



ADMINISTRATIVE OFFICE

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May 21, 2020

WI Dept. of Workforce Development
201 E Washington Ave
Madison, WI 53702

Submitted via email to DWDAdminRules@dwd.wisconsin.gov.

Dear Department of Workforce Development:

On behalf of Legal Action of Wisconsin's Farmworker Project, we offer these comments on the Department of Workforce Development's ("DWD") Statement of Scope 032-20 on DWD's proposed Emergency Rule No. 301 relating to COVID-19 protections for migrant farmworkers. Thank you for the opportunity to provide feedback.

Legal Action of Wisconsin is the largest provider of free, high-quality, civil legal aid to low-income individuals in Wisconsin. We ensure access to justice for Wisconsin residents by protecting their housing, safety, family stability, livelihood, and economic security. Through our statewide Farmworker Project, our staff represent and advise migrant and seasonal farmworkers ("MSFWs") who perform agricultural work in Wisconsin and their families. We represent both U.S. workers and workers with H-2A visas with civil legal concerns, including recruitment and hiring concerns, unpaid wages, unemployment insurance issues, public benefits access obstacles, and unsafe working and housing conditions.

MSFWs are an essential part of the Wisconsin economy, food and agriculture systems, and communities. Because they live and work in such close proximity to one another, Wisconsin's migrant and seasonal farmworkers are particularly susceptible to getting and spreading COVID-19. Unfortunately, Wisconsin has already seen numerous COVID-19 outbreaks in food processing facilities,¹ including at least one facility that employs migrant and seasonal farmworkers.² These

¹ *Brown County coronavirus cases explode to 292, with clusters tied to meatpacking plants in Green Bay area*, Green Bay Press Gazette, <https://www.greenbaypressgazette.com/story/news/2020/04/20/green-bay-coronavirus-jbs-packing-american-foods-employees-infected/5165369002/>; *Employees Say Smithfield Plant in Wisconsin Concealed COVID-19 Infections, Pressured Them to Work Elbow to Elbow Without Protection*, The Intercept, <https://theintercept.com/2020/04/19/smithfield-foods-wisconsin-coronavirus/?fbclid=IwAR3hKshBKEbpCi96q43XchY0U7WKPIG2-RQHJEcvBpkIGUk-rt4aAra2X9I>

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COVID-19 outbreaks have sickened hundreds of vulnerable workers and forced food processing facilities to suspend operations. Our farmworker clients are fearful for their health, safety, and jobs. Many of Legal Action's farmworker clients are over 65 and/or have underlying conditions, such as diabetes, that increase their risk of exposure to COVID-19.

Statement of Scope 032-20 indicates that the objective of the proposed emergency rule is to create requirements for protecting migrant workers from COVID-19 and preventing the spread of COVID-19 in Wisconsin. The scope statement also indicates that a proposed rule will supplant the standards set forth in Emergency Order 25. Extending and expanding the baseline standards set forth in Emergency Order 25 would tremendously benefit Legal Action of Wisconsin's seasonal farmworker clients by safeguarding their health and preventing the spread of COVID-19 in the communities where they live and work. It is highly unlikely that the pandemic will be significantly suppressed by June 13, the day that Emergency Order 25 is set to expire.

Emergency Order 25 Created Critical Protections Against the Spread of COVID-19 Among Migrant & Seasonal Farmworkers

There is no doubt that Legal Action's farmworker clients have avoided illness thanks to the requirements listed in Emergency Order 25, and the importance of all these measures will not expire on June 13. Therefore, as the scope statement indicates, it would benefit our clients' health and safety to include Order 25 in DWD's Emergency Rule No. 301.

Prior to Emergency Order 25, there was no minimal standard for **sanitizing high touch areas in common areas and facilities**, putting many of our clients at particular risk of getting and spreading COVID-19 at work and in employer-provided housing. Emergency Order 25 provides for important disinfection and sanitization requirements, including requiring employers to make hand-washing stations or sanitizer available in cooking and eating facilities, sleeping facilities, and in certain types of workplaces. New studies demonstrate that coronavirus is shed during respiration, toileting, and contact

2 *Birds Eye food processing plant suspends most operations amid virus outbreak*, Gazette Extra,
https://www.gazetteextra.com/news/health_care/coronavirus/update-birds-eye-food-processing-plant-suspends-most-operations-amid-virus-outbreak/article_3b3faa00-0ba9-5c82-896b-0bb15e517c2a.html

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with inanimate objects,³ meaning thorough sanitization is required more than once per day, in both the living and workplace facilities.

Emergency Order 25 also provides for social distancing in **farmworker transportation and the workplace**, by requiring employers to ensure that farmworkers can maintain a distance of at least six feet in transportation and in the workplace. These social distancing requirements have taken the onus off individual MSFWs, who may be afraid of retribution if they refuse to sit or work too close to another employee, and instead puts the requirement on employers. In addition to the bus travel to arrive in Wisconsin, many farmworkers have bus or van rides lasting over an hour to fields and worksites each day. Continuing Emergency Order 25's protective measures in transportation and the workplace are essential to prevent the spread of COVID-19 among Wisconsin farmworkers. However, Order 25 does not include facemask requirements in the transportation and workplace, which would add another protective layer for keeping our clients, the food they harvest or produce, and therefore all Wisconsinites, safe.

