

Maintaining a Safe Premise

Background

Farmers have unique liability concerns for harm that would occur to visitors on the farm property. A farmer often has more land, guests, trespassers, and dangerous equipment and machinery compared to a typical residential property owner. The “possessor” of the property is the first party to whom legal liability might extend. The possessor of the property is not always the property owner. The farmer should examine liability concerns for all property that he or she owns, leases, or performs work on as an independent contractor.

The farmer has a legal duty to protect a visitor on the property. The farmer must use reasonable care in keeping the premises free from dangerous conditions. Negligence is the failure to exercise the care that a reasonable person would exercise. An injured customer may claim that the accident was a result of your breach of duty to use reasonable care in keeping the premises free from dangerous conditions. The standard of care will depend on the circumstances.

Reasonable care toward children is expanded to take into account their smaller size, curiosity, and lack of caution or knowledge of particular dangers. If there are dangerous conditions on the property and children are likely to come onto the property then there is a heightened responsibility. Dangerous yet attractive conditions may include swimming pools, chemicals and chemical storage areas, grain bins, manure lagoons, water wells and cisterns, heavy equipment, machinery and tools, gas and water tanks, and some animals.

Status of the Property Visitor

There are three types of visitors that may come onto your property. Your level of responsibility varies with respect to each visitor’s status. An invitee is a person the farmer invites onto the property for business purposes. The invitation may be expressly stated or implied by the farmer’s actions. The farmer has the highest duty of care for an invitee, which is to protect the invitee from harm by keeping the property in a reasonably safe condition. The farmer must take reasonable steps to eliminate all known and unknown dangerous conditions on the property or to give the visitor adequate warning of dangerous conditions that have not been eliminated.

Reasonable care is the quality of care a reasonable person would exercise in the same or similar circumstances.

A licensee is a person who is on the property for his or her own benefit. The licensee is not invited onto the property but is there with the farmer’s permission or

acquiescence. A farmer must make safe any known dangerous conditions that the licensee would be expected to encounter or to warn the licensee of known dangerous conditions that have not been eliminated.

A third type of visitor to the property is the trespasser, a person who has not been invited onto the property and does not have the possessor's permission to be on the property. The farmer is not obligated to protect an unknown trespasser from dangerous conditions. The farmer's only duty is to refrain from harming the person by willful conduct. However, if the farmer knows that a person is trespassing on the property, the farmer must protect the trespasser from known dangerous conditions by eliminating the condition or warning the trespasser. An example of known trespassers is neighbor children who regularly cut across the field.

In the State of Washington, a farmer shall not be liable for unintentional injuries to a recreational user who does not pay a fee for coming on the property. A farmer who allows members of the public to use his or her for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, hang gliding, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefore, shall not be liable for unintentional injuries to such users.

Condition of the Property

The condition of the property is a critical factor when determining liability for injury.

- Was the injury the result of a dangerous condition on the property?
- Could the injury have been avoided if the possessor had inspected the property and eliminated the dangerous condition?

A dangerous condition is one that creates an unreasonable and unnecessary risk of harm that is not readily apparent to the visitor.

- Should the visitor have been aware that the condition was dangerous?

The determination of whether a condition is dangerous is based on two questions:

1. Does the condition create an unreasonable or unnecessary risk of harm?
2. Is the condition readily apparent to the visitor? If it does create an unreasonable risk of harm and it is not readily apparent, it is likely a dangerous condition.

A hidden dangerous condition is one a visitor would not discover even if being cautious. Since the condition is hidden and the visitor encounters this situation, harm is unavoidable. Some examples of these conditions are a hole in the floor that is covered with straw or an animal trap that is covered and camouflaged.

The farmer must take care that the elimination of a dangerous condition is complete and does not create new dangerous conditions. The farmer must ensure that repair work or other actions are successful in eliminating the condition. The farmer must warn visitors of dangerous conditions that have not been eliminated. This warning can be spoken, written, maps, signs or by roping or blocking off the dangerous area. The warning must clearly identify the danger. A spoken warning should also be backed up by a written warning.

Employees and Liability

If the employee creates a dangerous condition on the property and fails to warn a visitor of this condition, the employee is liable. The employer may not be liable for injuries resulting from willful or intentional acts of the employee.

Liability for Injuries by Animals

The owner of a dog is strictly liable for any injury that may occur when a invitee is on the property. Washington RCW16.08.040 clearly indicates that the farmer is liable regardless of the former viciousness of the dog or the owners knowledge of former viciousness of the dog.

Limiting Liability

There are many actions a farmer can take to limit the potential of liability for injuries to visitors on the property. When inviting the public to come onto your property landowner must take all necessary precautions against their injury and to warn of all known and hidden dangers.

- Inspect the Property. The farmer should regularly inspect the property for dangerous conditions, being sure to note all hidden and known dangerous conditions. Document the property inspections in writing.

