COMMENT

HARD TO WATCH: HOW AG-GAG LAWS DEMONSTRATE THE NEED FOR FEDERAL MEAT AND POULTRY INDUSTRY WHISTLEBLOWER PROTECTIONS

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INTRODUCTION

Many Americans choose blissful ignorance when it comes to learning
how meat makes it to their dining table,1 but, in the case of factory farm
meat and poultry production, what you do not know can, and often does,
hurt you.2 This tendency to avert one’s eyes has allowed concentrated
animal feeding operations (CAFOs),3 slaughterhouses, and meatpacking
facilities to raise livestock for human consumption largely free from public
scrutiny4 and has led to the passage of so-called “ag-gag” laws5 in an
increasing number of states.6 These laws are not explicitly targeted at
silencing existing employees but focus instead on deterring activists from

1. See DAVID KIRBY, ANIMAL FACTORY xiii (2010) (describing the tendency to avoid
   the reality of meat production as “willful ignorance”).
2. See, e.g., CTR. FOR DISEASE CONTROL & PREVENTION, CS218786-A, CDC
   ESTIMATES OF FOODBORNE ILLNESS IN THE UNITED STATES (2011) [hereinafter
   CDC ESTIMATES], available at http://www.cdc.gov/foodborneburden/PDFs/FACTSHEET_-
   A_FINDINGS_updated4-13.pdf (estimating that in the United States an average of
   48,000,000 (one in six) people become ill, 128,000 are hospitalized, and 3,000 die due to
   foodborne illness each year).
3. Concentrated Animal Feeding Operations (CAFOs) are “‘agricultural operation[s]
   where animals are held in reserve and raised in confined situations.’” Julie Follmer &
   Roseann B. Termini, Whatever Happened to Old Mac Donald’s Farm . . . Concentrated
   Animal Feeding Operation, Factory Farming and the Safety of the Nation’s Food Supply,
   5 J. FOOD L. & POL’Y 45, 51 (2009) (quoting U.S. Environmental Protection Agency (EPA),
   National Pollutant Discharge Elimination System (NPDES), Animal Feeding Operations,
   http://cfpub.epa.gov/npdes/home.cfm?program_id=7 [last updated Feb. 16, 2012]).
4. See David Sirota, States Shush Corporate Critics: From Factory Farms to Home Foreclosures,
   State Governments Are Helping Hide Corporate Wrongdoing, SALON (Apr. 4, 2012, 11:45 AM),
   http://www.salon.com/2012/04/04/states_shush_corporate_critics/ (detailing several
   recent state-level legislative efforts aimed at hindering industry transparency).
5. See Mark Bittman, Who Protects the Animals?, N.Y. TIMES, Apr. 26, 2011,
   http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (using the
   term “ag-gag law” for legislation criminalizing unauthorized recordings in agricultural
   facilities).
6. Dan Flynn, Five States Now Have ‘Ag-Gag’ Laws on the Books, FOOD SAFETY NEWS
   (Mar. 26, 2012), http://www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-
   laws-on-the-books/.
working undercover to expose violations. The laws display the covert status quo of the meat and poultry industry and suggest evidence of violations to which legitimate employees are exposed. While the recently enacted Food Safety Modernization Act7 (FSMA) was a strong step toward updating regulations originally prompted when Upton Sinclair’s The Jungle8 exposed repulsive slaughterhouse practices in 1906,9 the legislation’s regulatory reach falls short of the change that the American food safety system requires.

The FSMA’s primary shortcomings are its sole focus on the Food and Drug Administration (FDA) and its exclusion of meat and poultry production from regulation.10 For example, the Act provides whistleblower protections for private food industry employees who report activities that present public safety hazards.11 However, this applies only to FDA-regulated industries; people central to meat and poultry production—CAFO, slaughterhouse, and meatpacking employees—are not afforded these protections.12 The U.S. Department of Agriculture (USDA) has regulatory jurisdiction over meat and poultry production, primarily through the Food Safety and Inspection Service (FSIS),13 and Congress has not provided a law comparable to the FSMA for this largely parallel industry.14 This regulatory gap exists despite risks of foodborne illness outbreaks and more prevalent concerns about animal health within USDA.
industries than within FDA industries. 15

In the absence of a safety net for meat and poultry production whistleblowers, FSIS inspectors serve as the only check on production, 16 which does not permit the level of surveillance required to make a practical difference in oversight and accountability. 17 Ag-gag laws work to thwart the efforts of activists who recognize this regulatory shortfall and work undercover to record livestock abuse and unsanitary processing conditions. 18 While the laws vary in scope and penalty, they all operate to lessen transparency of an integrally public industry and raise serious concerns about what their supporters have to hide. As the arduous passage of the FSMA demonstrates, 19 a complete food safety regulatory overhaul may be far off. Nonetheless, there are mechanisms available—both supported by a recent Supreme Court interpretation of FSIS power and falling within the current USDA facility inspection authority—that would add a great deal of transparency without weighing too heavily on agencies involved.

This Comment recommends that the USDA, through its existing power, promulgate and enforce whistleblower protections as a condition for facility inspection across the entire meat and poultry production industry to ensure

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15. See Strauss, supra note 14, at 368 (describing risks involved with excluding the United States Department of Agriculture (USDA)).
16. Cf. Dennis R. Johnson & Jolyda O. Swaim, The Food Safety and Inspection Service’s Lack of Statutory Authority to Suspend Inspection for Failure to Comply with HACCP Regulations, 1 J. FOOD L. & POL’Y 337, 337–40 (2005) (noting that Food Safety and Inspection Service (FSIS) inspections are required for meat and poultry facilities to operate and that inspections will only be suspended when “cleanliness of the facility is so far below standards that the product may be implicated”).
19. See generally Strauss, supra note 14, at 355–58 (describing the FSMA’s political battles).
that the American food supply remains competitive, safe, and healthy for workers, consumers, and livestock. Though whistleblower protections should ultimately be provided through comprehensive legislation similar to the FSMA, the recommended regulatory addition will serve as a step in the right direction until larger employee-rights reform takes place. These changes would enhance the current food safety regulatory landscape, which this Comment will review in Part I. Next, Part II delves into the whistleblower protections currently unavailable in factory farm meat and poultry production and discusses common concerns in factory farming and trends in the industry’s workforce. Part III describes the recent increase in state ag-gag laws and how these laws highlight both the secrecy of meat and poultry production and the corresponding need for federal whistleblower protections. Finally, Part IV recommends that the USDA promulgate rules requiring whistleblower protections through industry-led Employee Protection Plans (EPPs) as an additional condition for facility inspection.

American farming impacts public safety,20 national security,21 environmental welfare,22 and animal health.23 While ag-gag laws are just one example of major meat producers working to continue operating under protected conditions, these laws demonstrate that employees courageous enough to stand up against serious labor, environmental, and animal law violations ought to be protected from retaliation.

I. OVERVIEW OF EXISTING FOOD SAFETY REGULATORY STRUCTURE

From the standpoint of a consumer without a background in the area of food regulation, it may seem counterintuitive that a law devoted to food safety modernization24 would exclude meat and poultry production. However, a historic overview of food safety prior to the FSMA’s passage sheds some light on why this regulatory hole continues to exist. The American food safety system is a regulatory thicket. It involves over fifteen

23. See generally Stathopoulos, supra note 17, at 410–13 (detailing the suffering and poor living conditions of animals raised for meat and poultry supply).
agencies with varied mandates and numerous other bodies at the state and local levels. In fact, this regulatory intersection led the Government Accountability Office to recently designate food safety as a high-risk area on which the Executive and Legislative Branches should focus reform efforts.

