

## Ch 4: Risk Management and Legal Concerns Beyond the Kitchen

### Introduction

After reading this chapter, readers will:

- Spot ways a farm food service operation might violate the local zoning code.
- Understand how farmers might become liable for their guests' injuries.
- Determine the best insurance policies to protect against slip-and-fall injuries as well as food safety injuries.
- Identify the differences between agricultural labor and non-agricultural labor, including the different minimum wage and workers' compensation laws that apply to the different types of labor.
- Be familiar with the farm's obligation to make public services accessible to folks with varying abilities.
- Know the role business entities play in protecting personal assets from business liabilities.

Hosting guests for delicious food is about more than just a meal. Integrating food service into the farm is about building a strong farm business- one that returns real value to farm families and enhances our rural and urban communities. To build stable, resilient farm businesses, the community also must pay attention to the risks and legal concerns that extend beyond the plate. A quick glance at this chapter reveals that there are quite a few. However, not all risks and legal concerns are necessarily barriers. Recall the saying, "It's only fun until someone loses an eye." Paying attention to risk can be an opportunity to create a safer event for everyone, and that means more fun for everyone. That being said, risks and legal concerns may take time, money, and effort to resolve. Some legal concerns may not be possible to resolve. For this reason, it's worth it to take a close look at legal matters early on in the process. Otherwise, folks may find out later on, after investments have been made and marketing plans deployed, that the food service operation isn't legally viable.

Accepting risk is a hallmark of the farming profession and some farmers accept it enthusiastically, waiting until problems develop to resolve issues. Others, perhaps farmers with more inherent caution or more financial investment at stake, prefer to put their legal ducks in a row before launching a new food venture. That decision is ultimately a personal one based on each individual venture and the proprietor's appetite for risk. However, everyone benefits from knowing what these risks are and their options for managing them ahead of time. This chapter discusses a few significant risks but it is by no means comprehensive. Entrepreneurs should continue their exploration through conversations with insurance agents, local government, business partners, lenders, and experienced food service entrepreneurs.

## Zoning

Whether hosting a community potluck, a festival of foodie purveyors, or a pizza dinner on the farm, zoning may be a significant legal issue for food service operations of all types. Traditional zoning separates land uses into different geographic regions. For example, residential homes are in a different location than businesses. In theory, separating the two uses will make both homeowners and business owners happier. Neither will have to deal with the concerns of the other.

Minnesota cities, towns, and counties each have the authority to zone lands under their jurisdiction. When a unit of government chooses to zone, the agency does two things. First, it creates a map that delineates different geographic zones. Then, it writes an ordinance describing the uses allowed within each zone. Although the framework of the zoning code is universal, the details within the code vary tremendously from location to location. For example, one county's agricultural zone may allow many more activities than the neighboring county's agricultural zone allows. Zoning is very location specific. Farmers will have a hard time generalizing from the experience of other farmers if they are not located in the same zone within the same city, county, or town.

Why is the zoning code relevant to potlucks, pizza, and parties? The zoning code may prohibit a farm from hosting a food-related event or starting a food service operation. Admittedly, rare is the zoning code that says something like, "Potlucks are not allowed." Instead, a restriction on food events generally occurs in two ways.

Farms located in agricultural zones may find that food service is not allowed. Food-related ventures may not be seen as an agricultural use of the land. Many zones define agriculture as the production and marketing of crops and livestock. Certainly, hosting a contest between chefs creating delicious zucchini dishes might market a farm's zucchini. But, that's not necessarily how the law defines marketing of crops. The marketing of crops may be limited simply to preparation of the zucchini for a wholesale or retail market- not preparing zucchini pizza or hosting an event to promote zucchini. Farm dinners and farm food events may be considered commercial, retail, or restaurant uses rather than agricultural uses.

Farms located in residential or suburban zones may also run into problems. The paragraph above explains that food service may be seen as a commercial, retail, or restaurant use. Residential zones are even more likely to prohibit commercial, retail, or restaurant uses than agricultural zones. Even when residential zones allow agricultural uses, the allowance doesn't usually extend to food service. Instead, only the production or marketing of crops and livestock are allowed. Farms located in commercial or retail zones are much less likely to run into zoning problems.

