

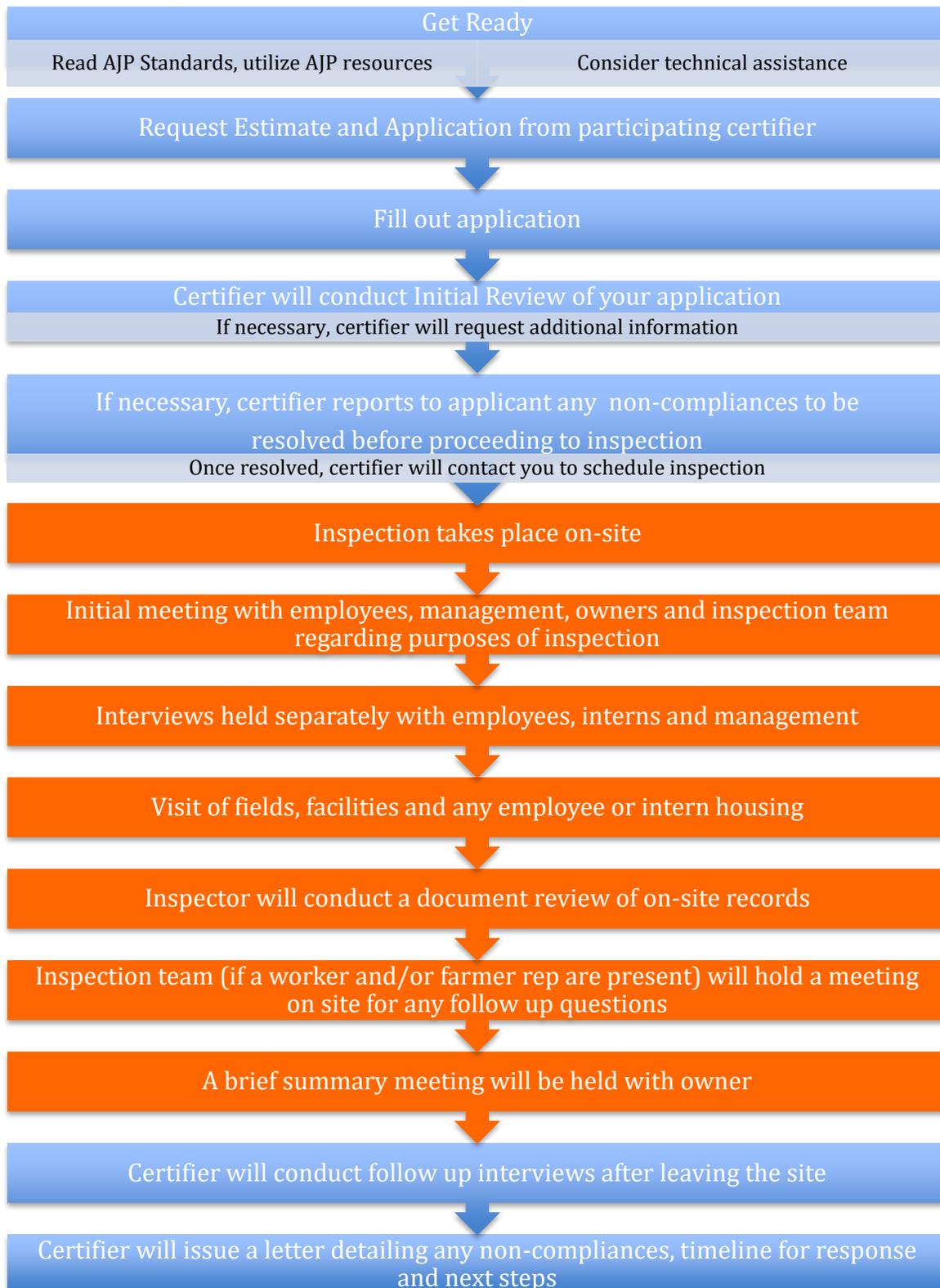
3.0. Certification

TABLE 3.1: Applicability of Standards Sections to the Types of Certification

Sections of the Standards that Apply	Type of Operation/Applicant									
	Producers				Food Businesses NOT Labeling Products				Food Businesses Labeling Products (Brand Holders)	
	Farms (any and all that apply below)			Grower Groups	Vendors (retailers, restaurants)	Intermediaries and Sub-Contracted Processors		C	R	
	All farms	Sells to certified buyer	Employs hired labor			C	R			
Buyer Responsibilities to Farmers (section 1.0)				X	X	X	X (to FJC clients)	X	X (for FJC product line)	
Farmer Responsibilities to Buyers (section 2.0)		X		X						
Farmer Responsibilities to Employees and Interns (section 3.0)			X	X						
Food Businesses Responsibilities to Employees and Interns (section 4.0)				X	X	X	Personnel Manual review	X	Personnel Manual Review	
Food Business Responsibilities to other Food Businesses (section 5.0)				X	X	X	X (to FJC clients)	X	X	
Grower Group Responsibilities (section 6.0)				X						

