

January 24, 2022

Secretary Designee Amy Pechacek
Unemployment Insurance Division Administrator Jim Chiolino
Wisconsin Department of Workforce Development
201 E. Washington Ave
P.O. Box 7946
Madison, WI 53707

Submitted via e-mail only via *Kathryn.Mueller@dwd.wi.gov*

RE: Unemployment Insurance Access Barriers for Wisconsin's MSFWs--Report and recommendations from the Governor's Council on Migrant Labor

Dear Secretary Designee Pechacek and Administrator Chiolino:

Wisconsin's Migrant and Seasonal Farmworkers (MSFWs) are among the hardest working members of Wisconsin's workforce.¹ Each year, over four thousand² migrant and seasonal farmworkers travel from their home communities to accept seasonal employment in Wisconsin. Many of Wisconsin's MSFWs are residents of South Texas communities such as Eagle Pass, Pharr, and Laredo –but seasonal workers from communities ranging from Arroyo, Puerto Rico to San Diego, California also comprise a portion of Wisconsin's migrant and seasonal workforce³. During Wisconsin's harvest season, MSFWs work long hours –with some shifts of up to twelve hours and many six-

¹ Because of factors including length of the season and the exclusions of some agricultural employers from coverage under Wis. Stat. § 108.02(13)(c)1, Wisconsin's migrant and seasonal food processing workers are more likely to be eligible for unemployment insurance benefits than other MSFWs. This report primarily addresses problems encountered by migrant and seasonal food processing workers.

² Wisconsin Department of Workforce Development, *2021 Migrant and H-2A Population Report*. available at <https://dwd.wisconsin.gov/jobservice/msfw/pdf/migrantpoprep2021.pdf>

³ See, e.g. Tiggs, Leann. *Needs of Wisconsin's Migrant and Seasonal Farmworkers 2017*

or seven-day work weeks —yet they remain peculiarly vulnerable to exploitation and economic distress.

Both migrant and employer Migrant Labor Council representatives report economic insecurity among MSFWs. Many migrant agricultural workers and their families arrive in Wisconsin with little or no money. Some MSFW families were homeless during the 2021 harvest season—living in vehicles and bathing in truck stop showers⁴. The migrant farm workers essential to the Nation’s food supply face food insecurity and need to rely on food pantries for assistance⁵.

This economic insecurity makes it critical that MSFWs receive the unemployment insurance benefits they are legally due in a timely manner. Legal Action of Wisconsin has several farmworker clients who worked through the season during the height of the pandemic and were eligible for unemployment insurance benefits —but did not receive any of the benefits they were due for nearly a year.⁶ While benefit determinations were pending, these Legal Action clients experienced increased financial stress including the need to borrow money from family members or under unfavorable terms and interest rates, risk of foreclosure on family homes, homelessness/ living in vehicles, and difficulty supporting minor children.

⁴ Ad Hoc Committee on Migrant and Seasonal Farmworkers. Draft minutes. December 11, 2021.

⁵ *Id.*

⁶ WP application for UI filed in January 2021; ALJ hearing found benefit due in September 2021; first payment received November 2021; JF no initial determination on claim filed in April of 2021 and difficulty because of earnings in multiple states, no benefits paid until December of 2021. MRR; issues with earnings in multiple states. Benefit application filed in early 2021, did not receive any of the benefits he was due until late fall 2021. (Identifying information regarding LAW’s clients is currently redacted though Several LAW clients expressed interest in sharing their experiences if it could prevent problems for other workers in the future).

Both employer and migrant Governor's Council on Migrant Labor representatives report that workers have sought seasonal employment in other states instead of Wisconsin because of frustration with Wisconsin's unemployment insurance system. As a result, Wisconsin's food processing employers have lost experienced employees to employers in other states.

We thank you in, advance, for considering the following actions which will help ensure Wisconsin's MSFWs have timely access to the unemployment benefits to which they are legally entitled.

I. The current work search requirements do not adequately recognize MSFWs' attachment to their jobs in Wisconsin

Many migrant and seasonal farmworkers have been returning to Wisconsin to work for the same employer for decades. They keep in contact with those employers and often have contracts or fixed start dates for their reemployment. While the United States Department of Labor (USDOL) recognizes that states have discretion to develop a reasonable definition to meet the requirement that an unemployment insurance beneficiary be "actively seeking work," the agency specifically has found, and recently re-affirmed, that an individual with a definitive recall date is "job attached" and can meet the work search requirement by maintaining contact with the recalling employer⁷.

