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Administrator's Interpretation No. 2012-1

December 12, 2012

Issued by DEPUTY ADMINISTRATOR NANCY LEPPINK

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**SUBJECT:** Pine Straw Industry under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the Fair Labor Standards Act (FLSA), and the Occupational Safety and Health Act (OSH Act) Field Sanitation Standards (FSS).

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The Administrator has determined that additional clarification is needed concerning the application of the MSPA, FLSA, and OSH Act FSS to activities in connection with the raking, gathering, baling, and loading of pine straw gathered from pine trees grown for commercial timber, as described below. The Administrator is issuing this interpretation to provide needed guidance to ensure these laws are properly applied to this industry and that workers are properly protected.

### Background

Pine straw is the fresh, undecomposed pine needles that have fallen from pine trees. It is produced commercially and collected for use as a mulch and groundcover. Although all pine forests or pine woodlands produce pine straw, the vast majority of pine straw gathered for commercial sale is collected from pine stands, or "plantations," grown for commercial timber. In order to gather pine straw, workers must first clear the ground of underlying plants and debris, which often requires the mechanical mowing of ground vegetation by a "bush hog," and the manual clearing of loose branches and pine cones. After clearing the tract, workers rake the pine straw and deposit it into a bailing box, which compresses the pine straw into bales. Workers then load the pine straw onto trucks with a forklift. Individual pine straw workers can generally gather and bale between 100 and 200 bales of pine straw per day, covering about one-half acre of land.<sup>1</sup>

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<sup>1</sup> *Morante-Navarro, et al. v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1165 (11th Cir. 2003).

The management of pine straw has become a growing industry practice for pine stand owners seeking additional sources of income. Numerous industry publications, including information distributed by Forestry Extension Services and the U.S. Department of Agriculture, explain how to cultivate pine straw by controlling weeds, and fertilizing the pine stand to increase tree growth and pine straw production. (See Mary L. Duryea, *Pine Straw Management in Florida's Forests*, University of Florida IFAS Extension (May 2009), <http://edis.ifas.ufl.edu/fr030>; E.A. Ogden and L.A. Morris, *Effects of Annual Pine Straw Removal and Mid-rotation Fertilization on Pine Growth in Unthinned Plantations in Georgia*, The Slash Pine Symposium (USDA Forest Service) April 2002, at 90, available at [http://www.srs.fs.usda.gov/pubs/gtr/gtr\\_srs076.pdf](http://www.srs.fs.usda.gov/pubs/gtr/gtr_srs076.pdf); Daniel Pote and Tommy Daniel, *Managing Pine Straw Harvests to Minimize Soil and Water Losses* (Jan. 1 2008), [http://www.ars.usda.gov/research/publications/publications.htm?seq\\_no\\_115=216239](http://www.ars.usda.gov/research/publications/publications.htm?seq_no_115=216239)). Generally, the activities of raking, gathering, baling, and loading of pine straw are carried out by “pine straw contractors” who contract with the pine stand owners to purchase and harvest the pine straw. The contractors then recruit and supervise the employees performing such work.

### **Pine Straw under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)**

The MSPA generally applies to workers engaged in agricultural employment that is of a seasonal or other temporary nature. The MSPA sets forth three definitions of agricultural employment: (1) employment within the provisions of section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 203(f); (2) employment within the provisions of section 3121(g) of the Internal Revenue Code, 26 U.S.C. § 3121(g); and (3) “the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802(3).

The Eleventh Circuit has held that the raking, gathering, baling, and loading of pine straw qualifies as agricultural employment under the third prong of the MSPA definition. See *Morante-Navarro, et al. v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1172 (11th Cir. 2003).<sup>2</sup> In *Morante-Navarro*, the Eleventh Circuit concluded that pine straw is an “agricultural or horticultural commodity” under MSPA. *Id.* Although MSPA does not define that term, the court observed that Congress intended to broadly define agricultural employment in the statute. *Id.* at 1167-69. The court also looked to a 1994 Wage and Hour Division opinion letter in which the Administrator stated that agricultural employment under MSPA includes forestry operations such as the handling of small, wild plants growing in the forest and the harvesting of evergreen boughs, yew bark, and ferns if performed with “predominately manual labor within a forest.” *Id.* at 1170-71 (quoting WHD Administrator Opinion Letter No. 1732, WH-541, 1994 WL 975108

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<sup>2</sup> The Eleventh Circuit also determined that these pine straw activities would not qualify as agricultural employment under the FLSA. While the Administrator generally agrees with the court’s conclusion regarding FLSA coverage, she disagrees with the court’s analysis as explained below.