* C = Certified, R = Registered

TABLE 3.2: Steps to Certification



3.1. Summary of Certification Steps

1. *Get Ready:* Read the AJP Standards (available at www.agriculturaljusticeproject.org or by requesting a hard copy from AJP or one of the AJP approved certifiers.) If you are a farmer, check out the AJP farmer toolkit; it provides templates for AJP compliant policies and contracts, as well as an easy self-assessment checklist to help you get ready for certification. (Food System Business toolkit coming soon.) AJP also offers several technical assistance packages and references to assist farms, grower groups, and food system businesses in improving the fairness and equity of their workplace practices and negotiations (contact AJP for more information and costs). And of course AJP can discuss your interests, explain the project's goals, and answer any questions you may have at anytime. The idea is to get your operation in shape and as compliant as possible prior to certification so that there is less work to do before obtaining your AJP certificate.

If you need additional technical assistance to come into compliance with AJP labor standards, such as translation of policies and conducting bi-lingual health and safety trainings, there may be a worker's organization in your area available to help. See the AJP website for a list of worker organizations.

2. *Apply for Certification:* Contact an AJP-approved certifier of your choosing to request a full certification application packet (check with your organic certifier to see if they offer AJP certification as an add-on to organic).

- a) Request an estimate of the costs for getting certified and the certification process.
- b) Fill out the application according to the certifier's instructions. Feel free to request assistance during the process from AJP as needed. Submit completed application to the certifier.
- c) The certifier will conduct an initial review of your application. You will be contacted if there are any questions about the application or if any issues are identified as needing further information to be provided at or before the on-site audit. If a major non-compliance is identified at the initial review, a denial may be issued at that point.
- d) If it is complete and no non-compliances are identified that would lead to denial, it will be presented to the inspection team. The makeup of the team will depend on the size of your operation. If you have workers, a trained inspector from a workers organization will be part of the team along with the certifier's inspector(s). Farmers may also request that a farmer representative be present. You will be contacted to schedule the inspection.
- e) Inspection time depends on size and complexity of the operation, such as whether or not the operation has workers, an intern program, or worker housing. A full inspection process will include:
 - i. Initial meeting with all workers, management, owners, and inspection team regarding purpose of inspection;
 - ii. Interviews held separately with workers, interns, and management;
 - iii. Visit of fields, facilities, and any worker or intern housing;

- iv. Inspector will conduct a document review of on-site records;
 - v. Inspection team may meet for a brief meeting on-site to compare notes;
 - vi. A brief summary meeting will be held with inspection team and owner of the operation regarding next steps.
- f) The certifier inspector and worker organization inspector will conduct follow up interviews or information gathering as needed after leaving the site, including talking with operations you sell to or buy from if you are applying as a farm or as a business.
 - g) A reviewer completes a final review of the application, supporting document, audit and follow-up interview findings and arrives at a certification decision. If additional information is needed before a certification decision is reached, you will be notified and provided with a timeline for submission.
 - h) If certification is granted, a certificate will be issued. The certification letter may also identify non-compliances and give timelines for correction.
 - i) If you have questions at anytime during the certification process, feel free to contact AJP.

3.2. Special Issues in Certification

AJP has identified certain issues that are particularly complicated and/or sensitive that we feel deserve extra attention in this manual. This section contains guidance documents for certified entities to understand AJP's position on these special issues.

3.2.1. At Will

In 49 of the 50 states, state law declares that businesses are at-will, that is, an employer can fire an employee without cause. Lawyers recommend that businesses underline and bold face at-will doctrine in employee handbooks, although under current law there are many exceptions and limitations, such as federal anti-discrimination laws and protections for the disabled. The at-will employment doctrine ("at-will doctrine") reflects a legal presumption that an employer enjoys absolute discretion to terminate employment without fear of liability. Termination may take place at any time and for any reason or no reason at all. Likewise, an employee may walk away from a job at any time, for any or no reason. While the at-will doctrine applies equally to both parties, its benefits flow to the party with greater negotiating power, which is usually the employer. The at-will doctrine originated in the law of master and servant in England. However, England's at-will rule possessed a particular property that America's version traditionally did not. England placed statutory limits upon the rule. Over the years, US law has also reduced the absolute character of at will.