While this complexity is not unique to food safety, the primary agencies involved in this area—the USDA and FDA—are similar in subject coverage, yet distinct in procedure and mandate. The USDA regulates livestock and meat production, including primarily poultry, cattle, and hogs, while the FDA regulates nearly all other food, drugs, and supplements. Given the array of grocery products available in the American marketplace, these items inherently intersect. Idiosyncratic overlaps in responsibility can take place when, for example, a single production plant produces chicken broth (FDA-regulated) and beef broth (USDA-regulated). This leads to varied regulatory expectations for food producers and their employees, particularly considering that FDA inspections occur far less frequently than USDA inspections. Though this type of overlap is less common than proponents of regulatory reform may suggest, it represents other underlying issues that have fueled recommendations for the creation of a single food safety agency made by many in the past.


28. See Note, supra note 25, at 1349 (describing the respective jurisdictions of the USDA and FDA).

29. Cf. id. at 1350, 1355–56 (comparing the regulations for other related products similarly).

30. See DeWaal, supra note 17, at 454–55 (describing how the FDA inspects plants only in response to an outbreak suspicion while USDA staff continuously inspects plants).

31. See Note, supra note 25, at 1355 (explaining that though overlap on particular products takes place, this duplication occurs in approximately 2% of production facilities—or roughly 1,450 plants).

32. See DeWaal, supra note 17, at 457–58 (raising issues such as food import and technological innovation that prompted support for a proposed legislative overhaul in 1999).
Congress created the USDA and FDA under distinct statutes passed in response to distinct societal concerns. The USDA largely promulgates regulations pursuant to the Federal Meat Inspection Act (FMIA), Poultry Products Inspection Act (PPIA), and Humane Methods of Slaughter Act of 1978. While these acts and the regulations developed thereunder have changed incrementally since 1907, the USDA inspection mandate has not been overhauled since the start of federal involvement in the industry.

The USDA's regulatory control over meat and poultry production depends largely on FSIS and its nearly 7,800 facility inspectors. Inspectors are responsible for reviewing livestock directly before and after slaughter to look for signs of animals being unfit for the human food supply. In 1997, the USDA abandoned its original “sight, touch, and smell” inspection method and adopted the Hazard Analysis Critical Control Point (HACCP) system. Rather than relying on sensory review by inspectors, the HACCP system focuses on industry involvement, enhances record keeping, and addresses critical points in the production process that lead to the highest risks of contamination. In practice, HACCP has largely reduced the role of FSIS inspectors and has enabled deceptive record keeping and less industry transparency. Despite efforts

But see Note, supra note 25, at 1366 (arguing that combining agencies is not a panacea for problems that exist).

33. See Note, supra note 25, at 1348 (indicating that the predecessors to the FDA and USDA went through an adversarial period in the early 1900s); Stathopoulos, supra note 17, at 439 (noting USDA's conflicted mandate to both promote and regulate agriculture).
38. See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 17, at 4, 8–10 (asserting that a decrease in the number of FSIS employees occurred despite an increase in budget and meat production and that the USDA stated that this was due to facility consolidation).
39. The Hazard Analysis Critical Control Point (HACCP) inspection system is currently used. See, e.g., Pape, supra note 12, at 435–42 (discussing the HACCP system and its flaws); 9 C.F.R. pt. 417 (2012).
40. Pape, supra note 12, at 434.
41. See 9 C.F.R. pt. 417 (detailing HACCP guidelines); Pape, supra note 12, at 435.
42. See Pape, supra note 12, at 436–38 (providing an overview of HACCP system principles).
43. See Katherine A. Straw, Note, Ground Beef Inspections and E. Coli O157:H7: Placing the Needs of the American Beef Industry Above Concerns for the Public Safety, 37 WASH. U. J.L. & POL’Y 355, 364 (2011) (describing how the change in FSIS’s role from inspecting livestock to reviewing records has weakened the agency’s role); see also Pape, supra note 12, at 439 (affirming that industry negotiations diluted the impact of HACCP). But see Hearing to Review
to bolster food safety nationwide, the current regulatory framework has allowed large-scale meat and poultry producers to slip out the back door. HACCP, the heralded advance in meat inspection, has actually removed inspectors and public reporting. Additionally, the number of inspectors has dropped while meat production and the USDA budget have increased.

Aside from the questioned strength of HACCP, FSIS power has been found to preempt state efforts to regulate in the area of meat production facility operations. In early 2012, the Supreme Court held that FSIS regulations preempted a California law that regulated an area of livestock slaughter and sale within the scope of the FMIA. However, meat and poultry producers have also successfully challenged FSIS enforcement actions independently. This varied level of impact suggests that, while FSIS has prominence over state meat and poultry regulation, its power over individual companies exists in a somewhat fragile balance. Against this backdrop, and when considering the redundancy in agency jurisdiction, it is easy to understand how food safety regulations have largely only adapted in response to crisis or tragedy and how legislation as vast as the FSMA was passed without impacting the meat and poultry industries.

II. WHISTLEBLOWER PROTECTIONS, THE CORPORATE MEAT PRODUCTION INDUSTRY, AND ITS WORKFORCE

The simultaneous evolution of more factory meat and poultry

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16. See Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 975 (2012) (stating the FMIA “expressly preempts” the challenged California law; see also infra Part IV.B. (discussing the preemption issue)).


18. See Johnson & Swaim, supra note 16, at 361–68 (comparing three successful industry challenges). But see Livestock Hearing, supra note 43, at 5, 19 (statement by Alfred V. Almanza, Administrator, FSIS) (noting that FSIS oversees approximately 6,200 facilities each year and providing context for how many enforcement actions remain unchallenged).

19. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 12 (stating that food regulation “evolved piecemeal, typically in response to particular health threats or economic crises”).
production and less industry transparency should raise questions for everyone impacted by large-scale American meat suppliers, particularly because employees in this industry are not provided with whistleblower protections. The need to advance the rights of employees through rule promulgation becomes clear when considering (1) the whistleblower protections recently provided in the FSMA, (2) health and environmental concerns present in the meat and poultry industry, and (3) the vulnerability of the industry’s workforce.

A. Where Meat is Not Food: The FSMA and Existing Federal Whistleblower Protections

As mentioned above, the complexity of food safety in the United States may explain how the USDA and meat regulations were left out of the FSMA. Less clear, though, is how food-producing entities have been exempt from providing whistleblower protections for so long. Federally enforced protections are common in areas where conditions are unsafe, stakes are high in the event of violations, or a workforce is particularly vulnerable and unable to address violations without protection from retaliation. Employees supporting meat and poultry production in the United States fall into all of these categories, yet they have no assurance against retaliation if they report violations that jeopardize the American food supply.

