHO CODE ANN. § 44—1504 (Supp.

accomplished by various means. For example, the Ohio statute excludes "labor on a farm" from the definition of "occupation".<sup>157</sup> New York's statute provides that the term "employee" does not include "any individual who is employed or permitted to work... in labor on a farm."<sup>158</sup> These provisions are typical of the other twenty-four state laws that fall into this classification.

### 3. States With Wage Laws That Cover Only Females and Minors

Six states have wage laws that are broad enough to cover agricultural labor, but coverage under these laws is limited to females and minors.<sup>159</sup> For example, California has this type of law.<sup>160</sup> The current minimum wage for adult female farmworkers in California is \$ 1.65 per hour.<sup>161</sup> and for minors it is \$ 1.35 per hour.<sup>162</sup> If women and minors are hired on a piece-work basis, the piece-rate must be such that it would yield not less than the hourly wage to at least 80 percent of the workers.<sup>163</sup>

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1969); ILL. ANN. STAT. ch. 48, § 198.1 (Smith-Hurd 1966); IND. ANN. STAT. § 40.134(m) (Supp. 1969); KY. REV. STAT. ANN. § 337.010(3)(c) (Supp. 1969); LA. REV. STAT. ANN. § 23:291 (1964); ME. REV. STAT. ANN. tit. 26, § 663(3)(A) (1965); MD. ANN. CODE art 100, § 82 (e)(1) (Supp. 1968); MASS. GEN. LAWS ANN. ch. 151, § 2 (Supp. 1968); MINN. STAT. ANN. § 177.02 (subdiv. 8) (1966); NEB. REV. STAT. § 48—1202(3)(a) (Supp. 1967); NEV. REV. STAT. §§ 608.250(2)(a), 609.020 (1967); N.H. REV. STAT. ANN. § 279:21(I) (Supp. 1967); N.Y. LABOR CODE § 651(5)(b) (McKinney Supp. 1969); N.C. GEN. STAT. § 95—86(3)(a) (1965); OHIO REV. CODE ANN. § 4111.01(D) (Page 1965); OKLA. STAT. ANN. tit. 40, § 197.4(e)(1) (Supp. 1969); PA. STAT. ANN. tit. 43, § 331b(6) (1964); R.I. GEN. LAWS ANN. § 28—12—2(g)(1) (1956); S.D. CODE § 17.0607 (Supp. 1960) *as amended* by S.8.62, L. 1969); VT. STAT. ANN. tit. 21, § 383(2)(A) (1967); W. VA. CODE ANN. § 21—5C—1(f)(1) (Supp. 1968); WYO. STAT. ANN. § 27—207(d)(1) (1967).

<sup>157</sup>OHIO REV. CODE ANN. § 4111.01(D) (Page 1965).

<sup>158</sup>N.Y. LABOR CODE § 651(5)(b) (McKinney Supp. 1969).

<sup>159</sup>CAL. LABOR CODE §§ 1171, 1172 (West 1955); COLO. REV. STAT. ANN. §§ 80—7—1 — 80—7—20 (1963); KAN. STAT. ANN. §§ 44—640, 44—643 (1964); UTAH CODE ANN. §§ 34—22—1 — 34—22—21 (Supp. 1969); WASH. REV. CODE ANN. §§ 49.12.010 — 49.12.230 (1962); WIS. STAT. ANN. §§ 104.01 — 104.12 (1957).

<sup>160</sup>CAL. LABOR CODE § 1171 (West 1955). The term "minor" is defined to include females under age 21 and males under age 18. CAL. LABOR CODE § 1172 (West 1955).

<sup>161</sup>8 CAL. ADMIN. CODE § 11500(3)(a) (1968).

<sup>162</sup>8 CAL. ADMIN. CODE § 11500(3)(b) (1968).