Many communities welcome the increased revenue from farm food service and would love to see an on-farm café or pizza shop in the neighborhood. But, other neighbors may not appreciate the increased traffic, noises, potential for litter, parked cars on the roadway, interruption of pastoral views, or perception of solitude that they expect from agricultural and residential communities. If a farm food venture attracts hundreds of guests, the farm may become a victim of its own success when the neighbors call the local zoning authorities. If that happens, the zoning authorities may scrutinize whether the event is permitted under the zoning code. The zoning authority, in turn, may decide the event violates the code and order the farmer to stop. This would be a devastating turn of events for any farm, but especially one that has invested in infrastructure or marketing for the food service.

Farmers must explore whether the local zoning code will hinder their on-farm food service. There are a few ways to go about this. For those who like to dive right in, farmers might consider reading the zoning code themselves. (The zoning code also affects buildings, housing, other diversification ventures; reading it can be a reasonable investment of time.) To start the process, first determine the correct zoning authority from amongst the city, town, or county. Some farmers make the mistake of checking with the wrong authority. If a farm is located within a town that has elected to zone, asking about the county zoning code will not help. First, determine who has zoning authority over the exact location of the planned food service venture. Many townships and counties have websites with maps and descriptions of their jurisdiction. Farmers can also determine which zone their farm is located in by calling the local offices and asking. Zoning offices go by various names such as the planning and zoning office, the building and zoning department, or simply the planning office. Staff should be able to look up a specific address and determine if it is within their jurisdiction.

Once a farmer finds the appropriate authority, the farmer should determine which zone the farm is located within. Some local governments have their zoning maps online. If the map is not online, farmers may need to go to the zoning office to consult a map. Farmers who call should have the address or tax identification number of their property handy so the clerk can look it up. Be prepared to write down a combination of letters and numbers. For example, agricultural zones may be called “A-1” while residential zones generally begin with an R.

The next step is to find the allowed or disallowed activities within that zone. The zone’s activities are described in the code. Many governments have the code posted online; the Minnesota State Law Library has links to many online municipal, town, and county codes at its website. If not, a paper copy should be available at the office. If a person prefers not to go to the office itself, each Minnesota county has a law library which

should have local ordinances on the shelf. Even after locating it, understanding the code can be quite a trick. First, look for the section corresponding to the zone title. Read any permitted or prohibited uses, and then check the definitions section for any words like “agriculture” or “farming.”

Of course, a farmer can always call the zoning office, give details of the proposed venture, and ask as to whether it will be allowed without ever consulting maps or ordinance text. Attorneys are an excellent resource as well. Local attorneys can also offer perspective on how local codes are interpreted or enforced.

The zoning code will often prohibit a farm food service venture unless the operator receives a conditional use permit. Conditional use permits may require that the operator show he or she has put the necessary traffic, parking, restroom, trash, and crowd control accommodations in place beforehand. The code may also require the farmer to hold a hearing where neighbors can voice concerns about a conditional use permit application. The investment of time and energy required for a conditional use permit may be worth it only where a farm is confident the food service venture is financially viable.

If the code appears to prohibit farm events entirely, all is not lost. Farmers might ask a variance, which can be described as official permission to violate the code. Variances are allowed under widely different circumstances in different communities, so it’s worth asking around for someone who has received a variance in the past while assessing the option. If that doesn’t work, farmers might think about mobilizing the community to get the code amended. Community-based farmers are in a great position to make this happen by recruiting neighbors to attend meetings or write letters. Changing the zoning code seems like an onerous task. But, it certainly has happened in the past. Many urban agriculture organizations have advocated for zoning code changes to allow food production within city limits. Food trucks have also managed to change the code to allow food sales from parking lots and curbsides. The experiences of other groups will be valuable for farmers who need to change the zoning code before offering on-farm food service. [Mention final title of Megan O’Hara’s report here.]

#### Checklist:

- Investigate the zoning code to learn how the zoning authorities will treat a proposed farm food service venture: read the code, call the office, or consult a professional.
  - If the venture is allowed, it can move forward within the zone’s constraints.

- If the venture is allowed only with a special use permit, farmers should determine what they need to show, have, or do to receive the permit.
- If the venture is not allowed, research the possibility of a variance from the zoning code by talking with someone who has received one. Farmers might also consider starting a campaign to change the zoning code.

