

# TOP 10 FOOD AND AG LAW ISSUES FOR EAST CENTRAL ILLINOIS LAWYERS

East Central Illinois Women's Attorney's Association

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## *Overview & Background: What is Agriculture Law?*

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### **I. FARM ESTATE, BUSINESS AND SUCCESSION PLANNING**

#### **A. Overview**

- 1) Average age of American farmer is 65 years of age
- 2) Few have any estate or succession plan
- 3) Problem with off-farm heirs
- 4) Encourage farmers to “have the conversation” and continue to do so as time goes on
- 5) Mediation is an option

#### **B. Estate Planning Documents to Consider:**

- 1) Last Will and Testament
- 2) Power of Attorneys (both for Health and Property)
- 3) Living Will
- 4) Trusts (revocable vs. irrevocable and inter vivos vs. testamentary)

#### **C. Business Planning:**

- 1) Choice of business entity
- 2) Should the land and operating farm have 2 separate business entities?  
Farm lease between the 2 entities at an arm's length transaction
- 3) Implications with federal farm programs and probate

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#### **D. Succession Planning**

1. Combines Estate Planning and Business Planning in order to transfer the farm to the next generation
2. **Tools to consider**
  1. Estate planning documents listed above
  2. Business entity structured so that it meets the needs of the family and farm
  3. Operations manual

### **II. SYNGENTA LITIGATION**

#### **A. Basis of lawsuit**

1. GMO corn seed that was approved in US, but not China, made its way to China and then was rejected.
2. US farmers sued because Syngenta claimed Chinese approval of seed was imminent, but then wasn't approved, it constituted fraud and the rejection of corn caused a decrease in the market causing monetary damages.

#### **B. Result**

\$1.51 billion settlement to class

### **III. WATER LAW**

#### **A. Types of Water**

1. Surface
2. Groundwater

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**B. Who has a right to use surface water?**

1. **Riparian Rights**

1. Whoever owns the *land adjacent to the water* has right to reasonable use of the water.
2. Reasonable use is any use that *doesn't interfere* with the rights of another riparian owner.
3. Reasonable use determined by factors such as:
  - (1) custom,
  - (2) climate,
  - (3) water body size

**C. Who has the right to use groundwater?**

1. Landowner has right to reasonable use of water on *land overlying water source*
2. Subject to *local groundwater* districts regulations.

**IV. HEMP LAW**

**A. What is Industrial Hemp?**

1. Plant variety of the Cannabis Sativa plant with lower levels of THC.
2. Produces fiber, paper, biodegradable plastics, biofuels, food products, animal feed

**B. New Opportunities for Hemp Production**

1. Hemp production outlawed by Marihuana Tax Act of 1937 then by Controlled Substances Act of 1970

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2. **Farm Bill History**
  - a) 2014 Farm Bill included legal hemp cultivation language.
  - b) 2018 Farm Bill broadened hemp production opportunities but still left many questions unanswered and up to individual states.
3. **New Legislation passed in numerous states**
  1. Illinois Industrial Hemp Act passed in 2018
  2. Illinois Compassionate Use of Medical Cannabis Program Act passed in 2019

## V. **RIGHT TO FARM**

### A. **Overview: Right to farm acts protect farmers against nuisance lawsuits when land has an existing agricultural use.**

1. ***Nuisance*** – action that interferes with the use and enjoyment of property.  
  
Examples: smells and dust
2. ***RTF statutes exist in all 50 states.***
3. ***Illinois Farm Nuisance Suit Act***
  1. This applies to “farms”
  2. A person cannot claim nuisance action if they “came to” the nuisance meaning the activity claimed to cause nuisance was occurring prior to plaintiff’s arrival.

### B. **Illinois Agriculture Mediation Program**

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## VI. SOLAR AND WIND ENERGY LEASES

### A. Solar Leases

1. Long term lease with lease rates paid per acre.
2. Solar panels placed across specified area of property
3. Doesn't allow for use of land for other purposes
4. More akin to a ground lease than an energy lease.

### B. Wind Energy Leases

1. Long term lease (40 years)
2. Rental payments dependent on number of turbines, potential production, proximity to transmission lines, other equipment placed on property
3. Lease defines number of turbines to be placed on property
4. Allows for continued agricultural use of property.
5. Tends to follow many traditional oil and gas lease terms

## VII. FOOD LABELING

### A. "Natural"

1. **There is a lot of litigation in this area with vague agency definitions**
2. **No artificial or synthetic ingredients have been added**
  - a) USDA specifically prohibits artificial flavor, coloring ingredients, or chemical preservatives.
  - b) USDA allows minimal processing to make food safe for human consumption or to preserve it or processes that do not alter the raw product.
  - c) FDA allows a limited group of chemical reactions (like roasting)



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## B. “Organic”

1. **NOP:** Must be produced and processed according to the National Organic Program standards under 7 C.F.R. Part 205.
2. **Standards:** The farm, processors, and other handlers must meet USDA Organic standards.
3. **Four approved organic labels**



1. “100 percent organic,” wholly organic ingredients and no nonorganic ingredients or additives.

2. “organic,” must contain at least 95 percent organically produced ingredients.
3. “made with organic ingredients,” must contain 70 percent organic ingredients.
4. Less than 70 percent organic ingredients - can only specify the organic ingredient(s) in the ingredients statement.



