Do Farmers Reap More Than Their Child Laborers Sow? The Conflict Between the Fair Labor Standards Act and State Workers' Compensation Laws

INTRODUCTION

State workers' compensation statutes as the exclusive remedy for a work-injured, agricultural child laborer raises inquiries about properly effectuating the policy underlying the Fair Labor Standards Act of 1938 (FLSA).[1] The discrepancy between this state and federal legislation arises in the context of the agricultural child laborer who is hired in contravention of the FLSA and subsequently injured on the job. The FLSA's child labor provisions[2] contain no express provision for a private right of action for the illegally employed, injured child plaintiff. Therefore, this child plaintiff class is relegated to state law. State workers' compensation benefits may be the child's only form of relief. Workers' compensation statutes maintain employer tort immunity for job-related injuries which can leave the injured child without adequate relief. Should the employer who unlawfully hires a child in violation of federal child labor law still retain tort immunity under state workers' compensation statutes?

The FLSA was enacted to protect the "health, efficiency, and general well-being of workers"[3] in industries "engaged in commerce or in the production of goods for commerce".[4] Besides setting forth minimum wage and hour prerequisites,[5] the FLSA includes special provisions for the protection of children in the labor force.[6] The Act's coverage re-

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[1] Act of June 25, 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994)).

[2] 29 U.S.C. § 212(d) (1994) (allowing the Secretary of Labor to require by regulation that employers obtain proof of age from any employee).

[3] *Id.* § 202(A).

[4] *Id.*

[5] *Id.* §§ 206, 207.

[6] *Id.* § 212(a) states, in relevant part: "No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of

quires an employer-employee relationship.[7] An employee is "any individual employed by an employer."[8] The term employee "includes any person acting directly or indirectly in the interest of an employer."[9] Specifically excluded, however, is "any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family."[10]

States began to enact workers' compensation statutes in the early 1900's.[11] Workers' compensation laws guarantee an employee's relatively quick, certain and standard recovery for job-related injuries. In return, the employee gives up his or her right to a common law tort suit against the employer.[12] The alternative right to sue at common law

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such goods therefrom any *oppressive child labor* has been employed . . . ." (Emphasis added.)

Id. § 203(l) states, in relevant part:

> "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor [Secretary] shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau [Secretary] certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau [Secretary] shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief . . . determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

[7] *Id.* § 206(a)(1).

[8] *Id.* § 203(e)(1).

[9] *Id.* § 203(d).

[10] *Id.* § 203(e)(3).

[11] *See generally* 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 68.00-68.13 (1984).

[12] *Id.* §§ 65.00-65.60; *see* Mott v. River Parish Maintenance, Inc., 432 So. 2d 827

is provided by statute for various employer acts in certain states.[13] Some state statutes provide percentage increases in addition to workers' compensation benefits for the employer's failure to provide safety devices; or to obey safety regulations; or failure to comply with duties imposed by statute or regulation.[14] However, some courts have denied workers' compensation tort immunity to employers who have committed an intentional tort against the employee.[15] The theory justifying a civil action by an employee for intentional injuries inflicted by the employer is that the intentional act was not accidental injury thereby not included within the exclusive provisions of the compensation act.[16] Without a controlling statute, courts are free to determine whether an employer loses his tort immunity in the event he personally inflicts injury on an employee.[17] Public policy reasons would justify courts denying such an employer the workers' compensation statutes' tort immunity protection. It follows that public policy prescribes that an employer who intentionally violates the child labor laws loses the tort immunity afforded by workers's compensation statutes.

The workers' compensation statutes work to the satisfaction of most

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(La. 1983) (personal tort injury action barred against employer who legally hired minor but who required minor to perform tasks in violation of child labor law).

[13] *See, e.g., Ariz. Rev. Stat. Ann.* § 23-1022A-B (1994)(employer's willful misconduct); KY. REV. STAT. ANN. § 342.610(4) (Michie/Bobbs-Merrill 1994) (employer's intentional injury); OR. REV. STAT. § 656.156(2) (1994) (deliberate intention of employer to produce injury or death); WASH. REV. CODE § 51.24.020 (1994)(intentional injury).

[14] Failure to provide safety devices or to obey safety regulations, or failure to comply with duties imposed by statute or regulation: KY. REV. STAT ANN. § 342.165 (Michie/Bobbs-Merrill 1994) (15%); MO. REV. STAT. § 287.120(4) (1994) (15%); N.M. STAT. ANN. § 52-1-10(C) (Michie 1994) (increased award of $5,000); N.C. GEN. STAT. § 97-12 (1994) (10%); OHIO REV. CODE ANN. § 4121.47(B) (Anderson 1994) (civil penalty up to $5,000 in discretion of Board); UTAH CODE ANN. § 35-1-12 (1994) (15%); WIS. STAT. ANN. § 102.57 (West 1994) (15%); penalties for serious and willful misconduct of the employer or his supervisory personnel: CAL. LAB. CODE § 4553 (West 1994) (maximum penalty $250); MASS. ANN. LAWS, ch. 152, § 28 (Law. Co-op. 1994) (double compensation award).

[15] *See, e.g.*, Johns-Manville Products Corp. v. Superior Court, 612 P.2d 948 (Cal. 1980) (intentional misrepresentation); Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 (W. Va. 1978) (recklessness amounting to an intentional tort); Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1990) (tortious discharge).

[16] *See generally* Thomas D. Schroeder, Note, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890 (1983).

[17] Magluilo v. Superior Court, 47 Cal. App. 3d. 760 (1975); *see* 2A LARSON, *supra* note 11, § 69.21.

of America's labor force. However, the theory of workers' compensation immunity provisions clash with the underlying policy behind the child labor provisions of the FLSA. Workers' compensation law can preclude child farm laborers, hired in violation of child labor statutes from receiving adequate relief at common law. In effect, an employer who illegally hires a child still retains the benefits afforded by workers' compensation along with his tort immunity, which "allows the policy of the workers' compensation immunity provisions to triumph totally over the policy of the Child Labor Law".[18]

Absent Congressional or state amendments to child labor provisions, courts have been hesitant to allow suit for common law tort damages. No federal court has implied a private cause of action for violation of the FLSA with respect to its child labor provisions, although some state courts have permitted a private right of action in tort to the illegally hired, work-injured minor.[19]

This comment suggests that viable arguments exist for recognizing common law tort actions for children hired in violation of child labor law, especially for those working in the agricultural industry. Ideally, the child labor law should be revised by Congress. Until then, federal courts should imply a private cause of action as they have done in the past with other federal regulatory statutes.[20] States[21] recognizing these arguments have provisions in their workers' compensation statutes to provide an election of remedies to illegally hired minors. The child or the child's representative in those jurisdictions may elect either workers' compensation or an action at common law for tort damages as a remedy.[22] In spite of these state actions, child farm laborers may still be

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[18] Ewert v. Georgia Casualty & Surety Co., 548 So. 2d 358 (Ga. 1989).

[19] *Id.*; *see also infra* part II.

[20] Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) (impled cause of action from Federal Communications Act); J.I. Case Co. v. Borak, 377 U.S. 426 (1964)(implied private right from National Securities Exchange Act).

[21] *See, e.g.*, ALASKA STAT. § 23.30.055 (1993) ("Common-Law Damage Action By Illegally-Employed Child Not Barred"); *see also infra* note 22 and accompanying text.

[22] *See, e.g.*, N.J. STAT. ANN. § 34:15-10, which states, in relevant part:

> If the injured employee at the time of the accident or compensable occupational disease is a minor under 14 years of age employed in violation of the labor law or a minor between 14 and 18 years of age employed, permitted or suffered to work without an employment certificate or special permit if required by law or at an occupation prohibited at the minor's age by law, a compensation *or* death benefit shall be payable to the employee or his dependents which shall be double the amount payable under the schedules . . . .
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> . . . .

exempted from adequate relief under agricultural exemptions.[23]

Part I addresses the peril to which children laboring in agriculture are potentially exposed. The significance of the conditions are explained in statistical terms.

Part II demonstrates how state courts reconcile their workers' compensation statutes with their child labor laws. Courts interpret and follow their state law. Nonetheless a major contention advanced is that a voidable contract exists when a minor is hired illegally, in violation of the child labor laws. Determining whether a valid employment relationship exists, is subject to ratification by the minor or the minor's representative. Therefore, if the employment agreement is not ratified, no employment may exist within the meaning of most states' workers' compensation laws. This position would enable courts to declare that minors hired in contravention of federal and state labor laws are not employees and thus would permit private suits in tort against the employer. Employers would have a greater incentive to comply with the labor law requirements, such as the simple duty of checking work permits.[24] Absent Congressional amendments to the FLSA, federal courts, should imply a private cause of action from the FLSA to promote national uniformity and provide adequate relief to illegally hired, work-injured agricultural child laborers.

Part III examines the irony that no private cause of action has been implied from FLSA for violation of its child labor provisions. Courts[25] have denied relief by the implication process, reasoning that states' workers' compensation statutes provide the necessary remedy and employers may be sanctioned with criminal and civil penalties under the FLSA.[26]

Part IV confirms that Congress intended to afford children special protection in the labor force. Several legislative acts are pending in the

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> Nothing in this chapter contained shall deprive an infant under the age of 18 years of the right or rights now existing to recover *damages at common law* or other appropriate action or proceeding for injuries received by reason the negligence of his or her master. [Emphasis added.]

See also infra part II.

[23] *See* discussion *infra* part II.

[24] 29 U.S.C § 212(d) (1994) ("Proof of age. In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."); 29 C.F.R § 1627 (1994) ("Records to be made or kept relating to age.").

[25] *See, e.g.*, Breitwieser v. KMS Indus., Inc., 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973).

[26] 29 U.S.C. § 216(a)-(e).

House and Senate to amend the child labor provisions of FLSA.

A major portion of the agricultural child labor problem is lack of public awareness and inaction. Until Congressional legislation is enacted, or states amend their workers' compensation schemes, federal courts have the capability to enforce compliance with child labor laws by implying a private right of action from the FLSA.