<sup>163</sup>8 CAL. ADMIN. CODE § 11500(3)(c) (1968). The wage rates for women and minors are set by order of the Industrial Welfare Commission after an investigation. CAL. LABOR CODE §§ 1180, 1182—85 (West 1955), 1181 (West Supp. 1968). The California Attorney General has issued an opinion that the Industrial Welfare Commission has jurisdiction and authority to promulgate orders covering women and minors engaged in agricultural employment. 28 OP. CAL. ATT'Y GEN. 261 (1956). The standard guiding the Commission in its determination is a wage adequate to

Unlike other states having wage laws of this classification, the California law may now be applicable to some adult male farmworkers. In 1968 the California legislature amended its law regarding discrimination in wages on the basis of sex.<sup>164</sup> The prior law had prohibited paying women a lesser wage than that paid men when engaged in the same type of employment and in the same classification of work, with exceptions for such factors as seniority, skill, and ability.<sup>165</sup> However, the law before amendment did not prohibit the payment of a lesser wage to male workers than paid to female employees for the same work. The current law provides that any individual is not to be paid wages less than wages paid to employees *of the opposite sex* for the same classification of work, subject to the same exceptions for seniority, skill, and ability.<sup>166</sup> Since the minimum wage order provides that all female farmworkers must be paid \$ 1.65 an hour,<sup>167</sup> that sum must be paid all male farmworkers doing the same work with comparable seniority, and skill. Because California has always been a leader among the states in wages paid farmworkers, a mandatory minimum wage of \$ 1.65 per hour does not constitute a significant change in the wage pattern of its agricultural industry. The average hourly wage for farmworkers in California for 1967 was reported to be \$ 1.59 per hour, which was 42 percent above the national average of \$ 1.03 an hour.<sup>168</sup> Hence, the battle for wage reform for farmworkers must first be fought on a nation-wide level, driving the wages paid in the other states up to the level of wages paid in the "leading" states, such as California. After this increase has been achieved, attention can then be turned to raising wages in the "leading" states.

#### 4. States With Wage Laws That Cover Farmworkers<sup>169</sup>

The remaining seven states<sup>170</sup> do not explicitly exclude agricultural labor *in toto* from their minimum wage laws. Most of these supply necessary costs of proper living and to maintain health and welfare. CAL. LABOR CODE § 1182 (West 1955). See *Rivera v. Div. of Ind. Welfare*, 265 A.C.A. 639, 71 Cal. Rptr. 739 (1968), which extensively discusses the authority and methods of operation of the Industrial Welfare Commission in setting wage rates for women and minors in agricultural employment.

<sup>164</sup>Cal. Stats. 1968, ch. 325, CAL. LABOR CODE § 1197.5 (West Supp. 1968).

<sup>165</sup>Cal. Stats. 1949, ch. 804, § 1, *as amended*, Cal. Stats. 1957, ch. 2384, § 1, *as amended*, Cal. Stats. 1965, ch. 825, § 1.

<sup>166</sup>Cal. Stats. 1968, ch. 325, § 1, CAL. LABOR CODE § 1197.5 (West Supp. 1968).

<sup>167</sup>8 CAL. ADMIN. CODE § 11500(3)(a) (1968).

<sup>168</sup>See CAL. DEP'T of EMPLOYMENT, CALIFORNIA ANNUAL FARM LABOR REPORT 3 (1967).

<sup>169</sup>It should be noted that if an employee is subject to both the FLSA and a state minimum wage law, the higher or stricter standard will apply. FLSA § 18(a), 29 U.S.C. § 218(a) (Supp. III, 1967).

<sup>170</sup>The States are: Arkansas, Hawaii, Michigan, New Jersey, New Mexico, North Dakota, and Oregon.

states provide at least some, although generally limited, coverage of farmworkers. Since these states' minimum wage laws vary with respect to their coverage of farm labor, each will be separately summarized and discussed.

North Dakota's wage law authorizes the Commissioner of Labor to prescribe "standards of minimum wages for employees in any occupation."<sup>171</sup> Although the law is broad enough to include agricultural labor, the Commissioner has not issued a wage order that would prescribe a minimum wage for farmworkers.<sup>172</sup> Thus, in reality, farmworkers do not receive minimum wage benefits in North Dakota.

Nearly the same treatment accorded the farmworker by North Dakota is found in Oregon wage law. The Oregon law excludes all agricultural workers who are "paid by the amount of work produced or services rendered,"<sup>173</sup> *i.e.*, paid on a piece-rate basis. All farmworkers who are not paid on a piece-rate basis are impliedly covered by the Oregon law. There are no figures available that indicate how many farmworkers are affected by this provision.

