

# LEGISLATIVE REFERENCE BUREAU

## The Right-to-Farm Law in Wisconsin

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All 50 states have what is known as a “right-to-farm” law. Generally speaking, the “right to farm” can be defined as legal protection from nuisance lawsuits brought against agricultural operations. According to a 1983 *Wisconsin Law Review* article, “right-to-farm statutes are designed to prevent the conversion of farmland to non-agricultural uses by insulating farmers and farming operations from nuisance liability.”<sup>1</sup>

Right-to-farm laws first emerged in the late 1970s as state lawmakers became concerned with the rapid loss of farmland that occurred following World War II.<sup>2</sup> Most states enacted their right-to-farm laws after 1979, with many doing so in the early 1980s.<sup>3</sup> While right-to-farm laws quickly gained momentum all over the country, there did not appear to be a central, uniform movement. Rather, the idea was spread informally by several agricultural interest groups.<sup>4</sup> Urban sprawl is often identified as one of the main culprits behind this loss of farmland as many city dwellers moved to rural areas during this time: “The ‘right-to-farm’ issue heated up in the 1970s, when increasing numbers of urban people moved to rural areas. They created ‘instant suburbs,’ often in the midst of farms that had operated for years.”<sup>5</sup> A number of these new rural residents, who did not appreciate the noises, odors, and other factors associated with farming, took legal action in the form of nuisance lawsuits to limit agricultural activities.<sup>6</sup> The plaintiffs in these cases claimed that agricultural activities, such as the spreading of manure, were a nuisance that prevented them from enjoying their land.

These nuisance lawsuits posed a serious challenge for farmers to keep their land and continue to farm. When successful, lawsuits forced farmers to cease or modify agricultural activities to reduce the nuisance at the heart of the lawsuit. Subsequently, farmers who were unable to continue farming or had to limit their activities often ended up selling their land as they could no longer make a living.<sup>7</sup> Even when nuisance lawsuits were unsuccessful, farmers faced the possibility of losing their land since it was often expensive to defend the lawsuits.<sup>8</sup> According to *Smithsonian Magazine*, “Before the statutes, some farms were forced to shut or change their operations, or spend large sums defending themselves against lawsuits.”<sup>9</sup>

Right-to-farm laws sought to remedy what farmers saw as an encroachment of their

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1. Margaret Rosso Grossman and Thomas G. Fischer, *Protecting the Right-to-farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 Wis. L. Rev. 95 (1983), 118.

2. *Id.*, 97.

3. Jacqueline P. Hand, “[Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland](#),” The National Agricultural Law Center, University of Arkansas, 1984, <http://nationalaglawcenter.org>, 298.

4. *Id.*, 298.

5. “[Assembly OKs Right-to-farm](#),” *Wisconsin State Journal*, May 21, 1981, <http://lrbdigital.legis.wisconsin.gov>.

6. Grossman and Fischer, *Protecting the Right-to-farm*, 97.

7. *Id.*, 97, 157.

8. Lisa Bramen, “[What Is the ‘Right-to-farm’ and Who Has It?](#)” *Smithsonian Magazine*, April 6, 2011. <https://www.smithsonianmag.com>.

9. *Id.*

right to farm without interruption. While the specifics of each state’s laws differ, all right-to-farm laws have the same general goal of protecting farmers by reducing the risk of nuisance lawsuits being brought against them.<sup>10</sup> Right-to-farm laws typically restrict the type of nuisance case that can be brought, the party who can bring the case, and the remedies available to address wrongdoing. In many states, right-to-farm laws establish a higher burden of proof than private nuisance cases, such as the need to prove an activity poses a serious public health or safety risk. Additionally, many right-to-farm laws prevent an individual who “comes to the nuisance,” or someone who moves to an area where farming activities were already occurring, from filing a nuisance lawsuit.<sup>11</sup> This stipulation provides protection to farmers by establishing the principle that if their activities were not a nuisance when they started, they could not be considered a nuisance once a new neighbor moves in. Many of these provisions state that an agricultural operation cannot be considered a nuisance after it has been operational for longer than a year.<sup>12</sup>

While farmers gain protections under right-to-farm laws, the laws do not give farmers free rein. A number of states provide exceptions for when agricultural practices threaten public health or safety. Additionally, some right-to-farm laws include provisions that a farmer is not protected in cases when his or her agricultural activities change drastically or the size of the operations change significantly;<sup>13</sup> when significant changes in agricultural activities cause a nuisance, those activities are not necessarily protected. But some right-to-farm laws—including Wisconsin’s—protect expansion of farming activities, taking into account changes in the industry and technology.

## Wisconsin’s right-to-farm statute

Wisconsin’s right-to-farm law provides protections to agricultural activity from nuisance lawsuits under certain circumstances. Nuisance law addresses controversies that arise when the property rights of different parties come into conflict: the right of property owners to control their property and use it to benefit their interests, and the right of neighboring property owners and the public to use and enjoy property without substantial impairment.<sup>14</sup> A nuisance exists when one person’s use of property wrongfully interferes with another person’s right to use or enjoy property.<sup>15</sup> Nuisances come in two types, public and private, that are distinguished by the type of right or interest that is injured.<sup>16</sup>

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10. Andrew C. Hanson, “Brewing Land Use Conflicts: Wisconsin’s Right-to-farm Law,” *Wisconsin Lawyer* 75, no. 12, December 2002, <https://www.wisbar.org>.