The FSMA includes whistleblower protections for FDA-regulated industries. While it is unclear how the whistleblower protections will

50. See, e.g., Spahn, supra note 20, at 714 (contending that food producers owe a higher duty of care to consumers); Trexler, supra note 25, at 321–22 (arguing that production secrecy should end because, unlike other consumer markets, everyone must purchase food).
54. See infra Part II.C.
operate as promulgated regulations, the fact that USDA-regulated industries are exempt from offering such protections will present serious problems in areas that receive double surveillance. Additionally, the exclusion of factory meat production signals a troubling double standard: worker protections are required to bolster food safety, yet the people who raise, slaughter, and pack meat and poultry remain unprotected.

B. Meat and Poultry Production: An Overview of Common Major Concerns

Factory-farmed livestock has an immense presence in our food system and has generated a great deal of research. Many recent studies have focused on the environmental impact of factory farming. As demand for meat in the United States and abroad has increased, so too has the size of CAFOs. Containment structures look like stretched airplane hangars and can hold up to 1,000 cattle for beef production, 700 cattle for dairy production, 2,500 hogs weighing more than 250 pounds each, or 125,000 chickens for broiling. Confined living conditions make livestock susceptible to disease and death, so antibiotics are used to keep animals

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57. See supra Part I.

58. See Gabriela Steier, Note, Externalities in Industrial Food Production: The Costs of Profit, 9 DARTMOUTH L.J., Fall 2011, at 163, 172 (stating that the majority of meat and poultry is factory farmed).

59. See, e.g., KIRBY, supra note 1, at 35–36 (describing a river turned orange due to CAFO runoff).


61. See Greenaway, supra note 60. CAFOs largely fall under the Environmental Protection Agency’s regulatory jurisdiction. See generally Animal Feeding Operations – Compliance and Enforcement, ENVTL. PROT. AGENCY, http://www.epa.gov/oecaagct/anafocom.html (last updated June 27, 2012) (including guidance for complying with CAFO regulations).

62. See Follmer & Termini, supra note 3, at 52 (describing the size designations of CAFOs).
eating and growing to a size suitable for slaughter.\textsuperscript{63} And with thousands of confined, eating animals comes a near-unimaginable amount of animal waste.\textsuperscript{64} In the natural environment, pasture-raised animals’ waste transforms into fertilizer and rarely presents issues related to fecal and urine concentration. However, CAFOs keep animal waste in “lagoons” or lake-sized cesspools.\textsuperscript{65} These lagoons can be up to 120,000 square feet and give off an unbearable odor.\textsuperscript{66} Exposure to the gases lagoons emit has been tied to severe health problems\textsuperscript{67} and can also have a devastating impact on surrounding waterways,\textsuperscript{68} local wildlife,\textsuperscript{69} and property values.\textsuperscript{70}

In addition to focusing on the environmental impact of factory farming, many researchers devote attention to the dismal living conditions that poultry, hogs, and cattle endure before being slaughtered and shipped to supermarkets and restaurants around the world. Livestock raised and slaughtered in factory production schemes are packed into containers so small that they are often unable to turn around or spread their wings.\textsuperscript{71} Animals often live standing in their own feces, with little exposure to fresh air or sunlight and no ability to act on instinct, making them anxious and depressed.\textsuperscript{72} To prevent the inevitable fighting that occurs with so many

\begin{itemize}
\item \textsuperscript{63} See Stathopoulos, \textit{supra} note 17, at 416–20 (explaining that the concoction of ingredients fed to livestock can include hormones, antibiotics, waste from chicken coops called “poultry litter,” dirt, plastic, arsenic, and even remains of other animals); Pape, \textit{supra} note 12, at 427–28 (adding to the issue of industry overlap by noting that the FDA regulates animal feed).
\item \textsuperscript{64} See Stathopoulos, \textit{supra} note 17, at 413–14 (documenting the immense animal waste farms produce).
\item \textsuperscript{65} See Kirby, \textit{supra} note 1, at 4 (depicting a flight above a CAFO and the stench as it was approached); Stathopoulos, \textit{supra} note 17, at 413–15 (detailing the toxicity of lagoons).
\item \textsuperscript{66} See Kirby, \textit{supra} note 1, at 4; Stathopoulos, \textit{supra} note 17, at 414 (quoting Jeff Tietz, \textit{Boss Hog}, \textit{Rolling Stone}, Dec. 14, 2006, at 89).
\item \textsuperscript{67} See Stathopoulos, \textit{supra} note 17, at 414 (stating that lagoon toxins are connected to “asthma, bronchitis, diarrhea, heart palpitations, headaches, depression, nosebleeds, and brain damage”).
\item \textsuperscript{68} See id. at 415 (illustrating the potential for extreme pollution should a lagoon rupture or leak).
\item \textsuperscript{69} See, e.g., Kirby, \textit{supra} note 1, at 35–36 (describing the fish kills in a river due to CAFO waste).
\item \textsuperscript{70} See id. at 31 (stating that air pollution results in economic depression in areas near CAFOs).
\item \textsuperscript{71} See Lynn M. Boris, Note, \textit{The Food-Borne Ultimatum: Proposing Federal Legislation to Create Humane Living Conditions for Animals Raised for Food in Order to Improve Human Health}, 24 J.L. & HEALTH 285, 290–91 (2011) (describing the evolution of pathogens due to animals living in confinement). \textit{But see Kirby, supra} note 1, at 33 (acknowledging that some cattle farms allow animals outside).
\item \textsuperscript{72} See, e.g., Michael Pollan, \textit{An Animal’s Place}, N.Y. TIMES MAG., Nov. 10, 2002, http://www.nytimes.com/2002/11/10/magazine/10ANIMAL.html (describing these
animals in containment, many operators remove the beaks of poultry and tails of cattle and hogs.\footnote{See Stathopoulos, supra note 17, at 412–13 (addressing the removal of beaks and tails as a way to prevent fighting and infection caused by animal anxiety, yet acknowledging that “stubs” resulting from removal often lead to infection).}

In slaughterhouse facilities, efficiency is the top priority.\footnote{See Taylor, supra note 25, at 387 (suggesting that regulators share the goal of efficiency with industry); Straw, supra note 43, at 356–57 (illustrating hesitation by the factory farming industry to adopt regulations that will slow production).} Undercover video that ultimately led to the nation’s largest beef recall\footnote{The video was released by the Humane Society of the United States (HSUS) through the work of an undercover activist. Andrew Martin, Largest Recall of Ground Beef Is Ordered, N.Y. TIMES, Feb. 18, 2008, http://www.nytimes.com/2008/02/18/business/18recall.html. This individual would be subject to criminal penalty under a number of pending ag-gag laws. See infra Part III.} documented slaughterhouse workers beating, dragging, and striking animals with electric prods to make them stand when they could not do so on their own.\footnote{See generally Martin, supra note 75 (describing the undercover video that spurred the recall of 143 million pounds of ground beef and noting that the exposed company has since closed).}

