Risk and Liability Management Strategies and Resources for AgriTourism

Yolo County Agritourism Professional Development Workshop
Woodland, CA
November 15, 2017

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Farmers Face Many Challenges!
What is Risk?

Possibility

DANGER

Peril

Threat

Chance

ENDANGER

Hazard

EXPOSURE

Jeopardy

Consequence

Menace

GAMBLE
What is Risk?

• In general, risk is defined as…”the possibility of loss or injury.”

https://www.merriam-webster.com/dictionary/liability#legalDictionary

• Risk is...*the possibility of adversity or loss, and refers to “uncertainty that matters.”*

*USDA/ERS Managing Risk in Farming: Concepts, Research and Analysis (1999)*
What is Agricultural Risk?

- Agricultural Risk is “the probability that an unpredictable event occurs which will negatively affect your farm business.”
  - Reduce productivity and annual income
  - Impact your financial situation & repayment capacity
  - Affect your personal or family satisfaction and wellbeing
What is your Risk Tolerance?

• Are you Risk Averse or Risk Taker?

• Assessing your Risk Tolerance and Assessing your risks will help
  – Identify and exclude alternatives with greater exposure to unacceptable risks
  – Guide providers of risk management services to offer the best options for you
  – Ensure your insurance dollars are spent wisely
  – Improve likelihood you will select the best combination of risk management strategies
Sources or Types of Risk

• **Production Risk** — affects yields & quality
• **Market or Price Risk** — changes in prices for inputs/outputs or market conditions
• **Financial Risk** — Changes in income, debt to asset ratio, repayment capacity
• **Human Resource Risk** — Labor availability & management
• **Legal/Institutional Risk** — changes in policies and regulations, contractual agreements
• **Business Interruption Risk** — loss of income due to weather, natural disasters
What About Agritourism?

Any income-generating activity conducted on a working farm or ranch for the enjoyment and education of visitors.

• Strategy to manage or mitigate marketing and financial risks for existing farm operations
• But, it often results in liabilities and greater risk exposure for farmers or farm operations!!
What About Liability?

- **Contingent Liability**: An amount that may or may not be owed depending on the outcome of a contingency

- **Fixed Liability**: Accountability & responsibility to another (party) enforceable by civil remedies or criminal sanctions (injuries caused by products)

https://www.merriam-webster.com/dictionary/liability#legalDictionary
How to Determine Liabilities?

Reasonable care approach:
Requires landowner to exercise reasonable care in any given situation

Status-equals-duty-approach:
Duty of the landowner varies according to the status of the injured person and the relation to the landowner at the time of injury
– Whether trespasser, licensee, invitee, social guest or recreational user
Types of Liability Exposure

• **Premises Liability** – property owner fails to protect people from potentially hazardous conditions

• **Product Liability** – injuries caused by products prepared/served by landowner

• **Property Damage** – Damage to property of customer by business/employee

• **Personal Liability** – when business provides a service and service provided causes personal harm

• **Employees** – Employment status (employee vs. contractor), proper training and vicarious liability (landowner responsible for actions of employees and independent contractors)
Liability Issues

• The National Agricultural Law Center
  – http://www.NationalAgLawCenter.org

• Nature of Agritourism: Legal Risk Management for Agritourism Operators
  – PPT by Shannon Myrus, Staff Attorney
Liability Issues

Arise when you allow People in your Farm

3 Categories of People on Your Premises

• Trespassers
  – Lowest duty of care

• Licensee
  – Higher duty of care than trespasser, but less than invitee

• Invitee
  – Highest duty of care
Premises Liability

- Based on the notion of negligence

- **Negligence** - The failure to exercise the care that a *reasonably prudent person* would exercise in like circumstances

Adapted from: Mirus, Shannon’s “Nature of Agritourism: Legal Risk Management for Agritourism Operators” The National Agricultural Law Center https://www.nationalaglawcenter.org
Negligence

• There are 4 parts to a cause of action for negligence:
  – **Duty of Care**
    • Your responsibilities as a land owner; different in each situation
    • Typically the “reasonable person” standard
    • Duty of Care changes with the person
  – **Breach of Duty**
    • A failure on your part regarding your responsibilities
  – **Causation**
    • Your failure caused the “injury”
  – **Damages**
    • There must be an actual harm that can be redressed
Liability Issues: Trespasser

Trespassers

• Entered upon land without permission or invitation
• Knowledge of trespasser
  – No knowledge - no duty, no liability
  – Knowledge - duty not to affirmatively harm
    • A course of action which shows a deliberate intention to harm
      or utter indifference to, or conscious disregard of, the safety of
      others
• Example: Teenagers going out to your pond and
  fishing without your permission
  – Do you know about them? What can’t you do about
    them?
Liability Issues: Licensee