I. CHILDREN IN AGRICULTURE

Agriculture is regarded as one of the most dangerous industries in the United States.[27] Agricultural workers are among the industrial groups with the highest fatality rates from occupational injuries (greater than 20 per 100,000 workers per year).[28] The American Academy of Pediatrics estimates that children under 14 years old make up 19% of the farm work force population.[29] Young laborers, because of their small physical size and experience, are at an even higher risk than adults of sustaining life-threatening injuries.[30]

Despite a public outcry against oppressive child labor of their industrial counterparts, the country has neglected the problem of child labor in agriculture. One commentator suggests that "[t]he reason for this shocking neglect was the continuing misconception that agriculture was not hard, difficult, or dangerous labor."[31] Work on the farm is often seen as a healthy, wholesome situation where the girls are freckled-faced and the boys are strapping. Although, not suggesting that this scenario is not sometimes the case, the hard reality is that for most young farm laborers, long, difficult hours are spent toiling in the fields.[32] Moreover, many of these child laborers are hired in violation of the FLSA.[33]

Opponents to any changes in the FLSA argue that the concerns are not about child labor but involve teenage labor. Contentions asserted are that there is a fine line between protection and deprivation of opportunity and that employers will not hire young people if legislation places onerous burdens on hiring minors. Noted is the general negative reaction of the farm community to any changes in agricultural coverage

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[27] U.S. GEN. ACCT. OFF., REP. NO. HRD-91-83BR, CHILD LABOR: CHARACTERISTICS OF WORKING CHILDREN 27 (June 1991).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] R. GOLDFARB, MIGRANT FARM WORKERS: A CASTE OF DESPAIR (1981).

[32] *Id.*

[33] 29 U.S.C. §§ 201-219 (1994).

of the FLSA that would result in financial hardship for farm-working children and their families.[34]

Despite these contentions, the farm worker community supports changes in the FLSA's child labor provisions.[35] The concerns stem from reports that illegal child labor still exists in this country, as thousands[36] of children work for too many hours in unsafe environments at too young an age. Even though the FLSA was enacted 56 years ago, an explosion of child labor violations has occurred in the last decade.[37] A General Accounting Office (GAO) report found that between 1983 and 1990, the annual detected number of child labor violations increased from 9,679 to 42,696.[38] GAO reported that between 1983 and 1990, the annual number of illegally employed children sustaining serious injuries increased by 100%.[39]

Working America's Children to Death is a compilation of data based on accounts of injuries and deaths among children on the job, especially those who work in garment manufacturing and as migrant laborers.[40] In 1990, the executive director of the American Youth Work Center and the head of the AFL-CIO's Child Labor Coalition urged the United States Department of Labor (DOL), employers, and schools to work together to end the ever increasing injury and death rates among children which could be as high as 200,000 workplace injuries per year.[41]

Proponents for amending the FLSA's child labor provisions have

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[34] S. REP. NO. 380, 102d Cong., 2d Sess. 32 (1992) (accompanying S. 600 (unenacted)).

[35] *Id.* Farm worker organizations supporting change include: the Association of Farmworker Opportunity Programs, the Virginia Farmworkers Legal Assistance Project, the Farm Labor Organizing Committee, the Migrant Clinicians Network, and the Yakima Valley Farmworkers Clinic.

[36] "Each year, 300 or more children under the age of [sixteen] are killed while working, run over by tractors or pulled into the whirling blades of wood chippers or suffocated when they fall into grain elevators. Another 23,500 are injured in accidents, leaving them without arms, legs or fingers." *Fatal and Nonfatal Farm Injuries to Children in the United States*, BOSTON GLOBE, April 22, 1990, at 2.

[37] S. REP. NO. 380, *supra* note 34, at 2-5.

[38] U.S. GEN. ACCT. OFF., *supra* note 27, at 27.

[39] U.S. GEN. ACCT. OFF., *supra* note 27, at 26.

[40] U.S. GEN. ACCT. OFF., *supra* note 27, at 26; *see also* Bill Treanor & Linda Golodner, *Child Labor Groups Issue Report on Injuries And Deaths Among Minors*, Daily Lab. Rep. (BNA) No. 171, at A-9 (Sept. 4, 1990) (Mr. Treanor is Executive Director of the American Youth Work Center. Ms. Golodner, Executive Director of the National Consumers League, heads the United States Department of Labor's Child Labor Advisory Committee and the AFL-CIO's Child Labor Coalition.).

[41] *Id.*

urged the DOL to enforce regulations to close loopholes in certain provisions of the FLSA that permit children to work in hazardous areas.[42] There is support for the proposition that employers seek children as entry-level employees as the underlying reason for the recent plethora of child labor law violations.[43] One commentator noted that working on family farms is the most dangerous occupation a child can have and hazardous environments do more than just hurt the children, they have a negative effect on the nation's competitiveness.[44] Students in other industrialized countries either do not work or do not do so during the school year. The goal is not to prevent young people from holding jobs, but to stop their jobs from hurting or killing them.[45]

As child labor violations continue to escalate,[46] it follows that neither the current penalty provision nor the civil fines included in the FLSA[47] are sufficiently enforced or represent much of an actual deterrent. Arguably, this is sufficient for federal courts to imply a cause of action.

II. Unlawful Employment and Workers' Compensation

A. Unlawfully Employed Minor

The most common instance of a contract which is prohibited but calls for no illicit activity is the unlawful hiring of minors. Generally, contracts made in violation of statutes are unenforceable.[48] Nevertheless, the rights of illegally hired minors are provided primarily by express statutory provisions, covering both legally and/or illegally hired minors.[49] The majority of state statutes add a penalty in the form of increased compensation.[50] Others provide an option to claim compensa-

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[42] 29 U.S.C. § 213(c)(C)(2) (1994).

[43] Treanor & Golodner, *supra* note 40.

[44] "Half of all migrant farm workers never graduate high school and their life expectancy is only forty-nine," *Nightline: Child Labor Abuse in the United States* (ABC television broadcast, May 2, 1990).

[45] Treanor & Golodner, *supra* note 40.

[46] *Latest Child Labor Dragnet Finds Violations at 753 Sites*, Daily Lab. Rep. (BNA) No. 118, at A-5 (June 19, 1990).

[47] 29 U.S.C. § 216(a) (1994) ("Fines and imprisonment. Any person who willfully violates any of the provisions . . . shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.").

[48] *See* 1B Larson, *supra* note 11, § 47.52; Smith Fertilizer and Grain Co. v. Wales, 450 N.W.2d 814, 815 (Iowa 1990).

[49] *See* discussion *infra* part II.B.

[50] 1B Larson, *supra* note 11, § 47.52(a).

tion or damages.[51] A few statutes cover only legally employed minors. Still others cover illegally employed minors either by statute or decision.[52] The remaining states either include an unlawfully employed minor within the definition of "employee" for purposes of workers' compensation statutes,[53] but provide for percentage increases for violation[54] of child labor laws, or allow an option to elect compensation or damages.[55]

Agricultural workers are covered in the same way as non-agricultural workers in approximately fourteen states.[56] The remaining states either completely exempt agricultural workers from their compensation acts or contain some limits on their coverage.[57]

1. Agricultural Exemption

Agricultural laborers are either wholly or partially exempt from workers' compensation laws in several states.[58] There are three grounds for the agricultural exemption.

First, farm workers do not need the protection of workers' compensation laws because their work is not hazardous.[59] One commentator has noted that while this proposition may have been true to a greater degree early in the century when the workers' compensation laws were first enacted, it is no longer valid today.[60] Complicated machinery and

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[51] *Id.*

[52] *E.g.*, Alabama, California, Colorado, Florida, Hawaii, Kansas, Nebraska, Oklahoma, South Dakota, Vermont and West Virginia cover illegally employed minors; Idaho, Indiana, New Mexico and Wyoming cover only legally employed minors.

[53] *E.g.*, Arizona and California cover agricultural workers as other workers: *See* ARIZ. REV. STAT. ANN. § 23-901; CAL. LAB. CODE § 3351 (West 1993); *see also* discussion *infra* part II.B.

[54] *E.g.*, ALA. CODE § 25-5-34 (1994); OR. REV. STAT. § 656.132(2) (1994); *see also* sources cited *supra* note 14.

[55] *E.g.*, Illinois, New Jersey, New Mexico and Texas; *see also* discussion *infra* part II.B.

[56] Arizona, California, Colorado, Connecticut, Hawaii, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania and Vermont.

[57] *See, e.g.*, ALA. CODE § 25-5-50 (1994); FLA. STAT. ANN. § 440.02(1)(c) (1994); IND. CODE § 22-3-2-9 (1994) (stating that Workmen's Compensation Act does not apply to "farm or agricultural" employees); KY. REV. STAT. ANN. § 339.210; N.D. CENT. CODE § 65-01-02 (1994)(limited coverage for agricultural employees); N.Y. WORK. COMP. LAWS § 2 (McKinney 1994) (covers minor agricultural employees only if under express contract for hire); VT. STAT. ANN. tit. 21, § 601 (1994).

[58] 3 NEIL E. HARL, AGRICULTURAL LAW § 20.03 (1987 & Supp. 1995).

[59] *Id.*

[60] *Id.*

chemical use on farms have made agriculture "quite hazardous."[61]

Second, farmers often cannot relegate compensation costs to the consumer by raising the prices of their products.[62] Authorities disprove this theory since it has no validity if farm labor coverage was mandatory in all the states.[63] Apparently, if only a few states required coverage, the competitive edge would be lost on those states as compared to the farmers in states not requiring agricultural labor coverage.

Third, farmers are not equipped to handle the administrative requirements of compensation acts. The commentators assert that this objection might be valid for small family farms but this argument loses its significance with respect to large farms.[64]

Compliance by agricultural employers is further complicated by the "family farm" exemption.[65] This exemption excludes children from the protective provisions of the Act when they are employed by a member of their immediate family. Children employed in agriculture predominately fall within this exemption, especially in the case of children of migrant workers. Most often, the migrant worker parents are classified as independent contractors and the children are not considered an employee of the grower/employer.[66] Therefore, the child labor provisions and other protections such as workers' compensation benefits do not apply. These children not only are left unprotected from oppressive child labor provisions,[67] but also may have no recourse for compensation of work-related injuries.

