

Kentucky Workers' Compensation Laws: Mulling Over the "Agricultural" Exemption

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Agriculture *noun*
ag • ri • cul • ture

The science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products.¹

INTRODUCTION

As surprising as it may sound, workers' compensation laws have been around for thousands of years.² The earliest codified schemes date back to approximately 2050 B.C. in ancient Sumer, wherein workers were compensated for their bodily injuries.³ Similar provisions were present in the laws of nearly all old-world powers throughout history, including ancient Greece, Rome, and China.⁴ In fact, all the aforementioned nations had compensation schedules in their laws that provided specific payments for workers based on which body parts they lost.⁵ It was not until the rise of feudalism in the Middle Ages that the concept of workers'

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¹ Agriculture, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/agriculture#other-words> (last viewed June 14, 2022) [<https://perma.cc/H3MQ-PCMZ>].

² Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHOPAEDIC J. 106 (1999), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/pdf/IowaOrthopJ-19-106.pdf> [<https://perma.cc/BPQ3-XQC7>].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

compensation began to disappear from legal codes around the globe.⁶

Workers' compensation laws remained largely dormant in global law until their resurgence was catalyzed by an unlikely champion—Prussian Chancellor Otto Von Bismarck.⁷ Under Bismarck's rule, the first modern workers' compensation system was established in 1884 and was coined "Workers' Accident Insurance."⁸ The concept has remained nearly unchanged since its 1884 re-inception, and the Prussian framework serves as a rough basis for nearly all active workers' compensation statutes in the United States.⁹

The movement toward implementing workers' compensation laws in the United States was spurred by Upton Sinclair's ubiquitous novel *The Jungle*, which described the horrendous working conditions of Chicago slaughterhouses in the early 1900s.¹⁰ Wisconsin was the first state to pass comprehensive workers' compensation laws in 1911.¹¹ Today, every state has workers' compensation laws that cover nearly 90 percent of the American workforce.¹² Every state has a mandatory workers' compensation system, with the sole exception of Texas—which leaves the choice to opt-in to the workers' compensation system at the discretion of employers.¹³

Under current workers' compensation laws, when an employee is injured on the job, they are compensated for lost wages

⁶ *Id.*

⁷ Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHOPEDIC J. 106, 107 (1999), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/pdf/IowaOrthopJ-19-106.pdf> [<https://perma.cc/BPQ3-XQC7>].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 108.

¹¹ *Id.*

¹² See Linda Darling-Hammond & Thomas J. Kniesner, *The Law and Economics of Workers' Compensation*, 4 (1980), <https://www.rand.org/content/dam/rand/pubs/reports/2008/R2716.pdf> [<https://perma.cc/4BN5-KERT>]; SOC. SEC. OFF. OF RET. AND DISABILITY POL'Y, ANN. STAT. SUPP. (2017), <https://www.ssa.gov/policy/docs/statcomps/supplement/2017/workerscomp.html> [<https://perma.cc/L67A-BEKM>].

¹³ SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R44580, WORKERS' COMPENSATION: OVERVIEW AND ISSUES (2020), <https://sgp.fas.org/crs/misc/R44580.pdf> [<https://perma.cc/WMT2-WQQ3>].

and medical care, regardless of negligence.¹⁴ Broadly speaking, wage-replacement payments correspond to the type and severity of the injury an employee sustains.¹⁵ The aggregate amount an injured employee is paid, for example, can depend on whether the disability sustained is permanent or temporary and whether the injury is total or partial.¹⁶ If an employee dies in the course of their employment, benefits are conferred upon their family.¹⁷

This Note will argue that the agricultural exemption present under Kentucky workers' compensation statutes should be amended or repealed. Part I presents a brief overview of the adoption of workers' compensation laws in the United States. Part II discusses the legislative history and legislative intent behind Kentucky's agricultural exemption. Part III discusses the effects of the agricultural exemption in Kentucky case law, including its overapplication due to the vague definition of "agriculture." Part IV discusses a proposed amendment to the agricultural exemption and other workable solutions the legislature, agricultural employers, and Kentucky Supreme Court can implement to mitigate its harmful effects.

I. THE THEORY OF WORKERS' COMPENSATION LAWS

A. *The Economics of the Workers' Compensation System*

Workplace injuries occur fairly regularly in the United States.¹⁸ In 2020, there were 2.7 million nonfatal workplace injuries—down from 2.8 million in 2019, according to the Bureau of Labor Statistics ("BLS").¹⁹ Between 2019 and 2020, the rate of injury per 100 full-time employees diminished from 2.6 to 2.2 percent.²⁰ Among the injuries included in the aforementioned BLS statistics are over 1.1 million nonfatal injuries and illnesses which

¹⁴ NAT'L ACAD. OF SOC. INS., *Workers Compensation: Benefits, Costs, and Coverage (2018 Data), Executive Summary*, 1 (2020), https://www.nasi.org/wp-content/uploads/2020/11/Executive-Summary_Workers-Comp-Benefits-Costs-and-Coverage-2018-Data.pdf [<https://perma.cc/QN54-UWFA>].

¹⁵ *Id.*

¹⁶ SOC. SEC. OFF., *supra* note 12.

¹⁷ *Id.*

¹⁸ NEWS RELEASE, *Bureau of Lab. Stat., Employer-Reported Workplace Injuries and Illnesses*, 1 (Nov. 3, 2021), https://www.bls.gov/news.release/archives/osh_11032021.pdf [<https://perma.cc/6PCA-UNVZ>].