Present for a non-commercial, non-business purpose with the consent of the possessor of the property, such as a social guest at someone’s residence

• Your Duty:
  – Refrain from injuring the person through willful or wonton conduct (i.e., deliberate behavior such as setting booby traps)
  – Warn of hidden dangers where the person does not know or is unlikely to know of the conditions or risks

• Example:
  – Someone asks your permission to walk, hunt or use land without paying a fee
Liability Issues: Invitee

• Person who is invited upon the premises in order to conduct business with the possessor

• Came on the land for your benefit
  – Customers in store or shopping center
  – Employees
  – Students
  – Business visitor
Liability Issues: Invitee

• Your duty:
  – Highest duty of care
  – A general duty to use ordinary care to keep the premises reasonably safe for the benefit of the invitee.
  – You typically show these people the most concern anyways (i.e. “the customer is always right”)

  – But what about employees?
    • What kind of concern do you show them? What kind of jobs do they typically perform? How are they covered?
    • This means making sure your employees have safe equipment, facilities, proper training, etc.
Status of Entrant

The status of a person on your land can change fluidly and suddenly.

- If you allow someone to fish in your pond, but they explore other parts of your land, they may change from a licensee to a trespasser,
- But, if you catch them and accept money for their access to the other parts of the land they become an invitee.

- It is important to clearly define the area that visitors have permission to use.
How to Manage Risks/Liabilities?

✓ Identify the risks you are dealing with
✓ Understand the legal considerations
✓ Understand the regulatory environment
✓ Assess the risks specific to the enterprise
✓ Identify methods to manage risks
✓ Consults experts (Attorneys, CPAS, etc.)
✓ Learn about insurance options & terms
✓ Develop safety measures and reevaluate often
What is Risk Management?

• **Process** of choosing among alternatives to reduce the financial effects of risk or uncertainties

• **Conscious** effort of planning, organizing, directing, and controlling resources and activities.

• Requires the evaluation of tradeoffs between changes in risk, expected returns, entrepreneurial freedom and other variables
Risk management strategies

- Avoid the Risk
- Reduce the risk
- Transfer the risk
- Assume the risk
Risk Management Method Matrix

Illustrates which risk management method relate to the severity and frequency combinations

<table>
<thead>
<tr>
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<th>LOW SEVERITY</th>
<th>HIGH SEVERITY</th>
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<td>LOW FREQUENCY</td>
<td>Reduce or Accept</td>
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<tr>
<td>HIGH FREQUENCY</td>
<td>Reduce or Transfer</td>
<td>Reduce, Transfer or Avoid</td>
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</table>
Managing Liabilities in Agritourism

Rutgers Extension Training for Agritourism Development:

http://agritourism.rutgers.edu/training/modules.html
Managing Liabilities

• Keep the farm safe for customers and employees
• Select the proper business structure
• Be a good neighbor
• Understand and comply with applicable federal, state, local laws/regulations/codes/permit requirements
• Consider the use of waivers
• Keep good records
• Maintain appropriate insurance
AGRICULTURAL LIABILITY

- Farm owners, or those who lease land for a farming operation, face liability issues.

- If someone enters your property, invited or not, the land owner has some level of responsibility for that person’s safety.

- Liability can apply to both the owner and the ‘possessor’ of the property.
  - Many states define ‘possessor’ as the party who is ‘in control’ of the property area where an injury occurred.

From ‘Understanding agricultural liability’ – Pennsylvania State University Cooperative Extension
DETERMINING LIABILITY

- **Reasonable care approach:** Requires landowner to exercise reasonable care in any given situation

- **Status-equals-duty-approach:** Varies the duty of the landowner according to the status of the injured person and their relation to the landowner at the time of injury

Categories of persons on land:
- **Trespasser** - neither invited nor permitted
- **Licensees** - not invited but permitted
- **Invitee** - comes by invitation, whether express or implied
- **Social guest** - invited onto property for mutual enjoyment of hospitality (e.g., party guest)
- **Recreational user** - visitor using nonresidential property for recreational purposes with permission from possessor/owner & without providing compensation.
## Types of Visitors to Farm Property and the typical Duty of Care for Each

