

January 29, 2020

VIA HAND DELIVERY

**To: Migrant Labor Council Members**

**From: Bruce Palzkill, Assistant Administrator  
Division of Employment Training**

**Re: Response to December 23, 2019 request for information from Kevin Magee**

Dear Council Members:

This letter is in response to a December 23, 2019 letter from Council Member Kevin Magee to Department of Workforce Development Deputy Legal Counsel Jennifer Wakerhauser requesting information about the Migrant Seasonal Farm Worker program. The Department is providing responses pursuant to its obligation to gather, compile, and submit to the Council information relative to Wis. Stat. §§ 103.90 to 103.97.

Mr. Magee's requests relative to Wis. Stat. §§ 103.90 to 103.97 and the Department's responses follow:

1. *We recently learned that the Department plans to update the Migrant Labor Work Agreement form (DETM-5223-F). As a committee with both employer and worker advocate representatives, we request the opportunity to offer feedback on the next version of the form. Please provide us with a current draft of the Work Agreement Form and let us know the appropriate way to offer any suggestions.*

A draft of the updated Migrant Labor Work Agreement has been provided to the full Council for review and discussion at the January 29, 2020 meeting.

2. *Please provide additional information concerning your current investigation and enforcement policies regarding work agreements and disclosures. We are not requesting information or discussions on past investigations. Instead, please describe, generally, the policies and procedures we can expect to see in the 2020 growing season. Specifically, we would like the following information:*
  - a. *Describe the steps the Department would take to determine joint employment in a case involving a labor contractor and farm owner.*

The Department is tasked with enforcing Wis. Stat. §§ 103.90 to 103.97 and Wis. Admin. Code ch. DWD 301. Section 103.915 provides the requirements for migrant work agreements. A migrant work agreement may be held between a worker and a "migrant labor contractor," or between a worker and an "employer," as defined by Wis. Stat. § 103.90(3), (4). The Department must set forth standard language, consistent with Wis. Stat. § 103.915 and DWD 301, to be used in migrant work agreements and must ensure compliance of the terms of the agreements by administering penalties under Wis. Stat. § 103.97. The Department's authority to ensure

compliance of the terms of the work agreements between a worker and an employer or a worker and a migrant labor contractor limited to the terms of the agreements.

Mr. Magee asked about the Department's authority to "determine joint employment in a case involving a labor contractor and a farm owner." Generally, DWD does not have a reason to review contract agreements between labor contractors and farm owners under Wis. Stat. §§ 103.90 to 103.97 and DWD 301. To the extent contracts exist between migrant labor contractors and employers, Wis. Stat. §§ 103.90 to 103.97 and DWD 301 do not provide authority for the Department to ensure compliance with such contracts. Nor does the Department have authority under the migrant labor law to enforce contract compliance of a joint employer of the party who signed the migrant labor agreement with the worker. While a common law or specific federal or state statutory provision (such as the revised "joint employer" definition under the Fair Labor Standards Act, see 85 Fed. Reg. 2820) may establish a joint employer relationship under other laws (such as FLSA), there is no basis to reach beyond the parties to the agreement to ensure compliance with that agreement under the state migrant labor laws, Wis. Stat. §§ 103.90 to 103.97 and DWD 301. Thus, there is no authority for the Department to enforce compliance of an entity other than the parties to the agreement under the migrant labor laws.

- b. In an ongoing investigation, describe steps that would be taken to determine whether the workers received or did not receive the required disclosures both at the time of recruitment and at the time of hire.*

The Department's migrant labor inspectors schedule work agreement reviews with half of the employers/migrant labor contractors (known as "crew leaders") that recruit/hire migrant and seasonal farmworkers to work in agriculture, horticulture, and food processing. These reviews occur every other year. Inspectors interview at least a quarter of the current workers, working closely with human resources managers and employers to reduce work disruption. In addition, inspectors conduct field sanitation inspections under DWD 301.09, during which workers and crew leaders are interviewed and asked if they received a work agreement and if a recruiting disclosure was provided, as required by Wis. Stat. § 103.915. Based on past reporting, many of the workers interviewed have only received work agreements, not recruiting disclosures.

Steps have been taken to modify the work agreement to ensure that a recruiting disclosure is also provided in advance of signing the work agreement. The updated migrant labor worker agreement will require that a copy of the written recruiting disclosure be maintained with the agreement and available for inspection. In addition, the updated migrant work agreement provides a check box for the worker to indicate whether a written disclosure statement was provided at the time of recruitment.

- c. Describe the steps that would be taken to prevent retaliation by employers against workers who share information with migrant labor inspectors. Describe additional protective measures that would be implemented in a case of potential human trafficking.*

During worker orientations and worker agreement reviews, workers are informed of their rights and protections under both state and federal law, including protection against retaliation for exercising any rights under federal or state law (Wis. Stat. § 103.96). Workers are provided with business cards from Department inspectors and outreach staff so they can contact them directly and they are also informed that apparent violations/complaints can be reported anonymously.

DWD 301.14 requires the posting of migrant worker rights. The Department checks for required posters (in English and Spanish) that describe worker protections. If the posters are not found, inspectors will provide them immediately and direct employers to post them.

If human trafficking is suspected, the Department contacts local law enforcement, UMOS Anti-Human Trafficking Team and/or the U.S Department of Labor-Office of Inspector General. Inspectors may also contact the Mexican Consulate when appropriate.

- d. *Describe how the Department determines when to refer a case of suspected migrant labor abuses to the federal DOL. How does the Department enforce the state migrant labor protections when a case is given to the federal enforcement agency?*

Any case of suspected migrant labor abuse that cannot be addressed under the Wisconsin migrant labor laws (such as workplace discrimination, sexual harassment, and human trafficking) will be referred to the U.S DOL, law enforcement, or another appropriate state or federal agency for investigation. When a case is taken over by a federal agency, the Department continues to enforce protections under state law.

Mr. Magee has also requested the following information regarding unemployment insurance (UI) issues:

1. *How many Wisconsin migrant workers have had benefit reductions and how many have overpayments remaining? We would like this information for each year from 2013 through 2018.*
2. *What is the median benefit reduction amount of a Wisconsin migrant worker?*
3. *What is the median overpayment amount Wisconsin migrant workers owe?*
4. *Please provide the number of migrant worker UI applications for January 2010, January 2016, and January 2019.*

Mr. Magee asks that if such information is not available separately for migrant workers, that the Department provide data on specific zip codes, which reportedly are "for the Texas home communities for a majority of migrant workers coming to Wisconsin[.]"

The Department does not track whether UI recipients are migrant workers and is unable to conduct the search requested. Furthermore, UI records are confidential and not open for public inspection or disclosure under federal and state unemployment insurance laws. See 20 CFR §§ 603.4, 603.5; Wis. Stat. § 108.14(7)(a); and Wis. Admin. Code § DWD 149.02. For these reasons, the Department is unable to provide a response to the requests related to UI.

Please feel free to request additional information related to migrant labor issues during the Council meeting. Information requests can be made during the Council meeting and the Department will respond at a subsequent Council meeting to provide the Council sufficient data and information for the Council to meet its duties and to allow for greater transparency of the issues for all interested.

The Department looks forward to continuing to work with the Council to support and protect migrant and seasonal farmworkers in Wisconsin.