Emergency Order 25 further provides for social distancing in **farmworker sleeping quarters** by separating beds by at least six feet if possible, with workers sleeping head to toe as possible. These measures continue to be critical for the protection of our MSFW clients and their families. Emergency Order 25, however, is silent on the usage of bunk beds. Usage of bunk beds increases the risk of contagion in farmworker sleeping quarters because more workers are packed together in tight quarters. In recognition of the increased risk that bunk beds pose to workers, Oregon OSHA recently adopted a temporary rule⁴ that prohibits the usage of bunk beds by unrelated individuals in MSFW housing. Additionally, CDC guidance for alternative care settings⁵ states that the best practice is to place a physical barrier between beds, in addition to providing six feet of distance and sleeping head to toe. Finally, there is a lack of good ventilation in most dormitory or barrack-style housing; housing can even

³ *Transmission Potential of SARS-CoV-2 in Viral Shedding Observed at the University of Nebraska Medical Center*; <https://www.medrxiv.org/content/10.1101/2020.03.23.20039446v2>

⁴ OAR 437-001-0749 Temporary rule addressing the COVID-19 emergency in employer-provided housing, labor-intensive agricultural operations, and agricultural transportation; <https://osha.oregon.gov/OSHArules/adopted/2020/ao2-2020-text-emergency-rules-ag-covid.pdf>

⁵ CDC Considerations for Alternate Care Sites; https://www.cdc.gov/coronavirus/2019-ncov/hcp/alternative-care-sites.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Falternative-care-sites.html

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lack windows. Even if workers are sleeping further apart, the virus droplets continue to circulate in the overall sleeping space, especially if precautions are not taken on how ventilation is structured.⁶

Emergency Order 25 requires employers to provide farmworkers exhibiting symptoms of COVID-19 or with a confirmed positive COVID-19 test a **separate, isolated living space and a separate bathroom if possible, or at least a separate toilet**. These are essential requirements that must be followed to limit the spread of COVID-19 in the agricultural industry. Similarly, the requirement for employers to **provide food and water** is also critical to the ability of farmworkers to remain in isolation while sick. Emergency Order 25 does not require employers to provide medicine or access to medical treatment to workers with symptoms of COVID-19 or a confirmed positive COVID-19 test. Most MSFWs do not have personal transportation and many workers travel to Wisconsin alone and may not have someone, other than the employer, who can help them obtain medicine or access medical care while they are sick.

Despite its Important Protections, Emergency Order 25 is Also Limited in Scope

Emergency Order 25 does not protect workers who report unsafe conditions in housing, workplaces, and transportation. Although Wis. Stat. §103.96 already prohibits retaliation, many of our clients nonetheless fear for their jobs if they report an unsafe condition. As a result, the impact of health and safety measures may be reduced where employers refuse to follow requirements, but workers do not feel safe reporting. In fact, many of our clients tell us that their employers do not comply with the baseline standards set forth in Emergency Order 25. Unfortunately, the breadth of Emergency Order 25's protections are limited, as the Order does not contain retaliation protections, enhanced inspection requirements, or significantly strong enforcement mechanisms.

Workers may still feel forced to choose between health and wages. Many migrant and seasonal farmworkers arrive to Wisconsin with little to no money, and most workers also send wages home to support family members. Because of their economic instability, farmworkers may be incentivized to conceal COVID-19 symptoms so that they can continue to work and earn wages. Emergency Order 25, however, does not specify that workers who need to quarantine due to COVID-19 are provided with full pay, including any lost overtime and bonus wages, during periods of quarantine. As a result, our clients lack the incentives to disclose symptoms, as they feel they are forced between prioritizing their physical health or the financial health of the family their wages are supporting.

⁶ *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article#comment.



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Emergency Order 25 does not protect and enforce farmworkers' right to have visitors in their homes. Although Wis. Stat. §103.925 already provides that "...No person other than the resident may prohibit, bar or interfere with, or attempt to prohibit, bar or interfere with, the access to or egress from the residence of any worker by any person...", we have heard from clients who have been denied access to visitors, even when following social distancing and other preventative measures. Unfortunately, Emergency Order 25 is silent on a farmworker's right to have visitors in their home, and employers are understandably confused. However, access to public and community health workers, state migrant labor inspectors and other government employees, and social and legal service providers are essential to our clients' well-being, and they are important partners in preventing the spread of the pandemic.

Emergency Order 25 does not ensure migrant farmworkers will have access to COVID-19 testing. The sanitizing, disinfection, and social distancing requirements in Emergency Order 25 have no doubt already prevented cases of COVID-19 among farmworkers in Wisconsin. However, Emergency Order 25 is silent on testing, and therefore we do not yet fully understand how the disease may be spreading among MSFWs in Wisconsin. In Washington State, for example, public health officials announced that after testing 71 farmworkers at one agricultural housing facility, more than half of the results came back positive for COVID-19, though all workers were previously asymptomatic.⁷

Thank you for the opportunity to comment on Statement of Scope 032-20 for DWD's proposed Emergency Rule 301. Please do not hesitate to contact us if you have any additional questions.

Sincerely,

Mariah Hennen
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Farmworker Project Program Manager
Director

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Attorney & Farmworker Project Legal

⁷ Expanded testing planned after 'remarkable' rate of cases in agriculture housing;
https://www.wenatcheeworld.com/news/coronavirus/expanded-testing-planned-after-remarkable-rate-of-cases-in-agriculture-housing/article_8f1809a2-84f5-11ea-be6a-dbdd2a598250.html