Basic to social justice is the requirement that no employer ever fire a worker without just cause. Yet, the finest, most progressive and sustainable food businesses in this country (food coops, certifiers, food justice NGOs, marketing coops) almost to a one have "at-will" in their employee handbooks. Many of their managers have told us that their lawyers insist that at will protects them from frivolous law suits.

Quite a number of legal cases exist on this subject. *That so many cases are out there in the first place demonstrates the risk of litigation despite at will laws.* And the risk is especially high where there are discrepancies between several documents, or where an employee manual contradicts itself. Different states have different rules and tests designed to determine whether a contract was formed, either expressly or impliedly, that supersedes the at-will law. The multiplicity of cases with different conclusions indicate that the status of the at-will rule is in flux. No two courts can seem to make a decision using the same rationale. Although most supreme courts of any state usually decide a case unanimously, when it comes to employment cases, courts tend to more frequently split, with either dissents or concurrences.

Clearly, the at-will rule is not an absolute protection against lawsuits. An employer's best chance against litigation is to develop a workplace with the atmosphere of respect. Where employer and employee both respect one another, the employees are likely to be more loyal. As a result, they are less likely to file a lawsuit. Having a clear employee manual that states that employees can be dismissed for “good cause” or other violations described in the employee manual are proactive and fair steps that ethical employers may take. Ethical employers are also well-advised to have an extended probation period at the beginning of employment to give ample opportunity to evaluate whether a new hire fits well and feels comfortable in the job. During or at the end of this probationary period, either party can end the relationship without violating the ethical requirement for just cause dismissal.

Lawyers we have consulted agree that the “at-will” doctrine does not prevent employers from waiving or renouncing at-will. An employer may form an agreement with employees, and that agreement will constitute an effective waiver of the employer’s right to terminate an employee at will. In order to be effective, such an agreement must be clear. Federal courts have held that, where there is ambiguity as to whether an employer has waived the at-will doctrine, that ambiguity will be resolved in favor of the at-will doctrine.

From Keith Talbot, a lawyer with Legal Services of New Jersey and a member of the AJP Advisory Council:

“Labor law protections provided by the National Labor Relations Act (NLRA) provide broad protections for workers acting together to complain about wages and working conditions. Although farmworkers are exempted from the federal law, state laws in states such as New Jersey and California provide similar protection. The NLRA protects workers who engage in concerted activity. This means that workers, including those not in unions, cannot be terminated for discussing with other workers problems in the workplace and attempting to address such issues with improvements. 29 U.S. C. Section 157, Sec. 7. (Employees shall have the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection).

“The Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. Section 1801, et seq. puts agricultural workers in a position that employment at will is particularly limited. The AWPA requires that farm labor contractors and agricultural employers jointly disclose in writing to migrant agricultural workers recruited for employment certain information

which includes the 1) place of employment; 2) the wage rates to be paid; 3) the crops and kinds of activities on which the worker may be employed; and importantly, 4) the period of employment. (emphasis added). 29 U.S.C. Section 1821.

“The terms and conditions of employment then become part of the working arrangement for the worker. Under AWP, at 29 U.S.C. Section 1822(c), employers and contractors cannot “without justification, violate the terms of any working arrangement made by that contractor, employer or association with any migrant agricultural worker. “ There is a similar working arrangement provision for seasonal agricultural workers at 29 U.S.C. Section 1832 (c), although for seasonal workers written disclosures must be requested. The working arrangement has been explained as follows in case law:

There is no precise definition of “working arrangement” set forth in the statutes. The regulations promulgated by the Department of Labor, however, provide that an employer's failure to comply with the arrangement is justified if due to acts of God or to “conditions beyond the control of the person or to conditions which he could not reasonably foresee.” The regulation also states that “[w]ritten agreements do not relieve any person of any responsibility that the person would otherwise have under the Act or these regulations.” [29 C.F.R. § 500.72\(a\), \(b\)](#). Thus, an employer cannot escape liability through a specific writing contrary to the responsibilities levied upon him by the Act. Nor, however, will he be held responsible for violations which arise under unforeseen circumstances. The working arrangement, then, is the understandings of the parties, given their mutual knowledge and conduct, as to the expected terms and conditions of employment.