In 1970, The Occupational Safety and Health Act (OSHA) established a National Commission on State Workmen's Compensation Laws. The committee was formed to study and evaluate these laws to determine whether adequate, prompt, and equitable systems were in effect.[68] A recommendation filed by the Commission in July of 1972

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[61] *Id.*; *see* S. REP. NO. 380, *supra* note 34.

[62] 3 HARL, *supra* note 58.

[63] *Id.* (citing 1C LARSON, *supra* note 11, § 53.20).

[64] *Id.*

[65] 29 U.S.C. § 213(a)(6)(B) (1994) (exempting "any employee employed in agriculture . . . if such employee is the parent, spouse, child, or other member of his employer's immediate family.").

[66] *See generally* Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455 (1991).

[67] 29 U.S.C. § 212(a); *see supra* note 6 and accompanying text.

[68] 29 U.S.C. § 676(a)(1)(2) ("The purpose of this section is to authorize an effective study and objective evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.").

stated that all the states should cover farmworkers in essentially the same manner as other workers.[69] The report suggested that by July 1, 1973, coverage should be extended to agricultural employees whose employer's annual payroll exceeded $1,000; and by July 1, 1975, coverage should be extended to all farm workers.[70]

In spite of these recommendations, the majority of states still exempt some farm labor from coverage.[71] Some states exclude all farm laborers from coverage,[72] while others do not extend coverage to migrant or seasonal workers.[73]

2. Farmers' Common Law Duties

In absence of workers' compensation coverage, the farmer still has common law duties to his or her employees.[74] Primarily, the farmer has the duty of reasonable care for the safety of employees and specifically include: (1) providing a reasonably safe place to work,[75] (2) furnishing safe tools, machines, and appliances,[76] (3) supplying competent fellow workers,[77] (4) warning employees of latent defects or dangers in use of

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[69] REPORT OF NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, INTRODUCTION AND SUMMARY, MAJOR CONCLUSIONS AND RECOMMENDATIONS (1972).

[70] *Id.*

[71] *See, e.g., supra* note 57.

[72] *See, e.g., supra* note 57.

[73] *See, e.g.*, ME. REV. STAT. ANN tit. 39, § 21 (West 1993).

[74] RESTATEMENT (SECOND) OF AGENCY § 498 (1957) provides:

> A master is not subject to liability to a servant harmed by the negligent breach of the master's duty to his servants, unless: (a) the servant harmed is one to whom the master owed the duty of care;
> (b) the harm suffered is within the risk created by the breach of duty; and
> (c) the negligent conduct is the responsible cause of the harm.

[75] *See, e.g.*, Waldreps Dairy Farm, Inc. v. Robinson, 228 So. 2d 610 (Fla. Dist. Ct. App. 1969) (employee slipping and falling while straightening tongue of fertilizer trailer was not in itself sufficient to establish breach of duty to provide safe place to work); Crader v. Illinois Power Co., 272 N.E.2d 413 (Ill. App. Ct. 1971)(employer held liable to worker injured while moving mill grinder, since employee was required to work in poorly lit area); *see also* RESTATEMENT (SECOND) OF AGENCY § 492.

[76] *See, e.g.*, Van Aernam v. Nielsen, 157 N.W.2d 138 (Iowa 1968)(farm worker injured by allegedly defective corn picker); Von Tersch v. Ahrendsen, 99 N.W.2d 289 (Iowa 1959)(employer failed to furnish guard for hammermill grinder). ***But see*** Kientz v. Carlton, 96 S.E.2d 14 (N.C. 1957)(employer not negligent in furnishing power mower to worker); Jones v. Lamm, 69 S.E.2d 430 (Va. 1952) (liability denied on basis of simple tool doctrine).

[77] *See* RESTATEMENT (SECOND) OF AGENCY § 505.

farm machinery or dangers in other jobs assigned,[78] and (5) a duty to young or inexperienced workers.[79]

3. Farmers' Common Law Duties to Young Workers

The farmer has a distinct duty to instruct young workers since hazards obvious to an older, more experienced worker may not be so obvious to younger workers. The test is the adequacy of the farmer's warnings or instructions. Hence, a farmer is not necessarily liable merely because an accident involves a younger worker; it must also be shown that the employee lacked proper training.[80]

However, the farmer-employers have three main defenses to raise in negligence actions: (1) contributory negligence, (2) assumption of risk, and (3) the fellow servant rule.[81] These are the precise defenses that an employer, possessing workers' compensation coverage, relinquishes in exchange for immunity from suit by the injured employee.

Providing the injured young laborer with a common law action could necessarily preclude recovery if the employer is able to raise the usual defenses. Therefore, it is arguable that deliberate infringement of the child labor laws, at least in initial hiring, should be held to be a breach *per se* of the employer's duty to the child.[82] Additionally, in order to provide the injured child with the assurance of recovery, the employer should not able to raise the usual tort defenses.[83] This may be justified in light of the youth and inexperience of a younger laborer and the employer's violation of the child labor laws.

Some existing statutes have abolished the fellow servant rule and the defenses of contributory negligence or assumption of risk with regard to regulation of certain labor conditions, including child labor.[84] Nonetheless, in those states whose compensation acts do provide a common law right to sue, for example, for an injury intentionally inflicted by the employer, the language of the statute is not always precise and thereby

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[78] *See, e.g.*, Childs v. Rayburn, 346 N.E.2d 655 (Ind. Ct. App. 1976).

[79] *See* discussion *infra* part II.A.3.

[80] *See, e.g.*, May v. Mitchell, 176 S.E.2d 3 (N.C. Ct. App. 1970) (holding that it was duty of employer to instruct youth as to danger of operating farm machinery). *See also* RESTATEMENT (SECOND) OF AGENCY § 494 (duty of care to children).

[81] *See generally* 2A LARSON, *supra* note 11, § 71.00.

[82] Almost all statutes prohibiting the employment of child labor have imposed an absolute duty on the employer. *See generally*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 227 (5th ed. 1984).

[83] 2A LARSON, *supra* note 11, § 67.00.

[84] KEETON ET AL., *supra* note 82, § 80, at 576.

leaves room for judicial interpretation.[85] The courts have been enthusiastic to undercut the common law defenses to provide the uncompensated industrial injury with remedies, as this is an area that remains in need of further treatment.[86] Uncompensated or inadequate agricultural child labor injuries desperately need further attention as well.

Federal courts have still refused to imply a private right of action from the FLSA.[87] Absent federal mandates, states must enact precise legislation setting forth criteria regarding child labor violations. This would alert employers of the extent of their liability under circumstances where the employer does not have workers' compensation coverage and in situations where although the employer may have coverage, the coverage will not underwrite violations of the child labor laws.

B. Workers' Compensation

A worker (other than one expressly excluded from the act)[88] qualifies for workers' compensation recovery if the following is established: (1) the worker suffered an injury or illness, (2) the worker was employed by the insured, (3) the occupational injury or disease happened while the employee was acting within the scope and course of employment, and (4) the injury or disease was causally related to the employment.[89]

The second element, whether the employee was employed by the insured employer, is central to judicial interpretation in construing the workers' compensation statutory language. A child laborer's action at common law may be barred based on the statutory definition of "employee" or "worker" as to whether an employment contract existed. Additionally, courts have to determine if the injuries of a minor employed in violation of child labor law are within the purview of a workers' compensation statute.

Statutory language in workers' compensation schemes (a) may or may not have specific provisions regarding minors,(b) may have provisions entitling a minor to receive compensation under the statute despite the fact that the minor was illegally employed, (c) may be construed to have a statutory presumption that the minor is to come within the pur-

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[85] KEETON ET AL., *supra* note 82, § 80, at 576.

[86] KEETON ET AL., *supra* note 82, § 80, at 576.

[87] *See* discussion *infra* part III.

[88] The agricultural exemption is important to farmers; *see* discussion *supra* part II.A.1. For a review of other classes of workers excluded from state compensation acts, *see* 1C LARSON, *supra* note 11, ch. 9.

[89] 2A LARSON, *supra* note 11, § 69.24(f).

view of the statute unless notice to the contrary is given, (d) may have provisions making a minor *sui juris*[90] for the statute's purposes without qualification as to the legality of the minor's employment, (e) may have provisions entitling minors to receive benefits even if illegally employed, (f) may provide an illegally employed minor additional benefits or require an employer to pay penalties if the illegally hired minor were injured, or (g) may provide specifically for the illegally hired minor to elect to bring an action at common law.

1. Workers' Compensation Schemes with No Specific Statutory Provision Regarding Minors

When construing workers' compensation schemes that do not include specific statutory provisions regarding minors, state courts apply contract theories, legislative intent and statutory construction differently as to whether illegally employed minors may or may not bring a common law action.

For example, the Idaho Supreme Court[91] held the workers' compensation statute definition of "employee" to include "any person who enters into the employment of, or who works under contract of service with, an employer." The court found this sufficient to include minors within the definition without limitation as to the legality of the employment. The court reasoned that although entered into by the employer in violation of the child labor statute, the employment contract was not void. The court deduced that the relationship of employer/employee did not depend upon the existence of an express contract; the relationship arose out of an implied contract and included any person who had entered into the employment of an employer. This was based upon the court's view that the contracts of minors are not void, though subject to disaffirmance.[92] Additionally, the labor statute which provided appropriate penalties for its violation, played an important part in the court's decision. The court emphasized that it had consistently held that the remedy provided by the workers' compensation statute was exclusive in all cases arising out of employment unless excepted from its provisions.

A Louisiana court[93] rejected an illegally employed minor's negligence action against the minor's employer on the ground of legislative intent. The legislature's deletion in 1948 of the previous provision excluding

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[90] "Not under any legal disability, or the power of another, or guardianship." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

[91] Lockard v. St. Maries Lumber Co., 285 P.2d 473 (Idaho 1955).

[92] *Id.* at 475.

[93] Mott v. River Parish Maintenance, Inc. 432 So. 2d 827 (La. 1983).

minors from coverage evidenced its intent to include minors, whether or not employed in violation of law, within the coverage of the statute.[94] The court reasoned that use of the term "every person" in the coverage provision was legislative intent to include minors under the statute.

