

# The Cranberry Brief

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**C**ranberries are a big industry in Wisconsin. For the past 20 years Wisconsin has led the world in cranberry production. In 2014 the Wisconsin cranberry crop is estimated at 5.3 million barrels. This bounty has not gone unnoticed. The Legislature has proclaimed the cranberry as the state fruit. Wis. Stat. § 1.10(3)(r). Wisconsin's Common Core standards now mandate that kindergartners learn the letter "c" by writing the word "cranberry," followed by a cranberry-pong contest during recess, followed by a pre-nap purge.

The cranberry culture (about 250 Wisconsin farms) has developed in a big way because of this little appreciated fact: Wisconsin has a Cranberry Law. Wis. Stat. § 94.26. It was enacted in 1867 and is largely unchanged. It may be among the state's oldest special-interest legislation still in effect. It's still in effect because it has worked. It has resulted in Wisconsin being the undisputed cranberry production capital of the world. Here is the story.

First, a cranberry cram. Cranberries are wetland plants that grow as low, creeping shrubs or vines. They have slender, wiry stems and small evergreen leaves. The fruit turns deep red when fully ripe. Cranberries have an acidic taste that can overwhelm their sweetness.

Cranberries are native to North America and were a significant food source to Native Americans in the region (a component of the legendary Indian traveling food called pemmican).

The cranberry plant produces a bud. The buds are formed in late summer, the season before they open and grow. Thus, the buds must survive through a Wisconsin winter in order to produce a crop the following year.

Wisconsin cranberries flower in late June and early July.

The harvest method for cranberries varies according to their use. Fresh fruit is harvested with a picking machine. Fruit processed into juice, sauce, or sweetened dried cranberries is wet harvested. For wet harvesting, beds are flooded with 8 to 10 inches of water. Either a rake or a machine with a circular beater mounted on the front is driven through the bed to remove the berries from the vines. The berries float to the water's surface, are corralled into a corner, then conveyed or pumped out of the bed to a waiting truck.

Most cranberries are processed into products such as juice, sauce, jam, and sweetened dried cranberries, marketed by independent handlers under varying names and by Ocean Spray as Craisins®. The remainder is sold fresh to consumers. Raw cranberries are often marketed as a "super fruit" due to their nutrient content and antioxidant qualities.

Commercial cranberry cultivation in Wisconsin began near Berlin about 1860. Early marshes were developed by digging ditches around stands of native vines and encouraging their growth. The early crop was seriously threatened by frost, insects, weeds, diseases, and fires. During the early 1890s, the center of the Wisconsin cranberry industry shifted to just west of Wisconsin Rapids. Later, farmers planted bogs near Black River Falls, Warrens, and Tomah. These were followed by cranberry farms in northern Wisconsin, primarily around Manitowish Waters, Eagle River, Spooner, and Hayward.

Cranberry growers are subject to environmental regulations including the Federal Clean Water Act, state and federal wetland regulations, state nonpoint source water quality rules, and state and federal pesticide regulations. But Wisconsin cranberry growers also enjoy a bit of special



protection that is the catalyst of this unique farm product's growth in Wisconsin: the "Cranberry Law."

The 1867 Cranberry Law was "an Act to encourage the cultivation of cranberries." The provision expressly conferred upon cranberry growers the right to "build and erect, keep up and maintain such dam or dams upon and across any stream, ditch, sluice, slough or any body of water, as shall be necessary for the purpose of flooding said marshland." The Cranberry Law has allowed cranberry growers the right to appropriate public waters for their own use, and exempts the industry from some of the state regulatory permitting processes pertaining to navigable waters. Thus, cranberry growers do not need to obtain permits under Chapters 30 and 31 of the Wisconsin Statutes to divert water from public waterways.

A reason exists for this continued exemption. The water needs of cranberry cultivation are very special. In Wisconsin, farmers flood cranberry beds in early winter to allow ice to form and totally cover the vines. This protects the buds from damage during the severe Wisconsin winter.

Frost is also a threat. Farms install sprinklers to irrigate the beds. If the temperature drops too low, growers spray the beds to create a temporary ice shield that protects the fruit from freezing. (Typically, the ice melts the next day and the fruit is undamaged by the frost!)

On the other hand, cranberries cannot survive water inundation for very long while they are growing. During the growing season, farmers hold the water table at 12 to 18 inches below the surface.

A dependable source of water is central to the successful long-term cultivation of cranberries. Unlike annual crops, which if lost early can be replanted and harvested, or if lost late replanted the next year, a drought will kill the current cranberry crop and the vines, too. Replanting costs tens of thousands of dollars an acre plus a long wait: three years for the vines to bear fruit and five years for full production to resume.

Cranberry growers point out that the security of water access is what distinguishes Wisconsin from, say, Minnesota or Michigan. Those states have the soil and water for cranberry production but no viable cranberry industry. The difference: Wisconsin has the Cranberry Law and Minnesota and Michigan do not.