(Dec. 1, 1994)). Based on this interpretation and its own reading of the statute, the Eleventh Circuit explained that the determination of whether an activity constitutes agricultural employment under MSPA must focus on the nature of the agricultural commodity and its manual cultivation, not the location of the activity. *Id.* Accordingly, the court concluded that pine straw is an agricultural commodity so long as workers use agricultural techniques or methods to cultivate it and that workers handling pine straw are therefore engaged in agricultural employment under MSPA. *Id.* at 1170-72.

The Eleventh Circuit's decision that the raking, gathering, baling, and loading of pine straw constitutes agricultural employment under MSPA is consistent with other court decisions concluding that the expansive scope of agricultural employment under MSPA includes work within the forestry industry. In *Bresgal v. Brock*, 843 F.2d 1163, 1171-72 (9th Cir. 1987), the Ninth Circuit held that MSPA covers workers engaged in predominantly manual forestry work, such as tree planting, brush clearing, pre-commercial tree thinning, and forest firefighting activities. Similarly, in *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir. 1988), the Fifth Circuit concluded that Congress intended that agricultural employment under MSPA include forestry operations even when not performed on a traditional farm. In that case, the Fifth Circuit determined that the planting of pine seedlings thus qualified as agricultural employment under MSPA. *Id.* at 276-77. The Eleventh Circuit also has determined that Congress specifically intended that the MSPA apply to farm labor contractors engaged in the forestry business. *See Davis Forestry Corp. v. Smith*, 707 F.2d 1325, 1328 n.3 (11th Cir. 1983).

For all of these reasons, the Administrator has determined that workers engaged in the raking, gathering, baling, and loading of pine straw are engaged in agricultural employment under MSPA. Such workers are therefore generally entitled to the protections of MSPA so long as their work is of a seasonal or temporary nature and their employer is subject to the statute.

### **Pine Straw under the Occupational Safety and Health Act (OSH Act) Field Sanitation Standards (FSS)**

“Agricultural employers” must comply with the OSH Act’s Field Sanitation Standards with respect to workers “engaged in hand-labor operations in the field.” 29 C.F.R. §1928.110. The OSH Act FSS therefore apply to pine stand owners and pine straw contractors that qualify as agricultural employers under the regulation. Pine stand owners are agricultural employers for purposes of the OSH Act FSS because they own or operate an agricultural establishment. *See* 29 C.F.R. § 1928.110(b)(i). A pine stand or pine plantation qualifies as an agricultural establishment because it is a “business operation that uses paid employees in the production of food, fiber, or other materials such as seed, seedlings, plants, or parts of plants.” 29 C.F.R. § 1928.110(b). A pine straw contractor may qualify as an agricultural employer if it contracts with the pine stand owner in advance to purchase and harvest the pine straw and exercises substantial control over the production or recruits and supervises employees that work at the pine stand. *See* 29 C.F.R. § 1928.110(b)(ii)- (iii).

The OSH Act Field Sanitation Standards apply to any agricultural establishment where eleven (11) or more employees are engaged on any given day in the preceding twelve (12) months in hand-labor operations in the field. *See* 29 C.F.R. § 1928.110(a). When eleven or more pine straw workers have been thus employed on any given day in the preceding twelve months to perform activities such as removing weeds or twigs from the straw, raking and gathering the straw, or baling the straw by hand or by using hand tools, pine stand owners and covered contractors are required to comply with the Field Sanitation Standards of the OSH Act.

### **Pine Straw under the Fair Labor Standards Act (FLSA)**

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards. Generally, the FLSA applies to any employee who engages in interstate commerce or the production of goods for interstate commerce, or to the employees of an enterprise engaging in interstate commerce or the production of goods for interstate commerce with an annual dollar volume of \$500,000 or more per year. As explained below, pine straw workers will generally be entitled to the minimum wage and overtime protections of the FLSA, as most pine straw workers are not engaged in exempt agricultural employment.