The minimum wage law of Hawaii is applicable to most private employment,<sup>174</sup> and specifically covers all agricultural employment, except coffee harvesting, if the employer hires at least twenty farm laborers during each work week.<sup>175</sup> The minimum wage is currently \$1.25 per hour.<sup>176</sup> Hawaii is the only state that provides for the payment of overtime compensation to farmworkers for work done in excess of a given number of hours per week.<sup>177</sup>

Michigan's wage law provides that "agricultural fruit growers, pickle growers and tomato growers, or other agricultural employers who traditionally contract for the harvesting on a piece-work basis" are exempt from the coverage of the act until piece-work scales have been set by the Wage Deviation Board,<sup>178</sup> the administration agency authorized to set wage rates. The Board has since established piece-

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<sup>171</sup>N.D. CENT. CODE § 34—06—03(3) (Supp. 1967).

<sup>172</sup>See 4A LABOR RELATIONS REPORTER SLL 44:302 — SLL 44:333 (1968) which lists all of the wage orders currently in force in North Dakota. None of these apply to farm laborers.

<sup>173</sup>ORE. REV. STAT. § 653.020(1) (1967).

<sup>174</sup>See HAWAII REV. STAT. § 387.1 (1968).

<sup>175</sup>HAWAII REV. STAT. § 387—1(2) (1968).

<sup>176</sup>HAWAII REV. STAT. § 387—2 (1968). This section requires the minimum wage to be paid only for work done in a week when the employer hires at least twenty employees.

<sup>177</sup>However, certain agricultural industries are given an exemption from overtime pay requirements for any twenty weeks a year for work in excess of 40 hours, but less than 48 hours per week. HAWAII REV. STAT. § 387—3(e) (1968). If the agricultural employee is required to work more than 48 hours per week, he is entitled to overtime pay for the excess. HAWAII REV. STAT. § 387—3(e)(3) (1968).

<sup>178</sup>MICH. STAT. ANN. § 17.255(14) (1968).

rates<sup>179</sup> which in its determination conform with the prevailing minimum wage of \$1.25 an hour.<sup>180</sup>

The wage laws of Arkansas<sup>181</sup> and New Mexico<sup>182</sup> provide the same coverage of the farmworker as does the FLSA, with, of course, the elimination of the commerce requirement.<sup>183</sup> Thus, the laws of both states contain exclusions from coverage for those workers whose employers do not meet the 500 man-day requirement,<sup>184</sup> as well as excluding members of the growers immediate family, commuting piece-workers who are employed as hand harvest laborers, and piece-workers under seventeen who are employed as hand harvest laborers on the same farm as their parents.<sup>185</sup> The minimum wage rate in New Mexico is \$1.15 per hour through January 31, 1969 and \$1.30 per hour thereafter.<sup>186</sup> Arkansas has set a minimum wage rate of \$1.00 per hour beginning January 1, 1969; \$1.10 per hour on January 1, 1970; and \$1.20 per hour on January 1, 1971.<sup>187</sup>

The minimum wage law of New Jersey<sup>188</sup> provides nearly the same coverage for farm workers as it does for other employees. The law prescribes a minimum wage for all "employees".<sup>189</sup> Since farmworkers are not excluded by any section in the act, it may be concluded that they are covered with other "employees." The New Jersey law provides for a minimum wage of \$1.50 an hour beginning January 1, 1969 plus one and one-half times this amount for any work in excess of 40 hours per week.<sup>190</sup> However, the overtime pay provision is made explicitly inapplicable to farm labor.<sup>191</sup>

The same rationales that are offered in argument against coverage of farmworkers under the FLSA are used as reasons for exclusion of agricultural labor from state minimum wage laws.<sup>192</sup> These

<sup>179</sup>MICH. ADMIN. CODE §§ 408.711 — 408.712 (Supp. 1967).

<sup>180</sup>MICH. STAT. ANN. § 17.255(4)(1)(c) (1968). In addition, § 17.255(4)(2) contains a declaration of intent of the legislature to adjust the minimum wage to reflect changes in the cost of living.

<sup>181</sup>Minimum Wage Act of the State of Arkansas, Act 25, L. 1968.

<sup>182</sup>N.M. STAT. ANN. § 59—3—21 (Supp. 1968).

<sup>183</sup>See text accompanying notes 121 and 128 *supra*.

<sup>184</sup>Minimum Wage Act of the State of Arkansas, Act 25, L. 1968 § 2(g)(6); N.M. STAT. ANN. § 59—3—21(D) (10)(a) (Supp. 1968). The 500 man-day requirement is discussed *supra* at notes 125—27 and accompanying text.

