

Liability on Farm Products (Food Safety)

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Overview:

Liability for Farm Products

Food safety is an important issue that cannot be overlooked by anyone who is involved in the production of food products. From the grower to the retailer, failure to take food safety into account can lead to injuries and costly lawsuits. With the increase in direct farm marketing and the shift of consumer's interest to ready-to-cook, or ready-to eat food, farmers need to be more aware than ever of the various laws and rules that govern food safety.

There are three sources of law that need to be considered when it comes to liability for farmers; state common law, state statutes and federal law. This outline deals with the state law of Pennsylvania. The common law, or the laws created by the courts, deals mainly with negligence of food sellers and any warranties that apply to food products. This law is driven by lawsuits involving injuries caused by food products. The State laws on the other hand deal with the proper method to handle food and to operate a business that sells food, either wholesale or retail. There are extensive and in depth regulations that interpret the state food safety law. These have also been given a brief overview. These regulations deal very specifically with the management and operation of a business that sells food. This includes the specific requirements for the facilities and equipment that is used.

Common Law (the law made by a state's courts, it is binding on the courts):

Theories of recovery for injury from food:

- **Negligence:** This requires that the injured party prove the food seller had a duty to act in a reasonable manner and then the breach of that duty by the food seller acting in an unreasonable manner. Selling food to people confers a duty to act in a manner that an ordinary reasonable person would act in to avoid causing injury. Producers/sellers of food are held to a reasonable level of care. There can be negligence per se for violation of food safety laws; this means that injury that result from actions that violate the food safety laws, are found by the court to be negligent as a matter of law. *Res Ipsa Loquitur:* (a legal doctrine that states that the mere occurrence of an injury, taken with the surrounding circumstances can be assumed to show negligence) can be used to prove negligence when there is circumstantial evidence of negligence
- **Warranty:** With a claim of breached warranty, an injured party is saying that the food was in effect guaranteed to be fit to eat, an implied warranty. It is not necessary to prove that any injury resultant from defective food is the fault of the seller; basically this means that

since food is assumed to be safe to eat, the seller is in reality offering a warranty of that the food is indeed safe to eat. If there is something wrong with the food, the injured party does not have to prove that the party selling the food caused the defect, only that they sold the food.

An injured party can also make a traditional claim of breach of warranty if there is a claim made as to the food, i.e. "boneless" or "ready to eat." If this food does not meet the conditioned claim, i.e. bones in the boneless chicken, this is a breach of an express warranty.

If there is no express warranty, a claim of implied warranty of quality and wholesomeness can be made. These are common law doctrines that apply to all products that are sold.

State Cases:

Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700

Pa., 1929

Manufacturer of foods and beverages owes duty of reasonable inspection before placing commodity on market.

Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687

Pa. Super., 1932

Vendor of foods and beverages owes duty to make reasonable inspection thereof before placing them on market for consumption, at least where not in original sealed packages.

Douglas v. Acme Markets, 35 Pa. D. & C. 447

Pa. Com. Pl., 1996

An unpackaged grape is not a defective and unreasonably dangerous product, and defendant's decision to display unpackaged grapes even after learning that grapes sometimes fell to the floor was not outrageous.

Campbell v. G. C. Murphy Co., 186 A. 269

Pa. Super., 1936

Seller of food at public eating place, to be consumed on premises, is presumed to know of any unwholesome condition of food, and is liable for damages to purchaser who is made ill on account of such unwholesomeness.

Sincavage v. Armour & Co., 74 Pa. D. & C. 279

Pa. Com. Pl., 1950

A manufacturer of food represents to a consumer that it is wholesome and fit to eat and is responsible for damages resulting from the presence of foreign matter, whether the food is sold in an original package or in bulk. A consumer who has been injured may sue a dealer or the manufacturer.

Levy v. Horn & Hardart Baking Co., 157 A. 369

Pa. Super., 1931

Purveyor of food and drink must use high degree of care and surveillance to exclude injurious foreign substances.

Taylor v. Great Atlantic & Pacific Tea Co., 48 Pa. D. & C. 687

Pa. Com. Pl., 1944

In an action to recover for the death of plaintiff's decedent as the result of eating contaminated meat purchased from defendant, plaintiff must prove by direct and positive evidence not only that the death resulted from eating contaminated meat but that it was contaminated at the time of purchase, and if, although there is no doubt

that the meat was contaminated when eaten, the evidence raises at most a probability that it was contaminated at the time of purchase four days before, recovery cannot be sustained.