11. Grossman and Fischer, *Protecting the Right-to-farm*, 129.

12. *Id.*, 127.

13. *Id.*, 127–28.

14. 58 Am. Jur. 2d *Nuisances* § 1 (2019).

15. *Id.*

16. Cf. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 27.

A private nuisance is an unreasonable interference with the private use and enjoyment of land.<sup>17</sup> A public nuisance is a condition or activity that substantially or unduly interferes with the use and enjoyment of a public place or a public right, or with the activities of an entire community.<sup>18</sup>

A nuisance lawsuit is a type of civil action in which a person aggrieved by a nuisance seeks a remedy. In determining whether an interference is a public or private nuisance, courts generally consider factors such as the gravity of the harm suffered, the utility of the actor's conduct, whether the financial burden of compensating the injured party would stop that conduct, and whether any defenses apply.<sup>19</sup> For a remedy, a court that finds that an actor is liable for a nuisance generally may award money damages for the injury suffered or order the actor to abate the nuisance, or both.

### **History of Wisconsin's right-to-farm law**

Wisconsin enacted the right-to-farm law in 1982, when there was a national movement to pass such legislation as well as a widespread sentiment for the need to protect farmers. Wisconsin's law was largely motivated as a result of a high-profile court case involving an egg farm that was forced to close from a nuisance lawsuit.<sup>20</sup> In *State of Wisconsin v. Quality Egg Farm, Inc.*, the state filed a public nuisance claim against the farm in 1978 on the grounds that the pungent odor from the farm created a nuisance.<sup>21</sup> Quality Egg Farm, Inc., established a large poultry farm in 1967 in an area near residences and a grade school. The operation grew to house 140,000 chickens by 1974 and produced 15 tons of manure a day, which was spread across the property and created an odor that had a nauseating effect on the farm's neighbors.<sup>22</sup> The circuit court ruled in favor of the state, initially ordering an injunction against the farm and providing it with time to change its practices to handle its waste in a way that was sanitary and would not pose a nuisance. In its final decision, the court ultimately ordered the farm to close. Quality Egg Farm, Inc., appealed the decision and the appellate court reversed it, but the state supreme court ultimately upheld the circuit court decision in November 1981.<sup>23</sup>

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17. Cf., Id.

18. Cf., Id. ¶ 30.

19. Cf., Prah v. Maretti, 108 Wis. 2d 223, 240–42 (1982) (citing Restatement (Second) of Torts (1977)). Relevant considerations for assessing the gravity of the harm are the extent and character of the harm involved, the social value that the law attaches to the type of use or enjoyment invaded, the suitability of the use or enjoyment invaded to the character of the locality, and the burden involved in avoiding the harm. Restatement (Second) of Torts § 827 (1979). Factors involved in determining the utility of conduct causing an interference with another's property are the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality, and the impracticability of preventing or avoiding the intrusion. Id., § 828. Defenses that may apply include coming to the nuisance, others contributing to the nuisance, contributory negligence, assumption of risk, and statutory compliance. Cf., Id., §§ 840B, 840C, 840D, and 840E.

20. Grossman and Fischer, *Protecting the Right-to-farm*, 102–03.

21. Id.

22. Id.

23. Id.

Following the supreme court decision, farmers and lawmakers were concerned that the case would establish a precedent for closing farms on the basis of nuisance lawsuits.<sup>24</sup> At a conference for the Wisconsin Association of Soil and Water Conservation Districts in 1980, then DATCP executive director, Arthur Kurtz, cited the egg farm case in a speech regarding the threat to farming amidst more people moving to rural areas.<sup>25</sup> In March 1982, just four months after the supreme court decision, the legislature passed Wisconsin's right-to-farm law in Chapter 123, Laws of 1981. The original version of the law was limited in scope—pertaining only to the remedies available to plaintiffs who brought a successful nuisance lawsuit. The law explicitly stated that “closure shall not be available as a remedy unless the agricultural use or practice is a threat to public health and safety.”<sup>26</sup> Additionally, the law stated that “the court may assess only nominal damages” in cases when the agricultural activity determined to be a nuisance did not differ substantially in scale, location, or manner as it did prior to being considered a nuisance.<sup>27</sup> Lastly, the law provided for the awarding of court fees to the defendant when the defendant won the case. The original version of the law also focused on restricting available remedies for nuisance lawsuits dealing with agricultural practices to deter the filing of these lawsuits and to ensure that a farm would not go out of business. It did not, however, limit the scope of lawsuits that could be brought or restrict who could file a lawsuit.