<sup>185</sup>Minimum Wage Act of the State of Arkansas, Act 25, L. 1968 § 2(g)(8); N.M. STAT. ANN. § 59—3—21(D) (10) (Supp. 1968). Compare 29 U.S.C. § 213(a)(6)(B), (C), and (D) (Supp. III, 1967). See text accompanying notes 134—35 *supra*.

<sup>186</sup>N.M. STAT. ANN. § 59—3—22 (Supp. 1968).

<sup>187</sup>Minimum Wage Act of the State of Arkansas, Act 25, L. 1968 § 3.

<sup>188</sup>N.J. STAT. ANN. §§ 34:11—56a — 34:11—56a29 (Supp. 1968).

<sup>189</sup>N.J. STAT. ANN. § 34:11—56a4 (Supp. 1968). The term "employee" is defined by the act to mean "any individual employed by an employer." N.J. STAT. ANN. § 34:11—56a1(h) (Supp. 1968).

<sup>190</sup>N.J. STAT. ANN. § 34:11—56a4 (Supp. 1968).

<sup>191</sup>N.J. STAT. ANN. § 34:11—56a4 (Supp. 1968).

<sup>192</sup>See text accompanying notes 144—55 *supra*.



arguments suffer from the same infirmities whether offered against coverage under the FLSA or under state wage laws.<sup>193</sup> That there are no overriding reasons why the states cannot enact wage laws to cover agricultural workers is exemplified by the recent New Jersey minimum wage law. This law could serve as model minimum wage legislation for the other states. The New Jersey law demonstrates that it is not impossible for states to provide minimum wage coverage for farmworkers comparable to coverage accorded other workers. However, the law does contain at least one major infirmity; *i.e.*, farmworkers are not entitled to overtime compensation.<sup>194</sup> This limitation should be removed from the act so that farmworkers will be truly equated with other employees. Adoption by the states of a New Jersey-type law, with the addition of overtime provisions applicable to farmworkers, would represent a significant step toward the elimination of wage discrimination against farmworkers.

In summary, an analysis of the minimum wage laws of all states indicates the following. Male farmworkers are completely excluded from coverage under these laws in 43 of the 50 states. Female and minor agricultural laborers meet the same fate in 37 states. Although the remaining seven states have minimum wage laws that are applicable to farmworkers, the actual coverage extended is often diluted when compared to that received by other workers.

As a result of the lack of coverage, the farmworker receives low wages wherever he works. In 1966 farm wages varied from a low of 65 cents an hour in South Carolina<sup>195</sup> to a high of \$1.52 in California.<sup>196</sup> The farmworker's national average hourly wage rate of \$1.09 is far below the average wages paid in other industries.<sup>197</sup> Since these low wages are a direct result of the express exclusion of agricultural employment from state minimum wage coverage,<sup>198</sup> the situation will not be improved until either the states provide coverage or a federal wage law applicable to farmworkers is enacted.

### *C. The Need for Change*

As of April 1, 1968, hired farmworkers earned, on the average, \$8.50 per day with board and room and \$9.40 per day without.<sup>199</sup>

<sup>193</sup>See discussion of the arguments and their weaknesses in text accompanying notes 144—55 *supra*.

<sup>194</sup>N.J. STAT. ANN. § 34:11—56a4 (Supp. 1968).

<sup>195</sup>S. REP. NO. 1549, 89th Cong., 2d Sess. 33 (1966).

<sup>196</sup>CAL. DEP'T OF EMPLOYMENT, CALIFORNIA ANNUAL FARM LABOR REPORT 29 (1966).

<sup>197</sup>S. REP. NO. 1549, 89th Cong., 2d Sess. 33 (1966).

<sup>198</sup>*Id.*

<sup>199</sup>U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, at 235 (table 340)(89th ed. 1968) [hereinafter cited as 1968 STATISTICAL ABSTRACT]

Assuming he works an eight hour day, a farm laborer's wages (excluding board and room) average less than \$1.18 per hour.<sup>200</sup> Although this wage is slightly more than 50 percent above that which he earned ten years ago,<sup>201</sup> it is obviously inadequate by today's standards. The average annual wage of a farmworker, computed on the basis of these figures, is \$2,350—well below the designated 1965 poverty level of \$3,100.<sup>202</sup> This poverty level figure, which represents a minimum income for a “non-farm” family of four, should be set at a higher level to reflect the increased cost of living. The poverty level established for a farm family is \$1,860.<sup>203</sup> The former figure is applicable to farmworkers because the farm figure applies only to those who own farms or sharecrop and grow most of their own food.<sup>204</sup> Moreover, the poverty level figure of \$3,100 is perhaps inapplicable to the many Mexican-American farmworkers because they traditionally have families of more than four persons. Thus, the poverty level figure of \$5,090 for families of at least seven members is suggested as being more appropriate.<sup>205</sup>