Opposite views are based on different application of contract theory or statutory construction. An Alaska Supreme Court decision[95] held that an illegally employed minor's negligence action was not barred by a workers' compensation statute which provided that the workers' compensation scheme is part of every contract of hire. The court's holding was based on the premise that a contract of hire between the employer and a minor is illegal, or at least voidable, and the employer should not be able to protect itself from common-law liability by professing the existence of an employer/employee relationship. The court reasoned that it was from the contract of hire, either express or implicit in the employment relationship that compensation coverage flowed. If the employer were to succeed in barring the minor's common law action, it had to show that a valid contract of hire was made. As to the legality of the contract, the court concluded that the agreement was illegal and voidable at the option of the minor since the child labor statute was premised in part on the notion that a minor is not competent to assess the risks of personal injury. The court precluded an employer who occupied a superior bargaining position from raising the agreement with the minor as a protection against the minor's common law action. The court would not allow the employer to benefit from an employment contract which was repugnant to public policy.

The Connecticut Supreme Court[96] held that when an illegally employed minor was killed in a job-related accident, the minor's personal representative may bring a negligence action against the minor's employer. The workers' compensation statute which defines the term "employee" as any person who had entered into or worked under any contract of service with an employer, is voidable when the agreement is in violation of the child labor statute. The minor's legal representative has the option of avoiding or ratifying the minor's employment agreement. The court reasoned that its holding corresponded with the common law

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[94] *But see* Ewert v. Georgia Casualty & Surety Co., 548 So. 2d 358 (1989). The court allowed an unlawfully hired, injured minor to proceed in a tort action against his employer. The court reasoned that it would be an anomaly to reward an employer for illegally employing a minor incapable of contracting. The court distinguished *Mott* because the minor in *Mott* had been employed legally but had been asked to perform an illegal task.

[95] Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 250 (Alaska 1976).

[96] Blancato v. Feldspar Corp., 522 A.2d 1235 (Conn. 1987).

doctrine that a child who enters into a contract may elect to avoid the legal relationship it created.

A New Mexico statute that defined "worker" as any person who works under contract of service with an employer did not bar a minor's negligence action. The court[97] explained that the statute in this case contained no specific language bringing illegally employed minors within its terms. The court's holding rested upon whether a valid employment contract existed. The contract here violated a penal statute and therefore was illegal and voidable.

If the statutory scheme contains language to the effect that coverage does not apply to employers of employees whose employment was prohibited by law, a negligence action may be brought. A West Virginia court[98] held that because a minor was unlawfully employed, and the statue specifically provided that it did not apply to employment prohibited by law, the negligence action was not barred by the statute.

2. Express Statutory Provision Regarding Minors

When workers' compensation statutes defined "employee" or "worker" as including minors, state courts have reached different dispositions as well. Opposing views have often depended on legislative amendments to the state's labor law.

For example, the Indiana workers' compensation statute had included only minors who were "lawfully" in the service of another. The legislature amended the statute by omitting the word "lawfully". One court[99] determined that the minor's negligence action was barred by the statute. The court declared that by amending the workers' compensation statute, the legislature did not mean to repeal the child labor statute since the amendment provided for double compensation in certain cases where a minor was employed in violation of the labor statutes. The court reasoned that the legislature clearly intended that the workers' compensation statute should govern and control in the case of all employed minors.

In a similar holding, a Michigan court[100] contended that the statute had previously defined the term "employee" as "every person in the service of another under any contract of hire, including minors who are legally permitted to work under the laws of the state." However, it had

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[97] Maynerich v. Little Bear Enters., Inc., 485 P.2d 984 (N.M. Ct. App. 1971).

[98] Morrison v. Smith-Pocahontas Coal Co., 106 S.E. 448 (W. Va. 1921).

[99] Dawson v. Acme Evans, Inc., 75 N.E.2d 553 (Ind. Ct. App. 1947).

[100] Thomas v. Morton Salt Co., 235 N.W. 846 (Mich. 1931), *cert. denied*, 284 U.S. 619 (1931).

been amended to define the term as "every person in the service of another, under any contract of hire, including minors." The amendment also provided double compensation and therefore the legislature had abrogated the disability of minors to contract and subjected minors, either legally or illegally employed, to the operation of the workers' compensation statute. The court reasoned that to this extent, the legislature had abolished the rule that a contract of employment in contravention of a child labor statute carrying criminal penalties was void.

An Arizona court's[101] statutory construction of a workers' compensation statute which defined "employee" as "every person in the service of any employer, including minors legally or illegally permitted to work for hire", concluded that an action at common law was barred. The court explained that common law may be changed by statute though it must be accomplished expressly or by necessary implication. Here the implication of the statute was that the common law with respect to a minor's capacity to contract had been changed. The legislature had withdrawn an historic protection of minors in exchange for providing them with what it considered greater protection in the employment arena.

A Florida decision[102] overruled an earlier case[103] that had construed the same statutory language "lawfully or unlawfully employed" to mean legislative intent as applied to minors who could be legally employed. The later decision asserted that since the statutory definition of "employee" included minors whether lawfully or unlawfully employed, the statute controlled whether an employment relationship existed. It declared that the statutory contract arose not by consent of the parties but came into being whether consent to employment could legally be given under the child labor statute. The court deduced it could not rule that an unlawfully employed minor was entitled to bring a common law suit and also hold that the minor was entitled to the protection of the workers' compensation statute. Therefore, the resolution should be in favor of the coverage of the workers' compensation statute.

A Utah case[104] decided in favor of a workers' compensation statute that also defined employees as including minors, "whether lawfully or unlawfully" employed. It concluded that while barring tort actions, the

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[101] S.H. Kress & Co. v. Superior Court, 182 P.2d 931 (Ariz. 1947).

[102] Winn-Lovett Tampa, Inc. v. Murphree, 73 So. 2d 287 (Fla. 1954), *overruled in part by* Mandico v. Taos 605 So. 2d 850 (Fla. 1992).

[103] Smith v. Arnold, 60 So. 2d 281, *overruled by Winn-Lovett Tampa, Inc.*, 73 So. 2d at 287.

[104] Bingham v. Lagoon Corp, 707 P.2d 678 (Utah 1985).

statute protected unlawfully employed minors to a preferable end. It reasoned that under the protection of the workers' compensation theory of no-fault, the minor would not have the prove the employer's culpability and that the employer's act was the proximate cause of injury.

An opposite result was reached by an early Nebraska decision.[105] The workers' compensation statute which defined employee as including those in the service of an employer, including "minors who are legally permitted to work under the laws of the state", did not bar the minor's negligence action. The court declared that the statute did not compel illegally employed minors to be categorized under it. The court recognized that the provisions against employing minors should penalize employers, not the minors.

3. Statutory Presumption that the Minor Falls Within the Coverage of Workers' Compensation Statute Unless Notice to the Contrary Is Provided

Over the years, courts have held that it would be conclusively presumed that the employer and employee had accepted the provisions of the workers' compensation statute (in either express or implied contracts of hire), unless either party gave written notice to the other at the time of contracting. This presumption applied to minors unless the parent or guardian of the minor gave written notice.

A Pennsylvania court[106] held that where a minor was employed in violation of the child labor statutes, the minor's negligence action was barred by the workers' compensation statute. The latter had been amended to provide that if neither the employer nor the employee had chosen not to be bound by the provisions of the statute, they would be held to have agreed to be bound by those provisions.

In a parallel holding, an earlier Pennsylvania decision[107] explained that all contracts of employment made subsequent to the statute would be presumed to have been made subject to its provisions unless notice to the contrary was given. The court reasoned that the object of the child labor statute was the protection of the minor. Further, minors were entitled to the equal protection of the law with adults and that if benefits and protection were afforded to adults, they should be extended to minors whenever it could be done consistently with the language and spirit of the workers' compensation statutes and the child labor statutes.

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[105] Benner v. Evans Laundry Co., 222 N.W. 630 (Neb. 1929).

[106] Lengyel v. Bohrer, 94 A.2d 753 (Penn. 1953). *See infra* note 111 and accompanying text.

[107] Humphries v. Boxley Bros. Co., 135 S.E. 890 (Va. 1926).

The court countered the contention that a contract is voidable by a minor by reasoning that it was within the power of the legislature to fix any age at which an infant could enter into a contract of a particular character. The court emphasized that otherwise, the minor may not be able to prove the negligence of the employer and receive nothing in a common law action but would be assured of some recovery under workers' compensation coverage.

An interesting aspect of the case was the court's explanation of the provision added in amendment of the workers' compensation statute. The amendment provided that if a minor, employed in violation of a child labor statute, was injured, the parents of the minor could maintain an action at law for loss of service of the minor against the employer, in addition to compensation benefits. The court reasoned that the legislature had intended that it was immaterial whether the employment was lawful or unlawful. It concluded that the remedy expressly given to the parents of the minor conferred no new right but that it was best to provide expressly for these damages.

Notwithstanding the arguments that the workers' compensation statute created a presumption that minors would be bound by the provisions of the statute unless notice to the contrary was given, other courts have held that the negligence action brought by an illegally employed minor, injured in the course of employment was not barred. The reasoning is that the minors employed in violation of a child labor statute could not lawfully assent to be bound by the provisions of the workers' compensation statute, therefore, no lawful employment contract existed.

An early Delaware case[108] found that the basic principle underlying the workers' compensation statute was that some contractual relationship existed and there was a claim for injuries. The court deduced that from this relationship rested the claim of the employee under the statute and upon this relationship was based the exemption of the employer from liability other than that provided by the statute. The statute defined employee as every person in the service of another under a contract of hire. It concluded that a minor employed in violation of a child labor statute could not lawfully assent to be bound by the provisions of the statute, hence no employment relationship existed. The court declared that to hold otherwise would largely nullify the child labor statute and would not discourage the practice which the statute had made illegal. The employer's liability would be no greater in case of an illegal employment than in legal employment.

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[108] Widdoes v. Laub, 129 A. 344 (Del. Super. Ct. 1925).