In 1995, the legislature passed legislation that substantially amended Wisconsin's right-to-farm law that strengthened protections for farmers by restricting the type of nuisance cases that could be brought and further limited relief options for successful plaintiffs.<sup>28</sup> The first significant change made by 1995 Act 149 was restricting the types of nuisance cases that could be brought against farmers by establishing that an agricultural use could not be considered a nuisance if the plaintiff came to the nuisance and the agricultural use does not present a substantial threat to public health or safety.<sup>29</sup> The 1995 law also added the provision that a change in agricultural use or scale has no impact on determining whether the agricultural activity is a nuisance.<sup>30</sup> This suggests that even if a farm drastically increases in size or changes the type of farming being conducted, that change might not be subject to nuisance liability.

The second significant change made by the 1995 law was further limiting the remedies available for successful nuisance cases. The remedies allowed under the new law could not substantially restrict an agricultural use unless the use poses a public health

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24. “Assembly OKs Right to Farm,” *Wisconsin State Journal*, May 21, 1981.

25. Tim Cuprisin, “Odors Risk Right to Farm, Delegates Told,” *Green Bay Press-Gazette*, December 4, 1980, <http://lrbdigital.legis.wisconsin.gov/>.

26. Wis. Stat. § 823.08 (2) (a) (1983).

27. Wis. Stat. § 823.08 (2) (b) (1983).

28. Hanson, “Brewing Land Use Conflicts.”

29. Wis. Stat. § 823.08 (3) (a).

30. See Wis. Stat. § 823.08 (3) (am).

or safety threat. Additionally, the law limits remedies that would “adversely affect the economic viability of the agricultural use” and requires courts to give farms reasonable time to comply with the changes.<sup>31</sup> These changes had the effect of reducing incentives for filing a nuisance claim by limiting the remedies available. In sum, the 1995 law substantially reduced the ability of individuals to successfully address alleged agricultural nuisances by restricting the situations in which courts can find a nuisance and limiting the relief available.

### **Current law**

Wisconsin’s right-to-farm law is established under chapter 823 of the Wisconsin Statutes, which addresses nuisances, as section 823.08: “actions against agricultural uses.” In a legislative purpose statement provided in section 823.08 (1), the legislature states its intent of the law to provide protections for agricultural use of land and encourage local governments to reduce conflicts through zoning. It states:

The legislature finds that development in rural areas and changes in agricultural technology, practices and scale of operation have increasingly tended to create conflicts between agricultural and other uses of land. The legislature believes that, to the extent possible consistent with good public policy, the law should not hamper agricultural production or the use of modern agricultural technology. The legislature therefore deems it in the best interest of the state to establish limits on the remedies available in those conflicts which reach the judicial system. The legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly.

The law provides criteria that define whether or not an agricultural activity is considered a nuisance. Section 823.08 (3) (a) states that an agricultural use is not considered a nuisance if it meets two conditions: (1) the activity is being done on land that was used for agricultural purposes “without substantial interruption” prior to the plaintiff coming to the property being affected by the activity; and (2) the activity does not present a substantial safety or health threat. The law also contains a provision in section 823.08 (3) (am) stating that the right-to-farm protection applies even if a change in agricultural use or practice since the plaintiff arrived is alleged to contribute to the nuisance.

The law also places specific restrictions on relief that can be offered in cases when an activity is found to be a nuisance. First, the granted relief cannot “substantially restrict or regulate the agricultural use or agricultural practice,” except when the activity poses

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31. Wis. Stat. § 823.08 (3) (b).

a substantial safety or public health threat.<sup>32</sup> Second, if the defendant is ordered to act to reduce the nuisance, the court must request information from public agencies with agricultural expertise on practices to reduce the nuisance and give the defendant “reasonable time” to take action. In this instance, “reasonable time” is defined to be at least a year unless the activity in question poses a serious health or safety threat. Third, the court cannot direct the defendant to act in a way that would significantly and negatively affect the economic output of the agricultural activity, except if it poses a serious safety or health threat. Lastly, the law contains a provision (Wis. Stat. § 823.08 (4)) that awards legal fees to the defendant if he or she is found to not be causing a nuisance for agricultural use of their land.

## Right-to-farm laws in nearby states

All 50 states have enacted a right-to-farm law in some form.<sup>33</sup> Right-to-farm statutes across the country can be divided into two main types: (1) traditional right-to-farm statutes; and (2) statutes that use zoning to protect agricultural areas.<sup>34</sup> Under traditional right-to-farm statutes, agricultural activity receives protection from nuisance lawsuits, with the protection applying to agricultural activity that existed before an aggrieved party files suit and the agricultural activity conforming to generally accepted farming practices or being an expressly protected activity under the statute.<sup>35</sup> For the other main type, states exercise their zoning power to preserve agricultural land.<sup>36</sup>

Wisconsin’s right-to-farm statute is traditional, and nearby states typically have traditional right-to-farm statutes as well.<sup>37</sup> Though traditional right-to-farm laws vary across states, these statutes commonly contain (1) a general policy statement; (2) a definition of “agricultural activity” or other similar term; (3) limitations on nuisance actions; and (4) the awarding of court costs and attorney fees in certain cases.<sup>38</sup> Right-to-farm statutes often begin with a general policy statement that explains the legislative purpose of the statute.<sup>39</sup> The statute then defines “agriculture,” “agricultural activity,” or other similar terms to specify the scope of the activity that is protected by right-to-farm laws.<sup>40</sup> The

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32. Wis. Stat. § 823.08 (3) (b) 1. (2018).