¹⁹ *Id.*

²⁰ *Id.*

caused private industry workers to miss at least one day of work in 2020.²¹

A caveat to consider regarding the dip in injury rates between 2019 and 2020 is the COVID-19 pandemic which sent many workers away from their day-to-day workplaces.²² The National Safety Council noted that the COVID-19 pandemic may have played a role in the decreased rate of workplace injuries in 2020.²³

The United States' workers' compensation scheme was developed to shift the burden of economic losses resulting from workplace injuries from the public to employers.²⁴ Interestingly, in economic terms, the Social Security Administration has referred to the cost of work-related accidents on employers as a "business expense."²⁵ The workers' compensation system shifts costs in this way as it is seen as the most efficient means of mitigating the economic costs of the loss of productivity from employee injuries.²⁶ Companies factor the costs of payments to injured workers into the cost of products, and ultimately shift the cost of employee injuries onto consumers.²⁷ In essence, companies can "price-in" the cost of workers' compensation when bringing their goods to market, spreading this cost broadly among consumers.²⁸

In addition to the benefit of cost-shifting medical expenses from workplace injuries, workers' compensation makes the dispute resolution process more efficient.²⁹ Before the workers' compensation system was established, employees only had one means of seeking damages from their employers when they were injured: litigation.³⁰ Eventually, workers and employers compromised on the workers' compensation system because of the

²¹ *Id.*

²² U.S. Bureau of Labor Statistics Report: *Injuries Down, Illnesses Up in 2020: The COVID-19 Pandemic Played a Unique Role*, NAT'L SAFETY COUNCIL (Nov. 12, 2021), <https://www.nsc.org/newsroom/us-bureau-of-labor-statistics-report-injuries-down> [<https://perma.cc/R3VS-AZC6>].

²³ *Id.*

²⁴ Edwin E. Witte, *The Theory of Workmen's Compensation*, 20 AM. LAB. LEGIS. REV. 411, 412 (1930).

²⁵ SOC. SEC. OFF., *supra* note 12.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Darling-Hammond & Kniesner, *supra* note 12.

³⁰ *Id.*

inefficient, expensive, and uncertain outcomes of workplace injury litigation.³¹

Now, workers receive a minimum guaranteed payment if they are injured on the job and are barred from suing their employers in tort.³² Workers' compensation laws also provide incentives to employers to make their working environments as safe as possible, as fewer accidents lead to diminished operating costs and higher profits.³³

B. The Moral and Societal Benefits of Workers' Compensation

Having addressed the economic significance of the workers' compensation system, it is also important to keep in mind that workers' compensation laws are inherently human. It has been stated that the purpose of workers' compensation is to “. . . keep [an] injured worker and his family at least minimally secure financially, and to prevent their becoming public charges.”³⁴ Simply put, income is how Americans support their families. The COVID-19 pandemic, tragically, exemplified en masse just how crippling job loss and diminished wages can be to U.S. households today.³⁵

Among households that had someone lose their job or take a pay cut during the COVID-19 pandemic, 46 percent had to dip into their savings or retirement funds, 38 percent had trouble paying their bills, 27 percent had problems paying their rent or mortgage, and 24 percent had to borrow money from friends or family to get by.³⁶ The financial hardships exemplified by the pandemic demonstrate what can happen to households when wages are diminished or disappear; the same crippling effects can occur when an injured or deceased worker goes uncompensated. 5,333 workers in the United States died on the job in 2019, and

³¹ *Id.* at 3.

³² SOC. SEC. OFF., *supra* note 12.

³³ Witte, *supra* note 24 at 415.

³⁴ *Casillas v. S.W.I.G.*, 96 N.M. 84, 88 (N.M. Ct. App. 1981) (Sutin, J., dissenting).

³⁵ Kim Parker, et al., *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> [https://perma.cc/HVT3-NH9S].

³⁶ *Id.*

some were statutorily exempt from receiving any compensation under the workers' compensation laws of their states.³⁷

II. LEGISLATIVE HISTORY

While a vast majority of U.S. employees are covered in the event of a workplace injury, some states exempt certain classifications of employees from workers' compensation coverage.³⁸ Five types of employees are commonly exempt from workers' compensation coverage: (1) domestic workers, such as housekeepers or child caregivers; (2) agricultural and farm workers; (3) leased or loaned employees, such as employees on a job through a staffing or temp agency; (4) casual or seasonal workers; and (5) undocumented workers.³⁹ Relevant to this Note are the agricultural exemptions present in the workers' compensation laws of sixteen states.⁴⁰

A. Overview of the "Agricultural Exemption"

In the Commonwealth of Kentucky, workers' compensation is a statutorily mandated program which provides medical and disability benefits to employees who suffer work-related injuries or illnesses.⁴¹ Under the workers' compensation laws enumerated in the Kentucky Workers' Compensation Act, every employer is required to have "workers' compensation coverage," meaning that in the event an employee is injured, that employee's treatment will be paid for by their company's insurer.⁴²

Under Kentucky law, however, not all employees are eligible to receive workers' compensation benefits.⁴³ Although this is not an exhaustive list, relevant for the purposes of this Note are

³⁷ NEWS RELEASE, *Bureau of Lab. Stat., Census of Fatal Occupational Injuries Summary*, 2020 1 (Dec. 16, 2021), <https://www.bls.gov/news.release/cfoi.nr0.htm> [<https://perma.cc/Z7PZ-SLSD>].

³⁸ Darling-Hammond & Knieser, *supra* note 12.

³⁹ Amy DelPo, *Are You Eligible for Workers' Compensation Benefits?*, NOLO, <https://www.nolo.com/legal-encyclopedia/are-you-eligible-workers-compensation-32963.html> (last viewed Apr. 23, 2022) [<https://perma.cc/PBU9-PUY3>].

