

Animal Ag Facilities and The Constitution

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Overview

In response to attempts to shut down animal confinement operations by activist groups, legislatures in several states have enacted laws designed to protect these businesses by limiting access. A common approach is for the law to criminalize the use of deception to access a confined livestock facility or meatpacking plant with the intent to cause physical harm, economic harm or some other type of injury to the business. But the laws have generally been struck down on free speech and equal protection grounds. Is there a way for states to provide legal protection to confinement livestock facilities? What can these facilities do to protect themselves?

Laws designed to protect confined animal livestock facilities from those intended to do them harm – it's the topic of today's post.

General Statutory Construct

The basic idea of state legislatures that have attempted to provide a level of protection to livestock facilities is to bar access to an animal production facility under false pretenses. At their core, the laws attempt to prohibit a person having the intent to harm a livestock production facility from gaining access to the facility (such as via employment) to then commit illegal acts on the premises. See, e.g., *Iowa Code §717A.3A*. Laws that bar lying and trespass coupled with the intent to do physical harm to an animal production facility should not be constitutionally deficient. Laws that go beyond those confines may be.

The Iowa provisions. Iowa legislation is a common example of how states have attempted to address the issue. The Iowa legislature has made two attempts at crafting a state law that would withstand a constitutional challenge. The initial version criminalized "agricultural production facility fraud" if a person willfully obtained access to such a facility by false pretenses (the "access" provision) or made a false statement or representation as part of an application or agreement to be employed at the facility (the "employment" provision). The law also required the person to know that the statement was false when made and that it was made with an intent to commit a knowingly unauthorized act. *Iowa Code §717A.3A*. This initial statutory version was challenged and, as discussed below, the employment provision was deemed unconstitutional.

The Iowa legislature then modified the law with a second version that described an agricultural production facility trespass as occurring when a person uses deception "on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to [the facility], with the intent to cause physical or economic harm or other injury to the [facility's] operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer [the "access" provision]. The revised law also criminalizes the use of deception "on a matter that would reasonably result in a denial of an opportunity to be employed at [a facility] that is not open to the public, and, through such deception, is so employed, with the intent to cause



physical or economic harm or other injury to the [facility's] operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer [the "employment" provision].

In other words, the Iowa provisions criminalizes the use of lies to either gain access or employment at an ag production facility where the use is coupled with the intent to do harm. Sounds quite reasonable, doesn't it? But the courts (a place where the telling of a lie can come with severe penalties) have generally come to a different conclusion.

Recent Court Opinions

North Carolina. In 2017, a challenge to the North Carolina statutory provision was dismissed for lack of standing. *People for the Ethical Treatment of Animals v. Stein*, 259 F. Supp. 3d 369 (M.D. N.C. 2017). The plaintiffs, numerous animal rights activist groups, brought a pre-enforcement challenge to the North Carolina Property Protection Act. They claimed that the law unconstitutionally stifled their ability to investigate North Carolina employers for illegal or unethical conduct and restricted the flow of information those investigations provide. As noted, the court dismissed the case for lack of standing. On appeal, however, the appellate court reversed. *PETA, Inc. v. Stein*, 737 Fed. Appx. 122 (4th Cir. 2018). The appellate court determined that the plaintiffs had standing to challenge the law through its "chilling effect" on their First Amendment rights to investigate and publicize actions on private property. They also alleged a reasonable fear that the law would be enforced against them.

On the merits, the trial court then held that the challenged provisions of the law were unconstitutional under the First Amendment as a violation of the plaintiffs' free speech rights. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547 (M.D. N.C. 2020).

Utah. The Utah law was also deemed unconstitutional. *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017). At issue was Utah Code §76-6-112 which criminalizes the entering of a private agricultural livestock facility under false pretenses or via trespass to photograph, audiotape or videotape practices inside the facility. While the state claimed that lying, which the statute regulates, is not protected free speech, the court determined that only lying that causes "legally cognizable harm" falls outside First Amendment protection. The state also argued that the act of recording is not speech that is protected by the First Amendment. However, the court determined that the act of recording is protectable First Amendment speech. The court also concluded that the fact that the speech occurred on a private agricultural facility did not render it outside First Amendment protection. The court determined that both the lying and the recording provisions of the Act were content-based provisions subject to strict scrutiny. To survive strict scrutiny the state had to demonstrate that the restriction furthered a compelling state interest. The court determined that "the state has provided no evidence that animal and employee safety were the actual reasons for enacting the Act, nor that animal and employee safety are endangered by those targeted by the Act, nor that the Act would actually do anything to remedy those dangers to the extent that they exist." For those reasons, the court determined that the Act was unconstitutional.