33. Jesse Richardson and Theodore Feitshans, *Nuisance Revisited after Buchanan and Bormann*, 5 Drake J. Agric. L. 121, 127 (2000).

34. Rusty Rumley, *A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 Vt. J. Envtl. L. 327, 328 (2011).

35. *Id.*

36. *Id.*

37. See Minn. Stat. § 561.19 (2018); Iowa Code Ch. 352 and § 657.11 (2019); 740 Ill. Comp. Stat. 70/1 to 70/5 (2018); Mich. Comp. Laws §§ 286.471 to 286.474 (2018); Ind. Code §§ 32-30-6-1 to 32-30-6-1.5, 32-30-6-6 to 32-30-6-9.5, and 32-30-6-11 (2018).

38. Rumley, *supra* note 31, 328–29.

39. *Id.*, 329.

40. *Id.*, 331.



activities included under those definitions are usually broad, so states also often have provisions that require some additional conditions to be satisfied for the right-to-farm protections to apply.<sup>41</sup> For instance, some states limit the immunity provided by right-to-farm laws by requiring that, in order to receive protection, an activity must exist for at least a specified amount of time before a lawsuit was brought against the activity; comply with federal, state, and sometimes even local laws; be consistent with generally accepted agricultural practices; and not have a substantial adverse effect on health, safety, or welfare.<sup>42</sup> Right-to-farm statutes also often provide that attorney fees and other court costs may be awarded to people conducting agricultural activity who are unsuccessfully sued for nuisance.<sup>43</sup>

### **Covered agricultural activities**

While the right-to-farm laws in Wisconsin and other nearby states—Minnesota, Iowa, Illinois, Indiana, and Michigan—have the same general features, some differences exist among the particular contents of the right-to-farm statutes. Wisconsin’s right-to-farm statute contains a broad definition of “agricultural use,” which results in the right-to-farm law applying to a wide scope of agricultural activity, such as fur farming, aquaculture, beekeeping, and forestry.<sup>44</sup> Minnesota’s right-to-farm statute applies to “crops, livestock, poultry, dairy products or poultry products.”<sup>45</sup> Similarly, the right-to-farm statutes in Illinois and Indiana explicitly mention crops, livestock, and agricultural or horticultural uses.<sup>46</sup> The statutes in these states differ from Wisconsin by not expressly including some of the activities listed in Wisconsin’s statute. The activities explicitly included in the right-to-farm statutes in Iowa and Michigan, however, closely parallel the activities mentioned in Wisconsin.<sup>47</sup>

### **Qualifications on right-to-farm protections**

Wisconsin’s right-to-farm law protects agricultural activity from nuisance actions if the agricultural activity occurs on land that was used in agriculture before the aggrieved party started using the property on which the alleged nuisance occurs and if the activity does not present a substantial threat to public health or safety.<sup>48</sup> To receive right-to-

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41. *Id.*, 333.

42. *Id.*, 334–35.

43. *Id.*, 346. The awarding of costs is allowed by some states at the court’s discretion, while other states allow costs only under certain conditions. *Id.*, 346–47.

44. Under Wis. Stat. § 91.01 (2), “agricultural use” includes crop or forage production, keeping livestock, beekeeping, floriculture, aquaculture, fur farming, forest management, and nursery, sod, or Christmas tree production.

45. Minn. Stat. § 561.19, subd. 1. (a).

46. 740 Ill. Comp. Stat. 70/2; Ind. Code § 32-30-6-1.

47. Iowa Code § 352.2; Mich. Comp. Laws § 286.472.

48. Wis. Stat. § 823.08 (3) (a).

farm protection from nuisance lawsuits in other states, different requirements apply. In Minnesota, the agricultural activity must conform to agricultural practices commonly used by other farmers in the county or adjacent county and must comply with federal, state, or local laws.<sup>49</sup> Additionally, animal feedlots having 1,000 or more pigs or 2,500 or more cows are excluded from Minnesota’s statute.<sup>50</sup> Minnesota’s right-to-farm law also does not apply in cases when “condition[s] [that] unreasonably [annoy], [injure], or [endanger] the safety, health, morals, comfort, or repose of any considerable number of members of the public” exist, causing a prosecution for the crime of public nuisance.<sup>51</sup> Another restriction Minnesota’s right-to-farm law contains is that agricultural activity is not protected until two years after it starts or undergoes significant change.<sup>52</sup>

Iowa’s right-to-farm statute provides protection to agricultural activity if the following conditions apply: (1) the activity is not in violation of a federal or state law; (2) the activity aggrieving another party does not result from negligent operation; (3) the activity does not pollute or change the conditions of stream waters or result in the overflowing of water or excessive soil erosion onto the aggrieved party’s land; and (4) the activity occurs on land that a local governmental body designates as an agricultural area.<sup>53</sup> In Iowa, the right-to-farm statute may protect an agricultural activity even if the activity did not begin until after the aggrieved party was already nearby.<sup>54</sup> Different standards apply for animal feeding operations in Iowa. Those types of activities generally receive protection if the operation complies with federal or state laws, uses generally accepted practices, and does not unreasonably and for substantial periods interfere with the comfortable use and enjoyment of another person’s property.<sup>55</sup> Animal feeding operations controlled by a person who has chronically violated animal feeding operation laws, however, are not protected.<sup>56</sup>