⁴⁰ 6 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 75.01 (2021).

⁴¹ WORKERS COMPENSATION GUIDEBOOK, *Dep't of Workers Claims*, 1 (2001), <http://www.comped.net/pdf/guide2001.pdf>, [<https://perma.cc/3SXB-94M8>].

⁴² *Id.* at 10.

⁴³ KY. REV. STAT. ANN. § 342.650 (West 2022).

the following categories of employees which are exempt from receiving workers' compensation benefits: (1) agricultural employers/employees; (2) domestic workers in private homes if there are less than two workers in the residence working for less than forty hours a week; (3) those working for sustenance if working with a charitable or religious organization; (4) those covered by the Federal workers' compensation act; (5) certain religious organizations.⁴⁴

In addition to their exclusion under Kentucky workers' compensation laws, agricultural employees are generally barred from receiving workers' compensation benefits in an additional fifteen states.⁴⁵ These jurisdictions include Alabama, Arkansas, Delaware, Georgia, Indiana, Kansas, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Carolina, Tennessee, and Texas.⁴⁶ Notably, excluding agricultural workers from workers' compensation coverage goes against policy recommendations published by the federal government after the Occupational Health and Safety Act of 1970 was passed by Congress.⁴⁷

Following the passing of the 1970 Act, the National Commission on State Workmen's Compensation Laws was created to make policy recommendations on nationwide workers' compensation laws; it submitted a recommendation for the scope of workers' compensation laws in July 1972.⁴⁸ The Commission was comprised of fifteen members who were selected by the President to represent all aspects of the American workforce and industry.⁴⁹ In addition to other policy recommendations, the Commission championed the following elements for workers' compensation statutes nationwide: compulsory coverage in all acts; *elimination of all numerical and occupational exemptions to coverage, including domestic and farm labor*; and full coverage of work-related diseases.⁵⁰

⁴⁴ *Id.*

⁴⁵ 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 75.01 (2021).

⁴⁶ *Id.*

⁴⁷ 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 2.08 (2021).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Today, despite the Commission’s recommendations nearly five decades ago, many agricultural workers across the country remain only partially covered, at best, if they are injured on the job.⁵¹ Sixteen states still generally exclude farm or agricultural employees from coverage.⁵²

1. History of the Agricultural Exemption in Kentucky

The Commonwealth of Kentucky’s agricultural exemption is codified in Chapter 342 of the Kentucky Revised Statutes, which enumerates several categories of employees that are exempt from workers’ compensation coverage.⁵³ The agricultural exemption itself can be found in section five (5)—it simply states that “any person employed in agriculture” is exempt from workers’ compensation coverage.⁵⁴ No meeting minutes are available on the Kentucky State Legislature’s website to provide insight into what was discussed when deciding whether to implement an agricultural exemption in Chapter 342.⁵⁵ And no meeting minutes are available regarding the passage of workers’ compensation exemptions in general on the Legislative Research Commission portion of the website, either.⁵⁶

The lack of legislative history availability may be attributed to the fact that the agricultural exemption was enacted in 1972.⁵⁷ As such, the legislative history of agricultural exemptions in other states may help deduce the Kentucky legislature’s rationale for including the agricultural exemption in Kentucky workers’ compensation laws.

2. History of Agricultural Exemptions in Other States

⁵¹ *Id.*

⁵² 6 ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 75.01.

⁵³ KY. REV. STAT. ANN. § 342.650 (West 2022).

⁵⁴ KY. REV. STAT. ANN. § 342.650(5) (West 2022).

⁵⁵ *LRC Information Bulletins*, KY. GEN. ASSEMBLY, <https://legislature.ky.gov/LRC/Publications/Pages/Informational-Bulletins.aspx?View=Out%20of%20Print&Title=OutOfPrint&Col=Number&Page=8> (last viewed June 16, 2022) [<https://perma.cc/A7M2-8SBZ>].

⁵⁶ *Id.*

⁵⁷ KY. REV. STAT. § 342.650(5) (West 2022) (enacted 1972).

The North Dakota Supreme Court provided some insight regarding the implementation of the agricultural exemption under North Dakota workers' compensation laws.⁵⁸ The Court in *Haney v. North Dakota Workers' Compensation Bureau*, grappled with the legislative history of agricultural exemptions and provided one key reason why agricultural workers have traditionally been exempted: to support small farms.⁵⁹ Quoting Professor Larson's *Workmen's Compensation Law* treatise from 1993, the Court considered the practical administrative difficulties that small farms would experience if there were no codified agricultural exemptions.⁶⁰ Larson reasoned that small farmers, especially in prior decades when technology was not as cheap or available, would be substantially burdened by handling the records, insurance, and accounting required to offer workers' compensation benefits to agricultural employees.⁶¹

While Professor Larson poses an intriguing point, technology has evolved rapidly since then, and that justification for having an agricultural exemption is likely antiquated. For instance, the work cited by the Court in *Haney* was published in 1993, the same year the internet became publicly available.⁶²

III. THE AGRICULTURAL EXEMPTION IN PRACTICE – KRS § 342.650(5)

A. Definition of "Agriculture" – KRS § 342.0011(18)

A prominent issue to consider regarding Kentucky's agricultural exemption is the potential the statute has for over-application due to the broad definition of "agriculture" under the Kentucky Workers' Compensation Act. Under Chapter 342 of the Kentucky Revised Statutes, this is the definition of "agriculture":

(18) "Agriculture" means the operation of farm premises, including the planting, cultivation, producing, growing, harvesting, and preparation for

⁵⁸ *Haney v. North Dakota Workers' Comp. Bureau*, 518 N.W.2d 195 (N.D. 1994).

