Agritourism

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Overview

Agritourism activities have expanded in recent years as an additional income stream for some farming and ranching operations and rural landowners in general, generating about $1 billion dollars nationwide. But, engaging in an agritourism activity (or activities) on the premises means that members of the public will be invited to be present upon paying a fee. That raises the prospect of injury and potential liability.

The liability issue is a major concern for landowners. In the U.S., about 80 percent of respondents to a survey listed concerns about liability as a limiting factor of engaging in agritourism activities. *Chase, et al., Agritourism and On-Farm Direct Sales Survey: Results for Vermont, University of Vermont extension (2021).* Also, about that same percentage were worried about the cost and availability of insurance. *Id.* To address landowner liability and other concerns, and incentivize agritourism activities, many states have enacted agritourism statutes. What does such legislation do? What liability protection is provided?

Agritourism laws – it's the topic of today's post.

In General

Agritourism generally includes numerous activities on a rural property associated with either entertainment, recreational, educational and even commercial activities. The USDA defines agritourism (and recreational) activities generally as "hunting, fishing, farm or wine tours, hayrides, etc." USDA National Agricultural Statistics Service (NASS), 2017 Census of Agriculture, Explanation and Census of Agricultural Report Form, B-24 Appendix B (2019)). Also commonly treated as agritourism are famers markets, roadside farm stands and "U-Pick" operations, but a permit may be required. *See e.g., Utah Code Ann. §26-15B-105.* It is also possible that the definition of "agritourism" could be statutorily defined to include certain types of overnight accommodations, hayrides, corn mazes, riding on tractors and other farm equipment, riding on horses, playing around or climbing on hay bales, and weddings. *See, e.g., Va. Code Ann. §3-2-6400.* The definition may also include camping and tours of the property. But some states exclude some of these activities from the definition of agritourism. The key is to always check the specifics of state law.

Federal Law

In early 2022, H.R. 6408 was introduced into the U.S. House of Representatives. The bill would create a Department of Agritourism. The bill defines "agritourism" to include education, outdoor recreation, entertainment, direct sales. the provision of certain types of accommodations, and dining on a farm. The bill was introduced into the House Agriculture Committee on January 13, 2022, where it presently remains.

State Laws

Liability. In recent years, numerous states have enacted agritourism legislation designed to limit landowner liability to those persons engaging in an "agritourism activity." A majority of states now have enacted such laws. Typically, the legislation protects the landowner (commonly defined as a "person who is engaged in the business of farming or ranching and [who] provides one or more agritourism activities, whether or not for compensation") from liability for injuries to participants or spectators associated with the inherent risks of a covered activity. *See, e.g., Tenn. Code Ann. §43-39-103* (requiring posting of warning signs informing of no

liability for injury or death arising from inherent risks). Without such liability protection a landowner is generally held liable for an injury to an invited guest under a high standard of care that requires the landowner to make sure the premises is safe, exercise reasonable care under the circumstances, and warn of hidden dangers.

The statutes tend to be written very broadly and have various standards of care that might apply to a landowner. For instance, legislation introduced into the Illinois legislature in early 2022 would grant liability protection to landowners for claims arising from participation in broadly defined agritourism activities. *IL H.B. 5487.* If the "agritourism operator" posts the statutorily required warning notice, the operator is not liable for the injury or death of a participant resulting from the inherent risks of participating in an agritourism activity. The operator is not protected, however, if the operator acts with willful or wanton disregard for the participant's safety and the operator's conduct is causally related to the participant's injury or death. The same is true if the operator fails to disclose known inherent risks.

Note: Many states have statutory provisions similar to what Illinois is considering. For instance, with many state statutes, the landowner must post warning signs to receive the protection of the statute, and in some states the landowner must register their property with the state. *See, e.g., 3 Pa. Stat. §2604.*

This modification in the standard of care under an agritourism statute is common among the states with an agritourism statute. *See, e.g., N.C. Gen. Stat. §99E-1(a); 4 Tex. Admin. Code §75A.002(a)(1)-(2).* Under these state statutes, liability is limited in situations where the landowner acted wantonly or with willful negligence, and liability is excluded for injury arising from the inherent risks associated with an active farming operation. In many of the states that have agritourism statutes, the posting of specific signage is required to get the liability protection and, of course, the person claiming the protection of the statute must meet the definition of a covered person and the activity that gave rise to the liability claim must be a statutorily covered activity. Further, in some states (such as Iowa), liability release forms, at least with respect to minors, may be deemed to violate "public policy" (as decided by judges rather than the public).