State Laws

Food act: 31 P.S. §20

This is the main law that deals with food safety and preparation. It is similar to federal statutes, particularly the Food, Drug and Cosmetic Act. Primarily deals with adulterated or misbranded food. The act gives authority to the Secretary of Agriculture to shall promulgate rules, regulations and food standards necessary for its proper enforcement. It provides criminal and civil penalties for violations. Food establishments are also required to register with the Department, but food establishments that are farms and grow at least 50% of what they sell do not have register.

- Deals with adulterated and misbranded food
 - Criminal and civil penalties
- Poisonous or deleterious substances and tolerances
 - Additives to food
 - Pesticide chemicals in or on raw agricultural commodities
 - Unsafe food additives
- Registration of food establishments
 - Food establishments where 50% of the food sold is grown on the premises is exempted from registration.

State Regulations

Food code: 7 PA Code 46

This is the regulations that interpret the Food Act. The regulations have very in depth and specific requirements. In addition to the food itself, the regulations cover topics such as employee sanitations and personal hygiene, requirements for the premises and equipment and utensils use and water, plumbing and waste water.

I. Definitions: some important definitions

Adulterated: Food with respect to which one or more of the following is accurate:

- (i) The food bears or contains any poisonous or deleterious substance, which may render it injurious to health. However, if the substance is not an added substance, the food will not be considered adulterated if the quantity of the substance in the food does not ordinarily render it injurious to health.
- (ii) The food bears or contains any added poisonous or added deleterious substance, which is unsafe within the meaning of section 11 of the Food Act (31 P. S. § 20.11). This subparagraph does not apply to a pesticide chemical in or on a raw agricultural commodity, a food additive or a color additive.
- (iii) The food is a raw agricultural commodity and bears or contains a pesticide chemical which is unsafe within the meaning of section 11 of the Food Act, except that, when a pesticide chemical has been used in or on a raw agricultural commodity with an exception granted or tolerance prescribed under section 11 of the Food Act or under any of the Federal acts and the raw agricultural commodity has been subjected to processing such as

canning, cooking, freezing, dehydrating or milling, the residue of the pesticide remaining in or on the processed food will, notwithstanding section 11 of the Food Act and this subparagraph, not be deemed unsafe if the residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice and the concentration of the residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agricultural commodity.

- (iv) The food bears or contains any food additive, which is unsafe within the meaning of section 11 of the Food Act or any of the Federal acts.
- (v) The food consists in whole or in part of any diseased, contaminated, filthy, putrid or decomposed substance or is otherwise unfit for food.
- (vi) The food has been produced, prepared, packed or held under unsanitary conditions so that it may have become contaminated with filth or may have been rendered diseased, unwholesome or injurious to health.
- (vii) The food is, in whole or part, the product of a diseased animal or of an animal which has died otherwise than by slaughter.
- (viii) The food is in a container composed, in whole or part, of any poisonous or deleterious substance which may render the contents injurious to health, unless the container is fabricated or manufactured with good manufacturing practices as that standard is defined and delineated by any of the Federal acts and their regulations.
- (ix) The food has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption under section 11 of the Food Act or under one of the Federal acts.
- (x) The food has had any valuable constituent, in whole or part, omitted or abstracted therefrom.
- (xi) The food has had any substance substituted wholly or in part.
- (xii) Damage or inferiority of the food is concealed in any manner.
- (xiii) A substance has been added to the food and it is mixed or packed so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.
- (xiv) The food bears or contains any color additive which is unsafe within the meaning of section 11 of the Food Act or under one of the Federal acts.
- Food establishment:
 - (i) A retail food store and a room, building or place or portion thereof or vehicle maintained, used or operated for the purpose of commercially storing, packaging, making, cooking, mixing, processing, bottling, baking, canning, freezing, packing or otherwise preparing or transporting or handling food.
 - (ii) The term includes those portions of public eating and drinking licensees which offer food for sale for off-premises consumption, except those portions of establishments operating exclusively under milk or milk products permits.
- Ready to eat food:
 - (i) Food in a form that is edible without additional preparation to achieve food safety, such as raw animal-derived foods that have been cooked in accordance with § 46.361 or § 46.362 (relating to cooking raw animal-

derived foods; and microwave cooking), or fish that have been frozen in accordance with § 46.364 (relating to parasite destruction in fish other than molluscan shellfish by freezing), although additional preparation may occur for palatability or aesthetic, epicurean, gastronomic or culinary purposes.