⁵⁹ *Id.* at 207–08.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *The Birth of the Web*, CERN, <https://home.cern/science/computing/birth-web> (last viewed June 14, 2022) [<https://perma.cc/4FWX-HLBA>] (the internet became publicly accessible on April 30, 1993).

market of agricultural or horticultural commodities thereon, the raising of livestock for food products and for racing purposes, and poultry thereon, and any work performed as an incident to or in conjunction with the farm operations, including the sale of produce at on-site markets and the processing of produce for sale at on-site markets.

It shall not include the commercial processing, packing, drying, storing, or canning of such commodities for market, or making cheese or butter or other dairy products for market. . . .⁶³

One portion of the statute leaves a great amount of discretion to courts in determining whether a worker falls under this definition: “[A]nd any work performed as an incident to or in conjunction with the farm operations.”⁶⁴ Several cases have already foreshadowed why this ambiguity could pose a problem to an injured worker that many may not deem an “agricultural” worker.⁶⁵

The definition of “agriculture” in the Merriam-Webster Dictionary is, “the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products.”⁶⁶ Keep the definition of “agriculture” in mind as the application of the agricultural exemption under Kentucky case law is discussed in the following section.

B. Kentucky Case Law

The agricultural exemption has been used to deny workers’ compensation claims numerous times over the past several years, arguably in cases where the employees involved were not

⁶³ KY. REV. STAT. ANN. § 342.0011(18) (West 2022).

⁶⁴ *Id.*

⁶⁵ See, e.g., *Brownwood Property, LLC v. Thornton*, 621 S.W.3d 434 (Ky. 2021); *Homestead Family Farm v. Perry*, 506 S.W.3d 325 (Ky. Ct. App. 2016); *Hanawalt v. Brown*, 2015-SC-000183-WC, 2016 WL 1068395 (Ky. Mar. 17, 2016).

⁶⁶ Agriculture, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/agriculture#other-words> (last viewed June 14, 2022) [<https://perma.cc/H3MQ-PCMZ>].

performing duties that were “agricultural” in nature.⁶⁷ As the definition of agriculture under the current Kentucky Revised Statutes simply includes work that is connected with farm operations, all a farm has to do to avoid paying workers’ compensation benefits to an injured worker is make a connection between their job duties and an agricultural end-goal.⁶⁸

1. *Brownwood Property, LLC v. Thornton*

At the time of writing, *Brownwood* is the most recent case the Kentucky Supreme Court has heard which involved the agricultural exemption.⁶⁹ In *Brownwood*, the Court addressed whether a woman who worked on a farm was considered an agricultural employee under the definition enumerated in Chapter 342.⁷⁰ In *Brownwood*, the Plaintiff, Sheena Thornton, carried out the following duties on the farm where she was employed: cleaning the guest house, emptying humidifiers in two houses on the property, and mowing.⁷¹ In carrying out her duties, Thornton was helping the owner with the objective of restoring the farm.⁷² The Kentucky Supreme Court held this as the key fact in making their determination that Thornton, in her role, fell under the definition of agriculture under Kentucky law.⁷³ The court reasoned that considering the “whole character” of her employment, all of Thornton’s work “was performed as part of the overall effort of all of Brownwood’s employees to restore the farm.”⁷⁴ This application of the agricultural exemption is concerning because the only connection Sheena Thornton had to agricultural work was the end-goal her duties contributed to.

The “whole character” assessment the court adopted was utilized by the Kentucky Court of Appeals a few years before *Brownwood* in *Homestead Family Farm v. Perry*, which the Court of Appeals heard in 2016.⁷⁵

⁶⁷ See, e.g., *Thornton*, 621 S.W.3d at 437 (cleaning, emptying humidifiers, mowing).

⁶⁸ *Thornton*, 621 S.W.3d at 434; KY. REV. STAT. ANN. § 342.0011(18) (2022).

⁶⁹ *Brownwood Property, LLC v. Thornton*, 621 S.W.3d 434, 436 (Ky. 2021).

⁷⁰ *Id.*

⁷¹ *Id.* at 437.

⁷² *Id.* at 436.

⁷³ *Id.* at 441.

⁷⁴ *Id.*

⁷⁵ *Homestead Family Farm v. Perry*, 506 S.W.3d 325 (Ky. Ct. App. 2016).

2. *Homestead Family Farm v. Perry*

In *Perry*, the Kentucky Court of Appeals considered whether the agricultural exemption applied to Defendant David Perry's claim for workers' compensation benefits.⁷⁶ In doing so, the Court considered whether Perry's role on Homestead Family Farm ("Homestead") was consistent with the definition of "agriculture" under Kentucky law.⁷⁷ Perry was a truck driver and laborer for two weeks at Homestead before he sustained a back injury on December 28, 2013.⁷⁸ The injury occurred when Perry was moving a load of soybeans from Boyle County to Springfield—he fell backward whilst moving the soybeans from a truck to a grain bin.⁷⁹

The Court ultimately found that Perry was an agricultural employee and cited the 1978 Kentucky Court of Appeals case *Fitzpatrick v. Crestfield Farm*, which addressed the same question. The Court in *Fitzpatrick* reasoned that:

[I]t is not just the nature of the work which the employee was doing at the time of the injury that determined coverage, but that the whole character of the employment should be considered in determining whether a person was employed in agriculture.⁸⁰

This is the rationale Kentucky courts have utilized on several occasions. The implications can be perplexing when considering how nearly any duty on a farm can be conformed to an agricultural end-goal if a Court so chooses. The *Brownwood* decision is a prime example. Again, in *Brownwood*, the employee in question was cleaning houses and mowing.⁸¹ The Court reasoned that because her work contributed to the restoration of the farm, and the farm would produce agricultural goods, she was an "agricultural" employee.⁸² It raises the question of where the line is drawn in determining whether an employee is an "agricultural" employee. Is a housekeeper on a farm an agricultural employee because they

⁷⁶ *Id.* at 326.