The current annual wage of \$2,350 assumes the worker can obtain employment for 50 weeks a year, which is a rare phenomenon in a seasonal industry such as agriculture.<sup>206</sup> On February 1, 1969, those farmworkers covered by the FLSA received a wage increase to \$1.30 an hour,<sup>207</sup> making their annual gross wage \$2,600. This, it is submitted, is still inadequate to bring the farmworker above the poverty line. Because of economic necessity, the wife and older children of a farm laborer often work to supplement family income. Even assuming such is the case, the combined family income is still near the poverty line. To illustrate, in New York it is estimated that the average farm labor family has an annual income of only \$3,300, consisting of \$2,800 from the head of the household and \$500 from other working members of the family.<sup>208</sup>

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<sup>200</sup>The exact average hourly wage based on daily earnings of \$9.40 is \$1.175.

<sup>201</sup>1968 STATISTICAL ABSTRACT 235 (table 340).

<sup>202</sup>Orshansky, *Counting the Poor: Another look at the Poverty Profile*, 28 SOC. SEC. BULL. 3, 4 (Jan., 1965).

<sup>203</sup>*Id.*

<sup>204</sup>*See generally Id.*

<sup>205</sup>*Id. at 10.*

<sup>206</sup>“In 1966, 79 percent or more of all hired farmworkers were employed on a seasonal basis, many of them for very short periods.” *Hearings on H.R. 10509 Before the Subcomm. of the Senate Comm. on Appropriations*, 90th Cong., 1st Sess. pt. 4, at 15 (1967).

<sup>207</sup>The wage increase was provided for in the 1966 amendments to the FLSA. *See* FLSA § 6(a)(5), 29 U.S.C. § 206(a)(5) (Supp. III, 1967).

<sup>208</sup>Note, *Migrant Labor in Upstate New York*, 4 COLUM. J. OF LAW AND SOCIAL PROB. 1, 14 (1968).

As a comparison, and to further illustrate the "wage gap" between farm and non-farm employees, in March 1968, production workers in manufacturing averaged \$2.96 an hour gross and \$2.84 an hour excluding overtime compensation<sup>209</sup> (which the farmworker does not have a chance to earn).<sup>210</sup> This is more than two and one-half times as much as the farm laborer earns. Unfortunately the "wage gap" between farmworkers and other employees has widened in the last twenty years.<sup>211</sup> According to statistics prepared by the Bureau of the Census, farmworkers and their foremen earned a median annual income that was only 31 percent of that enjoyed by craftsmen, foremen, and kindred workers in other industries.<sup>212</sup> By 1962 the median annual income of the farmworkers had slipped to 23 percent of what other workers were earning.<sup>213</sup> Farmworkers earned 50 percent of what other laborers (excluding mine workers) earned in 1947,<sup>214</sup> and by 1964, it had dropped to 40 percent.<sup>215</sup> From these figures it is clear that while other employees and laborers are gaining increased compensation to cope with the rising cost of living, the farmworker is not.

An important finding of a 1965 survey by the United States Department of Agriculture is useful to further illustrate the "wage gap." This study found that if a \$1.00 an hour minimum wage were to be paid to all farmworkers, the wages of half (728,000) of the 1.4 million farmworkers who were then employed would have to be increased.<sup>216</sup> If the required minimum wage were \$1.25 an hour, then the wages of 70 percent or 1,005,000 agricultural laborers would have to be raised.<sup>217</sup>

In addition to wage discrimination, farmworkers do not receive the benefits of overtime pay that are accorded other workers. That is, they are not entitled to a premium rate of pay for work done in excess of a certain number of hours. The FLSA specifically excludes agricultural labor from the overtime provisions of the act.<sup>218</sup> In addition, with the exception of Hawaii,<sup>219</sup> no state minimum wage law provides overtime compensation coverage for farmworkers.

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<sup>209</sup>1968 STATISTICAL ABSTRACT 230 (table 331).

<sup>210</sup>See text accompanying notes 221—22 *infra*.