- (ii) Food that is raw or partially-undercooked animal-derived food, where the food facility offering the food has complied with § 46.361(d)(1) and the consumer notification requirements of § 46.423 (relating to consumer advisory required with respect to animal-derived foods that are raw, undercooked or not otherwise processed to eliminate pathogens), although additional preparation may occur for palatability or aesthetic, epicurean, gastronomic or culinary purposes.
 - (iii) Food that is prepared in accordance with a variance issued by the Department under § 46.361(d)(2) and § 46.1103 (relating to variances), although additional preparation may occur for palatability or aesthetic, epicurean, gastronomic or culinary purposes.
 - (iv) Raw fruits and vegetables that are washed in accordance with § 46.285 (relating to washing raw fruits and vegetables).
 - (v) Fruits and vegetables that are cooked for hot holding in accordance with § 46.363 (relating to plant food cooking for hot holding).
 - (vi) Potentially hazardous food that is cooked in accordance with the time and temperature requirements for that specific food in §§ 46.361 46.363, and that is cooled as specified in § 46.384 (relating to potentially hazardous food: cooling).
 - (vii) Plant food with respect to which further washing, cooking or other processing is not required for food safety, and from which rinds, peels, husks or shells (if naturally present) are removed.
- **Retail food establishment:** A food establishment which stores, prepares, packages, vends, offers for sale or otherwise provides food for human consumption and which relinquishes possession of food to a consumer directly, or indirectly, through a delivery service such as home delivery of grocery orders or delivery service provided by common carriers

II. Management and personal

- Designation and duties of person in charge: A person who is designated as in charge is required to be present at all times when the establishment is open. the person who is designated as in charge is responsible for ensuring that the requirements of the regulations are met.

§ 46.102. Duties of the person in charge:

The person in charge shall perform the following duties:

- (1) Ensure that food facility operations are not conducted in a private home where the food facility has not been approved by the Department, or in a room used as living or sleeping quarters as specified in § 46.922(k) (relating to functionality of various physical facilities of a food facility).
- (2) Ensure that persons unnecessary to the food facility operation are not allowed in the food preparation, food storage or warewashing areas, except that brief visits and tours may be authorized by the person in charge if steps

are taken to ensure that exposed food; clean equipment, utensils, linens and unwrapped single-service and single-use articles are protected from contamination.

- (3) Ensure that employees and other persons (such as delivery and maintenance persons and pesticide applicators) entering the food preparation, food storage and warewashing areas comply with this chapter.
 - (4) Routinely monitor employee handwashing to ensure that employees effectively clean their hands.
 - (5) Routinely monitor employee observations and periodically evaluate foods upon receipt to ensure that employees visibly observe foods as they are received to determine that they are from approved sources, delivered at the required temperatures, protected from contamination, unadulterated and accurately presented.
 - (6) Conduct daily oversight of the employees' routine monitoring of cooking temperatures using appropriate temperature measuring devices properly scaled and calibrated in accordance with § 46.561 and 46.691(b) (relating to accuracy of temperature measuring devices for food; and utensils and temperature and pressure measuring devices: repair and calibration), to ensure the employees are properly cooking potentially hazardous food, and are being particularly careful in cooking those foods known to cause severe foodborne illness and death, such as eggs and comminuted meats.
 - (7) Conduct daily oversight of the employees' routine monitoring of food temperatures during cooling, to ensure that employees are using proper methods to rapidly cool potentially hazardous foods that are not held hot or are not for consumption within 4 hours.
 - (8) Ensure that consumers who order raw or partially cooked ready-to-eat foods of animal origin are informed, in accordance with § 46.423 (relating to consumer advisory required with respect to animal-derived foods that are raw, undercooked or not otherwise processed to eliminate pathogens), that the food is not cooked sufficiently to ensure its safety.
 - (9) Routinely monitor solution temperature and exposure time for hot water sanitizing, and chemical concentration, pH, temperature and exposure time for chemical sanitizing, to ensure that employees properly sanitize cleaned multiuse equipment and utensils before they are reused.
 - (10) Ensure that consumers are notified that clean tableware is to be used when they return to self-service areas such as salad bars and buffets, in accordance with § 46.306 (relating to using clean tableware for second portions and refills).
 - (11) Ensure that employees prevent cross contamination of ready-to-eat food with bare hands by properly using suitable utensils, such as deli tissue, spatulas, tongs, single-use gloves or dispensing equipment, or by following a procedure approved under § 46.261(d) (relating to preventing contamination from food employees' hands).
 - (12) Ensure that employees are properly trained in food safety as it relates to their assigned duties.
- Employee health