⁷⁷ *Id.*

⁷⁸ *Id.* at 327.

⁷⁹ *Id.*

⁸⁰ *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44, 45 (Ky. Ct. App. 1978).

⁸¹ *Thornton*, 621 S.W.3d at 437.

⁸² *Id.* at 441.

help the farm function, which contributes to an agricultural end-goal?

3. Commonwealth v. Gussler

The Kentucky Court of Appeals also found that the determination of whether logging is “agricultural” is a contextual determination under Kentucky workers’ compensation laws.⁸³ In *Gussler*, the Court of Appeals considered whether Mr. Gussler qualified for workers’ compensation benefits following an injury he sustained while carrying out his duties.⁸⁴ Mr. Gussler was a part-time worker employed by Ray Williams to cut timber.⁸⁵ In the course of his duties, Gussler was “99.9% of the time” performing timber harvesting activities.⁸⁶ On the day he was injured, a large tree struck Gussler on the left side of his head, causing facial injuries, skull fractures, brain hemorrhage, right-side paralysis, vision loss, and other neurological damage—he was deemed to be 40–63 percent impaired because of the incident.⁸⁷

The critical detail the court considered was how the timber Ray Williams harvested was used.⁸⁸ In this case, the harvested timber was being sold commercially; as such, the Court found that his activities did not fall under the definition of “agriculture.”⁸⁹ This is an instance where an arguably “agricultural” activity was deemed non-agricultural and serves as another example of the Court’s wide discretion under the current statutory scheme.

IV. REMEDIES – HOW CAN INJURED AGRICULTURAL EMPLOYEES GET THE COMPENSATION THEY NEED?

A. Voluntary Coverage by Agricultural Employers

The first means by which agricultural employees could gain workers’ compensation coverage would be for farms to take it upon themselves to opt into covering their agricultural workers.⁹⁰ Under

⁸³ *Commonwealth v. Gussler*, 278 S.W.3d 153, 158–59 (Ky. Ct. App. 2008).

⁸⁴ *Id.* at 154.

⁸⁵ *Id.*

⁸⁶ *Id.* at 155.

⁸⁷ *Id.*

⁸⁸ *Id.* at 157.

⁸⁹ *Commonwealth v. Gussler*, 278 S.W.3d 153, 157 (Ky. Ct. App. 2008).

⁹⁰ KY. REV. STAT. ANN. § 342.660(1) (West 2022).

KRS § 342.660(1), even if there is a statutory workers' compensation exemption in place, employers can choose to provide their employees with workers' compensation benefits.⁹¹ Although the mechanism for opting in has changed over the years, the adoption of such a proposal would not be completely atypical for Kentucky employers.⁹²

In 1961, an employer, Smiser West, opted to cover an agricultural employee who broke his arm on West's farm on August 27, 1959.⁹³ Under the statutory scheme that existed at the time, although employers were exempt from covering agricultural employees, employers and employees could jointly apply for what was then called "Workmen's Compensation" coverage.⁹⁴ In *West*, the farm owner failed to jointly apply for coverage under the Workmen's Compensation Act—however, the court still allowed the injured sixty-seven-year-old worker, Kelly Hedger, to collect benefits as West had unilaterally opted to provide workmen's compensation coverage.⁹⁵

Under current Kentucky workers' compensation laws, the process for opting into voluntary coverage is much simpler than the process described in *West*.⁹⁶ A joint application between employer and employee is no longer required under the Workers' Compensation Act; an employer may unilaterally decide to cover their employees.⁹⁷

B. Repeal the Agricultural Exemption

The next remedy to consider would be action through the legislative process—a bill could be passed to repeal the agricultural exemption.⁹⁸ The Kentucky legislature has the power to repeal or amend such a law.⁹⁹ This may be the most straightforward way of ensuring coverage for agricultural workers. In the event of repeal, agricultural workers would immediately become covered under the Workers' Compensation Act as they

⁹¹ *Id.*

⁹² *See e.g., West v. Hedger*, 350 S.W.2d 624 (Ky. Ct. App. 1961).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See* KY. REV. STAT. ANN. 342.660 (West 2022).

⁹⁷ *Id.*

⁹⁸ KY REV. STAT. ANN. § 446.110 (West 2022).

⁹⁹ *Id.*

would no longer be classified as an exempt category under the Workers' Compensation Act.¹⁰⁰

As this is the most drastic means by which agricultural workers could become covered, the legislature should consider the interests of small farms and the severity of the burden that would be placed upon them if they were required to carry workers' compensation insurance.¹⁰¹ However, there is a relevant argument for the fact that many other small, family-owned businesses in other industries are required to carry workers' compensation insurance.¹⁰² Why should small farms in Kentucky be treated differently from small, family-owned businesses in other industries under state workers' compensation laws?

