

New York State Addresses a Jim Crow-Era Legacy: The 2019 Farm Laborers Fair Labor Practices Act

By Beth Lyon

Food is a large, lucrative global industry that links predictable and growing demand with the instability of weather and the biology of plants and animals. Government bears some of the structural uncertainty, in the form of farm subsidies and tax and regulatory exemptions for farm owners. The personal risks fall on farmers and on America's estimated 2.5 million hired workers on farms and ranches, who often live in isolated farm labor camps



while they perform grueling, dangerous work. In July 2019, New York State passed the Farm Laborers Fair Labor Practices Act (FFLPA), a landmark law addressing a range of urgent concerns for farmworkers, including labor rights, wages, unemployment, health, safety, and wellbeing.

Farmworkers' Status

The law has failed farmworkers throughout history and throughout the world, including in the United States. The first failure has been the legal construction of farmworker status. The institution of chattel slavery of Africans was notoriously an economic project to use newly colonized land for

export agriculture. U.S. farm labor has involved other, varying levels of involuntariness over the centuries, including indentured servitude, the “coolie” labor system, the bracero program, and today's H2A temporary agricultural visa program, which ties visa holders' right to work to one employer.

A remarkable feature of farm labor today is the extremely high percentage of undocumented workers. The government estimates that 47% of farmworkers are undocumented, while other studies show a much higher percentage. Undocumented workers are more willing to accept low pay, sexual harassment and assault, and dangerous working conditions, and are less mobile than other workers due to lack of access to drivers' licenses (in most states). They also are vulnerable to deportation and dismissal after injury or assertion of rights. The National Human Trafficking Hotline notes that the agricultural industry is subject to two “industry vulnerabilities” leading to trafficking: seasonal/temporary work, and isolation. Also notable is the prevalence of child labor in farm work. According to the Government Accountability Office (GAO), the United States is systematically failing to track child labor in agriculture, and more than one-third of hired crop workers started working in U.S. agriculture at age 18 or under; of these, 30-34% began working in U.S. agriculture at age 14-18, and 6-8% began working at age 13 or younger.

Worker Protection Exclusions

The second failure lies at the feet of labor and employment law. Instead of innovating to protect these exceptionally vulnerable and marginalized workers, American labor and employment law include countless exceptional regimes *excluding* both

farmworkers and undocumented workers from basic protections. Promulgated during the Jim Crow era and the New Deal, federal and parallel state regimes almost uniformly excluded farmworkers and domestic workers, most of whom were African Americans. In the intervening decades, farmworkers have been written back into some New Deal-era protections such as social security, but glaring federal exclusions remain, including an agricultural employee exemption from overtime pay, a day of rest, union organizing rights, and key child labor protections, and most parallel state regimes reflect these exclusions. The prohibition on children undertaking hazardous labor does not apply to 16-to-18-year-olds working on farms.

Moreover, federal law contains *additional* exclusions from protection for undocumented workers, including no right to back pay for labor rights and employment discrimination violations, and the obligation to contribute to social security without the right to participation. Meanwhile, a minority of states have addressed their parallel farmworker exclusions. Before the FFLPA, ten states protected farmworkers rights to engage in collective bargaining: Arizona, California, Hawaii, Kansas, Louisiana, Massachusetts, Nebraska, New Jersey, Oregon, and Wisconsin, and five (California, Colorado, Hawaii, Maryland, and Minnesota) paid farmworkers time-and-a-half when working overtime. Of the protections that do exist, government monitoring and access to justice are severely limited owing to lack of political will and funding, and the isolated nature of farms.

Reduced Life Chances

As a result, today farmworkers have among the least favorable life chances in American society.

According to the Bureau of Labor Statistics, agricultural workers (separate from farmers) have the 11th most dangerous job while also having the lowest wages on the list of 15 most dangerous jobs. The BLS calculates that farmworkers are five times more likely to have a fatal injury than the average worker. The GAO reports that between 2003-2016, more than half of the 452 work-related fatalities among children were in agriculture, although 94.5% of working children work outside of agriculture. Reps. Rosa DeLauro and Lucille Roybal-Allard, who commissioned the report, stated: “child labor is contributing to a devastating amount of fatalities in the United States—disproportionately so in the agricultural sector. In that industry, kids are often exposed to dangerous pesticides, heavy machinery, and extreme heat, and they are being killed as a result.”

The 2019 New York State Farm Laborers Fair Labor Practices Act

For more than two decades, the New York State legislature has debated a broad bill addressing multiple Jim Crow-era farmworker exclusions. Introduced eight times, various iterations of the bill passed out of the State Assembly but foundered in the Senate along party lines, under vehement opposition from growers, dairy producers, and Republican legislators, particularly Republicans from upstate and Long Island farm communities. In 2018, with a new large Democrat majority in the state Senate and a Senate sponsor who vowed to be the last senator who would have to introduce the FFLPA, the bill gained political momentum. On June 19, 2019, the state legislature approved it in a vote of 84-51 in the State Assembly and 40-22 in

the State Senate. On July 17, 2019, Governor Andrew M. Cuomo signed the Farm Laborers Fair Labor Practices Act (FFLPA) into law, calling it a “a milestone in the crusade for social justice.” Most provisions of the new legislation will take effect on January 1, 2020.