## Injuries

After a farm invites customers onto the property, especially if those customers include children, injuries are usually a matter of “when,” rather than “if.” This isn’t to say that all farms are hazardous. Rather, customers’ unfamiliarity with farms makes them especially blind to the farm’s natural hazards. Further, hosting a food service event means creating an intimate space where people are encouraged to share in the home and livelihood of the farmer. That intimacy is exactly what many farmers want. But coziness also has a negative side- folks feel more comfortable taking liberties with farm space, equipment and facilities. To put it another way- visitors do things they shouldn’t. Injuries, no matter how they happen, are a legal concern deserving of close attention.

After spending any amount of time on a farm, a person acquires a kind of sixth sense about farm risks. This keeps farmers safe but it also makes them less aware of natural hazards. Visitors are much quicker to trip over rough ground, fall into depressions or holes, mishandle equipment, and fail to notice unsecure devices. In the excitement of food production, visitors may be distracted, children become reckless, and youths roughhouse with each other. Farmers can manage these risks, but the first step is realizing that these risks are real for visitors.

From a legal perspective, farmers aren’t necessarily responsible every time a visitor trips or falls. The primary (but by no means exclusive) way a farmer might become legally liable for a guest’s injury is through negligence. Negligence is a complex legal concept but suffice it to say, negligence is the failure to be as careful and prepared as any other farmer would have been under similar circumstances. For example, say a guest falls through rotting floorboards during a potluck dinner in a barn. If most farmers would have roped off the rotting boards, replaced the boards, or held the potluck elsewhere, a farmer who does nothing may be negligent. If the farmer’s negligence led to the guest’s injury, the farmer may be responsible in whole or in part.

As farmers might guess, using other farmers as a yardstick for anything makes for a very unpredictable measuring device! This is why personal injury lawsuits are expensive and time consuming- it requires detailed analysis on subjects over which reasonable people can disagree. This is also why many businesses exercise an abundance of caution. If negligence is being less careful than others, the best way to avoid negligence is to be

more careful than others. As the bar goes higher, everyone exercises more caution. This can be a good thing for customer safety but it can be hard for businesses to identify a reasonable limit.

When it comes to injuries and negligence, the single most important step a farmer can take is to buy an appropriate insurance policy. When a covered injury occurs, the insurance company steps in to handle the legal matters. If the case comes back with a judgment against the business, the insurance company pays the bill up to the limits of the policy. Farmers might be tempted to think, "I don't need insurance because I won't be negligent." The harsh reality is that a farm can be sued even if the farmer did nothing wrong. Innocent people can be hauled into court to establish their innocence. That takes time and money, which an insurance policy provides. Farmers need insurance even if they take every precaution to protect guests.

The insurance company will, to protect their ability to defend and win lawsuits, inspect the farmer's property. Insurance agents are (ideally) trained to understand where risk exists and to help farmers minimize it. If they find conditions considered too hazardous (or simply difficult to quantify in terms of risk) the insurance company may choose not to offer or renew a policy. For farmers with particular risks -including derelict buildings or some types of processing operations- this can present a very difficult situation. Insurance companies will be very hesitant insure the operation because the conditions will likely be seen as negligence in court. Farmers with uninsurable conditions can ask around but may need to resolve the risk first.

Getting the right policy for an on-farm food service venture can be tricky. Most farmers carry only farm liability insurance. Farm liability insurance acts as a homeowners policy by covering the farmer's residence and injuries to personal guests. It also acts as a business policy by covering the farm operation's facilities or buildings and injury to business guests. Farmers might mistakenly think that food service guests will be covered by a farm liability policy. Unfortunately, this is often not the case. The business portion of a farm liability policy will usually only cover the risks extending from the production and marketing of crops or livestock- not from food service. Farmers relying on a farm liability insurance policy to cover food service events, are taking a risk that food service-related injuries will not be covered by the insurance company. At a minimum, farmers should ask their insurance agent if their planned food service event is covered. This communication should be in writing. An agent can always be wrong and evidence may be important if a farmer wants recourse. Communicating over email and maintaining a regular phone log are good ways to create paper records of important communications.