Other videos showed workers gruesomely killing cattle that had suffered frostbite by hitting them with picks and shovels.\footnote{See generally Bittman, supra note 5 (discussing a video taken undercover at E6 Cattle Company and describing the problem with ag-gag laws deterring the collection of such footage).} In the fast pace of the processing plant, the line does not stop moving, and animals may start to be processed while still alive.\footnote{ERIC SCHLOSSER, FAST FOOD NATION 171 (2002).} The breadth of animal abuse that takes place throughout the factory meat and poultry production process is beyond the scope of this Comment, but the legal and societal importance of inhumane animal treatment and the impact it has on people exposed to it are nothing to ignore, particularly in the context of those animals that sustain us.\footnote{See Cass R. Sunstein, Standing for Animals (with Notes on Animal Rights), 47 UCLA L. REV. 1333, 1333 n.* (2000) ("[T]he cruel treatment of animals seems to me one of the great unaddressed legal problems of our time."); cf. Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform, 111th Cong. 38–39 (2010) [hereinafter HMSA Hearing] (statement of Dean Wyatt, Supervisory Public Health Veterinarian, FSIS) (discussing mistreatment he experienced after trying to enforce against violations).}

Perhaps most often, and reasonably so, research surrounding factory farm improvements is devoted to lessening debilitating and often deadly foodborne illnesses presented by pathogens and bacteria found in factory confined and filthy living conditions, and the tendency for pigs—highly intelligent animals—to become depressed as a result of their confinement.\footnote{See Stathopoulos, supra note 17, at 412–13 (addressing the removal of beaks and tails as a way to prevent fighting and infection caused by animal anxiety, yet acknowledging that “stubs” resulting from removal often lead to infection).}

\footnote{See Taylor, supra note 25, at 387 (suggesting that regulators share the goal of efficiency with industry); Straw, supra note 43, at 356–57 (illustrating hesitation by the factory farming industry to adopt regulations that will slow production).}
farm products. As mentioned above, factory-raised animals require a great deal of unnatural assistance to survive until slaughter. The effects of antibiotics, hormones, and unsound animal feed are all passed through to humans at consumption. While the presence of harmful bacteria can be alleviated with proper cooking, more serious side effects are less understood. Primary areas of concern include humans’ developing resistance to antibiotics, contracting mad cow disease, and falling ill to \textit{E. coli} or even cancer. Exposure to these health risks connects to the environmental and animal health aspect of the factory farm problem; each area perpetuates the worsening of other conditions. Likewise, stronger regulation to alleviate any of the problems above would necessarily improve other areas. For example, restrictions on livestock containment or antibiotic use would lessen the impact of harmful animal waste. As ag-gag laws display, now more than ever, effective alerts regarding any of these violations must come from within the facilities.

\textbf{C. By the Lagoons and on the Line: The Meat and Poultry Production Workforce}

If the conditions outlined above are difficult to swallow, one should try to imagine an eight-hour shift in such a setting. Workers in CAFOs, slaughterhouses, and meatpacking facilities are constantly exposed to these repugnant and dangerous conditions. Employees at CAFOs work amidst the harmful noxious gases and under constant stress of maintaining contained animals. Slaughterhouse and meatpacking employees are in particularly worrisome roles. From guiding animals toward slaughter and stunning them as they enter the facility to sawing carcasses apart and trimming meat along a fast assembly line, much of factory slaughtering is still done by hand. The pace is fast and constant, and the work is

\begin{itemize}
  \item \textbf{80.} See CDC Estimates, \textit{supra} note 2 (documenting the prevalence of foodborne illnesses transmitted through food).
  \item \textbf{81.} Of course, many animals do not survive until slaughter. See Stathopoulos, \textit{supra} note 17, at 412 (providing data regarding the high rate of death before slaughter).
  \item \textbf{82.} See sources cited \textit{supra} note 63.
  \item \textbf{83.} See, \textit{e.g.}, Stathopoulos, \textit{supra} note 17, at 420–33 (reviewing various health problems connected with additives in livestock diets and treatment, including: increases in antibody problems due to antibiotic exposure; increased rates of breast, prostate, and colon cancer due to consuming the growth hormone rbGH used in dairy production; and increased risks of contaminated meat and poultry due to fast processing that increases the presence of fecal matter on meat).
  \item \textbf{84.} See \textit{supra} Part II.B.
  \item \textbf{86.} See \textit{id.} at 395–98 (reviewing the psychological trauma impacting factory farm
\end{itemize}
gruesome yet monotonous. Severe injuries and even death are constant threats when working in close quarters with heavy machinery, sharp knives, and fatigue for long hours. Workers have been urged to leave injuries unreported, so as not to alert federal regulators, and may be rewarded if they stay silent. For injuries that are reported, collecting worker’s compensation can be difficult without a legal infrastructure that requires accountability on the part of employers.

Minority populations belonging to low socioeconomic classes comprise a large proportion of the factory meat and poultry production workforce. Recent immigrants pour into factory farming communities willing to take the work, no matter how gruesome. It has been reported that the least desirable job in slaughter facilities—the overnight cleaning crew—often belongs to illegal immigrants who lack both bargaining power and the ability to speak out about violations for fear of deportation. Currently, there are few avenues to learn about such conditions in factory farming aside from employee accounts; the few glimpses available show that these workers bear an incredible burden to bring consumers an affordable product.

III. SOMETHING TO HIDE: THE RECENT SURGE IN AG-GAG LAWS ACROSS THE UNITED STATES

Several states have recently passed or considered passing laws that restrict individuals’ abilities to document factory farm violations by workers).

87. See Schlosser, supra note 78, at 171 (describing a “sticker’s” job as being to “stand in a river of blood, being drenched in blood, slitting the neck of a steer every ten seconds or so” for eight-and-a-half hours).
88. See id. at 172–73 (describing the scene in a slaughter facility).
89. See id. at 175 (stating that workers who refrained from reporting injuries were rewarded with temporary, more-desirable positions).
90. See id. at 178–86 (documenting the difficulty that union members at meat production plants experience in maintaining bargaining power with employers).
91. See, e.g., Greenaway, supra note 60 (describing an influx of immigrants to a rural Illinois town—home to a Cargill plant—as the “sacrifice generation,” those willing to work in awful conditions to provide for their children); Sinclair, supra note 8 (detailing hardships of European immigrant populations in the Chicago stockyards of the early 1900s).
92. See Greenaway, supra note 60.
93. See Schlosser, supra note 78, at 176–78 (illustrating the task of using a hot temperature, high pressure hose to clean slaughter remnants from facilities and the gruesome deaths that occur when untrained workers clean machinery, and stating that Occupational Safety and Health Administration fined one company only $480 for each death).
94. See generally id. at 169–90; Dillard, supra note 85 (revealing the life of slaughterhouse workers and the psychological trauma they face).
criminalizing these efforts. The laws vary in scope and projected impact, but all are aimed at shielding corporate farming operations from scrutiny that occurs when undercover recordings of farm conditions are made public.95 Three states passed legislation resembling ag-gag laws between 1990 and 1991,96 but there has been a resurgence of efforts to introduce more exacting legislation across the country.