<table>
<thead>
<tr>
<th>Status of Visitor</th>
<th>Examples</th>
<th>Possessor's Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invitee</td>
<td>Customers, U-pick customers, Clients, Salespeople, Delivery persons</td>
<td>Discover and eliminate all known and unknown dangerous conditions, or Warn of all known and unknown dangerous conditions.</td>
</tr>
<tr>
<td>Licensee</td>
<td>Firewood cutter, with permission</td>
<td>Eliminate known dangerous conditions, or Warn of known dangerous conditions.</td>
</tr>
<tr>
<td>Social guest</td>
<td>Guests at social gathering</td>
<td>Eliminate known dangerous conditions, or Warn of known dangerous conditions.</td>
</tr>
<tr>
<td>Recreational User</td>
<td>Hiker, Hunter</td>
<td>No duty if meets the state's Recreational User's Statute.</td>
</tr>
<tr>
<td>Known Trespasser</td>
<td>Without permission, possessor aware of</td>
<td>Eliminate known dangerous conditions, or Warn of known dangerous conditions.</td>
</tr>
<tr>
<td>Unknown Trespasser</td>
<td>Without permission, possessor unaware of</td>
<td>Refrain from harming by willful conduct.</td>
</tr>
<tr>
<td>Child Trespasser</td>
<td>Without permission, presence foreseeable</td>
<td>Protect from actively dangerous instrumentalities.</td>
</tr>
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From PYO and agri-tourism liability and insurance issues for farmers. PickYourOwn.org
EXAMPLES OF LIABILITY EXPOSURE

- **Premises Liability**
  - Property owner fails to protect people from potentially hazardous conditions.
  - Customer is injured on property or ‘premises’
  - Examples: slip and fall, equipment usage, contact with animals

- **Product Liability**
  - Injured by a product that was prepared and/or served to them.
  - Examples: foreign object in food, becoming ill after consuming food

- **Property Damage**
  - Damage to property of customer by business/employee
  - Example: employee hits a customer’s car in the parking lot
EXAMPLES OF LIABILITY EXPOSURE

- Personal Liability
  - For businesses that provide a service & service provided inadvertently causes personal harm
  - Example: employee spills hot beverage on a customer & it causes a burn

- Employees
  - Employer is responsible for employee’s actions (“vicarious liability”)
  - Know employment status – employee vs. independent contractors
  - Provide proper employee training to recognize, mitigate, and report risks & hazards
  - Vicarious liability – landowner responsible for his/her own actions & for those of people acting on the landowner’s behalf (employees & independent contractors)
MANAGING LIABILITY

- Keep your farm safe for visitors and employees!
  - Routine safety inspections
  - Farm safety plan detailing hazard mitigation strategies/plans of operation
  - Employee training
  - Appropriate communication with farm visitors
  - Response plan for emergencies

- Organize the business under the appropriate legal structure

- Be a good neighbor

- Understand and be compliant with applicable federal, state and local laws/regulations/codes/permitting requirements
  - Understand applicable Right to Farm protections (statute and/or ordinance)

- Consider the use of waivers

- Keep good records

- Maintain appropriate insurance
Keeping the Farm Safe

- Employee training
- Develop a farm safety plan identifying hazards, mitigation strategies and plan of operations
- Develop a food safety plan
- Develop a risk management plan
- Conduct routine safety inspections
- Communicate with farm visitors
- Develop a response plan for emergencies
ORGANIZE THE BUSINESS TO LIMIT LIABILITY

- Decide which business structure best meets the needs of the owner/operation (e.g., in terms of liability protection, taxes, etc.)
  - Consult, as needed, with legal/accounting/insurance professionals
  - May involve separating the “farm” and “agritourism” businesses

Examples
- Sole Proprietorship (unincorporated)
- General Partnership
- Limited Liability Partnership
- Corporations (C- & S-Corps)

- Greater liability exposure
- Affords more liability protection
BE A GOOD NEIGHBOR!

- **Recommended Reading**: New Jersey’s State Agriculture Development Committee’s “Farmer-to-Farmer Advice for Avoiding Conflict” booklet

- Many agritourism farmers acknowledge that “the best right-to-farm protection often amounts to just being a good neighbor.”
  - **Get to know neighbors** - “People who know each other are more likely to approach each other when problems arise” (versus complaining to the township or filing a legal complaint)
  - **Help neighbors get to know you!** - Invite neighbors to tour the farm, educate them about what you do.
  - **Communicate** - Listen to neighbors when they express concerns and respect the viewpoint of others. “Respect goes both ways”
  - **Use common courtesy** - Make efforts to minimize noise during certain hours; Promptly remove litter generated by farm/visitors
  - **Other farmer advice**: Be involved in the community. Keep the farm clean and attractive. Make the farm an asset in the eyes of the community.
FEDERAL, STATE, & LOCAL REGULATIONS

- Identify applicable laws, regulations, codes, and permits **before** starting a project
  - What are they?
  - How long will it take to become compliant?
  - How much will it cost?
# EXAMPLES - REGULATIONS, PERMITS & LICENSES

## General Regulations
- Land Use and Development (county, city)
- Business License and Taxes (county, city)
- Lodging Taxes (county, city)
- Sales Tax Collection and Remittance (state, county, city)
- Americans with Disabilities Act (federal)

## Employment Regulations
- Fair Labor Standards Act (federal, state)
- Child Labor Act (federal, state)
- Occupational Safety and Health Act (federal, state)
- Workers’ Compensation (federal, state)
- Unemployment Taxes (federal, state)
- Income Tax Withholding (federal)