Under Michigan’s right-to-farm law, agricultural activity is protected from nuisance lawsuits if the activity conforms to the generally accepted agricultural and management practices designated by the state’s commission of agriculture.<sup>57</sup> The law also protects activity that exists before the aggrieved party moves within one mile of the boundaries of the farm land and that would not have been considered a nuisance at that time. Michigan’s law

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49. Minn. Stat. § 561.19, subd. 2. (a).

50. Minn. Stat. § 561.19, subd. 2. (c) (1).

51. Minn. Stat. § 561.19, subd. 2. (c) (2).

52. Minn. Stat. § 561.19, subd. 1. (b). Minnesota’s right-to-farm statute specifies that an expansion “in the number of a particular kind of animal” by at least 25 percent located on an agricultural operation would constitute a significant change but transferring ownership to a relative, temporarily stopping cropping activities, adopting new technologies, or changing the crop produced does not constitute a significant change.

53. Iowa Code § 352.11.1. (2019). Iowa’s statute has been found to be unconstitutional when applied in certain circumstances. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W. 2d 168, 173–74 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998). See section “Leading cases addressing right-to-farm laws”, *infra*.

54. Iowa Code § 352.11.1.a.

55. Iowa Code § 657.11.2.

56. Iowa Code § 657.11.3.

57. Mich. Comp. Laws § 286.473 (1) and (2).

also specifies that agricultural activity cannot become a nuisance on the basis of a change in size of an agricultural operation, temporary ceasing and then restarting of farming, adoption of new technology, or a change in the type of product being produced.<sup>58</sup>

In Illinois, the right-to-farm law protects an agricultural operation if the associated activity has taken place for one year and the operation was not a nuisance when it began operating.<sup>59</sup> The protection does not apply if an aggrieved party is harmed by negligent or improper operations or if the agricultural activity causes pollution or a change in the condition of a stream.<sup>60</sup> Indiana's right-to-farm law is similar to the law in Illinois: an agricultural operation receives protection if it has existed for more than one year, if the operation would not have been a nuisance at the time the operation first began at that location, if negligent operation is not causing the interference with the aggrieved party's property, and if the operation has not undergone a "significant change."<sup>61</sup>

### **Awards of attorney fees and other costs**

It is common for right-to-farm laws to also enable courts to award fees and costs under various conditions. Under Illinois's law, a court is required to award to a defendant agricultural operation that prevails against a party alleging nuisance the costs and expenses reasonably incurred in defense of action and reasonable attorney fees.<sup>62</sup> In Michigan, courts have discretion and are not required to award those costs to a prevailing agricultural operator.<sup>63</sup> Court costs and reasonable attorney fees are recoverable for defendants in Iowa and Indiana only if a court determines that a plaintiff's nuisance action was frivolous.<sup>64</sup> An outlier, Minnesota's statute does not authorize courts to award costs and fees to victorious defendants.<sup>65</sup> Wisconsin's statute falls along the end of the spectrum most favorable to prevailing defendants; like Illinois, it requires courts to award litigation expenses, including attorney, expert witness, and engineering fees, to an agricultural operator if the operator's activity is not found to be a nuisance.<sup>66</sup>

A unique feature of Wisconsin's right-to-farm law is that it limits the types of remedies that a court may grant when a nuisance is found, in addition to limiting the types of

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58. Mich. Comp. Laws § 286.473 (3).

59. 740 Ill. Comp. Stat. 70/3.

60. 740 Ill. Comp. Stat. 70/4.

61. Ind. Code § 32-30-6-9 (d). Indiana's statute specifies that the following are not "significant changes": the conversion from one type of agricultural operation to another type, a change in ownership or size, enrollment in or withdrawal from a government program, and adoption of new technology.

62. 740 Ill. Comp. Stat. 70/4.5.

63. Mich. Comp. Laws § 286.473b.

64. Iowa Code § 352.11.1.d.; Ind. Code § 32-30-6-9.5 (a) (1).

65. See Minn. Stat. § 561.19.

66. Wis. Stat. § 823.08 (4). The Wisconsin Court of Appeals has explained that "[t]he plain language of § 823.08(4) unequivocally mandates the recovery of reasonable attorneys' fees by a defendant who prevails 'in any action in which an agricultural use or agricultural practice is alleged to be a nuisance.'" *Zink v. Khwaja*, 2000 WI App 58, ¶ 16 (emphasis in text).

activity that can be recognized as a nuisance.<sup>67</sup> None of Wisconsin's surrounding states have provisions in their right-to-farm statutes that restrict the remedy that a court may grant when the court determines that a nuisance exists.