Very likely, an additional insurance product will be necessary to cover a food service venture. If the food event is only occasional, an event endorsement added to the farm liability policy may be adequate. For more regular events, a full commercial policy is

probably necessary. Commercial policies can be cost effective as an addition because most of the farm's risks are still covered under the existing farm liability policy. Farms working with another entity- such as a farm-to-table event management company- have another option. The farm can ask the other company to add the farm as an "additional insured" on the company's insurance policy. The other company should have a policy to protect the company and adding the farm on to the policy for a one-time event may be a more affordable option.

Of course, no farm wants an injury to occur even if the insurance policy will cover it. Injuries are sad, bad for the farm's reputation, and will likely result in a higher insurance premium going forward. Proactive farmers will create safe environments and help guests protect themselves. Here are several steps farmers might take to reduce the risk of injury.

- Clearly communicate with customers about safety procedures to prevent accidents. Use verbal instructions and signage.
- Put hazardous areas off-limits, and make this abundantly clear with physical barriers and signage.
- Farmers should assume that guests do not have any basic understanding of farm safety and will not recognize hazards. Just like toddler-proofing a house, farmers should guest-proof all guest areas. Remove, block, or secure anything that could hurt guests.
- Farmers should separate food service and any contamination sources while providing basic sanitation facilities to guests. (More later in this chapter.)

Many farmers wonder if they should be using a waiver to release themselves from liability if a farm visitor is injured. The short answer is that legally effective waivers are difficult to write. The law does not look fondly on the waiver of one's rights and scrutinizes any attempt of a party causing injury to disclaim responsibility. When it comes to youth under 18 years of age, it is highly unlikely that a waiver will be effective at all. Although a parent may be able to waive a child's rights, it isn't easy. If a legally sound waiver is still desired, a farmer might talk with his or her insurance agent. As the insurance company is familiar the exact contours of liability for the farm's situation, the company may have a recommended waiver. An attorney is another option for creating a waiver. Attorneys are the best possible source for a specific and legally binding waiver but the service comes at a cost.

Even if the waiver is legally sound, the farmer will still need to establish in court that the waiver complies with the standards for a legally permissible waiver of liability. For this reason alone, farms still need an insurance policy that covers the food service venture. Insurance will provide a defense in court and will pay on a judgment if the waiver is

proved invalid. If legal protection is the goal, waivers are generally not the most efficient way to achieve it.

Although enforceability isn't necessarily an efficient goal, waivers may still be worthwhile as a communication mechanism. A waiver demands the kind of attention that signs and verbal instructions can't compete with. Putting a signature on a document might inspire guests to pay more attention to the risks and rules. This can be a positive thing for preventing injuries.

#### Checklist

- The first line of defense against the legal aspects of injury is preventing injury itself. Install barriers, repair hazards, and generally adopt high standards for site safety. Use communication tools such as signs and verbal instructions to warn visitors of the farm's safety expectations.
- As the second line of defense, buy an insurance policy that will cover slip-and-fall type injuries which relate to the farm food service operation. The right insurance policy may be either: Current farm liability policy, the current farm liability policy plus an event endorsement, inclusion as an additional insured on another enterprise's commercial policy, or a separate farm commercial insurance policy.

#### Food Safety Incidences

It goes without saying that farmers strive to provide safe food to their guests, whether it's a fresh apple, an informal potluck, or a farmer-prepared meal. Those who work directly with customers feel directly responsible, so farmers are highly motivated to protect the quality of the food they serve.

But accidents still happen. Even if it's not the farmer's fault, a food safety incident is a tremendous liability. From a marketing perspective, even a suspicion that a farmer's food is unsafe can damage the business. Where the farmer's food is at fault, legal liability can make things much worse. As with slip-and-fall injuries, the proactive farmer focuses both on prevention and on insuring against such incidences.

Starting with food service events that involve no actual preparation or offering of food by the farmer, farmers might host potlucks. Or, a farmer might have a food truck or mobile kitchen on site selling food items during a festival. Can a farmer become legally responsible for a food safety incident when other businesses have prepared the food? In a word, yes. Although the liability possibilities are multiple, perhaps the most likely avenue for liability is negligence (just as with physical injuries). If a farmer is negligent in how the event is structured, she or he may become liable for food poisoning that results.