Council members representing both employer and worker organizations have collectively recognized that Wisconsin's current work search requirements ignore the needs of Wisconsin's seasonal agricultural employers and are burdensome for migrant

⁷ Unemployment Insurance Program Letter No. 5-13. January 10, 2013 page 3 available at https://wdr.doleta.gov/directives/attach/UIPL/UIPL_No_5_13.pdf; Unemployment Insurance Program Letter 13-20, Change 3. July 1, 2020. Page 5. Available at https://wdr.doleta.gov/directives/attach/UIPL/UIPL_13-20_Change_3.pdf

and seasonal farmworkers⁸. Employer representatives emphasize that the date of employee recall must vary from season to season. For example, in some cases, a portion of the workforce may be recalled as early as March to process an early crop; while, in other years, the bulk of the workforce may be recalled in early July. Wisconsin employers depend on a flexible workforce to meet the fluctuating demand of the harvest and the current work search requirements do not recognize the essential role MSFWs play in meeting this demand.

Legal Action of Wisconsin's MSFW clients are similarly frustrated that Wisconsin's work search requirements do not recognize their continuing attachment to their jobs, emphasizing, "I already have a job." or "I have a signed contract for next season." MSFWs have also shared that many South Texas employers will not take applications from workers who will be leaving the state in a few months.

Additionally, as MSFW workers and advocates have emphasized, many migrant and seasonal farmworkers come to Wisconsin for employment precisely because there are limited opportunities in their home communities⁹. As a Texas job service outreach worker with nearly three decades of experience testified:

Because of the lack of job opportunities in Laredo, during the summer and early fall months, many workers leave the Laredo area in search of food processing and agricultural work in other states –including Wisconsin, Minnesota, and Georgia. These workers all return to the Laredo Texas area at the same time during the fall. The returning workers are thus competing for the small pool of available jobs in the Laredo area¹⁰.

⁸ Ad Hoc Committee on Migrant and Seasonal Farmworker. Draft minutes. December 11, 2021. Comments of John Bauknecht and Erica Kunze.

⁹ Ad Hoc Committee on Migrant and Seasonal Farmworker. Draft minutes. December 11, 2021.; Comments of John Bauknecht.

¹⁰ April 19, 2019. Exhibit E1. GS hearing. LAW client information is currently redacted.

Though USDOL guidance allows states to determine that an employee with a recall date is actively looking for work, states are not required to adopt this interpretation. Currently, Wis. Stat. § 108.04(2)(a) requires four work search actions per week and the work search requirement must only be waived for employees who expect to be recalled within 8 weeks, for a total period not to exceed twelve weeks. Wis. Stat. § 108.04(2)(b)(1). Migrant advocates have observed that the requirement of four work search actions per week combined with the prohibition of multiple applications to the same employer¹¹ are particularly burdensome for MSFWs in home communities with little or no job opportunities¹².

Other aspects of Wisconsin work search requirements can delay timely payment of benefits for MSFWS. For example, workers may find it difficult to provide acceptable proof of job searches and could thus be initially found ineligible for receipt of benefits. Wis. Stat. § 108.04(2)(bm). Migrant workers who relocate many times a year in search of work find it particularly difficult to produce adequate proof of searches because paperwork can be difficult to maintain while traveling. If a migrant worker lacks access to a personal computer keeping documentation of the work search presents an additional burden. Since at least 2016, seasonal workers and employers throughout the state have expressed frustration with the rigidity of the work search requirements;¹³

¹¹ Wis. Admin Code § DWD 127.01(2)(a).

¹² E.g. Governor's Council on Migrant Labor Meeting. January 19, 2022 comments of Jose Martinez.

¹³ See, e.g. UI Public Hearing November 17, 2016 with 246 comments pertaining to waiver of the work search requirements. Available at: <https://wisconsinui.files.wordpress.com/2017/11/publicchrgremarks-2017-01-19.pdf>. Several speakers at public hearings of the Migrant Labor Council have also focused on this issue.

