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Determining the Employer (Grower or Farm Labor Contractor) Responsible for Providing Worker Safety Protection

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Enforcement Letter ENF 01-50

Distribution County agricultural commissioners

Referral If you have any questions, please contact your Senior Pesticide Use Specialist Liaison.

Approval
Original signed by...

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Background This information will address the issue of who is responsible as the employer when growers hire contract employees through Farm Labor Contractors (FLCs) to handle pesticides, conduct pest control activities, or perform fieldwork in a treated field.

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Determining the Employer (Grower or Farm Labor Contractor) Responsible for Providing Worker Safety Protection, Continued

Discussion Is the grower (operator of the property) or FLC the employer who can be held liable for violations of the California pesticide laws and regulations concerning worker safety requirements?

General There are two general areas where action can be taken against the employer for a violation of California pesticide laws and regulations. The first area is the pesticide worker safety regulations, which impose requirements for the safety of employees on employers. Title 3 of the California Code of Regulations (3CCR) section 6000 defines “employer” as:

“any person who exercises primary direction and control over the services, or activities of an employee”.

The second area occurs when there is an employee’s violation of a pesticide law or regulation. 3CCR section 6000 defines “employee” as:

“any person who, for any kind of compensation, performs work, services, or activities covered by Division 6 – Pesticides and Pest Control Operations”.

In this case, the employer can be held responsible for the violation under the principle that the employer is responsible for the acts of its agents.

When a grower hires an employee through a FLC and a violation of California pesticide laws and regulations occur, the determination of the employer (grower or FLC) for enforcement action must be made.

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Determining the Employer (Grower or Farm Labor Contractor) Responsible for Providing Worker Safety Protection, Continued

Determining Who's the Employer – Grower or FLC

The employer can be determined by identifying who has direction and control of the contract employee's work activities.

When contract employees are hired by a grower through a FLC, the contract employees supplement the grower's permanent work force. Sometimes the contract employees work under the direction and supervision of the FLC (or the FLC's management personnel) and sometimes they work under the direction and supervision of the grower (or the grower's management personnel). 3CCR section 6000 clearly states that the employer is the person who exercises primary direction and control over the employee's work activities.

When the contract employee's work activities are under the control, direction or supervision of the grower, there is both a general employment relationship between the FLC and the contract employee and a special employment relationship between the grower and the contract employee. The contract employee, in essence, has dual employers -- the FLC and grower.

The concept of duality of employers has long been recognized in workers' compensation law and work place health and safety law under the California Occupational Safety and Health Act (Cal OSHA). Under this concept, the person who is receiving services from a contract employee is known as the **secondary** or special employer. The person who supplies the contract employee for a fee is known as the **primary** or general employer. The primary employer typically pays the wages of the contract employee; withholds taxes; and provides employee benefits that generally are associated with an employer/employee relationship, including workers' compensation coverage. The primary employer also may maintain time records of the contract employee, but does not control, direct, or supervise the work activities of the contract employees. The secondary employer provides the work place and controls how the work is to be done, directs what work is to be done, or supervises the work activities of the contract employee. The secondary employer cannot discharge the contract employee. The secondary employer can only request that the contract employee be replaced by another worker.

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Determining the Employer (Grower or Farm Labor Contractor) Responsible for Providing Worker Safety Protection

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Determining Who's the Employer – Grower or FLC, Continued

Under general provisions of the Labor Code (section 6400 et seq.) and the regulations of the Department of Pesticide Regulation (DPR), employers have primary responsibility for employee safety. This includes the primary employer as well as the secondary employer.

Thus, when the secondary employer (i.e., the grower who receives services from the contract employee) has the control, direction or supervision of the contract employee's work activities the grower acts as the employer and is responsible for any worker safety violation that may occur. Conversely, when the primary employer (i.e., the FLC) has control, direction or supervision over the contract employee's work activities the FLC is the employer and is responsible for compliance of the FAC regulatory requirements relative to worker safety and pest control licensing. (See attached flow chart)

Employer's Worker Safety Requirements

To meet these worker safety responsibilities, it is necessary for the FLC to determine the specific work activities that a contract employee will be called upon to perform for the grower and to determine whether the FLC or the grower will be responsible for directing and controlling or supervising those activities. Likewise, it is necessary for the grower to inform the FLC of the work activities that the contract employee will be performing and whether the grower or the FLC will be responsible for directing and controlling or supervising those activities. For example, it is necessary for the FLC to know if the contract employee will be mixing and loading pesticide to ensure that the FLC provides only a contract employee that has been properly trained, provides and ensures the contract employee wears any necessary safety equipment, and provides a supervisor to supervise and direct the work activities if the grower specifies that supervision is a service that the grower wants and for which a fee will be paid to the FLC.

When determining the work activities that the contract employee will be performing for the grower, it is desirable for the grower to put in writing the work activities and who will be responsible for supervision of the contract employee (the FLC or the grower). This should be provided to the FLC before any work activities are performed by the contract employee. This will minimize the possibility of misunderstandings between the FLC and the grower as to who is responsible for the control and supervision of the contract employees work activities.

Determining the Employer (Grower or Farm Labor Contractor) Responsible for Providing Worker Safety Protection, Continued

**Consistent
With Federal
OSHA Law**

The 3CCR section 6000 definition of employer is also consistent with Federal Occupational Safety and Health Act (OSHA) law. The principal test relied upon by the courts for determining whether an employment relation exists has been whether the employer controls or has the right to control the work to be done by the employee.

**When does an
FLC need a
Pest Control
Operator
License?**

Please refer to PML 01-12 entitled Farm Labor Contractors – Guidance for Requiring a Pest Control Business License.

Attachment

cc: Mr. Daniel J. Merkley, Agricultural Commissioner Liaison
Mr. David Duncan, Chief
Mr. Roy Rutz, Agriculture Program Supervisor III
Mr. Mac Takeda, Agriculture Program Supervisor II
Mr. Victor Acosta, Program Specialist