C. Judicial Action

In addition to potential legislative changes, the Kentucky Supreme Court should consider the constitutionality of the agricultural exemption under the United States and Kentucky constitutions. The Michigan Supreme Court did just this in 1972 when the Court heard *Gallegos v. Glaser Crandell Co.*¹⁰³ In *Gallegos*, the Michigan Supreme Court held that the agricultural exemption that existed under Michigan law at the time violated the plaintiff's right to equal protection under the constitutions of both the United States and the State of Michigan.¹⁰⁴

Gallegos involved the Michigan agricultural exemption which, as read by the court, was vague enough to cover all kinds of work done on a farm, ranging from plowing to bookkeeping.¹⁰⁵ The plaintiff in the case was Frank Gallegos, a thirty-eight-year-old Mexican American man who fell and sustained a fractured wrist while working for the defendant, Glaser Crandall.¹⁰⁶ Gallegos filed suit following Crandall's refusal to voluntarily pay workers' compensation benefits following the injury.¹⁰⁷ According to the court, there was no basis for singling out certain labor tasks for

¹⁰⁰ See KY. REV. STAT. ANN. § 342.650 (West 2022).

¹⁰¹ See 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 75.02 (2021).

¹⁰² *Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 674 (Mich. 1972).

¹⁰³ *Id.* at 654.

¹⁰⁴ *Id.* at 674.

¹⁰⁵ *Id.* at 666.

¹⁰⁶ *Id.* at 669.

¹⁰⁷ *Id.*

exemption simply because the activities were carried out “on a farm.”¹⁰⁸

Discussing the constitutionality of the Michigan agricultural exemption statute, the court considered that the class of persons impacted by the exemption, seasonal agricultural workers, was largely comprised of “Chicanos, Blacks, and American Indians.”¹⁰⁹ The court also considered that the workers impacted by the statute were often below the poverty level.¹¹⁰ The court found that there was no compelling governmental interest in having an agricultural exemption and stated that “[d]iscriminatory legislation such as [the law] we have here cannot be validated in the interest of preferring a particular industry.”¹¹¹

The Michigan Supreme Court’s conclusion here is sound. Courts should take the demographics of those impacted by an agricultural exemption into consideration when discussing the statute’s constitutionality under both the United States Constitution and state constitutions. As was the case in Michigan and as the Court in *Gallegos* discussed, many of the agricultural exemption statutes that exist in states across the U.S. may currently be disproportionately impacting certain minority groups.¹¹² According to the U.S. Department of Agriculture (“USDA”), across the United States, 69 percent of farm laborers, graders, and sorters were Hispanic or Black in 2019.¹¹³

D. Proposed Amendment to KRS § 342.650(5)

Repealing the agricultural exemption statute may be deemed by some as too drastic a remedial measure, and perhaps rightfully so considering the importance of protecting small

¹⁰⁸ *Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 667 (Mich. 1972) (“There is no basis for distinguishing the work of a laborer who drives a truck at a factory from a laborer who drives one on the farm or for any one of numerous other labor activities “on a farm” as distinguished from the same activity in industry, wholesaling, retailing, or building. There is no basis for singling out for an exclusion piecework “on the farm” but not elsewhere.”).

¹⁰⁹ *Id.* at 672.

¹¹⁰ *Id.* at 674.

¹¹¹ *Id.*

¹¹² *Demographic Characteristics of Hired Farmworkers*, USDA, ECON. RSCH. SERV. (2022), <https://www.ers.usda.gov/topics/farm-economy/farm-labor.aspx#demographic> (last updated Mar. 15, 2022) [<https://perma.cc/G538-EHAY>] (see “Demographic Characteristics of U.S. Hired Farmworkers and All Wage and Salary Workers, 2019”).

¹¹³ *Id.*

farms.¹¹⁴ As a more modest proposal, another potential solution is to amend the statute and make it more narrowly tailored.

As of the writing of this Note, this is the current version of Ky. Rev. Stat. § 342.650(5)¹¹⁵:

Current Statute

Ky. Rev. Stat. § 342.650 – Exemptions of Particular Classes of Employees from Coverage

(5) Any person employed in agriculture

The following is a proposed amended version of Ky. Rev. Stat. § 342.650(5):

Proposed Statute

Ky. Rev. Stat. § 342.650 – Exemptions of Particular Classes of Employees from Coverage

(5) Any person employed in agriculture working for an employer whose gross cash income is less than \$250,000, and who is not a wholly or majority-owned subsidiary of a parent company

As stated previously in this Note, one of the primary purposes of the agricultural exemption is to mitigate the administrative difficulties which would burden small farms if they were required to carry workers' compensation insurance.¹¹⁶ The goal behind providing qualifying statements in the amended statute is to specify exactly which agricultural employers should

¹¹⁴ *Small Farms, Big Differences*, U.S. DEPT. OF AGRIC. (Mar. 11, 2021), <https://www.usda.gov/media/blog/2010/05/18/small-farms-big-differences> [<https://perma.cc/4MU2-RPTX>] (noting that most U.S. farms are deemed “small farms”, 91 percent according to the Census of Agriculture).

¹¹⁵ KY. REV. STAT. ANN. § 342.650(5) (West 2022).

¹¹⁶ 6 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 75.02 (2021) (discussing that if the reasoning behind the agricultural exemption is to protect small farmers, it should be confined to small farms).

be allowed to exempt their employees from workers' compensation coverage. If the legislature's goal is to protect small farms, the statute should be specific enough to do so without sacrificing coverage for those that work on larger farms that can afford workers' compensation insurance. The proposed amendment accomplishes that while requiring the coverage of workers that are employed by larger farms.