- § 46.111-5: Reporting certain medical conditions: a list of medical conditions or specific symptoms must be reported by employees to the person in charge, who if certain illnesses are involved must inform the Department. The food establishment must restrict sick employees from the premises if certain illnesses are involved or if certain symptoms are involved restrict employees from dealing with exposed food; clean equipment, utensils, linens and unwrapped single-service and single-use articles
- § 46.131-7: Personal cleanliness: this section deals with the employees' duty to keep clean including finger nails, outer clothes and a ban on wearing jewelry on the hands or wrist (except plain bands, ie wedding rings), to wash their hands and the requirement for hand sanitizers.
- § 46.151-3: Hygienic practices: prohibits employees from eating, drinking or using tobacco where contamination is possible, except if drinking from a contain that is unlikely to cause contamination. There is also a requirement for hairnets and a prohibition on animals(except fish tanks and such)

III. Food:

- § 46.201: Characteristics: Food shall be safe, unadulterated and honestly presented
- § 46.211-22: Sources of food: there are specific requirements for various types of food including beef, meat and poultry, milk and milk products, eggs, fish, wild mushrooms, shellfish, ice, and game animals. The main requirement is that food comes from a source that complies with the Food Act and that records are kept.
- § 46.241-51: Receiving food: there are requirements when receiving certain food items including shell eggs, eggs and milk products, shellfish, and juice. There are also requirements for record keeping and temperature requirements for received food.
- Preventing contamination: These sections have specific requirements to avoid contamination
 - § 46.261- 2: By employees:
 - § 46.281-6: By food and ingredients
 - § 46.301-7: By equipment
 - § 46.321-3: By the premises
 - § 46.341-4: By consumers
- § 46.361-6: Destruction of organisms: these sections have specific temperature requirements from various methods of cooking and various food items.
- § 46.381-5: Limitation of growth of organisms: These sections have specific requirements for storing and maintain foods at certain temperatures, including cooling and thawing potentially hazardous foods.
- § 46.401-2: Specialized processing methods: These sections allow for processing methods that the Department does not recognize as safe to be used if a special variance is used. This could be important for some farm operations using non modern methods to prepare food.
- § 46.421-3: Food identity, processing, and labeling: These sections have requirements for labeling food including identity and warning if food contains raw or uncooked animal products.
- § 46.441: Unsafe, adulterated or contaminated food: This sections requires that certain foods be discarded.

- IV. Equipment:** 46.501-775: There are very specific requirements for what is required for equipment, utensils, and facilities. This also covers
- V. Water, plumbing, and waste water:** 46.801- 886: These sections cover the source and quality of drinking water and the materials, location, capacity, and maintenance of a food establishment's plumbing facilities. This section also deals with sewage, waste water and rain water.
- VI. Physical facilities:** 46.901-982: These sections deal with the actual building of the food establishment. Specifically this deals with design, construction, installation and materials. There are also regulations that deal with maintenance and operation.
- VII. Poisonous or toxic materials:** § 46.1001-1041: These sections deal with poisonous and toxic materials that are necessary for the operation and maintenance of a food establishment.

Federal laws

There are many federal laws that effect the production, sale, and transportation of food. These laws are mostly administered by the FDA. Federal law food laws usually provide for cooperation with the states to avoid a dual regulatory system. Here are a few of the federal laws that can have an effect on direct farm marketing.

- I. Food Drug and Cosmetic Act:** 21 U.S.C. 9
This is the major federal law dealing with food safety. The act is administered by the Food and Drug Administration (FDA). This law deals with adulterated or misbranded food in interstate commerce. There is a requirement for food establishments to register with the FDA. Farms and retail food establishments are not required to register
- II. Meat inspection act:** 21 U.S.C. 12
- III. Poultry Products Inspection Act:** 21 U.S.C. 10
- IV. Egg Products Inspection Act:** 21 U.S.C. 15

For more information on any of these laws please feel free to contact the Center. *The Center does not provide legal advice, nor is its work intended to be a substitute for such advice and counsel. The Center suggests that you contact counsel or food inspection officers with specific questions.*