The pieces of legislation passed in Kansas, North Dakota, and Montana97 take the form of advanced trespassing restrictions. While the laws differ slightly in penalty range,98 each prohibits those without an owner’s consent from entering facilities to use video and audio recording devices.99 These recording restrictions are incorporated with other prohibitions on crimes such as setting animals free and destroying property.100

In 2011 and 2012, there was an influx of ag-gag legislation proposed across the country; after twenty years of inactivity in the area, eleven state legislatures introduced such bills. Laws were passed in Utah and Iowa in early 2012 and were considered in Minnesota, New York, Indiana, Tennessee, Illinois, Nebraska, Florida, Pennsylvania, and Missouri that same year.101 Together, these states comprise over 30% of the total agricultural output in the United States.102 Common provisions in the proposed laws include time limits on turning over legally obtained

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98. See KAN. STAT. ANN. § 47-1828 (allowing for treble damages); MONT. CODE ANN. § 81-30-105 (delineating fines or jail time depending on the damage valuation); N.D. CENT. CODE § 12.1-21.1-04 (allowing varied levels of felony offenses for violators).
99. See KAN. STAT. ANN. § 47-1827(c)(4); MONT. CODE ANN. § 81-30-103(2)(c); N.D. CENT. CODE § 12.1-21.1-02(6).
100. See KAN. STAT. ANN. § 47-1827(a)–(b); MONT. CODE ANN. § 81-30-103(2)(a); N.D. CENT. CODE § 12.1-21.1-02(1)—(2).
recordings to law enforcement, restrictions on the reproduction or dissemination of documentation, and limits on gaining employment under false pretenses.

Utah and Iowa enacted similar ag-gag laws in early 2012. The Iowa law prohibits committing “agricultural production facility fraud” by barring people from accessing facilities under false pretenses. This law includes separate restrictions stating that people may not seek employment with the intent of committing fraud and must report any such person to authorities. As opposed to the majority of ag-gag legislation, this bill does not include language specifically prohibiting recordings, but instead focuses on barring the presence of people who may have a motive to “commit . . . fraud.”

The passage of Iowa’s law sets a troubling precedent for industry involvement in lawmaking as well as the polarization that occurs when framing ag-gag opposition as an issue based solely on animal rights. Supporters suggest that the laws protect farmers from illegal interference

103. See, e.g., Leg. 915 §§ 28-1017(2)-(3), 102d Leg., 2d Sess. (Neb. 2012) (including details of how reports must be filed within a particular timeframe); see also Joseph Jerome, ‘Ag-Gag’ Laws Chill Speech, Threaten Food Supply, AM. CONSTITUTION SOC’Y BLOG (Apr. 17, 2012), http://www.acslaw.org/acsblog/%E2%80%98ag-gag%E2%80%99-laws-chill-speech-threaten-food-supply (showing that a supporter of time limits feels that without immediate release, documentation does not prevent further violations, but fulfills a less effective vendetta against the industry).


106. IOWA CODE ANN. § 717A.3A (West 2012); UTAH CODE ANN. § 76-6-112 (West 2012).

107. IOWA CODE ANN. § 717A.3A(1).

108. See id. § 717A.3A(3)(a) (presenting a twist on a law perceived as anti-whistleblower: those aware of a potential whistleblower must themselves “blow the whistle”).

109. Violators may be charged with varied misdemeanor offenses. See id. § 717A.3A(2)(a)-(b).

with operations, and agriculture industry leaders have both influenced Iowa legislators and also urged passage of similar bills elsewhere. This industry influence is particularly problematic given the opposition to the bill shown by Iowa citizens in a 2011 survey.

Utah’s legislature passed its ag-gag law in March 2012. The law defines the new crime of “agricultural operation interference” as knowingly recording images or sound, either in person or with a device planted within a facility. This law does not include prohibitions on gaining employment under false pretenses but instead focuses more on whether a facility owner consented to documentation generally.

As these two ag-gag laws were developing, state and national leaders from Iowa and Utah had varying opinions on the passage of the FSMA, which included whistleblower protections for FDA-regulated industries. Utah Representative Bill Wright vehemently opposed the FSMA and has made efforts to exclude Utah from its application. By contrast, U.S. Senator Tom Harkin of Iowa has widely supported the need for FDA industry whistleblower protections.

111. See, e.g., Henderson, supra note 110 (reporting that the Iowa governor supports the bill to protect farmers from “people doing illegal, inappropriate things”).


115. See UTAH CODE ANN. § 76-6-112(2) (West 2012).

116. Id. § 76-6-112(2)–(3). Section 76-6-112(2)(b), however, could be interpreted as a ban on gaining employment under false pretenses. Id. § 76-6-112(2)(b) (stating that a person is guilty of agricultural operation interference if the person “obtains access to an agricultural operation under false pretenses”).


118. See Strauss, supra note 14, at 363 (quoting Senator Harkin as supporting the FSMA protections: “Unless workers are free to speak out without fear of retaliation, we might never
congressional support for the FSMA.\footnote{See Karnowski, supra note 55 (describing Senator Harkin as an FSMA leader).} Iowa’s ag-gag law was passed before the Act’s regulations were promulgated.

Proponents of ag-gag legislation argue that the laws are necessary to keep activists from misrepresenting the factory farming industry with footage that is presented out of context to scare the American public.\footnote{See Jerome, supra note 103 (quoting an Iowa Representative who argues that distributing such information is seen by some as a politically motivated action meant only to cast a misunderstood industry in a bad light). But see HMSA Hearing, supra note 79, at 11 (statement of Lisa Shames, Director, Natural Resources and the Environment, GAO) (reporting that over half of USDA inspectors at large plants feel video surveillance in facilities would be useful).} Other supporters have suggested that barring outside documentation protects animals and products from contamination that can come from outsiders entering facilities without authorization.\footnote{See Rod Swoboda, Iowa ‘Ag-Gag’ Bill Signed Into Law, AM. AGRICULTURALIST (Mar. 3, 2012), http://farmprogress.com/story-iowa-ag-gag-bill-signed-law-0-57755 (documenting an Iowa bill supporter who cited preventing outside contamination as the bill’s objective). But see Stephanie Armour, \textit{Industrial Terrorism} of Undercover Livestock Videos Targeted, BLOOMBERG BUSINESS WEEK (Feb. 21, 2012), http://www.businessweek.com/news/2012-02-21/-industrial-terrorism-of-undercover-livestock-videos-targeted.html (reporting results from a study showing that media stories about animal welfare cause meat sales to drop).} Even considering these arguments, ag-gag laws send a message that states enacting such legislation have something to hide from the American public, a portrayal harmful to responsible farmers in impacted states.\footnote{See Mark Bittman, Banned from the Barn, N.Y. TIMES OPINIONATOR [July 5, 2011, 11:19 PM], http://opinionator.blogs.nytimes.com/2011/07/05/banned-from-the-barn/ (presenting an overview of Iowa farms that offer an example of healthy meat farming); See generally HMSA Hearing, supra note 79, at 72–74 (statement of Bev Eggleston, Owner, Ecofriendly Foods LLC) (offering information on an exemplary producer).} The laws operate as a deterrent for what has historically been the most effective way to expose violations on factory farms.\footnote{See HMSA Hearing, supra note 79, at 51 (stating that an FSIS inspector could neither cease operation nor effectively enforce against inhumane slaughtering at a veal production plant until the HSUS leaked video footage documenting violations); Armour, supra note 121 (discussing recent recalls spurred by released undercover videos).} By criminalizing these actions and framing the opposition as extreme, the only individuals left to expose violations are those who can legally witness infractions: the workers themselves.

\section*{IV. THE USDA SHOULD PROMULGATE RULES THAT REQUIRE MEAT AND POULTRY INDUSTRY FACILITIES TO PROVIDE EMPLOYEE PROTECTION PLANS AS A CONDITION FOR INSPECTION}

The high public health and environmental risks presented by factory
farming and the currently fragile enforcement power of FSIS prove that federal regulators should not police the meat and poultry industry alone. Instead, and in line with the current industry-led regulatory format, FSIS should promulgate rules that require whistleblower protection schemes as an additional condition for facility inspection.