Notably, Wis. Admin Code § DWD 127.01 echoes the requirements of Wis. Stat. § 108.04(2) but also provides the Department of Workforce Development with discretion to identify other actions as reasonable work search actions, and notes that the Department shall provide examples of such actions in its Handbook for Claimants. Wis. Admin Code § DWD 127.01(2)(j). Few of the current examples in the Unemployment Insurance Division’s Handbook for Claimants (UCB-10-P) are job search methods that could be successfully used by Wisconsin’s migrant and seasonal farmworkers in their home communities. The current example list in the UCB-10 includes “professional networking groups” and “establishing a linked in profile.”¹⁴

Under the Department of Workforce Development’s current interpretation, a worker’s verbal inquiry regarding the availability of work is never a valid work search action¹⁵ even though a significant number of agricultural workers– especially those with extensive hands-on experience and less formal education obtain employment through in person requests. This lack of recognition ignores the systemic reliance on verbal and face to face recruiting and hiring methods. For example, agricultural employers in Wisconsin and in other states continue to utilize migrant labor contractors to travel in person to South Texas to recruit and hire migrant and seasonal farmworkers¹⁶ because

¹⁴ Wisconsin Department of Workforce Development (DWD) Unemployment Insurance (UI) Division Handbook For Claimants. January 12, 2022. Available at <https://dwd.wisconsin.gov/uiben/handbook/pdf/ucb10print.pdf>.

¹⁵ Wisconsin DWD. (UI) Division Handbook for Claimants. (January 12, 2022) at 5. (“Contacting employer to learn that no openings exist/applications are not being taken” as an example of an “invalid” work search action).

¹⁶ See e.g. the National Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Registered Farm Labor Contractor Listing. <https://www.dol.gov/agencies/whd/agriculture/mspa/farm-labor-contractors> (noting 8962 migrant labor contractors as of January 22, 2022).

online recruitment alone is not a reliable means of locating workers willing to relocate for seasonal agricultural employment. Similarly, short term day labor jobs are almost exclusively obtained through verbal inquiry and negotiations.

To reduce the burden that the current work search requirements impose on MSFWs, the Governor’s Council on Migrant Labor respectfully requests the Department of Workforce Development take the following actions:

- Consider a change to Wis. Admin. Code § DWD 127.01¹⁷ or to Wis. Stat. § 108.04(2) to waive the work search requirement for all of Wisconsin’s Migrant and Seasonal Farm Workers. The Council requests that the DWD provide a response regarding 1) its position on a work search waiver for MSFWs 2) whether or not a law or rule change is necessary to obtain a waiver and 3) the feasibility of obtaining a rule or law change. The DWD is invited to share its initial responses at the February meeting of the Council’s Ad Hoc Subcommittee on Migrant Labor.
- If a complete waiver of work search requirements for MSFWs is not obtainable, the Governor’s Council on Migrant Labor suggests that the DWD reduce the number of required work search actions and/ or lift the prohibition on multiple applications to the same employer for MSFWs in home communities with a high unemployment rate and requests the DWD’s position on obtaining such a waiver.

During the time in which the work search requirements remain in effect DWD personnel should:

¹⁷ Wis. Stat. § 108.04(2)(bd). The department may, by rule, do any of the following if doing so is necessary to comply with a requirement under federal law or is specifically allowed under federal law:

1. Modify the availability of any waiver under par. [\(b\)](#) or [\(bb\)](#).
2. Establish additional waivers from the requirements under par. [\(a\)](#) [2.](#) and [3.](#)

- Reach out to job service outreach centers in worker home states, such as Texas, to develop a comprehensive list of meaningful and accessible training programs available to farmworkers during the off season. If there is a shortage of meaningful and accessible programs, consider partnerships to develop new programs. Wis. Stat. § 108.04(2)(bb)3 requires that the work search be waived for participants in certain approved training programs, including WIOA programs.
- Include 2-4 new examples of “valid” job search actions in the UCB-10-P Handbook for Claimants. Seek input from MSFWs, employers of MSFWs, job service outreach workers in South Texas and other MSFW home communities in order to identify some examples of successful work search actions typically used by migrant farm workers. Recognize that agricultural workers and other laborers continue to rely on informal networks and spaces (e.g., word of mouth and day labor corners) in identifying and securing work.
- If applicable, identify other means by which MSFWs with a lay off period anticipated to exceed 12 weeks could obtain waiver from the current 4 action requirement under current law/ rule.
- Update the Governor’s Council on Migrant Labor on the above efforts at the Council’s next meeting, currently scheduled for April 20, 2022.