“AWPA’s working disclosure and working arrangement sections are intended to make clear the terms and conditions of employment like a contract, which modifies at will employment, even though the concept of the working arrangement is in fact broader than a simple contract:

Its obvious purpose is to protect workers from arbitrary and prejudicial changes in any working arrangement made between the farm labor contractor and the worker, even if not reduced to writing. The burden is on the contractor to provide a written contract, [29 U.S.C. §§ 1821\(a\) & \(g\)](#). They cannot circumvent the requirement to follow the terms of the deal by failing to provide such a writing.

”Villalobos v. Vasquez-Campbell, 1991 WL 311902, 120 Lab.Cas. P 35,566 (W.D.Tex.,1991). As noted previously, growers are jointly responsible for complying with working arrangements to workers with contractors, even if the contractor promised terms of which the grower was unaware. Maldonado v. Lucca, 629 F. Supp. 483 (D.N.J. 1986).

“Finally, the termination of a worker, prior to the end of the period of employment, when justification is not shown, has been held to be a violation of AWP. Colon v. Casco, Inc. 716 F. Supp. 688 (D. Mass 1989). In Colon, the workers were fired over the contravention of an optional weekend work policy. The Court held the firing improper:

Appellant [farmer] does not contest the existence of its “policy” of voluntary or optional

weekend work or the general knowledge of this policy among the workers, including plaintiffs. Instead, it contends that this weekend work policy was never explicitly made a part of the “working arrangement.” It may be true that there was no written agreement handed over to the workers including this provision. However, given the undisputed mutual knowledge of and reliance upon this policy, it would not be fair or proper in consideration of the goal of protecting seasonal agricultural workers to exclude this understanding from the “working arrangement.”

With the inclusion of this term in the working arrangement, it was, as the Magistrate found, patently unjustified for appellant to terminate appellees for their failure to report to work on the weekend. Furthermore, according to undisputed evidence, the working season ran from March to November of 1985. The “period of employment” is a required term in every working arrangement. [29 U.S.C. § 1831\(a\)\(1\)\(D\)](#); [29 C.F.R. § 500.76\(b\)\(4\)](#). See [Maldonado v. Lucca, 636 F.Supp. 621, 626-27 \(D.N.J.1986\)](#) (noting the paucity of decisional law concerning AWPAs and recognizing that the growing season may set the duration of the period of employment). With even a general understanding of optional or voluntary weekend work between the employer and employees, it was certainly unjustified for appellant to violate the term of the working arrangement regarding the period of employment by firing appellees based on their failure to work on the weekend.... In essence, appellant [farmer] maintains that even if the voluntary weekend work policy was part of the working arrangement, it was subject to immediate unilateral change at appellant's whim. Therefore, concludes appellant, the Friday announcement of mandatory weekend work and subsequent termination of appellees was a result of appellant's change in, not its violation of, the working arrangement. Were this position given sanction under the law, there would be no violation of any working arrangement that could not be written off by unscrupulous employers as a unilateral “change” in the arrangement. See [Labor Board v. Katz, 369 U.S. 736, 743-48, 82 S.Ct. 1107, 1111-14, 8 L.Ed.2d 230 \(1962\)](#) (a collective bargaining case in which the Court recognized the various ills occasioned by the employer's unilateral actions in changing work policies).

“Colon at 693-694. AWPAs and its case law are clear that growers cannot without justification fire workers in violation of the working arrangement’s period of employment.

Talbot’s CONCLUSION

‘AWPA requires written disclosures to workers to protect them against abusive and false and misleading recruitment. The written disclosure is in effect a contract, and is incorporated into the broader working arrangement terms. If an employer fires a worker without justification, they are depriving the worker of a promised period of employment in violation of AWPAs. Thus, employment at will is limited by AWPAs, in addition to other applicable limitations of anti-retaliation, anti-discrimination and labor laws. As noted in the case law, even if a written disclosure is not given, the period of employment may be implied by the length of the season. It is clear that Courts are not inclined to let employers benefit from a violation of law by the failure to do a written disclosure, including the period of employment. Given AWPAs’ protection, the employer must prove a justification for termination in violation of the working arrangement.’”

