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June 24, 2022

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Dear Ms. Mueller:

Thank you for your request for initial recommendations regarding the Department of Workforce Development's ("Department" or "DWD") updates to Wis. Admin. Code DWD § 301 ("DWD 301"). Legal Action of Wisconsin's farmworker attorneys have been representing migrant workers in claims under Wisconsin's Migrant Law ("WMLA") since the law's inception in 1978. Our attorneys' experience also includes representation in federal protections that supplement the WMLA—including the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA")

The provisions of the WMLA have powerful quality of life determinations for Legal Action of Wisconsin's migrant farmworker clients and we thank you for the opportunity to educate the Department and other members of the Governor's Council on Migrant Labor on the ways in which the enforcement and implementation decisions in DWD 301 impact our clients.

I. Generally, a review of DWD 301 to ensure compliance with both the supplemental federal law protections and the Department's statutory mandate to enforce the WMLA would benefit Legal Action of Wisconsin's farmworker clients.

A. The protections of the Agricultural Worker Protection Act and the H-2A Visa Program create a floor, not a ceiling, for migrant labor protections.

Wisconsin's 1977 migrant labor law pre-dates the 1983 Migrant and Seasonal Agricultural Worker Protection Act (AWPA).[1] The AWPA is explicit in that it supplements, rather than replaces, state protections for migrant and seasonal farmworkers. 29 U.S.C. §1871 (the AWPA is "intended to supplement State law,

[1] For a discussion of the protections and purposes offered by both Wisconsin Migrant Law and the AWPA, see *Jimenez v. GLK Foods LLC*, 2016 WL 2997498, at *5 (E.D. Wis. May 23, 2016).

and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation."); *De Bruyn Produce Co. v. Romero*, 202 Mich. App. 92, 97, 508 N.W.2d 150, 154 (1993) (the AWPA "does not occupy the entire field of regulation so as to preempt state regulation.").

Similarly, though the current H-2A program[2] did not exist at the time of the Wisconsin Migrant Law's passing, the H-2A regulations require employers to declare under penalty of perjury, that a job complies with all applicable federal, state, and local employment-related laws and regulations. 20 C.F.R. §653.501(c)(3)(iii); 20 C.F.R. §655.135(e). Accordingly, aligning DWD 301 with federal law requirements may provide increased worker protections; but, federal standards which offer fewer protections may not legally be used as justification to reduce or "excuse any person from compliance" with Wisconsin's current state migrant protections.

B. Based on the law, any expansion of the use of variances under DWD 301 must be consistent with the Department of Workforce Development's statutory duty to enforce Wisconsin's Migrant Labor Law. Additionally, the Department could consider additional mechanisms for transparency and migrant worker involvement in the variance application process.

Currently, DWD 301 provides for variances to the labor camp requirements of DWD 301.07(7) [3] and the field sanitation of requirements of DWD 301.09(7) through written application. In its Statement of Scope regarding the proposed rule review, the Department "proposes to explore clarifying circumstances in which other variances may be granted." Any variances permitted under DWD 301 must be consistent with DWD's statutory duty to enforce the WMLA and its attendant regulations. Wis. Stat. § 103.905(5).

i. Because the variances require compliance with the purpose, and not the exact specification, of a regulatory or statutory provision, the DWD would be correct to consider the WMLA's intent to improve the status of Wisconsin migrant workers in its variance decisions.

The current variance application processes in DWD 301 require that an equivalency protect the health and safety of the housing occupants and observe the purpose of

[2] The current H-2A program was created through the Immigration Reform and Control Act of 1986.
[3] Department of Workforce Development. "Petition for Variance Application" DETM-5942-E (R. 03/2021).

the provisions from which the variance is sought;[4] but, it does not require that an equivalency plan consider other determinants of migrant quality of life or status. In the housing context, a few examples include privacy interests, family unity/integrity, and opportunities for recreation and/or community participation. The Migrant Labor Act provides, "It is declared to be the intent of this act to improve the status of migrant workers in this state." 1977 AB 404; § 1 (June 6, 1977). See also, *Jurado Jimenez v. GLK Foods LLC*, No. 12-CV-209, 2016 WL 2997498, at *6 (E.D. Wis. May 23, 2016). To ensure housing variance decisions incorporate observation of the WMLA's intent to improve migrant worker status, a third requirement that a proposed variance "does not, in turn, create a practical difficulty or unnecessary hardship for the camp occupants" could be added to the criteria in DWD 301.07(7)(a). This change would tremendously benefit Legal Action's clients by ensuring that the variance does not inadvertently leave them in a more difficult position.