Farmers may be legally negligent if the food service structure makes cross contamination likely. As an example, pretend that a farmer is hosting an apple fritter fry-off. To add to the fun, the farmer arranges a goat petting area right next to the

fritter sampling station. People, and especially children, may consume harmful bacteria if there is little physical distance and insufficient opportunity to wash up between the goats and the fritters. Individuals who get ill as a result could claim that any reasonable farmer would have provided soap and water or sanitizing gel and would have separated the petting areas from the eating areas. This isn't to say farmers are automatically liable for all contamination accidents or that the law prohibits offering food in the vicinity of animals. But, when the farmer's actions make it more likely that contamination will occur, they can expect to be held at least partly responsible when it occurs. This is just one example of the kinds of problems farmers may be expected to prevent. Even if the farmer isn't supplying the food, it's important to provide access to sanitation and reduce cross contamination vectors.

When a farmer is preparing or serving food directly the legal landscape changes. The farmer's liability potential is much greater as compared to food supplied by guests or other businesses. Farmers may be responsible for negligently causing contamination after serving the food. Farmers may be responsible for any injury resulting from the product itself. Foreign objects might fall into the food or the items may be contaminated with allergens, chemicals, bacteria, or viruses. The basis for liability under these circumstances is different than negligence, and simply adopting high standards may not be enough to avoid legal liability. Depending on the exact injury, the farmer may be liable simply because it occurred.. The bad news is that legal liability for food products is complex, variable, and far beyond the scope of this resource.

The good news is that farmers can protect themselves in two ways . Farmers should learn and adopt careful food safety practices. Especially where the applicable food service permit requires a procedure, farmers should make certain the procedure is followed every time. Not following legal obligations might easily be negligent. Going above and beyond the legal standards is always a good idea. Farmers should talk with inspectors and food safety professionals to learn the latest food safety techniques.

Insurance is just as important as good food safety practices. Even if a farmer offers perfectly safe food, the farmer can still be hauled into court to prove that the farmer did exactly that. Defending one's self is expensive, time consuming, and beyond the skills of most non-attorneys. Insurance addresses this problem by providing a defense as soon as the incident is reported. And if a judgment results, the farmer is covered up to the limits of the policy. The peace of mind from a good insurance policy can be worth the cost.

Farm liability policies are not intended to cover food service ventures. Some farm liability policies may offer some protection under very narrow circumstances. For example, it may cover bacterial contamination that results from a tornado. This is not the kind of risk farmers will frequently encounter. Farmers are encouraged to talk with their insurance agent about current coverage under a farm liability policy. But, they shouldn't be surprised to learn it's either non-existent or uncertain. A commercial restaurant insurance policy is intended to cover the many risks unique to a restaurant. It's much broader and covers unique risks such as disease transfer. If a farmer is

dedicating resources and effort to building a food service venture, a commercial policy is a wise investment.

### Checklist

- For farmers hosting food supplied and served by others such as a potluck or catering business, create a clean environment where sanitation is readily available and cross contamination vectors are limited.
- For farmers preparing or serving food themselves, consider a commercial policy for the broadest protection from the increased liability exposure.

### Employment Law

Any farmer considering diversifying the farm operation with food service should read this section carefully. Different rules affect farm labor as compared to food service labor. The law often treats agriculture differently than non-agriculture. For example, this chapter has already discussed how agriculture and non-agriculture are handled differently under zoning and insurance policies. Employment law is a third area where the rules change as a farm broadens beyond just the production of crops or livestock. Farmers who are not aware that the rules change once they begin food service operations may expose themselves to liability. This section explores the shifting overtime and workers' compensation requirements as farms add new ventures such as food festivals, dinners, and pizza nights.

This section does not discuss many very important employment law concerns. For the sake of space, minimum wage, youth employees, family employees, hiring procedures, discrimination issues, and a host of other vital concerns are not addressed at all. These issues are still very important. As this resource is specifically intended for the diversifying farmer, the focus is solely on the transition point between farm and food service. It is not a general summary of farm employment laws.

Some Minnesota farms do not have to pay overtime to employees who work over 48 hours per week. If a farm has an annual gross revenue of \$500,000 or more and the farm worker is guaranteed a fixed salary of at least \$588 per week, then the farm does not have to pay overtime. If the farm has an annual gross revenue of less than \$500,000 and the farm worker is guaranteed a fixed salary of at least \$385.88 per week, then the farm does not have to pay overtime. (Salary rates listed are relevant only from August 1, 2014 to July 31, 2015. The rate rises annually until 2016.)