The Agricultural Justice Project's Social Justice Standards, Sections 3.1.14 and 4.1.14 require that farmers and food business employers have a documented disciplinary procedure with a system of warnings before any dismissal and clear language in the employee manual that describes violations and ultimate dismissal procedures. These standards are at variance to the at-will employment doctrine. Employers who wish to comply with this standard must make an unambiguous and effective commitment to respect employee rights by following their own written disciplinary and termination process. Employers must provide new employees with a written statement in the employee handbook or in a separate brochure that explains the appeals, discipline and termination process, and the possibility of appeals to the AJP conflict resolution committee. This policy statement or orientation brochure should explain that:

1. The business is AJP Certified to use the Food Justice label
2. The business recognizes employees' rights to freedom of association
3. The business retains its at-will employer status
4. The business has a conflict resolution process for dealing with employee grievances and a tiered-disciplinary process for infractions and terminations
5. In certifying under the Food Justice label, the business makes the commitment to adhere to its conflict resolution process. In choosing to discipline or terminate an employee without cause, the business risks losing AJP certification.

If an employer fires an employee without following the process for discipline and termination in the business's own policy handbook, this will trigger a special review by the certifier. Any deviation from the employee manual and other employee-related policies will be considered a standards violation. The employer must notify certifier and AJP and provide justification for this action. Justifiable causes for immediate termination include danger to other employees, violence, use of drugs and similar extreme situations, which should be listed in the employee policy handbook. The Certifier and AJP will review the case and if they find that the termination was unjust, the employer will lose AJP certification.

3.2.2. Immigration Position

AJP often receives inquiries about how the program addresses the sensitive issue of the immigration status of employees. AJP's standards address this issue in only one place: the standard on non-discrimination includes "immigration status", with a note that this does not preclude the employer from completing all legal obligations, for instance in the U.S. their federal I-9 requirements. Based on the number of requests we receive for clarification, we have developed this guidance for certifiers and others to accurately interpret the standard.

AJP has solicited extensive stakeholder input on this issue from workers and their organizations, farmers and their organizations, legal experts, and others. AJP has made the determination that the consensus position among the stakeholder communities is that immigration status of an employee is not relevant to social justice certification or fair trade and therefore falls outside the scope of the program.

In other words, while it is expected that employers will fulfill their legal obligations related to employee status for their own purposes, AJP will not independently seek to verify this or concern itself with this. (Currently in the U.S. and many other nations it is illegal to *knowingly* employ someone who is undocumented. But the employer is not required to verify the authenticity of any document.)

Some have asked if this contradicts the AJP standard requiring “*All relevant federal, state, and local laws covering working conditions, health and safety, and terms of employment must be complied with*”. It does not, since this standard is carefully constructed to apply only to those laws that fall within the scope of the standards, such as those related to working conditions, terms of employment, condition of housing, etc. In other words, it is not the role of AJP to verify compliance with those laws that fall outside the scope of the standards – another example would be whether or not individuals are filing their income tax, or doing so accurately. This legal requirement simply falls outside the scope of the program and as such would not be evaluated one way or another by the certifier or inspectors.

The purpose and intent of including immigration status in the non-discrimination standard is to ensure that all employees are treated on an equal basis and that real or perceived immigration status, ranging from citizen to resident to undocumented, would not be used in any way by an employer to treat employees differently in terms of pay, benefits, other working conditions, and employee policies, or to create a worksite climate that is in any way intimidating towards workers on the basis of immigration status.

The role of the certifier inspector and worker organization inspector is to verify the above points, and to investigate any evidence to the contrary that comes to light during the certification process. The inspectors would not ask a worker about his/her status, but if an employee were to bring up their own status during an interview, it would be considered confidential. (There is no legal reporting requirement in the US for third parties.) What the auditor does verify however is that all employees' rights are equally respected and that they are working under equal working conditions (granted differing jobs etc of course). So if it were found during an audit that there was a two-tiered system on a farm or in a business, this would be unacceptable for any reason, including real or perceived immigration status.

Some have commented that they are concerned that by not taking a strict approach to the issue AJP is allowing a loophole that would permit unscrupulous employers to exploit vulnerable workers. It is true that undocumented workers are often employed deliberately by unscrupulous employers who know they are more easily exploitable. But we take the position that by excluding undocumented workers with some kind of zero tolerance policy that above all penalizes the migrant worker, programs would be in reality aiding and abetting this two-tiered system, albeit unintentionally. Including rather than excluding undocumented workers in social justice programs that are stringently implemented removes any incentive employers would have to go out of their way to employ undocumented workers for the purpose of exploiting them, since protections requiring equal rights and conditions would be in place. We believe that the protections in place under AJP are stringent enough to prevent this type of exploitation from occurring.