Similarly, a permanent variance or the repeated use of a variance to avoid or indefinitely delay meeting compliance standards is contrary to the WMLA's purpose of improving the status of migrant workers in Wisconsin. By way of example, Legal Action's previous Governor's Council on Migrant Labor representative recalls discussions as outhouses were eliminated in Wisconsin's migrant camps. Though at the time, a continuance of outhouses may not have always violated the purpose of a specific safety standard, it was recognized that ongoing exceptions to compliance with indoor plumbing requirements caused delay in the statewide improvement of status for migrant workers and that uniform statewide compliance was necessary.

The Occupational Safety and Health Administration (OSHA) variance application process includes procedures to prevent ongoing delays in compliance. Variance applicants must articulate a plan for compliance with the standard and articulate the steps taken towards meeting the standard and a date for complete compliance. 29 C.F.R. 1905.10(b)(6). A similar requirement for some DWD 301 variance plans would ensure that ongoing dependence on the variance process does not thwart the WMLA's purpose of improving the status of Wisconsin's migrant workers.

ii. The procedures for variances under federal provisions such as the standards enforced by the Occupational Safety and Health Administration (OSHA) and the Employment and Training Administration (ETA) offer examples of safeguards to ensure transparency and uniformity in variances.

[4] DWD 301.09(7)(b) provides that an equivalency must "…assure that the purpose of the provision from which the variance is sought will be observed"; DWD 301.07(7)(b)2. requires alternative measures to "assure that the purpose of the provisions from which variance is sought will be observed."

For example, the OSHA variance processes in 29 C.F.R. 1905.10(b)9-10 require variance applications to specify the steps taken to inform the impacted employees of the variance application and provides affected employees with a mechanism to challenge the variance with the Secretary of Labor. The current version of DWD 301.09(7)(d) provides a process for any person who wishes to contest a determination regarding a field sanitation variance to request a hearing with the DWD Secretary –but it is unclear how workers who may be affected by the variance determination would be aware that a variance determination took place. The current version of DWD 301.07(7) contains no requirement to inform or involve impacted workers in the variance application process. An update to the variance procedures under DWD 301 could instruct DWD Migrant Labor Enforcement staff to provide workers and other camp occupants with information and an opportunity to offer input in the variance process or and/or appeal variance determinations. This revision would provide a mechanism for impacted workers to receive information and offer input. Legal Action clients want to have this information and opportunity to participate in the process.

The structure of the ETA and OSHA variance application processes also provide a structure for additional transparency and accountability in the variance application process. The OSHA Variance Applications must be filed with the Assistant Secretary for Occupational Safety and Health (29 C.F.R. 1905.10(a)) and the ETA variance application process requires that the ETA Regional Administrator consult with the OSHA and provide copies of any approved variances to OSHA's Regional Administrator, the Regional Administrator of the Wage and Hour Division (WHD), and the appropriate State Workforce Agency (SWA) and the local Employment Services office. 20 C.F.R. § 654.402 (b)-(c). Though the current application processes for variances under DWD 301 require written application for variances, there is no indication that any application requires a review of more than one DWD staff member or a structure to inform other enforcement agencies or divisions of the decision.

II. Comment pertaining to DWD 301.05 Migrant Labor Contractors: The law requires that any proposed change to DWD 301.05's current migrant labor contractor vehicle insurance coverage requirements must comply with the WMLA's statutory mandate that the insurance cover all transportation of individuals or property in connection with activities as a migrant labor contractor.