- **Eliminate Dangerous Conditions, Where Possible.** The possessor will have the best assurance of liability protection by eliminating all dangerous conditions. Ensure that the repairs are complete and performed properly, and document the repair work in writing. Make sure all shields and protective devices are properly in place on machinery and equipment
- **Provide Warnings.** If a dangerous condition cannot be eliminated, the possessor should provide clear warnings of the condition. A warning can be in the form of a sign, a map, or instructions, or by roping, fencing, or otherwise blocking access to the dangerous condition. Avoid verbal warnings that cannot be documented. Keep a written record and/or copy of all warnings.
- **Educate and Train Employees.** Farm employees should also understand liability rules. The employees must be adequately trained so that they know how to recognize and eliminate dangerous conditions, do not create or contribute to dangerous conditions, and know how to warn visitors of the conditions.
- **Educate Visitors.** Educate parents, teachers and other visitors on any danger. Advise both verbally and in writing what the rules of behavior are when on the farm.
- **Maintain Records.** Take photographs or videotape of the property. Maintain a record of property inspections, corrective measures and protective actions.

Hold Harmless Agreement

A waiver or release is a way to shift liability to someone else. When appropriate, you are better off having a release than not. The release will not be useful if you have not taken reasonable precautions and reduce the possible risks of harm to your customers.

When inviting the public to your farm, you must first make your property as safe as possible to avoid accidents. However, should one occur, the agreements you make prior to the farm activity may dictate who is legally responsible for the injury. Following are explanations of a few practices you should be aware of before proceeding with farm visits. A discussion with your legal counsel is advised.

Hold Harmless Agreement. A hold harmless agreement between two parties states that one party will assume the risk of legal liability associated with an event for the other party. Usually landlords will include hold harmless language in leases to protect them from being sued if an accident occurs on their property. Farmers may ask on-site vendors to sign hold harmless agreements that release farmers from liability should a vendor-related accident occur on the farm.

Participant Waivers. Typically, participant waivers are used when minors are involved in school or camp activities, and would be appropriate for on-farm school tours. The minor's parents or guardians are required to sign the document agreeing to release the farmer from any responsibility for injury to their child. However, the waiver does not absolve farmers from liability for injuries directly caused by their negligence.

Supporting resources:

Sample Hold Harmless Agreement
[follows]

[Volunteer Assumption of Risk Forms](http://www.alephnet.net/MLK/PDF/SecondHarvest.pdf)

[<http://www.alephnet.net/MLK/PDF/SecondHarvest.pdf>]

Ohio State University Fact Sheet: [Liability for Visitors to Farm Property](http://ohioline.osu.edu/als-fact/1002.html)

[<http://ohioline.osu.edu/als-fact/1002.html>]

Sample Hold Harmless Agreement

RELEASE AND ACCEPTANCE OF RESPONSIBILITY AND ACKNOWLEDGMENT OF RISKS

ACKNOWLEDGMENT OF RISKS I understand and acknowledge that the activity that I am about to engage in bears certain known risks and unanticipated risks which could result in injury, death, or damage to myself, my property, or to other third parties. I understand and acknowledge those risks may result in personal claims against _____ or claims against me by other third parties.

ACCEPTANCE OF RISK AND RESPONSIBILITY - Being aware that this activity entails risks of injury to myself and to third parties as a result of my actions, I agree to accept and assume all responsibility and risk for injury, death, or damage to myself or to my property arising from my participation in this activity. I agree, covenant, and promise to accept and assume all responsibility and risk for injury, death, or damage to other third parties and their property arising from my participation in this activity. My participation in this activity is purely voluntary and I elect to participate in spite of the risks.

RELEASE - I hereby voluntarily release _____, its agents or employees, and all other persons or entities from any and all liability, claims, demands, actions or rights of action, which are related to or are in any way connected with my participation in this activity, including specifically but not limited to the negligent acts or omissions of _____, its agents or employees, and all other persons or entities, for any and all injury, death, damage to myself or to my property. I further agree, promise, and covenant to hold harmless and indemnify _____, its agents or employees, and all other persons or entities from all defense costs, including attorney's fees, or from any other costs incurred in connection with claims for bodily injury or property damage which I may negligently or intentionally cause to other third parties in the course of my participation in the activity. I further agree, promise, and covenant not sue, assert or otherwise maintain or assert any claim against _____, its agents or employees, and all other persons or entities, for any injury, death or damage to myself or to my property, arising from or connected with my participation in this activity or from any claim asserted against me by other third parties. In signing this document, I fully recognize that if anyone is hurt or property is damaged while I engage in this activity, I will have no right to make a claim or file a lawsuit against _____, or its officers, agents, or employees, even if they or any of them negligently caused the bodily injury or property damage.

EFFECT OF THIS RELEASE AGREEMENT - I understand and acknowledge that by initiating and/or signing this document I have given up certain legal rights and/or possible claims which I might otherwise assert or maintain against _____, its agents or employees, and other persons, entities, including specifically, but not limited to, rights arising from or claims for the acts or OMISSIONS, negligent in any degree, of _____, its agents or employees, and all other persons or entities.

I understand and acknowledge that by initiating and/or signing this document, I have assumed responsibility and legal liability for the claims or other legal demands, including defense costs, which may be asserted by spectators or other third parties against me as a result of participation in this activity. I understand that this is the entire Agreement between myself and _____, its agents or employees, or agent of ___ or by me. My signature below indicates that I have read this entire document, understand it completely, and agree to be bound by its terms.

SIGNATURE _____

SIGNATURE OF PARENT OR GUARDIAN (under 18) _____