Collective Bargaining

The right to collective bargaining was the subject of particularly intense negotiation. The FFLPA strikes the exclusion of “farm laborers” from the definition of “employees” under the New York State Employment Relations Act, thus granting them the right to organize and collectively bargain, and be free from retaliation for engaging in these activities. Fueling this legislative reform was a May 2019 New York state court decision ruling that the statutory exclusion of farmworkers from the State Employment Relations Act violated New York State’s constitutional mandate that “[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing.” The FFLPA does, however, maintain a significant exclusion by stipulating that farmworkers may not strike or engage in a work stoppage or slowdown, leaving farmworkers without a fundamental economic weapon and negotiating tool.

Wage and Hour Law

Impassioned debates on overtime resulted in graduated change. The FFLPA grants farmworkers overtime pay, at one and one-half times normal rate for any hours worked over sixty hours within one week. The Act also creates a “Farm Laborers Wage Board” with three members respectively representing the Farm Bureau, the AFL-CIO, and the Governor, charged with holding hearings and reporting back to the legislature and the governor on “the extent to which overtime hours can be lowered below such amount set in law, and may provide for a series of successively lower overtime work thresholds and phase-in dates as part of its determinations.” Although farmworkers and allies advocated for a 40-hour workweek, the compromise was necessary to win Senate support, and farmworker rights proponents believe the bill creates a pathway to forty hours in the future. The FFLPA also eliminates the sub-minimum wage for underage farmworkers and removes the exclusion of “service as farm laborers” from the definition of employment in the New York State Minimum Wage Act.

Unemployment Insurance

The FFLPA ends the exclusion of farmworkers from the

unemployment insurance mandate, and also stipulates that farmers no longer need make unemployment insurance contributions for H-2A visa workers, who are not eligible to collect unemployment. Undocumented workers continue to be excluded from unemployment eligibility.

Health, Safety and Wellbeing

The FFLPA requires employers to give farmworkers at least 24 consecutive hours of rest each week, and protects workers from retaliation for asserting this right. If a farmworker chooses to work on their day of rest, they must be paid at least one and a half times their hourly rate for each hour worked that day.

Through the new law, farmworker eligibility for workers’ compensation is no longer conditioned on an individual length-of-employment or firm payroll-size threshold. The law also requires that farm labor contractors and supervisors report injuries to employers of farmworkers, mandates Spanish as well as English language workers’ compensation notice postings, and decrees that farm employers may not retaliate against farmworkers for requesting a workers’ compensation claim form. The FFLPA also brings farmworkers into the fold of the New York state law mandate that

employers provide disability and paid coverage to employees for off the job injury or illness, and paid family leave benefits.

In a provision that goes into effect one year later than the rest of the law, the sanitary code now applies to all farm and food processing labor camps intended to house migrant workers, regardless of the number of occupants.

Conclusion

The New York State Farm Laborers Fair Labor Practices Act resulted from years of engagement involving a broad coalition of farmworkers, farmworker organizers, a few individual farmers, faith-based communities, civil rights organizations, organized labor, researchers, and journalists. The New York Farm Bureau opposed the measure and three statewide hearings on the bill were heavily attended. Protection gaps remain between farmworkers and most other workers in New York State, but the new law represents a significant shift, and implementation of the law will create new paths in agricultural labor relations. ■

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practice as an arbitrator and mediator. She thrived in the field for decades, including induction into the National Academy of Arbitrators and teaching dispute resolution across the country. Through it all, Susan’s primary focus was her family and friends, for whom she exuded love, joy, and care.

I missed Susan as soon as she had to absent herself from Section participation due to her illness. I miss her even more now. ■

Workplace Violence

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exposed to a particularly high risk of workplace violence. *See, e.g., Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers*, OSHA 3148-01R 2004; NIOSH Publication No. 2002-101, *Violence - Occupational Hazards in Hospitals*; *Security Risk: Preventing Client Violence against Social Workers* by Susan Weinger (National Association of Social Workers, 2004). The ALJ and Commission also found employer recognition because Integra had created policies and trainings, albeit insufficient ones, on the

risk of workplace violence. The Commission found that feasible means of abatement existed, including OSHA’s recommendation of: instituting a written workplace violence program; performing background checks on patients before assigning employees to work with them; and initiating red flags for patients with criminal histories. Integra began taking all of these actions after OSHA issued its citation.

In summary, the topic of workplace violence is vast and vital, and many aspects of jurisprudence and enforcement remain to

be explored. Labor and employment practitioners in the private and public sectors need to be aware of the standards governing potentially violent working conditions, so that they can properly advise and represent employers, employees and labor unions who are directly and critically affected by such workplace risks. ■

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