A. DWD 301.05's current migrant labor contractor vehicle insurance coverage requirement minimums are comparable to the insurance coverage requirements of other provisions governing the transport of multiple passengers.

DWD 301.05(8)(c) sets the minimum vehicle insurance coverage requirements for labor contractors pursuant to Wis. Stats. § 103.91(8)(f)[5]. Currently, the Department of Workforce Development requires labor contractors to provide a vehicle insurance policy which provides a minimum coverage level of $100,000 per seat with the required amount not to exceed $5,000,000 per vehicle. These coverage requirements are identical to the amounts specified in the AWPA. 29 C.F.R. § 500.121 (b) and are also comparable to the minimum coverage requirements for vehicles of similar occupancy levels. *See, e.g.* 49 C.F.R. § 387, Subpart B (Federal Motor Carrier Safety Administration mandates that "for hire passenger carriers" maintain minimum coverage levels of $1,500,000 for vehicles involving 15 passengers or less and $5,000,000 for vehicles involving more than 15 passengers).

B. The vehicle insurance coverage waiver options in the federal regulations have resulted in significant vehicle insurance coverage gaps for migrant workers in other states.

As noted in the DWD Statement of Scope, the federal labor contractor vehicle insurance requirements, unlike the current version of DWD 301.05, allow a waiver of the vehicle insurance requirements if the employer or farm labor contractor is covered by a current state law worker compensation policy and only transports workers under circumstances for which there is coverage under the state worker compensation policy. 29 C.F.R. §500.122; 20 C.F.R § 655.122(h)(4). While the AWPA and H-2A regulations require labor contractors to obtain additional vehicle liability insurance if there are also transportation circumstances not covered under the state worker compensation policy, the current USDOL review processes only require confirmation of a worker compensation policy and do not provide a mechanism for any independent inquiry to confirm whether the policy would cover all anticipated farm labor contracting activities[6].

C. To enforce Wis. Stat. § 103.91(8)(f), the DWD is required to ensure any policy or policies used to meet Wisconsin's migrant contractor

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[5] Wis. Stat. 103.91(8)(f). Obtain a policy of insurance from any insurance carrier authorized to do business in this state in an amount as prescribed by the department, which policy insures the migrant labor contractor against liability for damages to persons or property arising out of the operation or ownership by the migrant labor contractor or by his or her agent of any vehicle for the transportation of individuals or property in connection with activities as a migrant labor contractor. This paragraph shall not apply if the contractor furnishes transportation only as the agent of an employer who has obtained a policy of insurance against liability for damages arising out of the operation of motor vehicles.

[6] Schell, Greg. Letter to USDOL Office of Foreign Labor Certification and Wage and Hour Administrators. Re: Gaps in vehicle coverage of vehicles used to transport migrant and seasonal agricultural workers (Oct. 30, 2019). *See* also *Cornejo-Ramirez v. James G. Garcia, Jr. Inc.*, No. 99-cv-201, 2000 WL 33350974 (November 21, 2000) (Farm Labor contractor defendant did not meet the AWPA requirements when he neglected to purchase a policy to cover transportation activities not covered by the state worker compensation policy).

vehicle insurance requirements covers all transportation of individuals or property in connection with activities as a migrant labor contractor.

Farmworker advocates in states covered by the federal insurance requirements alone report significant gaps in coverage. For example, six H-2A workers who were killed in a farm labor contractor bus accident during their trip home were not covered under their employer/farm labor contractor's worker compensation policy because the worker compensation policy found that they were no longer employees after their last day of work in the fields.[7]

Similarly, the coverage gaps in the current federal system have left migrant workers traveling in labor contractor vehicles without coverage in situations including the following: travel between worksites in multiple states, travel in any time period in which work has stopped because of weather or waiting time between crops, travel for any time outside of work hours –including trips to the laundromat or grocery store in an FLC vehicle[8].