While the Administrator agrees with the Eleventh Circuit that pine straw activities are not within the FLSA's definition of primary agriculture, her analysis is different.<sup>3</sup> Section 13(a)(6)(A) of the FLSA exempts employees employed in agriculture from minimum wage and overtime pay in certain circumstances. Similarly, Section 13(b)(12) of the FLSA exempts from overtime pay any "employee employed in agriculture." For purposes of these exemptions, the definition of agriculture has been divided into two distinct branches: primary and secondary agriculture. Primary agriculture includes "farming in all its branches" and also includes "cultivation, growing, and harvesting of any agricultural or horticultural commodities." 29 U.S.C. 203(f). *See* 29 C.F.R. 780.105(b). Secondary agriculture includes "any practices (*including any forestry or lumbering operations*) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." 29 U.S.C. 203(f) (emphasis added). *See* 29 C.F.R. 780.105(c).

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<sup>3</sup> The court determined in *Morante-Navarro* that under the FLSA's definition of agricultural employment, the work must be performed on a farm. *See* 350 F.3d at 1167. The same conclusion was reached in *Bracamontes*, 840 F.2d at 273, and *Bresgal*, 843 F.2d at 1168. However, the plain language of the definition of agriculture in the FLSA is not limited to farms. As noted above the definition of primary agriculture is expansive, and it is only the definition of secondary agriculture that is limited to activities "performed by a farmer or on a farm." *See* 29 C.F.R. § 780.106 ("that production takes place in a city or on industrial premises . . . rather than in the country or on premises possessing the normal characteristics of a farm makes no difference.")

Based on the plain language of the statute, forestry and lumbering operations are not considered primary agriculture. *See Dep't of Labor v. North Carolina Growers Ass'n, Inc.*, 377 F.3d 345, 351 (4th Cir. 2004). In *North Carolina Growers Ass'n*, the court explained that the omission of the terms forestry and lumbering operations from the definition of primary agriculture, together with use of the terms in the definition of secondary agriculture, and the language of the section 13(b)(28) exemption, exclude forestry from the definition of primary agriculture. Section 13(b)(28) exempts from overtime pay “any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.” As the Fourth Circuit observed, the Section 13(b)(28) exemption “would be superfluous if Congress had not intended to exclude forestry from the primary definition of agriculture in § 203(f).” *Id.*

Section 13(b)(28) also defines the scope of such excluded forestry and lumbering activities. *See North Carolina Growers Ass'n*, 377 F.3d at 351 n.8 (explaining that the activities listed in Section 13(b)(28) are the forestry or lumbering operations that Congress intended to exclude from the definition of primary agriculture). Section 13(b)(28) refers to work performed on trees being grown for “traditional forestry purposes” such as processing into pulp or harvesting for timber. *Id.* at 353. The definition also includes the preparation or transportation of other forestry products. The FLSA’s implementing regulations explain that “other forestry products” means “plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as . . . roots, stems, leaves, Spanish moss, wild fruit, and brush.” 29 C.F.R. § 788.10.

Employees that are engaged in the gathering, preparing, and transporting of pine straw are, therefore, typically employed in forestry and lumbering operations. As discussed above, most pine straw harvested for commercial sale is collected from trees that are grown for commercial timber on pine plantations or pine stands. Pine straw is then produced commercially and collected for use as a mulch and groundcover. Because pine straw generally comes from trees that are used for traditional forestry purposes such as timber and pulp, employees harvesting pine straw are engaged in forestry and lumbering operations as defined in Section 13(b)(28). Similarly, because pine straw is a natural property or substance of trees, pine straw itself qualifies as a “forestry product” under Section 13(b)(28). *See* 29 C.F.R. § 788.10. Employees that prepare or transport pine straw to a mill, processing plant, railroad, or other transportation terminal are therefore also engaged in forestry and lumbering operations.

Workers engaged in the harvesting, cultivating, preparing, and transporting of pine straw from trees grown for commercial purposes are therefore generally entitled to the minimum wage and overtime protections of the FLSA. Because they are classified as forestry or lumbering operations, such pine straw activities cannot constitute primary agriculture.

Because pine straw operations are excluded from the primary definition of agriculture, such operations can only qualify as agriculture under the FLSA when they are performed by a farmer or on a farm as an incident to other farming operations. *See North Carolina Growers Ass'n*, 377 F.3d at 351; 29 C.F.R. § 780.200. Further, because pine straw activities typically do not occur on a farm in conjunction with other farming operations, such activities generally will not qualify as secondary agriculture. Accordingly, the minimum wage and overtime pay protections of the FLSA will apply to most workers employed to perform the pine straw activities described above.