A Wyoming law experienced a similar fate. *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), *rev'g.*, 196 F. Supp. 3d 1231 (D. Wyo. 2016). In 2015, two new Wyoming laws went into effect that imposed civil and criminal liability upon any person who "[c]rosses private land to access adjacent or proximate land where he collects resource data." Wyo. Stat. §§6-3-414(c); 40-27-101(c). The appellate court, reversing the trial court, determined that because of the broad definitions provided in the statutes, the phrase "collects resource data" included numerous activities on public lands (such as writing notes on habitat conditions, photographing wildlife, or taking water samples), so long as an individual also records the location from which the data was collected. Accordingly, the court held that the statutes regulated protected speech in spite of the fact that they also governed access to private property. While trespassing is not protected by the First Amendment, the court determined that the statutes targeted the "creation" of speech by penalizing the collection of resource data.



Note: The appellate court remanded the case to the trial court for a determination of the appropriate level of scrutiny and whether the statutes survived review. Ultimately, the trial court granted the plaintiffs' motion for summary judgment, finding that the statutes were content based and, as such failed to withstand constitutional strict scrutiny review on the basis that the laws were not narrowly tailored. *Western Watersheds Project v. Michael*, 353 F. Supp. 3d 1176 (D. Wyo. 2018).

Ninth Circuit. In early 2018, the U.S. Circuit Court of Appeals for the Ninth Circuit issued a detailed opinion involving the Idaho statutory provision. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The Ninth Circuit's opinion provides a roadmap for state lawmakers to follow to provide at least a minimal level of protection to animal production facilities from those that would intend to do them economic harm. According to the Ninth Circuit, state legislation can bar entry to a facility by force, threat or trespass. Likewise, the acquisition of economic data by misrepresentation can be prohibited. Similarly, criminalizing the obtaining of employment by false pretenses coupled with the intent to cause harm to the animal production facility is not constitutionally deficient. However, provisions that criminalize audiovisual recordings are suspect.

Eighth Circuit. In 2021, the U.S. Court of Appeals for the Eighth Circuit construed the initial version of the Iowa law and upheld the portion of it providing for criminal penalties for gaining access to a covered facility by false pretenses. *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021). This is the first time that any federal circuit court of appeals has upheld a provision that makes illegal the gaining of access to a covered facility by lying.

Conversely, the court held that the employment provision of the law (knowingly making a false statement to obtain employment) violated the First Amendment because the law was not limited to false claims that were made to gain an offer of employment. Instead, the provision provided for prosecution of persons who made false statements that were incapable of influencing an offer of employment. A prohibition on immaterial falsehoods was not necessary to protect the State's interest – such as false exaggerations made to impress the job interviewer. The court determined that barring only false statements that were material to a hiring decision was a less restrictive means to achieve the State's interest.

Note. The day before the Eighth Circuit issued its opinion concerning the Iowa law, it determined that plaintiffs challenging a comparable Arkansas law had standing to bring the case. *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714 (8th Cir. 2021). The court later denied a petition for rehearing. *Animal Legal Defense Fund v. Vaught*, No. 20-1538, 2021 U.S. App. LEXIS 27712 (8th Cir. Sept. 15, 2021).

In late 2019, the plaintiffs in the Iowa case file suit to enjoin the second version of the Iowa law – Iowa Code §717A.3B. The trial court agreed and preliminarily enjoined the revised law. The plaintiffs then filed a motion for summary judgment in early 2020 and the state filed a cross motion for summary judgment, and the case was continued while the appellate court was considering the case involving the initial version of the Iowa law. As noted above, the appellate court ultimately upheld the access provision but not the employment provision. The trial court, in the current case upheld the plaintiffs' motion for summary judgment, finding that the revised statutory language had been slightly modified, but was substantially similar to the initial version. As such, the trial court determined that the revised statute discriminated based on content and viewpoint and was unconstitutional under a strict scrutiny analysis. *Animal Legal Defense Fund v. Reynolds*, No. 4:19-cv-00124-SMR-HCA, 2022 U.S. Dist. LEXIS 48142 (S.D. Iowa Mar. 14, 2022).