A Vermont court[109] reasoned along these same lines. It held that the presumption referred only to minors who were employed without violating any of the child labor statutes. The court pointed out that the provisions of the workers' compensation statutes were inapplicable in cases where personal injuries had been suffered by a minor whose employment was unlawful.[110]

4. Minor as *Sui Juris* Under Workers' Compensation Statutes

Workers' compensation statutes that have language to the effect of making a minor *sui juris* for the purposes of the statute have also led courts to different conclusions in interpreting the statute. Court interpretations turned on whether *sui juris* meant to apply to a remedy or to the legality of the employment.

A Pennsylvania court[111] found that an illegally employed minor's negligence action was barred by the workers' compensation statute. The statute defined minors who were of majority age as "working at an age and at an occupation legally permitted" and additionally provided, "no other person shall have any cause of action or right to compensation for injury to such minor workmen." The court explained that the plain wording showed this section of the statute to provide legally employed minors their own cause of action before the workers' compensation board and collect their own money. The court interpreted this section to mean that by reverse implication, illegally employed minors must be represented by a guardian before the board at all times. The court declared that there was no doubt that illegally employed minors were within the purview of the statute since the section defined the term employee as every person in the service of any employer, including aliens and minors legally or illegally permitted to work for hire. The court felt that the two sections of the workers' compensation scheme were resolved in harmony.

In a wrongful death action, an Oregon court[112] held that the workers' compensation statute that provided for a minor working at an age legally permitted under the state laws was considered *sui juris* for the purposes of the statute and that no other person had any right to compensation for an injury to such a minor worker. The court determined

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[109] Wlock v. Fort Dummer Mills, 129 A. 311 (Vt. 1925).

[110] *See also* Wisell v. Jorgensen, 398 A.2d 283 (Vt. 1979) (following the rule in *Wlock*).

[111] S.H. Kress & Co. v. Superior Court, 182 P.2d 931 (Ariz. 1947). *See supra* note 106 and accompanying text.

[112] Manke v. Nehalem Logging Co., 315 P.2d 539 (Or. 1957).

that an illegally employed minor did not have the right to elect between receiving benefits under the statute or suing at common law as his adult counterparts could. The court noted that if the legislature had intended such a minor to have an election it would have extended these same protection and privileges that it provided for adult workers.

Other courts have held that despite statutory language making a minor *sui juris* for the workers' compensation statutes, it did not apply to those minors illegally employed. The courts liberally construed both workers' compensation statutes and child labor statutes to effectuate the purposes of both.

A Utah court[113] reasoned that minors legally permitted to work for hire were put in the same position before the law as adults but that all minors not legally permitted to work for hire were still under the disability of minority. Hence, they were not *sui juris* for the statute's purposes and were not to be considered limited in their remedies by provisions of the workers' compensation statutes.

A Rhode Island decision[114] found that employment of a minor without an employment certificate was expressly prohibited by the child labor statute and was unlawful. It deduced that the workers' compensation statute had to be construed in light of the condition of employment of the child labor statute. It asserted that the child labor statute and the workers' compensation statute were both examples of modern social legislation along different lines, that each had a beneficent design and each was to be construed liberally to effectuate its purpose.

5. Workers' Compensation Provision Entitling Minors to Receive Benefits Even if They Are Illegally Employed

Workers' compensations schemes which expressly provide that illegally employed minors are included within the purview of the statutory scheme lead courts to reach different conclusions. The results differ despite the express language in the statute.

A North Carolina court[115] held that an eight-year-old minor's negligence action was barred by the workers' compensation statute. The holding was based on the statutory language that expressly included illegally employed minors.

An Iowa court[116] reached a contrary disposition despite the workers' compensation scheme's express language which included the terminol-

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[113] Ortega v. Salt Lake Wet Wash Laundry, 156 P.2d 885 (Utah 1945).
[114] Taglinette v. Sydney Worsted Co., 105 A. 641 (R.I. 1919).
[115] Lemmerman v. A.T. Williams Oil Co., 350 S.E.2d 83 (N.C. 1986).
[116] Lodge v. Drake, 51 N.W.2d 418 (Iowa 1952).

ogy "illegally hired." The court reasoned that the statute's language did not limit the minor to the remedy of workers' compensation but gave him the option to sue at law. The court relied on an earlier decision[117] where the workers' compensation statute had contained a similar provision providing that an illegally employed minor was allowed to receive compensation but was entitled to double the compensation. The earlier decision had held that the statute gave the minor the privilege of taking compensation instead of pursuing an action at law since the section did not create a new right or liability. It provided a new remedy for an already existing right and the general rule is that such a remedy is not to be regarded as exclusive but as an additional remedy. The later decision noted that it was a general rule that where a statute merely prescribes a new remedy for a pre-existing right or liability, such a new remedy is cumulative, unless the statute shows an intention to supersede the old remedy. The court concluded that here, the statute did not indicate a legislative intent to provide compensation benefits as the exclusive remedy. The plain meaning of the statute permitted, but did not require, illegally employed minors to resort to the compensation remedy.

6. Workers' Compensation Scheme Providing for Additional Benefits or Penalties

Some courts construe workers' compensation schemes which provide additional benefits or penalties in cases of illegally employed, work-injured minors, as legislative intent to keep such minors within the protections of the statutes. The additional benefits or penalties provide the remedy. Other courts view these statutory provisions as additional rather than exclusive remedies.

A Michigan court[118] held that an illegally employed minor was entitled to double compensation. The court felt the legislature had abrogated the disability of minors to contract and subjected them whether legally or illegally employed to the operation of the workers' compensation statutes.

Likewise, an Oregon court[119] held that an action at law was barred by the workers' compensation statutes. The court contended that the scheme provided that if any worker at the time of injury was less than the maximum age prescribed by law for employment of a minor, the

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[117] *See Ortega*, 156 P.2d at 885.

[118] Thomas v. Morton Salt Co., 235 N.W. 846 (Mich. 1931), *cert. denied*, 284 U.S. 619 (1931).

[119] Rasi v. Howard Mfg. Co., 187 P. 327 (Wash. 1920).

employer was obligated to pay a penalty sum into the workers' compensation fund. The court construed this section as legislative recognition that a minor less than the maximum age for the employment was a worker within the meaning of the statute. Whether the minor was lawfully or unlawfully employed, the minor had to seek remedies under the statutes' terms. The court reasoned that the child labor statute did not make it unlawful for a minor under the prohibited age to work and imposed no penalty upon the minor when he did work. It followed that the minor neither gained nor lost any rights by such employment, even though the employer may be penalized.

A Utah decision[120] held that the workers' compensation statute did not bar a tort action. It held as such despite the fact the statute provided that an illegally employed minor "shall not be debarred from receiving compensation, but shall be entitled to double the compensation to which he would be entitled if legally employed." The court held that the double compensation provision was not the exclusive remedy of the statute. The court noted that the statute's language did not state that the remedy shall be double compensation, nor did it maintain that the minor was bound by any provision of the statute. The court reasoned that the purpose of the section was to prevent the employer from illegally using the minor's services as a defense to a claim for compensation, thereby giving the minor the right of taking compensation instead of pursuing civil remedies. The court concluded that the section did not create a new right or new liability but just provided a new remedy for a pre-existing right. It reasoned that the minor had a choice of remedy against an employer who did not comply with the law.

7. Workers' Compensation Statutes That Permit Minor to Bring Action at Law

Some courts[121] recognize the right of an illegally employed minor to bring an action at law against the employer if the workers' compensation statutes' provisions expressly confirm the right. The right exists if the minor rejects his statutory benefits usually within 6 months after the time of injury.

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[120] *Ortega*, 156 P.2d at 885.

[121] *E.g.*, Ginsberg v. Coca-Cola Bottling Co., 285 F.2d 77 (7th Cir. 1961); Estep v. Janler Plastic Mold Corp., 312 N.E.2d 618 (Ill. 1974); Alton v. Byerly Aviation, Inc., 368 N.E.2d 922 (Ill. 1977). For a more exhaustive study, *see* Annotation, *Workers' Compensation Statute as Barring Illegally Employed Minor's Tort Action*, 77 A.L.R. 4th 844 (1987).

C. Summary

State courts interpreting and reconciling state workers' compensation laws with state child labor laws reach different conclusions as to whether an illegally employed minor may bring an action at common law. Child labor laws are based somewhat on the assumption that a child is not competent to assess the risks of personal injury accompanying employment. If one party to an agreement is under such a legal disability, the other party in a superior bargaining position may not be able to raise the agreement as a protection against the child's common law suit. Moreover, a contract between an illegally employed minor and an employer, whether express or implied, if in violation of child labor laws should be unenforceable. Contract law should control in that no employment relationship exists or the "contract" is voidable at the option of the minor or the minor's representative. If no employment exists, the minor would not fall within the purview of most state workers' compensation schemes which require an employment relationship. The minor or a personal representative could either affirm or disaffirm the contract. In this way, the illegally employed minor is not penalized and is covered, either at his option, under the state workers' compensation laws or under an action at common law.

With respect to the agricultural exemption, the employer must comply with the child labor provisions of the Act prohibiting the employment of minors in agriculture except under certain conditions.[122] One condition, the FLSA's "family farm" exemption,[123] should mean just that, a family farm. It should not apply to children of agricultural laborers who accompany their parents to work. The FLSA requires employment.[124] Clarifying statutory language would enhance compliance with the law. It is not burdensome for grower/employers to check work permits for age. Children of agricultural laborers should be in school or have day care provided. Strict enforcement of the child labor laws would promote the welfare of child laborers in this regard.

Notwithstanding these various arguments, the courts must recognize the public policy implicated when a state statute shields one who intentionally violates the law. More importantly, the FLSA provided for the protection of children in the labor force. Federal courts usually will not imply a private cause of action from a federal regulatory statute if the

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[122] *See* 29 C.F.R. § 780.321 (1994).

[123] 29 U.S.C. § 203(e)(3) (1994).

[124] *Id.* § 206(A) (1).

state remedies have not been exhausted.[125] They have been known to imply a private right of action, though, if it would promote national uniformity.[126] As demonstrated above, the state courts are divided as to how they reconcile their workers' compensation schemes with their child labor laws. A great number of children employed in agriculture are migrant. It is unreasonable that an injured agricultural child laborer may be limited to a compensation remedy in one state and another child laborer "fortuitously" injured in some other state may have an election of remedies. Accordingly, an action at common law would promote uniformity among the states.