<sup>211</sup>See U.S. DEP'T OF LABOR, HIRED FARM WORKERS, A STUDY TO EVALUATE THE FEASIBILITY OF EXTENDING THE MINIMUM WAGE UNDER THE FAIR LABOR STANDARDS ACT 41 (1966).

<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>*Id.*

<sup>215</sup>*Id.*

<sup>216</sup>*Id.* at 47.

<sup>217</sup>*Id.*

<sup>218</sup>FLSA § 13(b)(12), 29 U.S.C. § 213(b)(12) (Supp. III, 1967).

<sup>219</sup>See note 179 *supra*.

The wage discrimination suffered by farmworkers cannot be justified on the ground that growers cannot afford to pay a more reasonable wage. The improvement of the growers' economic position in recent years indicates this fact. Although in the past twenty years there has been a decrease in the income of farmworkers as compared to other working men,<sup>220</sup> there has been a tremendous growth in farm income during this same period. Between the years 1940 and 1964, realized farm income has increased nearly fourfold—from \$11.1 billion to \$42.2 billion.<sup>221</sup> It would seem, therefore, that the grower could afford to pay a higher wage than he is now paying agricultural laborers. The small farmer who argues that he would be put out of business if he were required to pay increased wages is rapidly disappearing from American agriculture. The trend since 1939 has been for more large farms and fewer smaller ones.<sup>222</sup> Every year since 1920 the number of farms has decreased and the size of each farm has increased, thus confirming a trend toward big business in agriculture.<sup>223</sup> The growers who hire most of the farmworkers today are in a position, because of their size and income, to pay a much higher wage than they do in fact pay, or are required to pay where a minimum wage law is applicable. Because of the size and income of agricultural enterprises, the payment of higher wages to farmworkers should not injure the agricultural sector of the economy.

#### D. Suggestions for Reform

The best solution to the current problem of wage discrimination against farmworkers would be for the states to provide complete coverage of agricultural labor under their minimum wage laws. If this were done, there would be no need for federal action in this area. Also, it would be an easy task to draft legislation providing coverage under an existing state law. If appropriate state legislation were enacted, and a reasonable wage were required by law, the farmworkers' position would be significantly improved. However, since most of

<sup>220</sup>See text accompanying notes 214—18 *supra*.

<sup>221</sup>U.S. DEPT OF LABOR, HIRED FARM WORKERS, *supra* note 214, at 13.

<sup>222</sup>*Id.*, at 8.

<sup>223</sup>See 1968 STATISTICAL ABSTRACT 594 (table 895). Some representative figures are as follows:

<i>year</i>	<i>number of farms</i>	<i>av. acres per farm</i>
1920	6,518,000	147
1950	5,648,000	213
1960	3,962,000	297
1968	3,050,000	369

the states have failed to take action to provide coverage for farm labor in the past,<sup>224</sup> there is no reason to believe that they will act now. There have been a few states who have recently extended coverage to farmworkers,<sup>225</sup> but there is no indication that a significant number of states will follow suit. Thus, it appears that the only available solution to the problems of the farmworker lies with federal legislation.

Congress has thus far refused to expand the coverage of the FLSA under the full reach of its power to regulate commerce.<sup>226</sup> While the Taft-Hartley Act<sup>227</sup> applies to all activities that merely "affect" commerce,<sup>228</sup> the FLSA is limited to workers or enterprises "engaged" in interstate commerce or the production of goods for commerce.<sup>229</sup> Proposals to extend coverage to activities that "affect" commerce have been introduced in Congress,<sup>230</sup> but have not been approved. The coverage of the FLSA could be, and should be, so extended. Congress should declare that all agricultural business, even that which is wholly intrastate in character, affects interstate commerce.<sup>231</sup> Congress could then proceed to extend the FLSA to govern wages paid all farmworkers.

In conjunction with the expansion of the commerce test, the present dollar volume requirement of \$250,000 per year in gross sales<sup>232</sup> should be eliminated or changed. A farmworker who is

<sup>224</sup>See, text accompanying notes 156—201 *supra*.

<sup>225</sup>*E.g.*, Minimum Wage Act of the State of Arkansas, Act 25, L.1968; N.J. STAT. ANN. §§ 34:11—56a — 34:11—56a29 (Supp. 1968).

<sup>226</sup>"The coverage provisions of the Fair Labor Standards Act do not represent exercise by Congress of its full powers under the commerce clause." *Poland v. Herbert J. Siegel Org, Inc.*, 272 F. Supp. 821, 824 (D. Md. 1967).