Tenth Circuit. In *Animal Legal Defense Fund, et al. v. Kelly*, 9 F.4th 1219 (10th Cir. 2021), *pet. for cert. filed*, (U.S. Sup. Ct. Nov. 17, 2021), the court construed the Kansas provision that makes it a crime to take pictures or record videos at a covered facility "without the effective consent of the owner and with the intent to damage the enterprise." The plaintiffs claimed that the law violated their First Amendment free speech rights. The State claimed that what was being barred was conduct rather than speech and that, therefore, the First Amendment didn't apply. But, the court tied conduct together with speech to find a constitutional



violation – it was necessary to lie to gain access to a covered facility and consent to film activities. As such, the law regulated protected speech (lying with intent to cause harm to a business) and was unconstitutional. The court determined that the State failed to prove that the law narrowly tailored to a compelling state interest in suppressing the “speech” involved. The dissent pointed out (correctly and consistently with the Eighth Circuit) that “lies uttered to obtain consent to enter the premises of an agricultural facility are not protected speech.” The First Amendment does not protect a fraudulently obtained consent to enter someone else’s property.

A Different Approach?

The appellate courts generally holding that the right to free speech protects false factual statements that inflict real harm and serve no legitimate interest runs contrary to an established line of U.S. Supreme Court precedent, at least until the Court’s decision in *United States v. Alvarez*, 567 U.S. 709 (2012). See, e.g., *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Brown v. Hartlage*, 456 U.S. 45 (1982); *Herbert v. Lando*, 441 U.S. 153 (1979); *Garrison v. Louisiana*, 379 U.S. 64 (1964). The current split between the Eighth, Ninth and Tenth Circuits on the constitutionality of the Iowa Idaho and Kansas laws with respect to the issue of gaining access to a covered facility by lying could warrant a Supreme Court review.

Indiana trespass law. Short of a Supreme Court review of a state statute such as that of Iowa, Idaho or Kansas, is there another approach that a state might take to provide protection for agricultural livestock facilities? The state of Indiana’s approach might be the answer. In 2014, the Indiana legislature passed, and the Governor signed into law the “Indiana Trespass Law.” *Ind. Code 35-43-2-2*. Under the statute, “trespass” is defined as being on a property after being denied entry by the property owner, court order or by a posted sign (or purple paint). If the trespass involves a dwelling (including an ag operation), the landowner need not deny entry for a trespass to be established. The law also sets various thresholds for criminal violations.

The Indiana law appears to base property entry on the legal property interest of that of a license. A license is a term that covers a wide range of permissive land uses which, unless permitted, would be trespasses. For example, a hunter who is on the premises with permission is a licensee. The hunter has a license for the limited purpose of hunting only. If the hunter were to videotape any activity on the premises, that would constitute a trespass as exceeding the scope of the license. An unlawful entry. This would be the same result for a farm employee. Video recording would be outside the scope of employment. By focusing on the property interest of a license and that of a trespass for unauthorized entry, a claim of a possible free speech violation is eliminated.

Hiring Practices

In light of activists that wish to harm animal agriculture, ag animal facilities should utilize common sense steps to minimize potential problems. Of course, not mistreating animals should always be the standard. Proper hiring practices are also very important. A well drafted employment agreement should be used for workers hired to work in an ag animal facility to help screen potential hires. The agreement should specify in detail the job requirements and what is not permitted to occur on the premises and inside buildings. The agreement should give the employer the right to search every employee for devices that could be used to record activities on the farm and in farm buildings. Also, employee training should be provided and documented. Also, it’s critical that employee conduct be closely monitored to ensure that employees are acting within the scope of their employment and that animals are being treated appropriately.



Conclusion

It's unfortunate that groups exist dedicated to damage and/or eliminate certain aspects of animal agriculture, and that they will use lies and deception to become employed and gain access. But, until state law is drafted in a way that will be found constitutional, livestock operations must adopt hiring and business practices that will minimize potential harm.

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