Module 8: Managing Liability and Risk

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Learners’ Objectives

• Decide if GAPs certification fits your business model.
• Understand the cost/benefits of GAPs certification.
• Ask appropriate questions of insurers.
• Know how to find information related to liability exposure.
Introduction

• GAPs certification is voluntary (not mandatory).

• Growers of fresh produce need to decide whether to adopt GAPs and get certified.
  – Economic decision
  – Weigh benefits vs. costs
Economic Benefits of GAPs Certification

• Economic Risk Reduction
  – GAPs adoption and certification not 100 percent guarantee of food safety
  – Reduces risk/probably of outbreak
  – Calculate potential economic loss with and without GAPs

• Improved Market Access Opportunities
  – Many markets require 3rd-party GAPs certification
  – Credibility from having 3rd-party certifiers
Economic Costs of GAPs Certification

• Costs of adopting GAPs
  – Large capital investments (e.g. water purification facility)
  – Moderate expenditures (e.g. training on worker hygiene)

• Cost of hiring third party to undertake certification
  – No hard data
  – 2001 estimate: $300 to $500 per farm
Case Study: Spinach

• Sept. 14, 2006 – FDA announced spinach contamination due to *E. coli*
• No fresh spinach sales for 5 days
• Spinach from CA off the market for 10 days
Case Study: Spinach

Shipments of bunched spinach rebounded quickly.

Weekly bunched spinach shipments rebounded after outbreak

Case Study: Spinach

Bagged spinach sales are down four months after outbreak.

<table>
<thead>
<tr>
<th>In 2007, bagged spinach and salad retail sales values still lag</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent change in sales value from a year ago for:</td>
</tr>
<tr>
<td>January 24-February 24, 2007</td>
</tr>
<tr>
<td>Percent</td>
</tr>
<tr>
<td>Bagged spinach</td>
</tr>
<tr>
<td>Bagged salad with spinach</td>
</tr>
<tr>
<td>Bagged salad without spinach</td>
</tr>
</tbody>
</table>

Source: Perishables Group, Facts, Figures & the Future.
Case Study: Spinach - Market Outcomes

• Whole industry suffered from outbreak, even if only one field was contaminated (negative externality)
  – GAPs certified and non-GAPs certified growers were affected

• In March 2007, fresh produce handlers to service only GAPs certified growers
  – Able to recover faster
  – Market access benefits
Case Study: Cantaloupes

In May 2002, an outbreak of Salmonella in the U.S. and Canada was associated with Mexican cantaloupe.

- Shipped through McAllen, TX
- 58 cases identified
- 3rd season of Salmonella outbreak from cantaloupes traced to southern Mexico
Case Study: Cantaloupes

- In October 2002, the FDA issued an import alert against all cantaloupe exports from Mexico.
- To be removed from alert, Mexican farmers must petition FDA and provide documentation of food safety/GAPs practices.
Case Study: Cantaloupes

- FDA will conduct on-site inspections with priority to growers with third-party certification of food safety practices/GAPs.
- With this priority, GAPs certified producers can recover more quickly.
  - Can access markets faster than non-GAPs producers
  - Market access benefits (first-mover advantage)
Case Study: Green Onions

- In November 2003, outbreaks of Hepatitis A in TN, NC and GA were associated with undercooked green onions.
  - One person in TN died.
  - 500 people contracted Hepatitis A from PA diner.
- FDA identifies four Mexican firms as source (not GAPs certified).
Case Study: Green Onions

<table>
<thead>
<tr>
<th>GAP status</th>
<th>Impact on: Volume of green onion sales</th>
<th>Demand for other products</th>
</tr>
</thead>
<tbody>
<tr>
<td>GAPs</td>
<td>Fairly constant</td>
<td>No impact</td>
</tr>
<tr>
<td>Partial GAPs</td>
<td>Down a bit</td>
<td>Some impact</td>
</tr>
<tr>
<td>No GAPs</td>
<td>Down by 50 percent</td>
<td>Down by about 30 percent</td>
</tr>
<tr>
<td>No GAPs and named by FDA</td>
<td>No sales and most fields plowed under</td>
<td>Shippers stopped selling all or almost all products from these growers</td>
</tr>
</tbody>
</table>

Estimated losses: $10.5 M
Having a Risk Management Model Is Important

• Purpose:
  – Orderly management of risks
    • Reduces economic losses
  – Highest return on risk management dollars
  – Identification of training needs for management and employees
Steps in a Risk Management Model

• Risk Identification
• Risk Evaluation
• Risk Treatment
  – Insurance is one of many risk treatments
• Selection and Implementation
• Program Monitoring
Insurance Is One Mechanism to Protect Against These Risks

• What types of insurance policies are out there for food safety-related risks?
• What are their characteristics?
• Growers need to make informed insurance purchase decisions.
Insurance Coverage Options for Risks Related to Food Safety