A. FSIS Has Authority to Require Whistleblower Protections from Meat and Poultry Facilities

Although FSIS has acknowledged that it was not explicitly granted the authority to provide comprehensive whistleblower protections, the existing agency authority provides room for more subtle antiretaliation mechanisms. Congressional findings included at the outset of both the FMIA and the PPIA convey intent to prevent the adulteration of meat and poultry products intended for human consumption. The findings state, “It is essential in the public interest that the health and welfare of consumers be protected by assuring that [meat and poultry] products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.” These findings precede a broad grant of authority given to the USDA to regulate the meat and poultry producers that might jeopardize this goal.

124. See supra Part II.B.


126. See Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,822 (July 25, 1996) (stating that HACCP regulations do not provide whistleblower protections because the FMIA and PPIA did not explicitly grant this authority); see also Sharlene W. Lasitter, From Hoof to Hamburger: The Fiction of a Safe Meat Supply, 33 Willamette L. Rev. 411, 457–60 (1997) (recommending that meat industry workers be provided with whistleblower protection and qui tam litigation rights to strengthen the HACCP mission); HMSA Hearing, supra note 79, at 23 (statement of Jerold Mande, Deputy Under Secretary for Food Safety, USDA) (“[W]histleblowers play an honored role in our democracy. It takes great courage to speak out about potential mismanagement or waste by something as big and as powerful as the U.S. Government.”).


128. See 21 U.S.C. §§ 451, 602 (concluding findings by stating that “regulation by the Secretary and cooperation by the States... are appropriate... to protect the health and welfare of consumers”).
suggests that FSIS statutory interpretation and regulations should be granted deference when they reasonably further an enabling statute’s mandate, particularly if they advance public safety.

Additionally, FSIS is granted more concrete authority by the PPIA and FMIA to enhance the inspection and safety mechanisms used at meat and poultry production facilities. For example, the FMIA states, “The Secretary of Agriculture may utilize existing authorities to give high priority to enhancing and expanding the capacity of the [FSIS] to conduct activities to . . . enhance the ability of the Service to inspect and ensure the safety and wholesomeness of meat and poultry products.” Pursuant to this power, the USDA is responsible for designing and enforcing regulations for inspection. The USDA has already promulgated a number of regulations standardizing facility inspection. For example, two current inspection conditions—the implementation of valid Sanitation Operating Procedures (SOPs) and HACCP plans—were promulgated pursuant to FSIS’s enabling statutes rather than explicit statutory requirements.

Facility operations rely on the FSIS inspection power, and if a facility does not meet stated conditions, inspection will be suspended. Federal inspection is required for continued meat production, so a suspension effectively shuts down facility operations. This action is the strongest penalty FSIS has at its disposal in the event of violations. Within its


130. See United States v. An Article of Drug . . . Bacto-Unidisk . . ., 394 U.S. 784, 792 (1969) (predating Chevron and acknowledging the need for deference to the FDA’s interpretation of an enabling statute where “such regulation is desirable for the public health”).


133. See id. §§ 603–06 (granting the USDA authority to inspect meat entering the food supply).

134. See supra Part I.


136. See id. § 304.5(b)–(c) (imposing conditions that facilities must meet for inspection to take place).

137. See Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6,774, 6,824 (Feb. 3, 1995) (describing FSIS’s interpretation of its legal authority to regulate inspections with additional requirements).

138. See Johnson & Swaim, supra note 16, at 357–60 (detailing the FSIS power to suspend or withdraw inspection in case of HACCP or SOP violations).

139. Id. at 356.

140. See id. at 356–60 (reviewing the enforcement powers available to FSIS).
existing authority to add conditions for inspection, FSIS could include an
additional requirement for employee protection. As an extension of the
HACCP and SOP model, whistleblower protections could be added so long
as they are both promulgated under the Agency’s delegated responsibility of
“enhancing and expanding the capacity of the [FSIS]”\textsuperscript{141} and also pursuant
to the USDA’s discretion in adding regulations under the FMIA and PPIA.

Moreover, it is not unheard of for agencies to promulgate employee
protection mechanisms independent from an explicit statutory mandate. A
number of regulatory mechanisms have been used in recent years to bolster
offshore drilling oversight, for example.\textsuperscript{142} This includes the establishment
of Safety and Environmental Management Systems (SEMS), which are
comprehensive, industry-led plans mandating minimum safety protocols
and contingency plans for offshore operations.\textsuperscript{143} The original framework
for the SEMS rule has been finalized,\textsuperscript{144} but the most potent comparison
comes from a recently proposed addition. The Department of the
Interior’s Bureau of Ocean Energy Management, Regulation, and
Enforcement\textsuperscript{145} has proposed that employee protection requirements be
added to the finalized SEMS mandate.\textsuperscript{146} Proposed additions include
providing a Stop Work Authority for any and all employees or

\begin{footnotesize}
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\item \textsuperscript{141} 21 U.S.C. § 679c(a) (2006).
\item \textsuperscript{142} The 2010 Deepwater Horizon offshore rig explosion in the Gulf of Mexico spurred
this increase in regulation. See Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and Environmental Management Systems, 75 Fed. Reg. 63,610,
explosion adds an exigent element to the changes, increased regulations were still
promulgated within existing authority and not pursuant to legislative mandates. See id.
(noting that the Gulf explosion underlies additional regulation); see also Offshore Oil and Gas
whistleblower protection for offshore oil and gas employees).
\item \textsuperscript{143} Safety and Environmental Management Systems (SEMS), 30 C.F.R. §§ 250.1900–
1929 (2012) (guiding regulated entities on how to implement Safety and Environmental
Management Systems (SEMS)).
\item \textsuperscript{144} Id. §§ 250.1900–1929. But see Sandra Snyder, \textit{BOEMRE’s Final SEMS Rule
Substantially Modifies the Original Proposal, Inviting Legal Challenge}, ENERGY LEGAL BLOG (Oct. 6,
2010, 2:00 PM), http://www.energylegalblog.com/archives/2010/10/06/3231 (discussing
the opportunities for challenge presented by the finalized SEMS regulations).
\item \textsuperscript{145} The Bureau of Ocean Energy Management, Regulation, and Enforcement—
formerly the Minerals Management Service—is undergoing a large-scale reorganization. See
Press Release, U.S. Dep’t of the Interior, Salazar Divides MMS’s Three Conflicting
Missions: Establishes Independent Agency to Police Offshore Energy Operations (May 19,
Conflicting-Missions.cfm.
\item \textsuperscript{146} Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Revisions to
\end{itemize}
\end{footnotesize}
contractors.147 Stop Work Authority programs would enable employees to cease a specific task without fear of reprisal if they deem an imminent risk or danger to be present.148 Proposed changes would also require offshore operators to issue reporting guidelines through which employees can address unsafe work conditions.149 The functionality of the SEMS and its proposed additions offer an example of an agency responding to a public safety risk by promulgating employee protection mechanisms pursuant to its general preexisting authority. Though the employee protections have not been finalized, the very proposal of the SEMS rule demonstrates that an agency has interpreted its power to include adding employee protections.