Farms taking advantage of the above exemption from overtime must be very cautious about using the same employees for food service. A farm employee who also does food service work is not eligible for the exemption described above. Instead, standard

overtime rules apply. The standard overtime rules depend on the business size and sales. If the farm's product is sold across state lines or the farm has annual gross sales of more than \$500,000, the farm must pay overtime for all hours over 40 in one week. If the farm's product is sold entirely within the state of Minnesota and the farm grosses less than \$500,000 annually, the farm must pay overtime for all hours exceeding 48 in the work week.

Here is another way of explaining the overtime rules: A farm can avoid paying overtime for a work week only if 1) the farm meets the guaranteed salary rates described above AND, 2) the farm worker performs exclusively agricultural labor in that week. Labor relating directly to a food service venture is not agricultural labor.

Employment law can be easier to understand with examples. Pretend for a moment that Farmer August wants to host a pizza night once per month at his vegetable farm. He currently employs two friends to help him plant, cultivate, and harvest vegetables at his farm. He pays them the applicable guaranteed salary rate and he does not pay overtime. If Farmer August uses his two friends for pizza night, the exemption no longer applies. Farmer August must now follow regular overtime rules for all the hours those employees worked during the week of the pizza night. If the friends happened to work a total of 50 hours that week, their pay would be at least time and a half for the overtime hours. The overtime hours total either 10 or 2 hours, depending on where August's products are sold and his gross revenue. If August Farmer August cannot say, for example, that the extra hours were for farm labor and avoid overtime. All hours over the threshold must be paid at time and a half if any non-farm labor was performed in that week.

Worker's compensation is another important focus area for any farmer considering diversification into food service. Minnesota's workers' compensation laws allow some small farm operations to go without workers' compensation if the farm carries a liability insurance policy that covers employees. Farms relying on this exemption should be cautious as they diversify. The more a farm is involved in activities that are not the production of crops and livestock (such as food service) the more they should follow the rules for non-farm businesses. Non-farm businesses are required to have workers' compensation when they have one employee.

Farms who rely on the small farm exemption from workers' compensation should know that covering farm employees through a liability policy may require a commercial policy. As with a farm liability policy and injuries to guests, farm liability coverage only extends to farm activities. Food service is likely not a farm activity. If employees are injured while preparing food or running the food service event, the farm liability policy may not cover their injuries. A general commercial policy covers the broader risks of food service, but not all will cover employees. Generally, a commercial policy will only cover the risk of injury to a seasonal and temporary employee. If the farm's employees are employed year-round, a workers' compensation policy may be the only option. If a

farmer doesn't get the right policy, not only does this leave the farmer exposed to liability for the injury itself, the farmer may be exposed to a steep fine for violating workers' compensation laws. It is essential to make certain that employee injuries are covered whether it's through workers' compensation or a commercial policy.

#### Checklist:

- Determine the appropriate minimum wage for agricultural and food service workers
- Implement careful record keeping practices to demonstrate compliance with employment laws.
- Consider an investment in workers' compensation insurance to ensure coverage for employee injuries

#### Sales Tax

Farmers who begin a food service venture are wading headlong into the issue of sales tax. Farmers who sell only fresh or raw agricultural products do not need to collect Minnesota sales tax. But, that doesn't hold true for prepared food products. Food service is subject to sales tax. The line between "food" and "prepared food" can be thin. Four general guidelines lay out when a food becomes "prepared" and is subject to sales tax.

1. Foods sold with napkins, plates, forks, straws, cups, or other utensils are taxable.
2. Food items that are mixes of ingredients ( for example: fruit salad, sandwiches, ice cream on a cone) are taxable.
3. Foods heated by the seller and then given to the customer are taxable.
4. Foods sold ready for display and serving, such as vegetables arranged on a tray, are taxable.

The details certainly add some complexity. As for utensils (the first guideline), simply setting out napkins on the counter is enough to make food taxable. The farmer does not have to go as far as placing a fork in a bag for food to become "prepared." Regarding mixed ingredients (the second guideline), even salad mix, jam, and cheese is taxable when sold by the same person who made the item. Anything that is a combination of one or more ingredients is taxable when sold by the preparer. If a separate business prepares the food and the farmer subsequently sells it, the item is not taxable under the second guideline. (However, if the fruit salad, sandwich, etc. is sold with a fork it becomes taxable under the first guideline even if it's prepared by a different business.) Each of the guidelines above is a separate basis for taxability. For example, if the farmer heats a dish for sale but does not also include utensils the item is still taxable.