## Permits and Licenses for Specific Enterprise Types
- Food Service Permits and Inspections (state, county)
- Retail Food Store Permits and Inspections (state)
- Animal Exhibitor Licensing (federal)
- Winery Licensing (state)
- Access to Public Lands & Wildlife Resources (federal, state, county)

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From: **Agritourism in focus: A guide for Tennessee farmers.** Agricultural Extension Service – The University of Tennessee.
NOTICES & LIABILITY WAIVERS

- Have visitors sign a liability waiver before entering the farm or engaging in an agritourism activity
  - A document whereby a farm guest “agrees to indemnify and hold harmless the landowner from any claims made by the user or third parties arising from the use of the land or activities”
  - **Waivers do not remove landowner responsibility for the safety of farm visitors...but they are legal documents in the eyes of the court system**

- Post rules and warnings regarding known safety hazards.
  - **Examples:**
    - “No consumption of alcoholic beverages allowed”
    - “No smoking on farm”
    - “This is a working farm”
    - “Caution electric fence”
    - “No swimming in pond”
    - “Do not touch animals – they may bite”
KEEP GOOD RECORDS

- Document all property inspections (e.g., what was done, when, and by whom)
- Record each repair & safety practices installed
- Document all steps & procedures taken to ensure safety
  - Training, emergency plans, signage, fences, etc.
  - Consider taking photos/video to document the condition of the premises and actions to protect visitors
- Keep records of accidents (e.g., incident report forms)
- Make sure important documents can be easily found
INSURANCE

- An agritourism business should NOT operate without insurance.
- Discuss in detail all aspects of a planned agritourism enterprise with an insurance provider:
  - Some insurance providers may not accept the risks of an agritourism enterprise.
  - Discuss types of coverage appropriate for the operations (e.g., general business liability, umbrella policy, etc.).
  - Understand what is included/covered by each policy.
  - Understand what is specifically excluded by each policy (e.g., the policy’s exclusions section).
  - Obtain quotes for various levels of coverage (Considerations: What can the farm afford? What level of risk is the farm willing to accept?)
  - Decide on an insurance strategy (e.g., insure as a single company with multiple policies or separate companies and policies).
- Review insurance policies regularly (at least annually) with an attorney and insurance provider.
INSURANCE

- Consult with the insurance provider before changing the type(s) or extent of activities offered
  - Avoid the risk of having a claim denied because an activity is not specifically included in the farm’s insurance policy

- Consult with an insurance provider if visitation levels change

- Understand strategies to transfer risk to other parties
  - E.g., If a third party offers a service or activity on the farm (for example, a food vendor or pony ride operator), be sure they demonstrate proof of appropriate insurance and name the farm/operator as an additional insured
  - Have a written agreement detailing each party's responsibilities
# Insurance Terms & Definitions

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<tr>
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<th>DEFINITION</th>
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<tbody>
<tr>
<td>Policy</td>
<td>Written contract for insurance coverage</td>
</tr>
<tr>
<td>Coverage</td>
<td>The dollar amount available from the insurance company to meet liabilities or cover damages as defined in the policies</td>
</tr>
<tr>
<td>Premium</td>
<td>The price paid to the insurance company for the policy.</td>
</tr>
<tr>
<td>Deductible</td>
<td>The amount specified in an insurance policy that the insured party must pay out of pocket. It relieves the insurer of responsibility for an initial specified loss.</td>
</tr>
<tr>
<td>Covered Peril</td>
<td>Something that imperils or causes risk of injury or loss that is eligible for coverage.</td>
</tr>
<tr>
<td>Excluded Peril</td>
<td>Something that causes risk of injury or loss that is not eligible for coverage. Usually, perils not specifically listed as covered are assumed to be excluded.</td>
</tr>
<tr>
<td>Claim</td>
<td>A request for payment for damages or loss sustained.</td>
</tr>
<tr>
<td>Exposure</td>
<td>The potential for damages or loss.</td>
</tr>
</tbody>
</table>
Risk Management Decision Process: It Never Ends

1. Identify exposures
2. Evaluate loss potential
3. Select method
4. Implement selected method
5. Monitor results/Modify methods

UCCE University of California Agriculture and Natural Resources Cooperative Extension
Other Resources?

• UC Small Farm Program: http://sfc.ucdavis.edu
• CalAgTour: http://calagtour.org
• USDA Risk Management Agency: https://www.rma.usda.gov/
• Regional Centers for Risk Management Education: http://westrme.wsu.edu/
• The National AgRisk & Farm Management Library: https://agrisk.umn.edu/
• California E-rightrisk: http://california.erightrisk.com/2015/default.htm
The End!!

Questions? Comments?

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