<sup>227</sup>Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141—87 (1964).

<sup>228</sup>61 Stat. 136 (1947); 29 U.S.C. § 141(b) (1964).

<sup>229</sup>FLSA § 6(a), 29 U.S.C. § 206(a) (Supp. III, 1967).

<sup>230</sup>EDITORIAL STAFF OF THE LABOR RELATIONS REPORTER, THE NEW WAGE AND HOUR LAW 43 (Rev. ed. 1967).

<sup>231</sup>For example, the Taft-Hartley Act in 29 U.S.C. § 141(b) (1964) contains this declaration:

"It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

A similar declaration could be made under the FLSA regulating all activities that affect commerce.

<sup>232</sup>FLSA § 3(s), 29 U.S.C. § 203(s) (Supp. III, 1967), discussed in text accompanying notes 128—30 *supra*.

employed by a grower doing a small volume of business should not be discriminated against. The fact that he works for a smaller operator does not affect his needs; he still must earn enough to adequately provide for himself and his family. Moreover, if there must be a limitation on coverage with respect to small operators, it should be based on a profit margin, rather than on gross sales. The grower who has a volume of sales of \$249,000 may be netting \$30,000 or more. It seems most unfair to allow such an employer to escape payment of a minimum wage to his employees.

The FLSA 500 man-day requirement for agricultural labor<sup>233</sup> should also be changed. The man-day provision contains a serious loophole. The statute provides that farmworkers are excluded from coverage if they are employed "by an employer who did not, during any calendar year, use more than five hundred man-days of agricultural labor."<sup>234</sup> The effect of the wording of this section is to provide that a new agricultural enterprise will be completely exempted from paying minimum wages in its first year of operation. The statute will also exclude those farmworkers who work for an enterprise which has recently been sold to a new operator. For example, assume a businessman purchases a going agricultural enterprise that hires 50 or more farmworkers. The employees of the new enterprise will not be entitled to a minimum wage because the statute requires that the new employer must have hired 500 man-days of agricultural labor, during a quarter of the prior year. The fact that the particular farm itself has met this requirement is apparently irrelevant, so long as the new employer has not.

Perhaps the man-day requirement should be dropped in its entirety because it serves no real purpose. Small operators are already exempted from complying with the minimum wage provisions by the gross sales requirement. If an exemption for small operators must be retained, it should be changed, as suggested, to a profit test. Small growers will thus be excused from complying with the requirements of the FLSA if their profits are below a certain level. Hence there would be no need for an additional test, such as the man-day requirement, to exempt the small operators.

The need for a federal minimum wage law with maximum coverage of agricultural workers is clear. The substandard income of farmworkers, the lack of coverage under state minimum wage laws, and the competition in interstate commerce among growers who pay wages ranging from \$.055 to \$1.46 an hour illustrate the need for a

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<sup>233</sup>FLSA § 13(a)(6)(A), 29 U.S.C. § 213(a)(6)(A) (Supp. III, 1967).

<sup>234</sup>*Id.*

uniform federal minimum wage law that will adequately cover agricultural labor.<sup>235</sup> Although workers in some industries receive salaries far in excess of required minimum wages,<sup>236</sup> thus rendering the wage laws meaningless, the minimum wage standard is necessary in agriculture. Because the farmworkers are generally unorganized and are not classified as skilled workers, there is little motivation for an employer to pay a wage higher than required by law, and they rarely do so.<sup>237</sup> Consequently, farm laborers can expect to receive only the mandatory minimum wage.

Moreover, overtime pay provisions ought to be applicable to farm labor. The same reason that prompted the original overtime pay provisions in the FLSA is present today in the agricultural industries. That is, there are too many workers for available jobs.<sup>238</sup> The ability of growers to pay the present low wages indicates that this is the situation in agriculture.<sup>239</sup> The requirement of an overtime premium rate would tend to encourage growers and large agricultural businesses to hire additional workers. Growers would probably prefer to pay regular wage rates to additional workers rather than pay premium rates to current employees for work in excess of forty hours a week. In addition, basic concepts of fairness are ignored when farmworkers are excluded, while nearly all other workers are covered by the FLSA overtime provisions. Of course an adequate minimum wage would be a prerequisite to an overtime premium rate. That is, before enactment of an overtime provision, farmworkers would have to be able to earn a sufficient amount by working a 40 to 48 hour week because the overtime requirement would discourage employers from allowing additional work.