Two-hundred and fifty thousand dollars was chosen as the gross income cap for "small farms" because that figure represents the amount of gross income the USDA utilizes to delineate small farms from large farms.¹¹⁷ Another potential metric that has been previously recommended is a farm's annual payroll.¹¹⁸

This Note previously referenced the National Commission on State Workmen's Compensation Laws and its October 1972 policy recommendations report.¹¹⁹ In its report, the Commission recommended an "essential" requirement that all agricultural employers with an annual payroll over \$1,000 carry workers' compensation insurance.¹²⁰ Adjusting for inflation, today, the Commission's recommendation would apply to farms with an annual payroll of over \$6,650.¹²¹

In the same report, the Commission expressed its concern about the lack of progress some states had made in evolving their workers' compensation policies to comply with the demands of the modern principles of the workers' compensation system.¹²² In making its recommended changes, the report stated, "[members of the commission] were without exception supporters of the basic principles of workmen's compensation...[w]e voice our criticism because present practice falls so far short of the basic principles and because there is no possible justification for this shortfall."¹²³

¹¹⁷ U.S. DEPT. OF AGRIC., *supra* note 115.

¹¹⁸ SOC. SEC. ADMIN., Notes and Brief Reports, *Report of the National Commission on State Workmen's Compensation Laws* (1972), <https://www.ssa.gov/policy/docs/ssb/v35n10/v35n10p31.pdf> [<https://perma.cc/E68J-4EZ5>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; *CPI Inflation Calculator*, BUREAU OF LAB. STAT. (stating that \$1.00 in October 1972 has the same buying power as \$6.65 in January 2022) <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1&year1=197210&year2=202201> (last viewed Jun. 14, 2022) [<https://perma.cc/8HU2-UMZC>].

¹²² SOC. SEC. ADMIN., *supra* note 121.

¹²³ SOC. SEC. ADMIN., *supra* note 121.

Fifty years later, the Commission's call for change remains largely unanswered across half of the states in the U.S.¹²⁴

CONCLUSION

Wage statistics for farmworkers in Kentucky demonstrate why repealing or amending to the agricultural exemption could do a great amount of good for a substantial number of agricultural workers that may otherwise be placed in a dire situation if they sustain a workplace injury. In April 2019, there were around 42 thousand farmworkers in the Appalachian region of the United States.¹²⁵ First, consider that the average wage of a farmworker in the Appalachian region of the United States as of April 2019 was \$12.58.¹²⁶

The Massachusetts Institute of Technology ("MIT") calculates that the current living wage for a single adult with zero children in Kentucky is \$13.48.¹²⁷ The living wage more than doubles to \$28.25 if a single adult has one child.¹²⁸ Of course, the number climbs higher as more adults and children are added to a family. MIT calculates that if a Kentucky family had two working parents and one child, the level of income needed to have a living wage would be \$15.53 for each adult.¹²⁹ As wages currently stand at \$12.58 an hour for Appalachian farmworkers, on average, farms are not paying farmworkers a living wage in Kentucky.¹³⁰

While that is itself problematic, a living wage for Kentucky farmworkers is outside the scope of this Note. The relevant issue, with the above wage statistics in mind, is the financial doomsday scenario that farmworkers and their families risk if a workplace

¹²⁴ *Workers' Compensation*, FARMWORKER JUSTICE (2022), [HTTPS://WWW.FARMWORKERJUSTICE.ORG/ADVOCACY_PROGRAM/WORKERS-COMPENSATION/#:~:TEXT=THESE%20STATES%20ARE%3A%20ALABAMA%2C%20ARKANSAS,SOUTH%20CAROLINA%2C%20TENNESSEE%20AND%20TEXAS](https://www.farmworkerjustice.org/advocacy_program/workers-compensation/#:~:text=THESE%20STATES%20ARE%3A%20ALABAMA%2C%20ARKANSAS,SOUTH%20CAROLINA%2C%20TENNESSEE%20AND%20TEXAS) [https://perma.cc/2EZ9-46XC].

¹²⁵ U.S. DEPT. OF AGRIC., *Farm Labor*, NAT'L AGRIC. STAT. SERV. 16 (2019), https://www.nass.usda.gov/Publications/Todays_Reports/reports/fmla0519.pdf [https://perma.cc/JKM2-66YA] (see "Combined Field and Livestock Worker Wage Rates by Type Farm – Region and 48 States: April 7–13, 2019," wage average across all farms).

¹²⁶ *Id.*

¹²⁷ *Living Wage Calculation for Kentucky*, MASS. INST. OF TECH. (2022), <https://livingwage.mit.edu/states/21> (last viewed May 6, 2022) [https://perma.cc/HQR2-586D] (as of writing).

¹²⁸ *Id.* (as of writing).