II. The Department of Workforce Development should designate UI staff members to respond to Migrant and Seasonal Farm Workers' unemployment insurance access barriers and proactively identify and waive overpayments caused by the intersection of state and federal benefit programs

A. UI access barriers for MSFWs will not be resolved through computer system upgrades or other “modernization” efforts alone.

According to the last available National Survey of Agricultural Workers, nearly 80% of agricultural workers in the United States identify as Hispanic and over half feel most comfortable conversing in Spanish, though Farmworkers reported greater ability to speak Spanish than to read Spanish. Additionally, nearly a third of the agricultural workers surveyed in the NAWS survey indicated they could not read English “at all” and an additional third indicated they could only read English “a little” or “somewhat.” The average level of education for farmworkers was 9th grade –with 35% of agricultural workers reporting an education level of 7th grade or less¹⁸.

Many of Legal Action of Wisconsin’s migrant and seasonal farmworkers have also reported that they do not know how to use computers. Because of language barriers¹⁹, lack of computer access, and lack of familiarity with the legal system, Wisconsin farmworkers based in South Texas often seek help from “notarios”²⁰ in filing online

¹⁸ Findings from the National Agricultural Workers Survey (NAWS) 2017–2018. March 2021. 13-17. Available at <https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2014.pdf>:

¹⁹ The Workforce Innovation and Opportunity Act (WIOA) signed into law on July 22, 2014, provides that recipients of WIOA funding cannot discriminate based on national origin, including limited English proficiency. 29 CFR § 38.9. See also. *Sarosh*. UI Hearing Number 20017805MD. LIRC March 26, 2021.

²⁰ American Bar Association. *About Notario Fraud*. “The literal translation of “notario publico” is “notary public.” While a notary public in the United States is authorized only to witness the signature of forms, a notary public in many Latin American (and European) countries refers to an individual who has received the equivalent of a law

applications and weekly claims for unemployment insurance benefits²¹. As one migrant farmworker reported in his 2019 administrative complaint against a notaria:

I hired...a notaria because I didn't understand Wisconsin unemployment law and wanted to do everything correctly. I trusted the notaria because she spoke my language and lived in my community. Everyone in the community said she was the person to go to for help with completing UI paperwork and with doing the job searches. I had questions about what I needed to do to file for unemployment insurance benefits in Wisconsin, and the notaria answered these questions...I relied on her legal advice and now have an unemployment insurance overpayment. I paid the notaria \$25 so that she could file weekly unemployment insurance claims...When I learned I may have been filing my work searches incorrectly, the notaria charged me an additional \$50 to file an appeal. She also helped other workers with filing unemployment benefit claims in Wisconsin and other states 22. Claims filing assistance, accompanied by accurate Spanish language information regarding Wisconsin's unemployment insurance thus remain the most critical barriers for MSFW unemployment insurance access.

For Wisconsin's migrant and seasonal farmworkers, access to the unemployment insurance program is not provided through a translation of an online benefit application, but through providing professionals that understand workers have the right to receive information in their own language and who can be reached by phone to answer questions and help MSFWs with any issue or task that stands between them and their unemployment benefits. If all of the UI Division's language access efforts continue to focus on improvements to the online portal, MSFW UI barriers will continue and MSFWs will seek help where it can be located –including through unreliable sources such as notarios.

license and who is authorized to represent others before the government. The problem arises when individuals obtain a notary public license in the United States, and use that license to substantiate representations that they are a "notario publico" to immigrant populations that ascribe a vastly different meaning to the term."

https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/ November 11, 2020. Last accessed January 17, 2022.

²¹ See also Strebel, Erika "Migrant workers tripped up with new work search rules, slapped with fraud." Wisconsin Law Journal. November 22, 2017.

²² GS complaint to the Department of Agriculture Trade and Consumer Protection. Exhibit E2. LAW client info currently redacted.

B. Wisconsin’s unemployment insurance access crisis disproportionately harmed Wisconsin’s migrant and seasonal farmworkers. MSFWs encountered increased language access barriers and benefits delays due to difficulties caused by the intersection of state and federal benefit programs.