Finally, AJP is not alone in taking this approach to the issue. Indeed, many law enforcement agencies such as local and state police departments, as well as the US Department of Labor, have decided to avoid assessing immigrant status when investigating violations for the same reasons as listed above. There is also precedent for other certifiers to address this issue in a similar way. The excerpt below is from a report prepared by the German based certifier Naturland Association for IFOAM on social auditing:

Migrant and seasonal workers often have legal problems in securing rights of residence and work. Undocumented workers with an illegal residence status are common in agriculture labour markets. This places the worker in a very weak position, as far as both social security and bargaining power. Migrants, seasonal and temporary workers often tend not to join or have adequate access to trade unions.

It is the farmer's responsibility by law to check that workers have identification documents; however, the farmer is not required by law to verify the authenticity of the documents presented. Yet, for a certification body to focus specifically on the issue of documentation status of workers may not lead to an outcome that would be in the best interests of workers. In order to ensure that workers' rights are protected while at the same time not breaching any national laws and regulations, a sensitive approach is needed. Certification programs should look first to improve social and human conditions, rather than focusing on verifying legal status of workers.

-Excerpted from *Recommendations for Inspection of Social Standards* compiled by: Manfred Fürst, Jorge Casale & Birgit Wilhelm, IFOAM, May 2005

3.2.3. Labor Contractors

TABLE 3.3: Guidance for Farmers Using Labor Contractors



EMERGENCY EXEMPTION: Farmers who suffer temporary unforeseen labor crisis due to severe weather, natural disasters, or other such unexpected calamities or unexpected loss of existing labor force shall have the right to seek emergency labor through any means. Under no circumstance shall this occur other than for documented and fully temporary emergencies. Post emergency, the farmer must submit to the certifier, an explanation of the emergency situation, labor contractor and labor used and timeframe, as well as a plan for how such emergency needs for labor could be more compliant with AJP standards in the future.

3.3. Basis of Non-Compliance Decisions

Certifiers will use the AJP standards and other guidance documents as they are released as a reference for making non-compliance decisions. Certifiers will communicate to the applicant what the non-compliance is, along with a set timeline for resolution of the non-compliance or for providing additional information. Certifiers are given the discretion to evaluate which issues need to be addressed at initial review and which can be cleared up in later phases (post-inspection). Certain non-compliances will be considered “major” and in these cases a denial or

suspension may be issued. Applicants are encouraged to seek technical assistance and utilize the resources on the AJP website before applying to make the certification process more efficient.

3.4. Continual Improvement for Renewals

It has been critical to the Agricultural Justice Project to develop a certification system that recognizes continual progress over time. For year two and beyond, including those who switch certifiers, it is expected that AJP certified entities continue to improve from year to year (i.e., they do not stagnate once they receive certification). Certified entities may select from one of the suggested/encouraged standards outlined by AJP in each standards section (indicated by italics and the terminology “are encouraged” or “may”), or develop a specific practice that aligns with the principles that is not outlined in the standards. The entity must document the area of specific selected improvement and progress towards this annually, beginning in the year after initial certification, as part of their certification application information and inspection.

3.5. Certification Fee Structure

AJP approved and accredited certifier’s set their own fees for certification and audit costs. In addition to this, certifiers collect an AJP licensing fee that is passed directly to AJP. The licensing fee is for participation in the AJP certification program and use of the Food Justice Certified certification mark or logo. This fee goes toward AJP’s operating costs to administer the program. This fee also covers AJP’s work on promoting certified entities and the Food Justice Certified brand. This promotion includes, but may not be limited to:

- Publishing the name of all certified entities on the AJP website,
- Writing and distributing news press releases and articles to increase awareness of the certification label, and
- Linking to certified entities through AJP social network media.

AJP’s fee structure is subject to change more frequently than the Policy Manual. Therefore the fee structure is posted on the AJP website. Please visit the website for more information.

Certifiers will have 90 days to implement AJP’s fee structure following revisions. Certifiers may decide that clients who have already initiated the application process may go forward with the fee calculated when applied even if based on previous AJP fees. The revised fees should be implemented for new clients.