In certain limited circumstances, however, workers engaged in pine straw activities may be exempt from the minimum wage or overtime pay provisions of the FLSA. For example, if such activities are performed by a farmer or on a farm as an incident to the farmer's farming operations, such workers could be exempt from the overtime pay provisions of the FLSA under Section 13(b)(12) and may also be exempt from the minimum wage provisions under Section 13(a)(6)(A) if all other criteria of the exemption are met. When such work is not within the scope of FLSA secondary agriculture, if eight or fewer employees are employed in the pine straw operation, they would be exempt from overtime pay pursuant to Section 13(b)(28).

The general rule, however, is that workers engaged in the raking, gathering, baling, and loading of pine straw from commercial pine stands or plantations will be covered by the minimum wage and overtime provisions of the FLSA. While it may seem counterintuitive that pine straw activities will be considered agriculture under MSPA, but not under the FLSA, such an outcome merely reflects that MSPA defines agriculture more broadly than does the FLSA. *See Colunga v. Young*, 722 F. Supp. 1479, 1486 (W.D. Mich. 1989) ("The relevant MSAWPA provisions define agriculture more broadly than the FLSA exemption, reflecting Congress' remedial purpose to protect migrant workers under the MSAWPA and to circumscribe exemptions from minimum wage requirements under the FLSA").

Finally, the FLSA also contains child labor standards that limit the ages of employment and types of jobs that may be performed by young workers. As previously stated, the raking, gathering, baling, and loading of pine straw generally only qualifies as "agriculture" under the FLSA when it occurs within the meaning of secondary agriculture (i.e. performed by a farmer or on a farm as an incident to or in conjunction with such farming operation). In such situations, the agricultural child labor standards apply. *See* 29 C.F.R. § 570.71. Generally, under such agricultural standards, hired farm workers under the age of 16, employed in compliance with the age limitations established by Congress, may be employed to perform all the tasks associated with the collection of pine straw except operating and assisting in the operation of a forklift. If the work does not fall within the meaning of secondary agriculture, it would fall under the FLSA child labor provisions applicable to nonagricultural work. Under the nonagricultural provisions, hired workers under 16 years of age are prohibited from employment involving the raking, gathering, baling, and loading of pine straw as it is not an occupation permitted by the federal child labor provisions. *See* 29 C.F.R. §§ 570.31-570.39. Workers who are 16 and 17 years of age could perform most activities associated with harvesting pine straw,

except they are prohibited from operating or assisting in the operation of power-driven hoisting devices, such as forklifts, backhoes, and skid steer loaders. *See* 29 C.F.R. § 570.58 (occupations involved in the operation of power-driven hoisting apparatus).

### **Pine Straw Employees and Temporary Immigration Programs**

Employers can utilize the H-2B temporary visa program to employ workers in the pine straw activities discussed here so long as the other criteria of the program are met. Pine straw employers cannot generally utilize the H-2A temporary visa program because their activities generally do not meet the definition of “agriculture” under section 3(f) of the FLSA or section 3121(g) of the Internal Revenue Code. Although the September 2009 Notice of Proposed Rulemaking on the H-2A program proposed the inclusion of pine straw activities within the definition of agriculture, a lack of support on all sides compelled the Department to exclude these activities from the Final Rule and to maintain them as non-agricultural labor or services for purposes of the H-2B program. *See* 75 Fed. Reg. 6884, 6889 (Feb. 12, 2010).

### Conclusion

Based upon a thorough examination of the relevant factors, it is the Administrator’s interpretation that, in general, pine straw activities discussed here will be considered “agricultural employment” for purposes of coverage under the MSPA and the OSH Act FSS. Pine straw workers will therefore be generally afforded the protection of both of these statutes. Pine straw workers will also generally be entitled to the minimum wage and overtime pay protections of the FLSA except under the very limited circumstances discussed above (i.e. where such activities are performed by a farmer or on a farm as an incident to the farmer’s farming operations). Employers may employ workers under the H-2B temporary visa program in the pine straw activities discussed herein so long as the other criteria of the program are satisfied.