## Leading cases addressing right-to-farm laws

Few appellate cases in Wisconsin have addressed the right-to-farm law. Precedent has confirmed that Wisconsin's right-to-farm statute requires courts to award costs and fees to agricultural operators who are unsuccessfully sued for nuisance.<sup>68</sup> Besides that, decisions indicate that the right-to-farm statute does not apply to regulation by local governments that does not take the form of a nuisance action, and that the right-to-farm law does not preempt local governments from enacting ordinances that regulate agricultural practices.<sup>69</sup>

A possible open question that remains is what type of conduct meets the right-to-farm statute's standard of presenting a "substantial threat to public health or safety"? Under the right-to-farm law, a court may find that an agricultural activity is a nuisance if it presents a "substantial threat to public health or safety."<sup>70</sup> The same "substantial threat to public health or safety" standard applies to several other determinations: whether a court orders an agricultural operator to take an action to mitigate a nuisance's effects, including by paying damages, that substantially and adversely affects the economic viability of an agricultural operation;<sup>71</sup> whether a court grants relief that substantially restricts agricultural activity;<sup>72</sup> and whether a court requires an actor to mitigate a nuisance in under one year.<sup>73</sup> Case law has not provided guidance about what is needed to show a "substantial threat to public health or safety" or, relatedly, whether showing a "substantial threat to public health or safety" requires meeting a more demanding threshold than the "unreasonable interference" standard that generally applies in nuisance cases or whether the right-to-farm law's requirement is equivalent to the typical nuisance standard.

While Wisconsin courts have not opined on many issues involving the right-to-farm law, courts in other states have ruled on constitutional issues raised by their right-to-farm laws. Iowa's courts have declared unconstitutional the application of its right-to-farm law in certain situations,<sup>74</sup> while in Idaho, Indiana, Texas, and Missouri, right-to-farm laws

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67. Wis. Stat. § 823.08(3) (b).

68. *Zink*, 2000 WI App 58 ¶ 16.

69. *Town of Trempealeau v. Klein*, 2014AP2719, 2015 Wisc. App. LEXIS 608, \*22–25 (unpublished); see also *Vill. of Black Earth v. Black Earth Meat Mkt., LLC*, 2015AP912, 2015AP913, 2016 Wisc. App. LEXIS 170, \*11–13 (per curiam) (holding that the right-to-farm law does not preclude local governments from issuing citations for agricultural activity that violates a local ordinance).

70. Wis. Stat. § 823.08 (3) (a) 2.

71. *Id.* § 823.08 (3) (b) 3.

72. *Id.* § 823.08 (3) (b) 1.

73. *Id.* § 823.08 (3) (b) 2. b.

74. *Bormann*, 584 N.W.2d 309.

were upheld against constitutional challenges.<sup>75</sup> The right-to-farm law in Iowa applies to, among other things, raising and storing crops and livestock, treating and disposing wastes from livestock, and creating noise, odor, dust, or fumes.<sup>76</sup> Agricultural operations falling within those categories that take place within a zone designated by a local government as an “agricultural area” receive immunity from nuisance lawsuits by neighbors unless the conduct of the operation is negligent.<sup>77</sup> The right-to-farm law prevents neighbors from bringing nuisance suits for noise, odor, dust, or fumes produced by agricultural operations for which they otherwise would be able to receive compensation. The Iowa Supreme Court ruled that because the right-to-farm law extinguishes the right of neighbors to sue for nuisance, the law provides an easement to agricultural operators to maintain a nuisance on the property of their neighbors.<sup>78</sup> The court then concluded that under prior Iowa Supreme Court and U.S. Supreme Court decisions, the nuisance immunity easement conferred to agricultural operators under the right-to-farm law is a property interest subject to the just compensation requirements of the Fifth Amendment’s takings clause.<sup>79</sup> Determining that the right-to-farm law constituted a governmental taking without providing just compensation to the neighbors affected by agricultural operations, the Iowa Supreme Court held that in certain situations, the right-to-farm law is unconstitutional under both the U.S. and Iowa Constitutions.<sup>80</sup>

Legal scholars have questioned whether it is correct to conclude that right-to-farm laws like Iowa’s violate the U.S. Constitution’s takings clause,<sup>81</sup> and courts in other states have reached contrary conclusions about the constitutionality of their own right-to-farm laws. In Idaho, a right-to-farm statute that applied to burning crop residues was in effect from 2003 until being repealed in 2008.<sup>82</sup> Grass farmers in Idaho have a practice of burning the straw and stubble in their fields after harvest, producing a “thick, oppressive smoke.”<sup>83</sup> The Idaho right-to-farm law “effectively extinguished liability for all North

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75. *Labrayere v. Bohr Farms, LLC*, 458 S.W.2d 319, 328–331 (Mo. 2015); *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637 (Idaho 2004) (The statute at issue, Idaho Code Ann. § 22-4801 et seq. (2003), was later repealed. 2008 Idaho Sess. Laws 71.); *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1259 (Ind. Ct. App. 2009); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 549 (Tex. Ct. App. 2004). Since the decision by the Missouri Supreme Court in *Labrayere*, a right-to-farm amendment to the Missouri Constitution has become applicable. See Mo. Const. art. I, § 35.

76. *Bormann*, 584 N.W.2d, 314.