Opponents to the USDA’s power to promulgate employee protections may suggest that the FSMA’s whistleblower provisions for food producers complicate the case for authority.150 The Act’s exclusion of the USDA could be framed as Congress intending to prevent similar protections in the meat and poultry industry. However, the fragmented historical development of FDA and USDA regulations as well as the recent introduction of a bill for a Foodborne Illness Reduction Act, which includes USDA whistleblower protections similar to those in the FSMA, dilutes this argument.151 Considering this history, and the agency’s authority, it is reasonable to interpret the FMIA and PPIA as delegating the USDA power to promulgate regulations that promote public safety by protecting employees’ ability to draw attention to violations that threaten food safety.

147. Id.
148. Id. at 56,686.
149. Id. at 56,685, 56,687.
150. See FSMA, Pub. L. No. 111–353, § 402, 124 Stat. 3885, 3968–71 (2011) (providing guidelines for employees who feel they have been retaliated against for reporting violations). Congressional leaders have also acknowledged federal inspector whistleblowers who have exposed FSIS inspection shortfalls. See HHSD Hearing, supra note 79, at 61 (statement of Dean Wyatt, Supervisory Public Health Veterinarian, FSIS) (receiving thanks from Rep. Dennis J. Kucinich for Wyatt’s “put[ting] [his] career on the line just to do the right thing”); see also GovAcctProjTV, WWTW #32: Highlights from GAPs Food Whistleblower Conference, YOUTUBE (Apr. 7, 2011), http://www.youtube.com/watch?v=15Cw7kOlfik (including an expert panelist reporting that, though weakened by negotiation, whistleblower protections were a major victory for the FSMA).
151. See supra Part II; Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong., § 201(a)(1) (2011) (proposing adding section 270(c)(1) to the Department of Agriculture Reorganization Act of 1994 to provide USDA employee protections); see also Karnowski, supra note 55 (reporting that according to Government Accountability Project’s legal director, the FSMA bill sponsors left out USDA industries to avoid political obstacles).
B. FSIS Requirements Would Likely Preempt State Ag-Gag Laws: The Impact of National Meat Ass'n v. Harris

The January 2012 Supreme Court case National Meat Ass'n v. Harris challenged a California law that prohibited the sale of nonambulatory livestock by measures more stringent than those laid out by FSIS. In a unanimous decision, the Supreme Court upheld the preemptive effect of the federal regulation and struck down the state law. The Court held that FMIA's preemption clause is broad, noting, “[The California law] reaches into the slaughterhouse’s facilities and affects its daily activities. And in so doing, [the law] runs smack into the FMIA's regulations.” This holding strongly supports the proposition that state-led efforts (through ag-gag laws or otherwise) to prevent whistleblower protections would be preempted by FSIS regulations in this area. Additionally, it is unclear whether the standard of “reach[ing] into the slaughterhouse’s facilities and affect[ing] its daily activities” would ever allow states to effectively impact USDA-regulated facilities if overlap with FSIS power were possible.

The National Meat Ass’n decision also holds that agency preemption falls within the FMIA's language. The Court found, “The FMIA contains an express preemption provision . . . [stating] ‘[r]equirements within the scope of this [Act] with respect to premises, facilities and operations of any establishment . . . which are in addition to, or different than those made under this chapter may not be imposed by any State . . . except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. . . . [This] shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.’”

Given the clear delegation of inspection power to FSIS, it would be challenging for states to implement facility requirements for employee protections without infringing on the FMIA’s scope.

153. Id. at 975.
154. Id.
155. Id. at 974. See also FMIA 21 U.S.C. § 678 (2006) (including the FMIA’s preemption clause). It also states: Requirements within the scope of this chapter [on meat inspection] with respect to premises, facilities and operations of any [inspected] establishment . . . which are in addition to, or different than those made under this chapter may not be imposed by any State . . . except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. . . . [This] shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.

158. Opponents to FSIS’s enforcing whistleblower protections could point to successful industry challenges to suspension actions as a sign that FSIS has questionable impact. See Johnson & Swaim, supra note 16, at 361–68 summarizing three cases in which FSIS has lost
Ag-gag law supporters may counter this assumption of preemption by noting that some ag-gag laws do not directly impact daily facility operations. As discussed above, ag-gag laws vary a great deal, and those that are tailored specifically to antifraud and employment prerequisites may have a stronger case to avoid federal preemption because the FMIA and PPIA are more closely aligned with slaughter practices than personnel concerns. For example, a court’s review of an ag-gag law that explicitly exempts legitimate employees may face a more complicated review. However, federal preemption is sharper in the case of ag-gag laws that are vague and that encompass actions by legitimate employees. It follows that a state law impacting the actions and concerns of employees exposed to FSIS violations could be viewed as “reach[ing] into the slaughterhouse’s facilities and affect[ing] its daily activities.” Additionally, this opposing argument is weakened by provisions in the FMIA that provide standards for record keeping, surveillance, and mislabeling of products, which could be interpreted as broadening the Act’s scope to cover state laws that impact information about slaughter facilities more generally.

Ag-gag supporters may also argue that the last clause of the FMIA’s preemption provision leaves room for debate about states legislating in this area independently. However, this language is unclear and provides unstable grounds for an exception; the clause is unlikely to support a preemption challenge because the ag-gag laws are designed to insulate and protect facility workings from scrutiny, clearly impacting operations. While questions regarding preemption for certain ag-gag provisions are legitimate, the Supreme Court has noted that the FMIA’s preemption clause “sweeps widely,” and this will likely guide courts to find that laws impacting facility employees are within the scope of the FMIA and PPIA.

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But see id. at 360 (stating that FSIS has enforced hundreds of actions).

159. See supra Part III.

160. This is the case with Missouri’s proposed law. See infra notes 175–76 and accompanying text.


162. See, e.g., FMIA, 21 U.S.C. § 642 (2006) (providing FMIA’s record keeping rule, which, notably, is a possible exception to the Act’s preemption clause, as states may be able to legislate in this area if they are doing so more stringently than the FMIA permits).

163. See 21 U.S.C. § 678 ("This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.").


165. The argument for federal preemption also correlates with the support for USDA’s authority to promulgate protections. If FSIS’s ability to add employee protections is deemed appropriate pursuant to the FMIA and PPIA, then state laws that overlap in this area
Following _National Meat Ass’n_, ag-gag laws should not thwart the effort to add whistleblower protections or measures that impact facility operations. Additionally, these measures should take place at the federal level to be effective.\textsuperscript{166}

C. FSIS Should Require Whistleblower Protections Through Employee Protection Plans

Current conditions for inspection include verification that facilities are operating under minimum standards to ensure safe and healthy food production.\textsuperscript{167} A measure should be added to these conditions that relates to antiretaliation plans for workers who expose violations to the USDA, facility management, or other outside parties.

Like the HACCP systems\textsuperscript{168} and SOPs currently required of meat and poultry facilities, comprehensive EPPs should be an additional condition for federal inspection. Procedurally, these Plans could follow the organizational structure already required for SOP implementation, which will reduce the need for added infrastructure or training.\textsuperscript{169} Industry-led Plans will also encourage meat and poultry producers to take a leading role in protecting their employees and to retain the independence that SOP and HACCP requirements currently allow.