An implied cause of action from the FLSA would not only promote national uniformity but also the underlying policy behind the child labor provisions of the Act. It must be noted that an employer, benefitting from immunity under workers' compensation statutes, can transfer these costs on to society in the form of higher prices for products. The employer pays his/her insurance carrier or pays the fines under the laws for violations but this can be written-off as a cost of doing business. This is not to mention the detrimental effects the violating employer imposes on our children as a whole.[127]

III. The Fair Labor Standards Act

The FLSA[128] is a regulatory statute that affords no remedy for child workers, a class it specifically sets apart from all other classes of workers.[129] An illegally employed, work-injured child has no recourse under the Act. Furthermore, workers' compensation statutes do not necessarily provide a child plaintiff adequate recovery. This is especially true for child farm laborers.

Traditionally, agriculture has been excluded from labor law protection.[130] The original version of the FLSA did not provide protection to farm workers generally and specifically exempted agricultural workers from its coverage.[131] In 1966, the FLSA was amended to raise mini-

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[125] *See* discussion *infra* part III.

[126] *See* discussion *infra* part III.

[127] *See generally* Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, (1987).

[128] 29 U.S.C. §§ 201-219.

[129] *Id.* § 212.

[130] *See* National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449 (1935) (codified at 29 U.S.C § 152(3)).

[131] Fair Labor Standards Act of 1938, ch. 676, § 13, 52 Stat. 1067.

mum wages and extend protection to agricultural employees.[132] The 1966 amendments also included provisions against oppressive child labor in agriculture.[133] Congress amended the FLSA in 1966 to offer the Act's worker protections to the agricultural industry, since it realized the relationship between the farm workers oppressive conditions and their exclusion from the original enactment of the FLSA.[134]

In 1974, subsequent amendments were approved, prohibiting the employment of all children under the age of twelve in agriculture.[135] Another section was added that required employers to provide proof of the child's age.[136] Nevertheless, children who worked on a family farm or with the consent of the parents outside of school hours, were exempted.[137] This is the only exemption from the child labor provisions relating to agriculture.[138] Basically, this provision effectively works against the interests of the majority of children of migrant farm laborers who traditionally work with their parents in the fields.[139]

With these 1974 amendments, the FLSA prohibited all employment of children under twelve in agriculture.[140] However, in 1977 the Secretary of Labor was given authority to provide waivers[141] of the application of the FLSA's child labor provisions to farm employers who hired ten- and eleven-year-old children to harvest short-season crops.[142] These waivers were further limited to prohibit employment that would

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[132] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 203, 80 Stat. 830 (codified as amended at 29 U.S.C. § 213(a)(6)).

[133] *Id.* (codified at 29 U.S.C. § 213(c)); *see also* S. REP. NO. 1487, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3010-13.

[134] "It is a shocking fact that demands immediate remedy that 41 percent of all children living in poverty were [sic] in families where there is a worker who has a full-time job throughout the year." S. REP. NO. 1487, *supra* note 133, *reprinted in* 1966 U.S.C.C.A.N. at 3004.

[135] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 25, 88 Stat. 72 (codified as amended at 29 U.S.C. §§ 212-213 (1994)).

[136] *Id.*, § 25(a) (codified as amended at 29 U.S.C. § 212(d)).

[137] *Id.*, § 25(b) (codified as amended at 29 U.S.C. § 213(c)(1)).

[138] 29 C.F.R. § 570.123 (1994).

[139] Because the children involved are employed by their parents, who are either independent contractors or employees of the farmer, the children fall within the ambit of the exemption.

[140] 29 U.S.C. § 213 (c)(1)(A).

[141] Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, § 8, 92 Stat. 1250 (codified as amended at 29 U.S.C. § 213(c)(4)(1994)).

[142] 29 U.S.C. § 213(c)(4)(A)(i). A short-season crop is defined by recognizing that "[t]he variety of each crop to be harvested must ordinarily be harvested within 4 weeks in the region in which the waiver will be applicable." 29 C.F.R. § 575.5(a) (1994).

in any way be deleterious to the child's health.[143] Also, the industry of the employer has to be one that traditionally and substantially employed children under twelve years old.[144]

The FLSA also has provisions treating many types of employment that are related to or involve agriculture.[145] For example, irrigation, tobacco, country elevators, livestock auctions and the processing of agricultural products are among those provided for by the Act as it applies to coverage and exemptions.[146]

The FLSA requires compliance with all other federal or state laws or municipal ordinances that are not conflicting. If these other statutes have higher standards than those provided in the FLSA, an employer may not rely upon the Act to justify non-compliance with their provisions.[147]

A. The FLSA's Exemptions Relating to Child Agricultural Laborers

The FLSA exemptions tend to mislead, especially if not read in conjunction with the Code of Federal Regulations (CFR) promulgated from the Act. Upon an initial reading, and without the benefit of the CFR's further explanation, the farm employers' duty with regard to employment of children may be misunderstood.

The FLSA exempts from the minimum wage, equal pay and overtime requirements of the Act, "any employee employed in agriculture . . . if such employee is the parent, spouse, child or other member of his employer's immediate family."[148] Although the statute does not define "immediate family", other than the specifically named "parent, spouse, [or] child,[149] the regulations stipulate that only the following additional persons qualify as the employer's immediate family: step-children, foster children, step-parents and foster parents.[150]

The Act also exempts from the minimum wage, equal pay and overtime requirements "any employee employed in agriculture . . . if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been and is customarily and

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[143] 29 U.S.C. § 213(c)(4)(A)(ii).
[144] *Id.* §213(c)(4)(A)(v).
[145] *Id.* §§ 207(m), 213(b)(12)-(16), 213(b)(28).
[146] *Id.*
[147] *Id.* § 218(a).
[148] *Id.* § 213(a)(6)(B).
[149] *Id.*
[150] 29 C.F.R § 780.308 (1994) (defining "immediate family").

generally recognized as having been paid on a piece rate basis in the region of employment . . . ."[151] This exemption was meant to encompass the random, temporary worker and not the full-time farm worker such as a migrant laborer.[152] The pertinent regulation emphasizes that the requirement for the hand harvest laborer cannot be satisfied by a migrant worker, no matter how long such a worker remains in the vicinity.[153]

To qualify for the hand harvest labor exemption, all six conditions specified by the statute must be met. The basic condition requires that the employee be "employed in agriculture."[154] The next statutory condition requires that the employee be a "hand harvest laborer."[155] This means that the farm workers must be engaged in harvesting soil-grown crops either by hand or with hand tools.[156] If the employee's work involves any use of power driven mechanical tools or equipment or pertains to animals or poultry, the employee ceases to qualify as a hand harvest laborer.[157]

The definition is limited to harvesting, so that the act of any non-harvesting operation in the same work week would eliminate the hand harvester exemption.[158] Furthermore, the employee must be paid on a

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[151] 29 U.S.C. § 213(a)(6)(C) provides, in pertinent part, that the employee "(ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year . . . .").

[152] 29 C.F.R. § 780.310 (exemption for local hand harvest laborers).

[153] *Id.* § 780.315(a).

[154] 29 U.S.C. § 203(f).

[155] *Id.* § 213(a)(6)(C)(i).

[156] 29 C.F.R § 780.312(a).

[157] *Id.*

[158] *Id.* § 780.312(b) provides:

> The definition is limited to harvesting and the performance by the hand harvester of any non-harvesting operation in the same workweek which would cause the loss of the section 13(a)(6)(C) exemption.
>
> For example:
>
> (1) employees who wrap tomatoes in a packing shed would not qualify, as the wrapping is a non-harvesting operation. (*Schultz v. Durrence* (S.D. Ga.); 63 CCH Lab. Cas. 32,387; 19 W.H. Cases 747.)
>
> (2) Employees who hand pick small undesirable fruit prior to harvesting in order to insure a better crop would not qualify for the exemption. This is a pre-harvest culling operation performed as a part of the cultivation and growing operations not harvesting.
>
> (3) Employees who chop cotton, since this is a non-harvesting operation.

piece work basis only[159] and that this is "customarily and generally recognized as having been . . . [paid this way] in the region of employment."[160]

The final condition for hand harvest labor is that the employee be employed in agriculture less than thirteen weeks during the preceding calendar year.[161] The Congressional intent was that the exemption apply *only* to temporary workers.[162]

It is easy to see how confusion may result if one reads the statute pertaining to hand harvest laborers alone. It would appear that this exemption was directed to migrant workers, given the language about the impermanent work and use of the term "hand harvest". The corresponding regulation clarifies the statute, in that the statute is not directed towards migrant workers and only applies to temporary workers. In any event, this is an exemption for only the minimum wage, equal pay and overtime requirements coverage of the FLSA.

However, there is an exemption for piece work agricultural workers "sixteen years of age or under" directed to non-local minors who are the children of migrant agricultural workers.[163] Yet the exemption is limited by its term, as it is available only to those children 16 years of age or under.[164]

Lastly, the statute requires that the minor be employed on the same farm as the parent or guardian.[165] The regulation however has some latitude in the construction of the terms "parent" and "person standing in the place of his parent." The statutory language is overbroad. The latter term is not limited to a natural parent or legal guardian and may include "one who takes a child into his home and treats it as a member of his own family, educating and supporting the child as if it were his own."[166]

Nothing in the statute permits noncompliance with any of the Act's

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[159] 29 U.S.C. § 213(a)(6)(C)(i).

[160] 29 C.F.R § 780.313.

[161] 29 U.S.C. § 213(a)(6)(C)(iii).

[162] 29 C.F.R. § 780.316(b).

[163] The statute provides that this exemption for non-local minors does not pertain to an employee who comes within the commuting pieceworker classification. The statute refers to an employee "other than an employee described in clause (C) of this subsection." 29 U.S.C. § 213(a)(6)(D). Specifically, the exemption is intended to apply in the case of migrant farm workers' children who characteristically accompany their parents in harvesting and other agricultural work. S. REP. NO. 1487, *supra* note 133, *reprinted in* 1966 U.S.C.C.A.N. at 3012; *see also* 29 C.F.R. § 780.318(b).