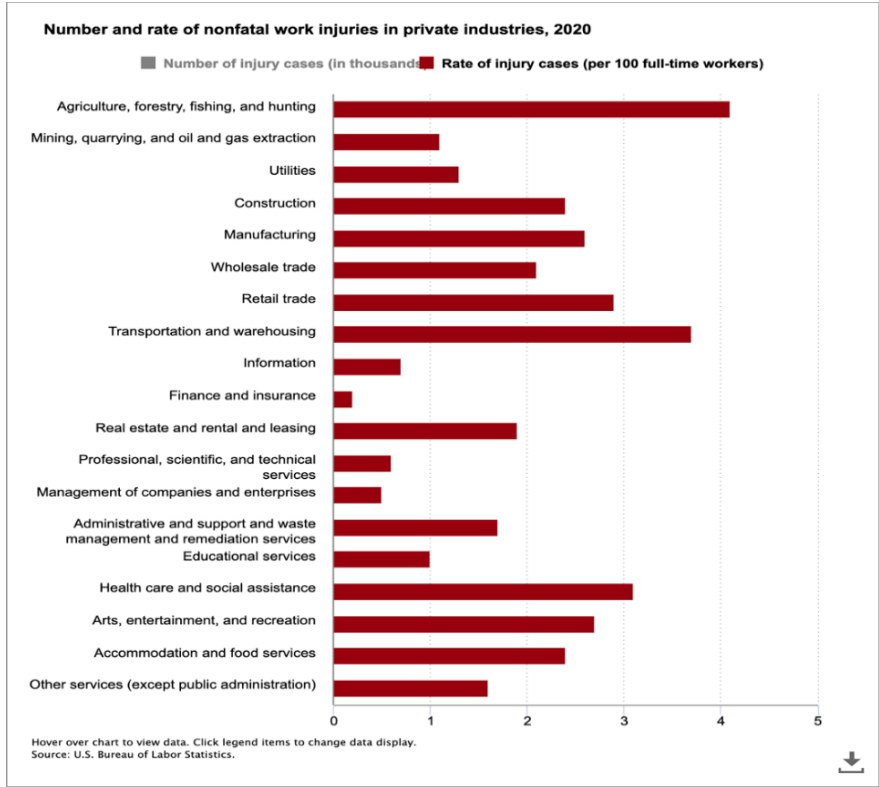
¹²⁹ *Id.* (as of writing).

¹³⁰ *Id.*; FARM LABOR, *supra* note 125.

injury occurs. This issue is of great concern because of the medical expenses injured workers risk incurring by coming to work. The average total medical cost incurred across all workers' compensation claims between 2018 and 2019 was \$22,965 according to the National Safety Council.¹³¹

To make matters worse, agriculture is at the top of the list of industries where injury cases force workers to miss multiple days of work.¹³² Additionally, U.S. Bureau of Labor Statistics data show that agricultural workers, per capita, are injured at a higher rate when compared to employees in any other industry.¹³³

Figure 1. Graph illustrating the rate of nonfatal work injury cases per 100 full-time workers in private industries. U.S. Bureau of Labor Statistics.



¹³¹ *Workers' Compensation Costs*, NAT'L SAFETY COUNCIL (2022), <https://injuryfacts.nsc.org/work/costs/workers-compensation-costs/> [https://perma.cc/8UP3-SV7P] (see "workers' compensation costs by cause, 2018-2019").

¹³² *Id.*

¹³³ BUREAU OF LAB. STAT, *Number and Rate of Nonfatal Work Injuries in Private Industries*, (2020) [https://perma.cc/YWL7-HFFB].

Further, according to the Bureau of Labor Statistics, agricultural employees had a 1.7 percent rate of injury occurrence which resulted in days away from work in 2017.¹³⁴ That rate rose in 2020 to 1.9 percent.¹³⁵ Even more worrisome when considering these statistics is the fact that the Bureau of Labor Statistics excluded farms with fewer than eleven employees in calculating some of the statistics.¹³⁶

The financial state of Kentucky's agricultural industry suggests that the present is as good a time as ever to make a change to cover agricultural workers under the Workers' Compensation Act. Kentucky's agricultural industry is thriving; additional bandwidth in farm budgets likely exists that would allow farms to pay for workers' compensation insurance without causing financial strain on the industry.¹³⁷ University of Kentucky agricultural economists reported in December 2021 that this year's crop yield is expected to generate \$6.7 billion in revenue—surpassing the \$6.5 billion record that was set in 2014.¹³⁸

The bottom line is this: agricultural workers are in a high-risk field, they are generally not making a “living wage” when they are working, and when they are not working due to work-related injuries and dealing with medical debt, our statutory scheme leaves them with little to no means to provide for themselves and their families. In addition, the overly broad definition of “agriculture” under the workers' compensation laws in Kentucky may be similarly harming people that some may not consider “agricultural” employees.

Human beings share the same basic physiological needs for survival: food, water, shelter, clothing, warmth, and sleep.¹³⁹ In most modern societies, income is necessary to satisfy those needs. As the agricultural exemption stands, the Commonwealth of Kentucky risks putting tens of thousands of agricultural workers in a compromising position if they are injured at their high-risk

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ ASSOCIATED PRESS, *Kentucky Farm Sector May Reap Record Receipts: Economists*, WHAS 11 ABC NEWS (Dec. 2, 2021, 9:17 PM EST), <https://www.whas11.com/article/news/kentucky/kentucky-farm-record-receipts-economists/417-54f312ce-627d-48c9-ae55-b5216c43022c> [<https://perma.cc/53EA-HUEX>].

¹³⁸ *Id.*

¹³⁹ Dr. Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLYPSYCHOLOGY (updated Apr. 4, 2022), <https://www.simplypsychology.org/maslow.html> [<https://perma.cc/CJ4T-UVEB>].

jobs. This Note seeks to shine a light on this risk and calls upon our legislators to (1) repeal the agricultural exemption or (2) amend Ky. Rev. Stat. § 342.650(5).

If legislators fail to change these portions of Chapter 342, Kentucky farms should consider mandating that they carry workers' compensation insurance and decide to offer their injured employees' compensation of their own accord.¹⁴⁰ Finally, the Kentucky Supreme Court should consider the Michigan Supreme Court's holding in *Gallegos v. Glaser Crandall Co.* and whether the agricultural exemption is constitutional under the United States and Kentucky constitutions.¹⁴¹

¹⁴⁰ KY. REV. STAT. ANN. § 342.660(1) (West 2022).

¹⁴¹ *Gallegos v. Glaser Crandall Co.*, 388 Mich. 654, 675 (Mich. 1972).