- Increased concerns about outbreaks of food-borne illness
  - Tomatoes (Salmonella)
  - Spinach (E. coli)
- Outbreaks are becoming more frequent
- Economic losses due to outbreak:
  - Monetary damages from lawsuits
  - Financial damage from product recall/warning (cost of taking off shelf, catastrophic drop in sales, damaged reputation, business interruption, etc.)
Insurance Coverage Options

• General farm liability insurance
• Commercial business liability insurance
• Product liability insurance
• Product recall insurance
• Accidental/product contamination insurance
Insurance Coverage Options

- Malicious tampering insurance
- Combination policies
- Excess/umbrella/surplus lines of insurance
- Adjusted gross revenue (AGR) or adjusted gross revenue-lite (AGR-Lite) insurance
General Farm Liability Insurance

• Protects against liability claims for bodily injury and property damage arising out of one’s premises and/or operations.
• Protects against lawsuits due to on-farm accidents.
• Recommended for pick-your-own operations and those with on-farm stands.
• Covers lawsuits from activities considered “farming.”
Commercial Business Liability Insurance

• Same as general farm liability but may cover activities considered “non-farm” or “non-agricultural.”
• For growers that process fresh produce and have processing facilities.
• For growers that sell in farmers markets and sell large proportion that originate off-farm.
Product Liability Insurance

- Protects against claims of injury caused by a defective or hazardous product (e.g., contaminated fresh produce).
- Provides protection if fresh produce causes injury or illness.
- Strictly covers claims of injured parties, not recall costs.
- Premium estimate: $1,000 per year for $1 million of protection
Product Recall Insurance

• Covers actual or direct costs of a product recall.
  – Costs associated with getting contaminated product off the shelf and destroyed; cost of replacement; transport costs.

• Does not cover indirect costs.

• Intended for growers that were contaminated (source).
Accidental or Product Contamination Insurance

- Covers both direct and indirect costs of product recall.
- Examples of indirect costs – third-party expenses, loss of profit due to recall (lost confidence), business interruption losses.
- Intended for growers that were contaminated.
Malicious Tampering Insurance

• Covers direct and indirect losses of product recall, but also covers losses from criminal actions of sabotage against grower.

• Intended for growers that were contaminated.
Combination Policies

- Combines several different policies.
- For example, you can combine general farm liability and homeowner’s insurance if the family operations are smaller.
- Typically have lower premiums compared to the cost of purchasing separate policies.
Excess/Umbrella/Surplus Lines of Insurance

• To provide for coverage when underlying available insurance is “lacking” – hard-to-place risks.
• Not regulated under state laws – premium rates not regulated and no guarantee protection from Insurance Guaranty Association.
Adjusted Gross Revenue (AGR) or Adjusted Gross Revenue-Lite (AGR-Lite)

• Whole-farm revenue insurance based on tax forms.
• Covers revenue losses below a guarantee – if losses are from insured cause of loss.
• Can cover part of revenue losses of non-contaminated growers if losses are due to market fluctuation (industry-wide drop in prices due to a product warning).
Case Study Activity
Tort Definition

• A civil wrong

• A wrong for which the courts provide redress in a civil action
Types of Torts

• Strict
• Intentional
• Negligent
Products Liability

- Defective design/production
- Theories of liability
  - Strict liability (liability without fault)
    - Not available in North Carolina
  - Negligence (fault)
Products Liability (cont’d)

• Express warranties
  – Subject to negotiation
  – Interpretation
    • Usage of the trade
    • Course of dealing

• Implied warranties
  – Merchantability
  – Fitness for a particular purpose
Strict Liability Torts

- Liability without fault
- Ultra-hazardous activity
- Duty to make safe
- Products liability
Intentional Torts

- Intent
- Punitive damages available
  - Unrelated to actual damages
    - Actual damages need not exist
  - Also available for quasi-intentional torts
    - Gross negligence/reckless disregard
Negligent Torts

- Duty
- Breach of duty
- Proximate cause
- Actual damages
Negligent Torts (cont’d)

- Defenses to negligence
  - Contributory negligence
  - Comparative negligence
- Statutory modification
- Liability waivers & disclaimers
Statutory Liability

- Administrative (civil)
- Criminal
- Private right of action
Liability for Acts of Independent Contractor

• Vicarious liability
  – Question of state law
  – General test: Was the activity inherently dangerous?

• Distinguish from strict liability test.
  – Independent Contractor must be negligent
Burden of proof

• Civil
  – Preponderance of the evidence
• Criminal
  – Beyond a reasonable doubt
References


References


Holland, R. 2007. “Food Product Liability Insurance.” Center for Profitable Agriculture Info. # 11, University of Tennessee, Knoxville, TN.


Contacts

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For assistance in finding authorized insurance services in North Carolina:
– N.C. Department of Insurance

For assistance finding insurance, regularly licensed companies and surplus lines:
– MAP 919-733-9811

For help with unauthorized insurance:
– 1-800-546-5664 Consumer services
– 919-733-7487 Agent services