Exclusions. Some activities may be excluded from the definition of "agritourism" under a state's statute. Common activities that might be excluded are roadside fruit and vegetable stands; operations that are solely for the purpose of selling or merchandising food; marijuana-related activities (even if permissible under state law); rodeos; sky and water diving; paintball; various types of bicycling; activities in structures primarily intended for use by the general public; and various types of animal therapy activities. Again, the point is that each state statute is unique to that particular state and before starting an agritourism activity, the landowner/operator must be familiar with the applicable rules.

Compensation. There are also differences among state agritourism statutes as to whether charging participants a fee changes the landowner/operator's duty of care. In most of the states with an agritourism statute, the liability protection of the statute applies if the landowner charges a fee. That is the case in AR, CO, DE, FL, KS, KY, ME, MN, MO, NC, ND, OK, OR, SD, TN, TX, VA and WI. But, in Alaska, no heightened liability protection is provided by the agritourism statute if a fee must be paid to access the land at issue to engage in an agritourism activity. *Alaska Stat. §09.65.202(c)(1).*

Other states with an agritourism statute do not mention the issue of compensation and whether charging a fee changes the liability protection of the statute.

Financial incentives. Some state laws related to agritourism relate to financial incentives via tax credits or cost-sharing, promotion, exemption from permits, protecting the ag real property tax classification of the property involved or providing special classification for structures used for agritourism activities. *See, e.g., Md. Code Pub. Safety §12-508* (exempting buildings used for agritourism from performance standards and building permit requirements); *Neb. Rev. Stat. §75-303(3)*(exempting motor carriers from certain requirements if engaged in transportation related to agritourism); *S.C. Code Ann. §6-9-67* (classifying certain

structures without a commercial kitchen used in agritourism activity as ag and removes sprinkler system requirement).

Some states address agritourism activities either via laws governing agriculture in general or via land-use/zoning laws. This is particular true for activities that are "events." For example, Pennsylvania law doesn't provide any liability protection for injuries occurring during weddings or concerts on the premises. *3 Pa. Stat. §§2603(c)(2)-(3) et seq.*

On the tax classification issue, Ohio law includes agritourism in the definition of "land exclusively used devoted to agriculture" for tax assessment purposes. *Ohio Rev. Code. §5713.30(A)(4).* Thus, the definition of "agritourism" is critical in receiving ag classification. On that issue, the Ohio Supreme *Court, in Columbia Township Board of Zoning v. Otis, 663 N.E.2d 377, 104 Ohio App. 3d 756 (Ohio 1995),* held that haunted hay rides on farm property did *not* constitute the use of land for agricultural purposes because the addition of a Halloween theme with shrieks and flashing lights was completely inconsistent with traditional agricultural activity. Similarly, in *Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405 (Tenn. Sup. Ct. 2013),* the Tennessee Supreme Court reversed a determination by the court of appeals that music concerts on a farm were within the definition of farm activities within the scope of the agritourism statute and were exempt from a county zoning provision. The Tennessee Supreme Court said the activity was not "agriculture" as defined by the statute. Likewise, in *Forster v. Town of Henniker, 167 N.H. 745 (2015),* the court held that the use of a Christmas tree farm for weddings did *not* meet the definition of agritourism and, as a result, was not "agriculture" for zoning purposes.

Note: On the tax classification/zoning issue, a state agritourism statute may define an agritourism activity involving an event (such as a wedding, concert or festival, etc.) by reference to local zoning rules and ordinances. Such local rules and ordinances may set size limitations, require certain permits, set operational standards and address issues involving sound and light, and restrict the number of guests/participants based on local conditions.

Insurance. Any landowner conducting an agritourism activity on their property should make sure insurance coverage is adequate. It is not likely that a comprehensive farm/ranch liability policy will cover any claims arising from the activity. That's because an agritourism activity will likely be classified as a non-farm business pursuit of the insured that is excluded from policy coverage. Thus, a separate rider (or policy) may be necessary to provide adequate insurance coverage.

Conclusion

Agritourism activities on a farm or ranch or other rural land can provide an additional income stream for the landowner. For farmers and ranchers, that may be particularly important if current ag markets in Russia, China or Ukraine become lost in the long-term.