77. *Id.*

78. *Id.*, 315–16 (citing Restatement of Property § 451 comment a, 2911–12 (1944)).

79. *Id.* The takings clause of the Fifth Amendment to the U.S. Constitution states in pertinent part, “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

80. *Id.*, 321. The court stated that the legislature “exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation.” *Id.*

81. Cf., Eric Pearson, *Immunities as Easements as “Takings”*: *Bormann v. Board of Supervisors*, 48 Drake L. Rev. 53 (1999); Terrence J. Centner, *Governments and Unconstitutional Takings: When Do Right-To-Farm Laws Go Too Far?*, 33 B.C. Envtl. Aff. L. Rev. 87 (2006); Adam Van Buskirk, *Right to Farm Laws as Takings in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 Alb. L. Envtl. Outlook 169 (2006).

82. 2003 Idaho Sess. Laws 316; 2008 Idaho Sess. Laws 71.

83. *Moon*, 96 P.3d, 642.

Idaho grass farmers that burn in compliance with its provisions.”<sup>84</sup> When the statute was challenged as an unconstitutional government taking of private property without just compensation, the Idaho Supreme Court determined that the right-to-farm law’s protection of grass burning practices did not result in taking a property interest from neighboring landowners.<sup>85</sup> Therefore, the court found that the nuisance lawsuit protections of the right-to-farm statute were consistent with the takings clause.<sup>86</sup>

It is unclear how a Wisconsin court would rule if presented with a challenge to the right-to-farm statute under the takings clause. It is possible that a court could adopt reasoning similar to the Iowa Supreme Court and find that providing protection to the maintenance of a nuisance invades constitutionally protected property interests of nearby landowners.<sup>87</sup> On the other hand, Wisconsin’s courts might reject that reasoning and side with the constitutional theories espoused by courts in the states that have upheld right-to-farm statutes as not infringing on neighbors’ property rights.<sup>88</sup> Additionally, it may be significant to a court’s analysis that Wisconsin’s right-to-farm statute is substantially different from Iowa’s law, as remedies for a nuisance are still available if an aggrieved party can demonstrate that an agricultural practice presents a substantial threat to public health or safety.

## Current issues

Since the establishment of right-to-farm laws, critics have argued that the laws go too far in protecting farmers at the expense of rural residents’ property rights. Critics claim that these laws prevent or severely limit landowners’ ability to challenge legitimate nuisances.<sup>89</sup> As previously illustrated, the constitutionality of these laws has been challenged, at times successfully, for infringing on property owners’ rights. The issue of whether right-to-farm laws unfairly infringe upon the rights of property owners has been exacerbated by the trend of agricultural operations drastically increasing in scale over the last several decades. The main source of contention is the rapid increase in the number of Concentrated Animal Feeding Operations (CAFOs), which are large-scale livestock operations often consisting of thousands of animals. Historically, livestock operations have been the source of a majority of nuisance claims against agricultural practices.<sup>90</sup>

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84. *Id.*, 640.

85. *Id.*, 645.

86. *Id.*, 646.

87. See *Jost v. Dairyland Power Coop.*, 45 Wis. 2d 164, 177 (1969) (Decades before passage of Wisconsin’s right-to-farm law, the Supreme Court of Wisconsin in dicta opined that “[t]o contend that a public utility, in the pursuit of its praiseworthy and legitimate enterprise, can, in effect, deprive owners of the full use of their property without compensation, poses a theory unknown to the law of Wisconsin, and in our opinion would constitute the taking of property without due process of law.”).

88. See *supra* note 77.

89. Hanson, “Brewing Land Use Conflicts.”

90. *Id.*

CAFOs were at the center of a string of recent high-profile lawsuits in North Carolina, where individuals living near large hog farms sued for nuisance due to air pollution and odor from manure storage lagoons.<sup>91</sup> Twenty-six lawsuits have been filed against the company that operates the farms, Murphy-Brown, the country's largest pork producer.<sup>92</sup> Since 2017, plaintiffs in five of the cases have been successful and were awarded approximately \$574 million in damages.<sup>93</sup> However, the actual amount awarded to plaintiffs was substantially reduced due to a law in North Carolina that places a cap on the amount of punitive damages that can be awarded.<sup>94</sup> In the rulings, the courts found that the state's right-to-farm law was not applicable since the neighbors that sued lived there prior to the farms being established.<sup>95</sup> Because of this, courts ruled that the statute's triggering language, which deems an agricultural operation to not be a nuisance due to "changed conditions in or about the locality outside of the operation," was not satisfied.

In response to the lawsuits, North Carolina passed two bills amending the state's right-to-farm laws. The first bill, 2017 HB 467, limited the amount in damages a successful plaintiff can be awarded to the "fair market value" of the affected property. In June 2018, just two months after the first Murphy-Brown verdict was handed down in favor of the plaintiffs, the state legislature passed SB 711, the North Carolina Farm Act, which made changes to the conditions needed to file a nuisance lawsuit against an agricultural operation. The act eliminated the triggering language, the "changed conditions" clause, and replaced it with a series of three conditions that must be met: (1) the plaintiff must be the owner of the property affected by the alleged nuisance; (2) the affected property must be within one-half mile of the nuisance source; and (3) the lawsuit must be filed within one year of the operation being established or "undergoing a fundamental change."<sup>96</sup> Under state statute, "fundamental change" excludes a number of conditions including a change in size or ownership of an operation, implementation of new technology, a change in the agricultural product, and an interruption in farming activity for three years or less. The effect of this law is to make it more difficult to file a successful nuisance claim by establishing limitations on when a nuisance can be found.