Some farm businesses may choose to set up their food event with an admission or cover charge. Even though the sale is for access to an event rather than for an item itself, these sales are subject to sales tax. For example, a farm might host several food trucks on the farm and sell tickets to customers for entry. The ticket sales are taxable.

Farms who are new to taxable sales will need to apply for a sales tax permit. The process is quite easy and can be done over the phone or with a paper application. Contact the Minnesota Department of Revenue to begin the process. After the application has been filed, the department will issue the farm a sales tax account number and permit. Sales tax is collected by the business and then remitted to the state either by phone or online. The business's average taxable sales for each month in the previous year determine whether the business must deposit sales tax on a monthly or quarterly basis. Detailed information on registering for, collecting, and remitting sales tax is at the Minnesota Department of Revenue's website.

#### Checklist

- Determine if the food service operation will be making taxable sales.
- If taxable sales will be made, apply for a sales tax permit and implement a system to track and remit sales tax.

#### ADA

The Americans with Disabilities Act (the ADA) requires that places of public amusement be accessible to those with disabilities. The ADA is a federal law that prohibits discrimination and ensures folks with a range of abilities can participate fully in American life. This law affects farmers, too. If a farm offers events open to the public, the farm must accommodate disabled individuals as much as is reasonable. For example, a person in a wheelchair may not be able to roll from the parking lot to the site if the ground is deeply rutted. If more accessible routes can be reasonably installed, the law may require it. The ADA does not require that every individual feature be fully accessible, and it does not require that business owners completely remodel at great expense. Exactly what a farm should do to satisfy the ADA depends on when the farm began operations, the nature of the event, and the cost of retrofitting facilities. For example, installing a wide walkway with fine gravel may be rather affordable. With such uncertain requirements, the starting point is recognizing that the ADA may apply to on-farm events if they are open to the public and doing more research.

Generally, the requirements of the ADA are put into place when a business applies for a building permit, whether for new construction or remodeling. Then, the permit-granting agency will check the building plans to see that they meet accessibility standards. However, it is important to note (as clarified above) that the law is enforceable even against public farm events that have not done any remodels or gone through the building permit process.

At a minimum, farmers should check to see that folks in wheelchairs are not prevented from attending the event or using a restroom. Installing smooth, wide pathways

accomplishes the first part of this goal. (At the same time, this is a good practice to avoid injuries from people who are not disabled, as well.) Farms should consider meeting the second part of the goal by renting at least one handicapped accessible portable restroom. Farms can use other techniques to ensure folks of all abilities can enjoy the event. For example, benches or chairs placed throughout the festivities will allow guests with limited mobility to rest.

Disabilities accommodations are always a good idea. But when does a good idea become a legal obligation? Unfortunately, it can be hard to figure out exactly what a farm must do to comply with the ADA. Farmers should review the Department of Justice's guide for small businesses, titled "ADA Guide for Small Businesses." Farmers might also call the Department of Justice's toll-free hotline at 800-514-0301 with specific questions. The Small Business Administration (SBA) also helps businesses understand how to comply with the ADA, and they have offices throughout Minnesota.

Minnesota has also adopted a state law that prohibits businesses from denying protected individuals the same enjoyment of the businesses services as are provided to other guests. The Minnesota law is similar to the federal law in many respects. Both laws clearly prohibit places of public accommodation (which include farm businesses that provide food service opportunities to the public) from failing to make reasonable accommodations for disabled persons. For example, a farm cannot prohibit blind or deaf individuals from coming onto the farm if there are safety practices that might easily protect that person. Determining precisely how to accommodate individuals of varying individuals is a fact-specific matter. Specific guidance is available from the Minnesota Department of Human Rights.

#### Checklist:

- Consider whether the food service operation is accessible to individuals with a wide range of abilities. If it is not, create a plan to make it more accessible.
- Contact the Small Business Administration and the Minnesota Department of Human Rights for more information on whether the accessibility plan meets the law's requirements.