[164] 29 U.S.C. § 213(a)(6)(D)(i).

[165] 29 C.F.R. § 780.322(a).

[166] *Id.* § 780.322(b).

provisions relating to the employment of child labor.[167] The exemptions exist only as they pertain to minimum wage, equal pay and overtime requirements.

B. Implied Private Right of Action from the FLSA

The federal judiciary has the authority to imply a private remedy for violations of the federal regulatory statutes.[168] This doctrine was introduced by the United States Supreme Court in *Texas & Pacific Railway Co. v. Rigsby*.[169] Following this decision, private remedies have been implied from the Securities Exchange Act,[170] the National Banking Act,[171] and the Federal Communications Act,[172] among others. In order to imply a private civil remedy from a regulatory statute, the statute must establish a minimum standard of care for the type of conduct it regulates. This standard of care sets forth the standard of reasonableness to be used in guiding the court. Therefore, the statutory standard of care is applied to plaintiff's pre-existing tort action.[173]

Proof of the defendant's violation of the FLSA could establish fault

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[167] *Id.* § 780.321 ("Although 29 U.S.C. § 213(a)(6)(d) provides a minimum wage and overtime exemption for minors 16 years of age or under, the employer must nevertheless comply with the child labor provisions of the Act prohibiting the employment of minors in agriculture except under certain conditions and circumstances."). *See also id.* § 570.123(a) ("Section 13(c) of the Act provides an exemption from the child labor provisions for 'any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed.' This is the only exemption from the child labor provisions relating to agriculture . . . . This exemption . . . is limited to periods outside of school hours . . . .").

[168] The doctrine was originated by the English Courts in 1854. *See* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). However, it has since been rejected by those courts. During the Warren Court era, the United States Supreme Court liberally granted implied rights of action when implication would effectuate the congressional purposes underlying the statutory right at issue. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969); J.I. Case Co. v. Borak, 377 U.S. 426 (1964). The Burger Court, maintaining judicial restraint, permitted the implication process only if there was legislative intent to create an implied right of action. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981).

[169] 241 U.S. 33 (1916).

[170] *E.g., J.I. Case Co.*, 377 U.S. at 426.

[171] *E.g.*, Dietrick v. Greaney, 309 U.S. 190 (1940).

[172] Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[173] Glanville L. Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233 (1960). *See, e.g.*, Jacobson v. New York, N.H. & H.R. Co., 206 F. 2d 153 (1st Cir. 1953).

either on a theory of strict liability or negligence *per se*.[174] Proof that defendant employer's violation caused the injury should also be an essential element of the action.[175] In violating child labor laws, proof of the defendant's violation should be sufficient to establish a *prima facie* causation. This is based on the theory that the child's injury presumptively resulted from the defendant's act of assigning him [or her] to a particularly hazardous occupation. The child, because of his youth, is incapable of appreciating the dangers associated with the assigned task.[176] Accordingly, the employer violating the child labor laws would be held liable when delegating prohibited tasks even if the child is legally hired. In conjunction with the theory of no-contract no-employment status, the legally hired child who is injured when performing an unlawful task would also have a recourse to recovery, thereby covering both aspects of employer misconduct. In any event, workers' compensation schemes were meant to cover only negligently caused work-related injuries.[177] Employers necessarily must be familiar with labor laws. Deliberate violation of child labor laws cannot be characterized as negligence.

The costs of industrial accidents, like the other costs of doing business, should be borne by the business that engendered them.[178] As such, the right to workers' compensation benefits is made to depend on the relationship of the injury to the victim's work. Indeed, there is no requirement that the employer be at fault in order for the employee to recover benefits.[179] On the other hand, the employee relinquishes all his common law actions against the employer.[180] Therefore, whether tort immunity under workers' compensation should shield the employer would primarily depend on the particular harm. The immunity should not be enjoyed when the employer has violated state and federal labor laws.

However, federal courts have refused to apply this theory under the FLSA in cases of the unlawfully hired, work-injured child.[181] Primarily, federal courts are hesitant to create an entirely new federal cause of action.[182] The creation of a new cause of action is significant. If the

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[174] *See* KEETON ET AL., *supra* note 82, at 229.

[175] *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 383-85 (1970).

[176] Berdos v. Tremont & Suffolk Mills, 95 N.E. 876, 880 (Mass. 1911).

[177] *See generally* Schroeder, *supra* note 16.

[178] *See* KEETON ET AL., *supra* note 82, § 89, at 573.

[179] *See generally* LARSON, *supra* note 11.

[180] *Id.*

[181] *See, e.g.*, Breitwieser v. KMS Indus., Inc., 467 F.2d 1391 (5th Cir. 1972).

[182] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403

statute under consideration is, by definition, silent in terms of private causes of action, then the court must define the cause of action as to venue, jurisdiction, measure of damages and beneficiaries of the action.[183]

Additionally, courts may not imply a new federal private right if the statute provides criminal penalties for its violation.[184] Violations of the FLSA child labor provisions can amount up to six months imprisonment and/or a $10,000 fine.[185] Nonetheless, no one may be imprisoned under the Act unless he or she has already been convicted.[186] Apparently, these penalties do not act as much of a deterrent compared to the increased number of violations.

Policy considerations are especially important in the implication process since federal courts are reluctant to assume the role of enacting legislation.[187] The strict constructionist judges[188] would allow implied rights from regulatory statutes only if there is a strong legislative intent to that end.

This "legislative intent" test, if construed strictly, could eliminate the implication doctrine. Congress does not specifically state such an intent

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U.S. 388, 402 n.4. (1971) (Harlan, J., concurring).

[183] *See generally* Michael Braunstein, *Implied Remedies—Fair Labor Standards Act—Violation of Federal Child Labor Laws Does Not Give Rise To Implied Cause of Action For Damages*, 47 TULANE L. REV. 1201 (1973).

[184] Although the Supreme Court in *Bivens* rejected the idea that the availability of money damages necessarily decided the question of whether such damages were necessary to either imply a cause of action or not, Justice Harlan's concurrence declared, "a court of law . . . should [not] deny . . . relief simply because [the plaintiff] cannot show that future lawless conduct will thereby be deterred." *Bivens*, 403 U.S. at 408.

[185] 29 U.S.C. § 216(a) (1994).

[186] *Id.* ("No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.").

[187] This parallel to lawmaking is used to justify decisions, not to imply civil remedies. *See, e.g.*, United States v. Standard Oil Co. 332 U.S. 301, 316 (1947) ("[E]xercise of the judicial power to establish the new liability . . . would be intruding within a field properly within Congress' control.").

[188] These justices advocate that federal courts not imply rights of action absent the "most compelling evidence that Congress in fact intended such action to exist." Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 408-09 (1982) (Powell, J., dissenting). The three other justices (Chief Justice Burger and Justices Rehnquist and O'Connor) who joined Justice Powell in his dissent and who seem to agree consistently with a restrictive approach are referred to as the "strict constructionists." *See generally* K.G. Jan Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978).

when the statute does not expressly provide for a cause of action.[189] Therefore, adoption of this position forecloses any possible judicial relief for aggrieved minor plaintiffs. Moreover, it effectively immunizes the private agricultural employers from judicial review of their noncompliance with the regulatory child labor provisions of the FLSA. Perhaps, child agricultural laborers, need the federal regulatory mandates for their safety in the work force more than any other protected group.[190]

The administration and enforcement of these federal provisions are woefully lacking.[191] Absent a Congressional amendment providing a private right of action for aggrieved child laborers, these children are without remedies for violations of rights created by Congress. Moreover, given the additional amendments to the FLSA,[192] an indication of legislative intent to extend the maximum protections possible to child farm laborers is indeed present.

Nevertheless, the availability of relief under state workers' compensation statutes[193] is the likely rationale the federal courts employ to deny private actions from the FLSA' child labor provisions. The federal judiciary usually will not imply a cause of action when an analogous remedy exists under state law.[194] However, private remedies are explic-

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[189] Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). The doctrine of implied rights of action is a judicial, not a legislative concept. It would be highly unusual, therefore, if Congress stated a specific intent to imply a private right of action when it had not provided an express cause of action.

[190] Examples of regulatory programs for protected groups (minorities and the indigent) include: programs for civil rights protections, Titles VI and IX of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d)(1)-2000(d)(6) (1994) and U.S.C. §§ 1681-1683 (1994) (prohibiting race and sex discrimination by entities receiving federal financial assistance); health care for indigents, for example, the Hill-Burton Program, 42 U.S.C. §§ 291(a)-291(h) (1994) (requiring provision of free health care services to indigents by hospitals receiving federal assistance for construction of facilities).

[191] S. REP. NO. 380, *supra* note 34, at 7 ("There are fewer than 1,000 Federal Wage and Hour Division compliance officers nationwide who enforce federal child labor laws.").

[192] *See* discussion *supra* portion of part III prior to part III.A.

[193] Generally, policies favoring conservation of the resources of the federal judiciary dictate that federal courts avoid creating private actions needlessly duplicative of state-law actions. *See, e.g.*, Bell v. Hood, 327 U.S. 678, 686 (1946) (Stone, J., dissenting); Florida *ex rel.* Broward County v. Eli Lilly & Co., 329 F. Supp. 364, 365 (S.D. Fla. 1971).

[194] The case for implying a federal remedy loses strength in direct proportion to the availability of an analogous administrative remedy. *See* Fagot v. Flintkote Co., 305 F. Supp. 407, 413 (E.D. La. 1969). *See generally* Robert M. O'Neil, *Public Regulation and Private Rights of Action*, 52 CAL. L. REV. 231, 262-70 (1964).

itly granted in the Securities Exchange Act of 1934[195] to individual private investors. Corporation law is historically a creation of state law and despite redress under the state law, federal enforcement carries out the legislative intent to provide uniformity in the trading of securities of publicly held corporations.[196] If nothing else, this same policy of uniformity should apply in the enforcement of child labor provisions of the FLSA.[197]

The doctrine of judicial restraint requires the federal judiciary to avoid unnecessary interference with employee injuries, a responsibility traditionally left to the states.[198] However, a federal right of action might be implied despite the existence of an analogous state law action if national unity so required[199] or, if in the federal court's determination, the agency responsible for enforcement of the regulatory statute cannot realistically investigate and prosecute every violation.[200] The inability to enforce the child labor provisions of the FLSA is apparent from the sheer number of recent violations within the last decade.[201] Moreover, federal agencies may not be able to provide the relief necessary to rectify the wrong done. Since state workers' compensation statutes generally represent the exclusive remedy,[202] the available damages embody only certain elements of possible damages that may be collected. For example, some wrongful death statutes provide the full value of the decedent's life.[203] Limiting a work-injured child, hired in violation of the FLSA, to state workers' compensation statutes' remedies, places a narrow and inadequate ceiling on what the child or the

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[195] 15 U.S.C. §§ 78i(e), 78p(b), 78r(a) (1994).