The plaintiffs' success in these lawsuits against CAFOs has been a source of motivation for legislation to be introduced in 2019 in several states<sup>97</sup> to strengthen right-to-farm protections. Agricultural lobbying groups and farm bureaus in several of these

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91. Leah Douglas, "Big Ag Is Pushing Laws To Restrict Neighbors' Ability To Sue Farms," NPR, April 12, 2019, <https://www.npr.org/>.

92. *Id.*

93. *Id.*

94. Rusty W. Rumley, "Smithfield Foods and Right to Farm in North Carolina," National Agricultural Law Center, October 10, 2018, <https://nationalaglawcenter.org/>.

95. *Id.*

96. 2018 N.C. Sess. Laws 113.

97. Georgia (HB 545), Oklahoma (HB 2373), Nebraska (LB 227), Utah (SB 93), and West Virginia (SB 393) have all introduced legislation.

states have specifically cited the lawsuits in North Carolina as the reason they are pushing for the legislation.<sup>98</sup> In three states, West Virginia, Oklahoma, and Utah, legislation has been passed to amend their laws. Details of the proposed legislation vary, but the bills generally aim to make changes similar to the laws enacted in North Carolina, primarily reducing the damages that can be awarded and setting limitations on when courts can find that a nuisance exists.<sup>99</sup>

One approach taken by states is to eliminate or reduce punitive damages that can be assessed. In the North Carolina lawsuits, punitive damages accounted for the significant damages that were awarded. West Virginia's bill completely eliminates punitive damages and allows damages to be awarded only to compensate for a loss in property value, up to the "fair market value."<sup>100</sup> Similarly, Oklahoma's law sets a cap on the amount of non-economic damages that can be awarded to a successful plaintiff.<sup>101</sup> Eliminating punitive damages and reducing the amount in damages that can be awarded act as a disincentive to file lawsuits and can limit the ability to file a lawsuit. In some cases, the amount a plaintiff can win is significantly reduced to the point that it may not cover legal fees.<sup>102</sup>

One outstanding question regarding right-to-farm laws is how they apply to urban farming—an increasingly common trend in agriculture. Since right-to-farm laws were originally constructed to protect rural farmland from encroaching residential development, they were not aimed at protecting urban farming. Most states' right-to-farm laws protect only agricultural activities that occur on land traditionally used for agricultural purposes and those activities that pre-date residential development.<sup>103</sup> Under these stipulations, urban farming is typically not covered. Ultimately, to what extent urban farming is protected under right-to-farm laws depends on the construction of each state's statute and how the courts interprets those laws.

States and municipalities have tended to rely on zoning or other laws to address urban farming rights and issues. Zoning laws appear to be a more practical and relevant tool to address urban farming since they can address areas with varied land use conflicts and are adopted locally, allowing municipalities to determine which policies best fit their needs.<sup>104</sup> However, zoning laws do not provide the same protections from nuisance lawsuits as right-to-farm laws.<sup>105</sup> Additionally, the use of zoning laws to determine urban farming rights can create conflict and confusion between local and state laws. Michigan

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98. Douglas, "Big Ag is Pushing Laws to Restrict Neighbors' Ability to Sue Farms."

99. *Id.*

100. West Virginia 2019 SB 393.

101. Oklahoma 2019 HS 2373.

102. Douglas, "Big Ag is Pushing Laws to Restrict Neighbors' Ability to Sue Farms."

103. Susanne A. Heckler, "A Right to Farm in the City: Providing a Legal Framework for Legitimizing Urban Farming in American Cities," *Valparaiso University Law Review* 47, no. 1 (2012): 251, <https://scholar.valpo.edu>.

104. *Id.*

105. *Id.*



has been wrestling with how to define and establish regulations for urban agriculture. In 2014, the Michigan Commission of Agriculture and Rural Development established a new category of farming for urban agriculture, to which the state's right-to-farm law does not apply.<sup>106</sup> The commission left municipalities in charge of determining whether to allow livestock in urban areas. In 2017, legislation was introduced in Michigan that would prohibit local governments from adopting zoning ordinances regulating livestock in suburban or urban areas unless those ordinances are consistent with the state's right-to-farm law.<sup>107</sup> The intersection between zoning and right-to-farm laws and how they pertain to urban agriculture remain a challenge for states and municipalities. ■

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106. Dani Heisler, Kathleen Reed, and Jude Barry, "Michigan Right to Farm Act, GAAMPs, Urban Livestock? What Does It All Mean?" Michigan State University, Center for Regional Food Systems, July 21, 2015, <https://www.canr.msu.edu>.

107. Michigan 2017 SB 109.