The Department of Energy’s (DOE’s) Employee Concerns Program provides a useful model.\textsuperscript{170} The DOE program includes the right of necessarily fall within the scope of both enabling acts. More plainly, if the USDA is able to regulate issue \( x \), issue \( x \) clearly falls within the scope of the agency’s enabling acts. See supra Part V.A.

166. States could still create regulations to monitor meat and poultry production for intrastate use and commerce pursuant to each state’s distinct regulatory structure. But see HARRISON WELLFORD, SOWING THE WIND 5–6 (1972) (discussing the historical lag in state compliance with meat and poultry inspection norms when products did not enter interstate commerce).

167. See supra notes 135–36, and accompanying text.


169. See 9 C.F.R. §§ 416.11–.17 (2012) (detailing the implementation, maintenance, record keeping, and federal agency verification required of valid SOPs).

170. The DOE program was promulgated pursuant to explicit statutory requirements for employee protections. See 42 U.S.C. § 5851 (2006) (providing DOE employee protection mechanisms). While it is not an example of authority for the USDA regulating employee protection, the DOE program’s comprehensive and industry-led model serves as a useful framework for those agencies with inherent authority to provide similar programs. See generally U.S. DEP’T OF ENERGY, supra note 51 (providing guidelines for the processing of
nuclear energy employees to express concerns, a process for notifying employees of their rights, and procedures that must be followed when employees express concerns.\textsuperscript{171} In fact, the DOE has had success in implementing other alternative employee grievance procedures in the area of nuclear power,\textsuperscript{172} an industry arguably comparable to the food industry in importance, inspection rate, and risk posed to society if ineffectively monitored.

Following the DOE model, EPPs should prioritize internal resolution of employee problems, but provide external avenues for employees who feel they have been or will be retaliated against for speaking out about facility violations. EPPs will be enhanced by including accountability measures, such as annual employee notification procedures, clear postings of employee rights in facilities, an employee hotline, and a grievance tracking system to monitor repeated violators.\textsuperscript{173} In addition, EPPs should provide a private right of action for employees in the event that their concerns are not addressed or employers retaliate by forcing demotion, job loss, or other maltreatment.\textsuperscript{174}

In the event of an employee exercising his or her right to sue through an EPP in ag-gag states, an employee might be subject to criminal charges depending on the ag-gag legislation in effect. While ag-gag law supporters claim that the charges should only impact workers who gained employment under false pretenses, the legal difference may be difficult to decipher in some cases. For example, under Missouri’s proposed law,\textsuperscript{175} if an employee filed a suit through her EPP private right of action guarantee because she had repeatedly witnessed a violation and was unable to seek remedy internally, she could simultaneously be charged for “willfully . . .

\textsuperscript{171}U.S. Dep’t of Energy, supra note 51.


\textsuperscript{173}Each of these components, along with a detailed process for addressing concerns, is included in the Department of Energy’s model. See U.S. Dep’t of Energy, supra note 51, at 4–8.

\textsuperscript{174}Cf. Richard Moberly, Protecting Whistleblowers by Contract, 79 U. Colo. L. Rev. 975, 988 (2008) (discussing the need for employee contracts to include a private right to sue to bolster whistleblower protection beyond what tort and statutory laws currently provide).

[p]roduc[ing] a record which reproduces an image or sound occurring at
the facility.” 176  This employee, who was not hired under false pretenses,
would be committing a crime by simply documenting an industry violation
because Missouri’s bill does not specify who is covered by the restrictions.
This conundrum is the essence of what is at stake with ag-gag laws,
particularly should the laws become ingrained before EPP requirements
are promulgated. 177

The FSIS role in the EPP scheme will be to review internal procedures,
monitor EPP implementation, and support employees who are unable to
address their concerns about violations internally. As with HACCP and
SOP violations, facilities will be subject to corrective actions, agency
verification, and inspection suspension or withdrawal. 178  While other
methods exist to bolster the rights of workers and whistleblowers, 179
incorporating EPPs as a condition of federal inspection falls within FSIS’s
existing power, follows the trend of industry autonomy in regulations,
allows FSIS oversight while adding accountability, and protects workers
and the food supply. Each of these steps should be welcomed as further
legislative advances are pursued. 180

While there are strong arguments for large-scale food safety regulatory
overhaul, 181 requiring whistleblower protections through EPPs across the
meat and poultry production spectrum will only assist agency efforts to
progress and collaborate with industry leaders. The protections will
combat the dangerous precedent ag-gag laws have set and offer support to
employees in one of our nation’s most dangerous sectors. 182  If, as
supporters argue, ag-gag laws are meant to prevent public
misrepresentation yet preserve the rights of workers to sound the alarm


177. Ag-gag law supporters urge that the laws target only people who have sought
employment with the intent of leaking harmful information, and these laws should not
impact existing employees. See, e.g., IOWA CODE ANN. § 717A.3A (West 2012) (focusing on
criminalization for seeking employment under false pretenses). The language of other
legislation does not draw this line so clearly. See supra Part IV.

178. See 9 C.F.R. § 416.15 (2012) (corrective actions for SOP violations); id. § 417.3
(corrective actions for HACCP violations); id. § 417.8 (agency verification requirement).

179. There are benefits of including antiretaliation clauses in employee contracts as
another method to protect corporate whistleblowers. This may be effective for the meat
and poultry industries that use employee contracts, but perhaps not for the industry workforce
as a whole. See supra Part II.C. See generally Moberly, supra note 174, at 988 (arguing that
employee contracts should provide a private right to action).


181. See supra note 32 and accompanying text.

182. See supra Part III.C.
where necessary, these protections will only strengthen this effort. As an industry that is both public and personal for consumers, meat and poultry production should be transparent, healthy, and safe, not only for consumers, but also for the workers risking everything to provide these cornerstone commodities.

CONCLUSION

Factory farming plays a role in public safety, food integrity, the environment, the economy, animal health, and national security. Yet ag-gag laws are permitting secrecy in this industry. When documenting farming industry violations becomes a crime, the public loses its ability to monitor factory farms and farm operators can escape accountability. Requiring whistleblower protections through EPPs as an additional condition for FSIS inspection should be the first step toward preventing such injustices.

To balance the entire food safety regulatory system, the USDA should be granted the same authority that was provided to the FDA in the FSMA. Congress should also support the passage of the Foodborne Illness Reduction Act to provide comprehensive and standardized food industry whistleblower protections.183 But the meat and poultry industry faces a number of immediate challenges in providing Americans with a safe food supply. Illness outbreaks, environmental hazards, and animal welfare concerns show that the current system is in dire need of additional oversight and accountability. As immediate legislative overhaul is unlikely, requiring EPPs in meat and poultry production facilities will greatly improve worker and food safety while consumers wait and work for large-scale changes.

In 2002, columnist Michael Pollan suggested a simple, yet drastic change to eradicate irresponsible factory farming: “[M]aybe all we need to do to redeem industrial animal agriculture in this country is to pass a law requiring that the steel and concrete walls of the CAFO’s and slaughterhouses be replaced with . . . glass. If there’s any new ‘right’ we need to establish, maybe it’s this one: the right to look.”184 With the recent ag-gag law resurgence and the simultaneous decrease in industry transparency, Pollan’s suggestion rings true now more than ever.

184. Pollan, supra note 72.