4. **USDA Seal:** USDA seal can be placed only on foods that qualify as “100 percent organic” and “organic.”



## C. “Non-GMO”

1. Federal government does not require GMO labeling except under special circumstances
2. Three states (Vermont, Maine, and Connecticut) passed GMO labeling laws.

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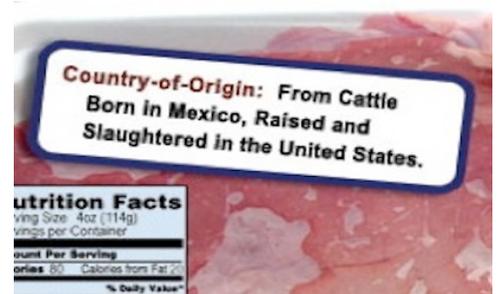
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3. Major debate as to whether these labels should be mandatory or voluntary.

#### **D. Country of Origin Labeling (COOL)**

1. 2002 Farm Bill required retail level country of origin labeling (COOL) for ground and muscle cuts of beef, lamb, and pork, as well as farm-raised fish, wild fish, shellfish, peanuts, and fresh fruits and vegetables.



2. 2016 appropriations bill modified this to remove requirement for muscle cuts of beef and pork after WTO challenges.

3. The most recent 2016 regulation applies COOL to lamb, chicken, and goat meat, perishable agricultural commodities, macadamia nuts, pecans, peanuts, and ginseng.



4. Does not require these items to be labeled if only ingredients in processed food.

### **VIII. UNDERCOVER SURVEILLANCE – “AG GAG” STATUTES**

#### **A. What are Ag Gag Statutes?**

1. Laws that criminalize undercover filming of ag facilities or treatment of animals.

#### **B. States who have enacted ag gag statutes**

1. **States:** KS, WY, MT, ND, IA, UT, MO, ID, NC, AR
  1. These laws face Free Speech Violation allegations

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2. ID, UT, WY – struck down as violation free speech
3. Illinois does not have an Ag Gag Statute

## **IX. LANDOWNER LIABILITY STATUTES**

### **A. Premise Liability Act – 740 ILCS 130**

1. **Reasonable Care-** Property owners must exercise reasonable care to prevent foreseeable injuries to invitees and licensees either by making condition safe or warning of danger
2. **Recreational Use –** Property owners who open land for off-roading and firearm ranges are immune from criminal liability from noise or sound, nuisance, and private trespass.
  1. This limits liability for landowner.

### **B. Recreational Use of Land and Water Areas Act – 745 ILCS 65**

1. **Duty of Care-** Landowner owes no duty of care to keep the premises safe for entry or use by any person for recreational or conservation purposes, or to give any warning of a natural or artificial dangerous condition, use, structure, or activity on such premises to persons entering for such purposes if invited on property free of any charge
2. **Activities-** Activities include hunting, recreational shooting, conservation resource management, education, or outdoor recreation.

### **C. Equine Activity Liability Act – 745 ILCS 47**

1. Horse activity participant assumes risk of injury, loss, and damage from participating in activity.
2. Participant may sign release
3. Doesn't apply if provided faulty tack, willful/wanton disregard for safety, intentional acts.

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4. Must post signage containing specific language

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## **X. FARM LEASES**

### **A. Why are leases important?**

1. Outline each parties expectations to avoid future conflict.
2. Written product in case of future disputes.
3. May be required by the statute of frauds.

### **B. Types of agricultural leases**

1. Crop share
2. Cash Lease
3. Hybrid

### **C. Hot Button Issues**

1. Right to recover crops after termination of farm lease- Doctrine of Emblements under 735 ILCS 5/9, Section 301 et seq.
  - a. Tenant farmer is entitled to re-enter the premises and harvest crops such as corn, wheat, beans, vegetables, etc.
2. Passive vs. Active income for social security -- landlord farmer needs to “Actively engage in farming”
3. “Default” farm lease in Illinois unless written agreement to the contrary is March 1 to February 28/29

### **D. Key Terms to include**

1. **Length of Lease**
2. **Consideration**
  1. **Crop shares** – Landlord and Tenant share in certain costs and in sale of crop.

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2. **Cash Lease-** Agreed Dollar amount per acre.
3. **Hybrid/Flex Lease** – Flexes between crop share and cash lease depending on market conditions
3. ***Will the Landlord reserve any rights?***
  1. Right to enter
  2. Rights to minerals
  3. Right to funds and damages from condemnation proceedings
  4. Right to hunt and/or fish
4. ***Hunting and Fishing***
  1. Who can hunt or fish?
  2. What game can be hunted?
  3. Liability waivers
5. ***Assignments and Subleasing***
  1. Allow assignments and subleases or not.
  2. If allowed, is it subject to landowner approval.
6. ***Land use***
  1. What crops will be farmed?
  2. What types of livestock allowed?
  3. How should the land be operated? “efficient and economic methods of production suitable for Premises and as custom in the area”
7. ***Fencing and Improvements***
  1. Which party will be responsible for building fences, structures, erosion control (terraces, etc), irrigation systems.
8. ***Default and Termination***
9. ***Indemnity Clause***

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