The enactment of a federal minimum wage law to cover agricultural employment will not completely solve the income problems of farm laborers. Even when a farmworker is fortunate enough to be covered by a minimum wage law, he might receive less than the

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<sup>235</sup>See S. REP. NO. 1549, 89th Cong., 2d Sess. 34 (1966).

<sup>236</sup>For example, the following figures show the average hourly wage, excluding overtime compensation, for workers in three industries in 1967:

<i>Industry</i>	<i>av. hourly wage</i>
Manufacturing	\$ 2.83
Contract Construction	\$ 4.09
Retail Trade	\$ 2.01

1968 STATISTICAL ABSTRACT 231 (table 332).

<sup>237</sup>For example, the national average wage for farm workers in 1968 was less than \$1.18 per hour. 1968 STATISTICAL ABSTRACT 235.

<sup>238</sup>See EDITORIAL STAFF OF THE LABOR RELATIONS REPORTER, THE NEW WAGE AND HOUR LAW 33 (Rev. ed. 1967).

<sup>239</sup>See Chase, *supra* note 116, at 65.

required amount. For example, when there is an alternative piece-rate which would yield an amount lower than the hourly minimum, the former is likely to be the basis of his compensation. Because of his lack of knowledge and sophistication, the farm laborer will generally accept it without demanding the hourly minimum due him.<sup>240</sup> To remedy this situation, the employer, when an alternative piece-rate is offered, should be required by law to fully inform the worker of the respective yields of each and allow the employee to select the method of payment. Thus, the worker could intelligently choose either the hourly wage or piece-rate.<sup>241</sup> In no event would the grower be allowed to pay a piece-rate that would yield less than the minimum hourly wage. The employer-selected piece-rate method also is subject to great abuses. For example, when the fields are thick and well stocked, the employer may opt for an hourly basis of pay because payment for piece-work will be more costly to him. Conversely, when the fields are sparse and picked over, resulting in slower production, the piece-rate might be forced upon the worker rather than the hourly wage.<sup>242</sup>

As an additional safeguard, every employer should be required periodically to demonstrate his compliance with the minimum wage laws. This could be accomplished by requiring the employer to produce payroll records showing the time worked and amount paid to each employee. To enforce such a provision, those agricultural employers who persist in paying less than the required wage or fail to furnish adequate reports should be subject to strict penalties, such as a required premium payment to the affected employees.

These proposals represent the minimum protection currently needed by the agricultural workers. They are only the first steps that should be taken in alleviating the plight of the farmworker. After these or similar proposals are acted upon, attention may be turned

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<sup>240</sup>See generally Chase, *supra* note 116, at 61.

<sup>241</sup>Note the following proposal:

“[T]he Secretary [of labor] should require that the wage rate disclosure be broken down into at least three parts: (1) The hourly rate expected to be paid, (2) The piece rate expected to be paid on each crop, and (3) The expected piece rates converted into estimated average daily (9) hours a day) earnings of a first year worker. The conversion of expected piece rates into estimated daily earnings is especially important since piece rates (wages paid on the basis of the quantity of work done) are meaningless without knowledge as to how much can normally be picked in a day.” Note, *Migrant Farm Labor in Upstate New York*, 4 COLUM. J. OF LAW AND SOCIAL PROB. 1, 11—12 (1968).

<sup>242</sup>See Chase, *supra* note 116 at 65. Apparently this situation is not a problem in New York. In Note, *Migrant Farm Labor in Upstate New York* 4 COLUM. J. OF LAW AND SOCIAL PROB. 1, 17 (1968), it is reported that “in 1967 growers had adjusted most piece-rates so that the average worker was getting about \$ 13 to \$ 17 for eight or nine hours of work. This places average hourly earnings in the range of \$1.50 to \$2.00.”



toward making other improvements in the farmworker's socio-economic position.

#### IV. CONCLUSION

Workmen's compensation and minimum wage represent two types of legislation that have long been denied to the farmworker. Although there has recently been token expansion of a few of the laws to encompass the farmworker, the general rule for both types of laws is still exclusion of all persons engaged in agricultural labor. The reasons and rationales offered in defense of exclusion no longer have validity. It is time that all workers who are willing, or who are forced by economic necessity, to do the hard work required in farm labor become entitled to the same protection that is provided other workers.

*Loren E. McMaster*