[196] J.I. Case v. Borak, 377 U.S. 426, 434 (1964).

[197] Although administrative agencies exist to enforce criminal penalties which may exist for violation of the FLSA, an individual agency can typically investigate only a handful of cases. For example, the government has told the Supreme Court that it can inspect fewer than four percent of the employers subject to the FLSA. Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 287 (1973). Therefore, a private damage action would tend to indirectly force compliance with the Act where public enforcement often cannot.

[198] *See, e.g.*, Rogers v. Ray Gardner Flying Serv., 435 F.2d 1389, 1394 (5th Cir. 1970).

[199] *See* Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (2d Cir. 1956).

[200] Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1968); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

[201] *See* discussion *supra* part I.

[202] *See generally* 2A LARSON, *supra* note 11, § 65.00.

[203] *See, e.g.*, GA. CODE ANN. §§ 105-1308 (1993) (full value of decedent life recoverable in action for wrongful death); *id.* §§ 105-1310 (funeral and medical expenses similarly recoverable).

child's representative may recover. This ceiling would be ineffectual if a federal cause of action for wrongful death were implied, in which case the plaintiff would be able to recover "meaningful compensation".[204]

The federal judiciary implies private rights of action under federal regulatory statutes where the remedies provided by the law creating the right have been unclear, nonexistent or grossly inadequate.[205] Remedies available under most workers' compensation schemes (and thus, the amount of the total employer's liability) are generally limited to disability, medical, death and burial benefits. There is no right to damages for pain and suffering or punitive damages.[206] Workers' compensation disability, death and burial benefits are subject to ceilings limiting potential recovery.[207] Furthermore, workers' compensation benefits are usually paid periodically, as compared to the payment of lump sum recoveries in tort cases.[208]

Since Congress has granted protections to minors under the FLSA, violations of those rights should compensate the minors adequately and the violators of the child labor laws should lose their limited liability under state workers' compensation laws. Currently, the injured child loses and the employer who violates the law benefits from limited liability under workers' compensation insurance. Society as a whole loses, since the costs are passed on in the form of increased prices.[209]

If private child labor cases could be brought in federal court, arguably, the state workers' compensation schemes would be set aside.[210] The legislative history of the FLSA suggests that Congress did not intend to preempt the field of child labor regulation. Congress appears to have wanted to leave state law intact, at least for intrastate production.[211] This involves federal and state cooperation. But relegating private child

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[204] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring).

[205] J.I. Case Co. v. Borak, 377 U.S. 426 (1964); *Bivens*, 403 U.S. at 388; Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

[206] *See* 2A LARSON, *supra* note 11, § 65.51(c) (benefits for pain and suffering are recoverable only to the extent that such pain and suffering cause disability that is compensable under the Act or necessitate payments for medical services to alleviate the pain).

[207] *See* 2A LARSON, *supra* note 11, § 65.51(c).

[208] *See* 2A LARSON, *supra* note 11, § 65.51(c).

[209] *See* 2A LARSON, *supra* note 11, § 65.51(c).

[210] *See generally* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

[211] The FLSA presupposes that federal enforcement investigators will be cooperating closely with state agencies and that state law, which is more exacting than federal law, will be followed. 29 U.S.C. §§ 211(b), 218(a) (1994).

plaintiffs to state workers' compensation exclusive remedies, raises inquiries about the proper implementation of the Congressional policy underlying the child labor provisions of the FLSA.

Legislative history indicates that early proponents of child labor law enforcement envisioned a system similar to that under the National Industrial Recovery Act.[212] Under that system, enforcement agencies closely supervised business operations to ensure that violations did not occur. Additionally, private citizens were to report supposed violations to proper authorities.[213]

The legislative history also indicates that Congressmen were concerned with authoring a bill that would pass constitutional muster and were only secondarily concerned with enforcement techniques.[214] Enforcement under these considerations may have been feasible in 1937. However, given the vast changes and expansions in the agricultural industry over the past fifty-six years, continuous government supervision is impracticable today. Therefore, since the problems concerning enforcement of child labor laws in society fifty years in the future were unforeseen in 1937, implying a private cause of action would seem to "construe the details of [the] act in conformity with its dominating general purpose . . . ."[215] Thus, in order to conform with the FLSA's general policy, changes in its child labor provisions are imperative.

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[212] *See Joint Hearings on S. 2475 and H.R. 7200 before the Senate Comm. on Educ. and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess., pt. 1, at 7-8 (1937) [hereinafter *Hearings*]. *See also* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (Child Labor Tax Law of 1919 held unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Owen-Keating child labor bill held unconstitutional). The National Industrial Recovery Act of 1933 was responsible for approximately 100,000 child laborers under the age of sixteen to be withdrawn from the labor force, and when that statute fell, states reinstituted child labor. *Hearings, supra* at 174 (remarks of Hon. Frances Perkins). A constitutional amendment was approved in 1924, but by 1937, only 28 states had ratified it. Therefore, Congress merged the wage and hour provisions with the child labor provisions, in an effort to combine the statutory provisions focused on the oppressive labor conditions which affected interstate commerce, so that the Court would view the employment of children as an important aspect of anticompetitive labor practices. *Hearings, supra* at 5-6 (remarks of Robert H. Jackson, U.S. Dep't of Justice).

[213] *See Hearings, supra* note 212, at 174 (remarks of Hon. Frances Perkins).

[214] *See Hearings, supra* note 212, at 1-10 (remarks of Robert H. Jackson, U.S. Dep't of Justice). Congress never explicitly discussed the possibility of private enforcement of the child labor provisions.

[215] SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943).

IV. CONGRESSIONAL INTENT

Presently, legislation that would amend the child labor provisions of the FLSA is pending in both houses of the Congress.[216] The proposed legislation would strengthen the enforcement of federal child labor law and enhance the criminal and civil penalties available to respond to child labor law violators. The pending amendments provide for a system of certificates of employment for minors and this federal certificate system will help educate children, parents, and employers about the national child labor laws. The legislation extends comprehensive coverage to minors under the age of fourteen employed in agriculture other than on the family farm. It extends the list of hazardous occupations for children, and further requires the reporting of deaths and serious injuries.

The legislation seeks to prevent the exploitation of children under age fourteen who work as migrant and seasonal farm workers. Although children under fourteen are not allowed to work in agricultural settings, exemptions in the current federal law permit children aged twelve, ten, eight, and even as young as four, to work as migrant and seasonal farm workers.[217] Senate Bill S. 600 seeks to protect the young children of families who have been victimized. The bill applies the same minimum age for minors in non-agricultural jobs (fourteen years old) to minors who would work as migrant and seasonal farm workers. It would also prevent young farm workers from handling dangerous pesticide products.[218]

Congressional concerns in the proposed legislation reflect the legislative intent to provide further protections to young agricultural farm laborers. Congress has recognized the drastic change the agricultural industry since the FLSA was first enacted. Accordingly, until such legislation is enacted, the federal courts should heed this legislative in-

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[216] H.R. 1106, 103d Cong., 1st Sess. (1993) (Young Workers' Bill of Rights) (unenacted); H.R. 1173, 103d Cong., 1st Sess. (1993) (Agricultural Worker Protection Reform Act of 1993) (unenacted); H.R. 1397, 103d Cong., 1st Sess. (1993) (Child Labor Deterrence Act of 1993) (unenacted); H.R. 1446, 103d Cong., 1st Sess. (1993) (Western Hemisphere Environmental/Labor/Agricultural Standards Act) (unenacted); S. 86, 103d Cong., 1st Sess. (1993) (Child Labor Amendments of 1993) (unenacted); S. 90, 103d Cong., 1st Sess. (1993) (Trade Enforcement Act of 1993) (unenacted); S. 613, 103d Cong., 1st Sess. (1993) (Child Labor Deterrence Act of 1993) (unenacted).

[217] S. REP. NO. 380, *supra* note 34, at 6.

[218] S. 86, 103d Cong., 1st Sess. (1993)(unenacted) (which would amend 29 U.S.C. § 203(1) to provide that "[t]he Secretary shall find and by order declare that . . . and pesticide handling . . . are occupations particularly hazardous for the employment of children between the ages of [sixteen] and [eighteen] . . . .")

tent in providing a vehicle of relief for work-injured minors, hired in violation of the child labor laws, by implying a private cause of action from the FLSA.

CONCLUSION

Due to the disparity in the laws among state workers' compensation acts, in order to effectuate the policy underlying the FLSA, public policy considerations dictate that this conflict be resolved in favor of the child labor provisions of the FLSA. Deterrence to violators of child labor laws, should be applied in the form of a minor's action at common law. Employers would tend to comply with child labor laws if they knew they were not shielded through state workers' compensation law. This deterrence would compensate for the lack of federal enforcement. Agriculture is considered a hazardous occupation and regulations must be specifically set forth to protect children working in this employment realm. It is time that agriculture be recognized at the federal level as a modern industry having as many risks as other industries. Therefore, until the proposed Congressional legislation is enacted into positive law, the federal courts should imply a private cause of action against deliberate violators of the child labor provisions.

The author realizes that there are reasons for not constraining farm employers to the extent that they will hesitate to employ minors or their families. Farm employment is a financial necessity for many minors and their families. However, commentators have noted that violators of the child labor laws exploit children's cheap labor as a sound business practice.[219] Accordingly, to this end, changes in the child labor laws are needed to stop this exploitation.

NINA KRAUTH

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[219] *See supra* note 40 and accompanying text.