Language access issues for Wisconsin farmworkers increased during the pandemic. For example, the unemployment insurance division issues determinations – including decisions denying benefits, only in English. Claimants who have indicated a preference for communicating in Spanish receive a “babel notice” at the top of the determination which indicates translation services are available by providing the number of Wisconsin’s UI telephone help center. During the initial months of the pandemic, the demand on the call center phone system prevented most callers from receiving assistance²³; but claimants of limited English proficiency were also left without the interpretation required to receive information regarding appeal rights and benefits denials, and many missed appeal filing deadlines. Though Legal Action of Wisconsin successfully represented many farmworker claimants in demonstrating “good cause” for untimely benefits appeals filings, those clients had to suffer through the wait created by two separate Administrative Law Judge hearings prior to receiving the benefits they were due. Currently, DWD requires one hearing to establish good cause for a late appeal and another hearing to establish that the Unemployment Insurance Division had erred in the benefits denial or overpayment. Additionally, the USDOL has recognized that the avalanche of unemployment claims caused by the pandemic combined with the demand to implement multiple new unemployment insurance programs on antiquated computer

²³ Beck, Molly. *Less than 1% of calls to state unemployment call centers were answered, audit shows* Milwaukee Journal Sentinel. September 25, 2020. <https://www.jsonline.com/story/news/politics/2020/09/25/less-than-1-calls-unemployment-call-centers-were-answered/3529690001>

systems created unprecedented problems with payment of UI benefits.²⁴ For example, federal benefit programs such as Pandemic Emergency Unemployment Compensation (PEUC) or Pandemic Unemployment Assistance (PUA) are only available to claimants who are not eligible for regular state unemployment compensation benefits. In one recent case, Legal Action of Wisconsin represented a farmworker who faced an overpayment and a denial of benefits because of the possibility that he *may* have been eligible for benefits in four states other than Wisconsin. Since migrant and seasonal workers are more likely to have earnings in multiple states, Wisconsin's MSFWs will likely experience even more delays and potential overpayments because of lack of coordination between states, complications in the overlap of unemployment insurance eligibility programs, and the burden of understanding and navigating complicated interstate-agency-communication protocols.

In another case, a LAW client was caught in a limbo between advice provided by the Wisconsin DWD UI help center, 414-435-7069, and the UI Division of another state. One Wisconsin call center representative incorrectly advised LAW's client that he needed to travel to Wisconsin to complete the required work registration, costing the client unneeded relocation expenses. Additionally, Wisconsin call center staff repeatedly advised client that he was eligible for benefits in another state –while that State's own call center staff informed client he was not eligible. The MSFW client with language

²⁴ See UIPL 20-21. *State Instructions for Assessing Fraud Penalties and Processing Overpayment Waivers under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as Amended May 5, 2021*
https://wdr.doleta.gov/directives/attach/UIPL/UIPL_20-21_acc.pdf

barriers was being made to act as a messenger between two states' unemployment insurance programs²⁵.

The Migrant Council recommends that the UI Division of the DWD:

- Designate staff members with increased training in UI issues encountered by Wisconsin's MSFWs.

The designated staff could work to reach Wisconsin's MSFWs at times in which they are most likely to be available –for example the weeks in late June/ early July prior to the start of the season or, during the season, at designated times to ensure access for workers of each shift. If work search requirements remain in effect, the designated staff members could also provide outreach to MSFWs at the end of the season in order to provide workers with suggestions on meeting any work search requirements and to decrease the chances that MSFWs would rely on notarios in filing their weekly claims. Designated UI staff members could receive additional trainings in multi-state earnings and combined wage claims to prevent delay of benefits determination or overpayments.

- Proactively identify MSFW cases in which overpayments were caused by errors in the intersection of state and federal benefits²⁶ and coordinate with workers to provide waiver in such cases.

Thank you, in advance, for your consideration of these requests. Migrant and seasonal farmworkers have always been essential to the Nation's stability and success. We look

²⁵ Thankfully, the Wisconsin UI Division was ultimately able to resolve this problem after communication from LAW—but LAW is concerned that other MSFWs are in the same situation and not aware of how to access help.

²⁶ See UIPL 20-21. https://wdr.doleta.gov/directives/attach/UIPL/UIPL_20-21_acc.pdf

forward to continued collaboration to provide Wisconsin's MSFWs with an accessible UI System.

Respectfully submitted,

The Governor's Council on Migrant Labor



Lupe Martinez
Acting Chair



Erica Sweitzer-Beckman
Secretary