#### Business Structure

Choosing a smart business entity can help farmers achieve their risk management objectives as they diversify into value-added enterprises like food service. Across the United States, the majority of farmers organize their businesses as sole proprietorships or general partnerships. Although these entities are easy to establish and have fewer paperwork concerns, they come at a cost. The sole proprietorship and the general partnership both leave a farmer's personal assets available to satisfy a business judgment. For example, if a farmer with a sole proprietorship buys seed on credit and then fails to pay the bill, the seed company could demand both the farmer's business assets and personal assets to get paid back (assuming the seed company gets a

successful legal judgment against the farmer). By contrast, the LLC and corporation business entity shield personal assets from business judgments.

The protection offered by LLCs and corporations are important but should not be overstated. In terms of risk management, insurance is far more important than establishing an LLC or a corporation. Even if a business is organized as an LLC or corporation, a disgruntled individual or creditor may still argue that the owner is personally liable for the judgment. If the business owner hasn't followed best practices in managing the LLC or corporation (including keeping separate bank accounts, following established procedures, fully capitalizing the business, and more), the court may look right past the entity and take personal assets anyway. When it comes to creditors, many will require a personal guarantee before extending any credit to a farmer. An LLC or corporation provides no protection when a debt has been personally guaranteed. Lastly, some protections for personal assets are extended to the farmer, even those with sole proprietorships and partnerships, through the bankruptcy process. Some farmers see diminishing value in an LLC or corporation in comparison to the fee and accounting costs.

Farmers should also note that business assets are always available to satisfy business liabilities. Creating an LLC won't protect farm items like tractors, planters, or washing equipment as those items are clearly assets of the business. Successful creditors can get at those assets to satisfy debts.

Organizing as an LLC or corporation may be a smart move for many farmers starting a food service venture. An LLC or corporation is an excellent last line of defense. For example, a farmer may not have purchased the correct insurance policy or might have violated terms of the insurance policy, thus losing coverage. If the farmer also lost the case in court, he or she could be at risk of losing personal assets. Further, separate entities can help manage risk in diverse enterprises. Farmers can cordon off the risks of the food enterprise to the food enterprise's assets. As explained above, business assets are always available to satisfy judgments against the business. If a farm creates a separate LLC for a food service venture, only the food service equipment will be available to satisfy the judgment (assuming, of course, that best business practices are followed). Starting an LLC or corporation is a straightforward procedure and is quite affordable in Minnesota. The Minnesota Secretary of State's Office handles the paperwork for forming business entities. Further information is available at the Minnesota Secretary of State's website and at [www.farmcommons.org](http://www.farmcommons.org).

If a farmer chooses to establish one or more LLCs or corporations, proper management of the entity is essential to maintain the entity's protections. The business should be sufficiently capitalized. Farmers should maintain separate bank accounts and books for each entity. Negotiating, writing down, and following an operating agreement or bylaws establishes legitimacy as well. Keeping up-to-date with annual renewal paperwork is also important to keep the protections of the entity.

Managing liability can be complicated and stories are often helpful. Here's an example. This story helps to illustrate how a farm's first line of defense is insurance. If that fails, a business entity can help protect the farmer's personal assets. Let's say that Farmer June hosted guests for a 5-course dinner on the farm. A guest, May, fell through some rotten floorboards and broke her hip. May (or more likely, her health insurer) sues June for negligence. June forwards the claim to her liability insurance company. But, the insurance company replies that June's policy never covered food service injuries. If June had had an insurance policy, she would have received an attorney for her defense and coverage for the resulting judgment, if any. June can't afford a good attorney herself and so she loses her case in court. June now owes May \$50,000 for medical expenses. If June doesn't pay with cash, May can put a lien on June's assets. If June's farm is organized as an LLC or corporation, May is limited to the business assets. But, if June is a sole proprietorship (or if she mismanaged her LLC or corporation), May could claim June's personal assets as well. This would likely happen only if June's business assets weren't enough to cover the total debt. If June has a personal items such as a vacation property, a savings account, or stocks she could lose them to May. Even if June has no personal assets, May's claim can extend to any assets June acquires in the future.

Checklist:

- Consider forming an LLC or corporation for the farm's food service operation to further insulate personal assets and farm assets from the food service operation's liabilities.
- Farms organized as an LLC or corporation must adopt best practices to maintain the entity's protections.