The law has its critics. Regulators like to regulate and the Cranberry Law erected an obstacle to that inclination. Others worry that cranberry farm expansion means fewer wetlands. The industry responds that

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# New IRS Memo Offers Insights on Application of “Limited Partner” Exclusion for Self-Employment Tax

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The Internal Revenue Code (the “Code”) imposes a tax on “net earnings from self-employment.” See I.R.C. § 1402(a). The Code defines net earnings from self-employment generally as the gross income, less deductions, derived by an individual from any “trade or business” carried on by that individual. *Id.* Thus, the self-employment tax is only imposed on individuals; there is no self-employment tax applied at the entity level. Moreover, the only entity-level income of which pass-through triggers self-employment tax at the individual level is income of an entity that is treated as a “partnership” for tax purposes. *Id.*

Assuming that the “trade or business” in question is subject to the self-employment tax (there are a number of exceptions, and exceptions to the exceptions), the choice of entity can make a big difference in how the tax applies. In this regard, it is not only the broad “tax” categories of C corporation, S corporation, and partnership that make a difference. Even within the “tax” partnership category (i.e., general partnerships, limited partnerships, limited liability companies, and other entities treated as partnerships for tax purposes), the form of legal entity selected may yield very different outcomes, depending on both its classification for state law purposes

and the substantive characteristics of such status under state law. This dynamic is particularly pronounced in the context of so-called “limited partners.”

Section 1402(a)(13) of the Code specifically provides that, in determining net earnings from self-employment, “there shall be excluded the distributive share of any item of income or loss of a *limited partner*, as such”—other than certain “guaranteed payments” made to that partner for services actually rendered to or on behalf of the partnership. (*Italics added.*) This “limited partner” exclusion is seemingly straightforward and categorical. It should apply to an individual with respect to his or her limited partnership interest, even if that individual also happens to be a general partner of the limited partnership. Similarly, it should apply in the fairly common situation where the same individual owns some or all of the stock of an S corporation that is the general partner of the limited partnership, in addition to owning his or her limited partner interest. See, e.g., *Crigoraci v. Comm’r*, T.C. Memo 2002-202 (Aug. 12, 2002).

In 1997, the Service proposed changes to the self-employment tax regulations (the “Proposed Regulation”) that were intended

to create definitive rules governing how the “limited partner” exclusion applies in the context of limited liability entities other than state law limited partnerships—i.e., primarily limited liability companies. However, the Proposed Regulation came under fire from Congress over concerns that it would present a significant tax increase for small businesses and that it violated certain procedural requirements. See Patrick McCarthy, “LLCs and Self-Employment Tax,” *74 Practical Tax Strategies* 132, 134 (March 2005). Congress imposed a moratorium preventing the IRS from issuing final or proposed regulations defining a limited partner under § 1402(a)(13) of the Code, but the moratorium expired July 1, 1998. *Id.* Since then, Congress has not acted and the IRS has never withdrawn the Proposed Regulation.

In the past three years, two court cases have denied the application of the “limited partner” exclusion to active partners in professional service partnerships. The first, *Renkemeyer, Campbell & Weaver, LLP v. Commissioner*, 136 T.C. 137 (2011), held that practicing lawyers in a law firm organized as a limited liability partnership were not “limited partners” within the meaning of the exclusion. The second,

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cranberries are a wetland plant; growers, through water management strategies, have created, restored, and protected far more classic wetland acres than are used to grow the plant; and responsible water stewardship is the norm and not the exception. Cranberry farmers know they have a good deal in Wisconsin. Growers don’t want to abuse the privilege so they do their best to conserve the water resources at their disposal.

Historically, cranberry growers have aggressively defended their industry and have beaten back challenges to the law. *State v. Zawistowski*, 95 Wis. 2d 250, 290 N.W.2d 303 (1980) (Cranberry Law creates an exemption from the requirement of Chapter 30 permits to divert water for cranberry cultivation); *Tenpas v. DNR*, 148 Wis. 2d 579, 436 N.W.2d 297 (1989) (Cranberry Law supersedes dam regulations); *State v. Zawistowski*, 2008 WI App 51, 309 Wis. 2d 233, 747 N.W.2d 527 (unpublished) (cranberry marsh did not create nuisance by phosphorus discharge), *review*

*denied*, 2008 WI 115, 310 Wis. 2d 706, 754 N.W.2d 849. Although the two *Zawistowski* cases were 28 years apart, the defendant in each appears to have been one and the same: William Zawistowski a/k/a William Zawistowski, Jr. Not only did he prevail in both, but he also reportedly recovered his legal fees in the second case upon remand from the court of appeals under Wis. Stat. § 823.08, the Right to Farm Law. (See [wfbf.com/legislative/issue-backgrounders/wisconsins-right-to-farm-law](http://wfbf.com/legislative/issue-backgrounders/wisconsins-right-to-farm-law) (viewed October 29, 2014).) One might think twice before provoking Mr. Z, even if one is the State of Wisconsin.

Several marketing groups, called “handlers,” purchase cranberries from Wisconsin growers. The largest is Ocean Spray, a Massachusetts-based cooperative, which has about 60% of the cranberry acreage in Wisconsin under contract with its member growers. Only about 5% of the state crop is sold as fresh fruit.

For several years now there has been a cranberry glut—supply exceeds demand.

But don’t worry. Although a wholesale expansion of the industry—“cranberry creep” if you will—is not on the horizon, Warrens, Wisconsin is. Here is the home of the Wisconsin Cranberry Discovery Center and the Warrens Cranberry Festival. The last full weekend in September, this festival also features the well-regarded Cranberry Marsh Tours and Wisconsin’s biggest marching band parade.

Here is my Thanksgiving wish for you. Just before you dig into that tasty cranberry sauce so perfectly complementing that succulent turkey, think about the Native Americans sharing their cranberry harvest with the pilgrims. Then think about the cranberries on your plate. Think Wisconsin.

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