Wisconsin worker compensation law, generally, covers travel to and from work in employer provided vehicles;[9] but, many or most worker compensation policies in Wisconsin may not cover other damages arising out of vehicle operation in connection with migrant labor contractor activities as required by Wis. Stat. § 103.91(8)(f), including travel to another state following the completion of the Wisconsin contract, travel to the grocery store or laundromat, or the transportation of worker family members. Additionally, in the past, because some labor contractors have also allowed their required H-2A worker compensation coverage to lapse,[10] it is important that DWD's Worker Compensation division determine the extent to which Wisconsin's Uninsured Employer's Fund would cover injuries and property damage arising out of FLC vehicle use. Aligning the insurance coverage for migrant labor contractor activities with analogous worker compensation provisions of state law is both the legally prudent thing to do and would benefit our clients' safety and financial security.

III. Comments related to work agreements under DWD 301.06

A. The current version of DWD 301.06(1) could be eliminated as it no longer reflects common Wisconsin employment practices and

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[7] Schell. *supra.*
[8] Deposition of Stephanie M. Rosen, April 12, 2018, *Lopez v. Vasquez Citrus & Hauling, Inc.*, No. 2:17-cv-14383 (S.D. Fla.) as discussed in Schell, *supra.*
[9] See, *Doering v. State of Wis. Lab. & Indus. Rev. Comm'n*, 187 Wis. 2d 472, 481, (Ct. App. 1994).
[10] *See, e.g., DWD vs. Beiza Brothers Harvesting.* Racine County Case No. 2019WC000083.

increases the likelihood of violations of other migrant worker protections.

DWD 301.06(1) allows single work agreements to be used for multiple family members. Though this may be permissible under Wis. Stat.§103.915(1)(b), this practice is no longer common in Wisconsin. Few, if any, of Legal Action of Wisconsin's clients have received work agreements covering multiple family members in recent years.

Also, historically, the use of single agreement to hire an entire family increases the possibility of violations of other migrant worker protections. For example, from the past experience of Legal Action attorneys who represented migrant workers in the 1980s–early 2000s, employers that used a single work agreement for one family were almost always inclined to include wages for all family members on a single paycheck with a single paystub —a violation of multiple worker protections including the wage statement requirements of Wis. Stat. § 103.93(2), and the record keeping requirements of the Fair Labor Standards Act 29 U.S.C. § 211 and the AWPA 29 U.S.C. § 1821.

B. In order to discourage communicable disease transmission, DWD 301 could include payment for sick days in the work guarantee formula.

Emergency Rule 2204 provided that periods of employer required testing and quarantine were included in the work guarantee period. DWD 301.06 (8m). Continuing provisions to provide some payment for sick days would decrease the chance that workers would report to work while sick and, in turn, potentially reduce chances of communicable disease transmission in the workplace. As the University of Wisconsin Population Health Institute reported[11], paid sick days reduce community spread of respiratory illness and influenza. Unfortunately, we have had clients who have gone to work even when sick because they could not afford to miss a payment, even while putting their own health and that of other workers at risk.

C. Portions of the current version of DWD 301.06(8) conflict with the language of Wis. Stat. 103.915(4)(b) and increase risk of violations of federal protections for migrant and seasonal farmworkers.

i. DWD 301.06(8)'s reduction of the work guarantee period conflicts with the plain language of Wis. Stat. § 103.915(4)(b)

The description of the work guarantee period in Wis. Stat. § 103.915(4)(b) provides:

[11] University of Wisconsin Population Health Institute. January 2021. *Healthy Workers, Thriving Wisconsin: Solutions Addressing Lack of Income as a Barrier to COVID-19 Isolation and Quarantine.* Madison, WI.

> …The guarantee shall cover the period from the date the worker is notified by the employer to report for work, **which date shall be reasonably related to the approximate beginning date specified in the work agreement**, or the date the worker reports for work, whichever is later, and continuing **until the final termination of employment, as specified in the work agreement,** or earlier if the worker is terminated for cause or due to seriously adverse circumstances beyond the employer's control…(*Emphasis added)*

"[S]tatutory language is interpreted in the context in which it is used." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Here the statute includes language to allow the work guarantee start date to differ from the approximate start date in the work agreement –but does not include the same language in reference to the work guarantee end date. In contrast to the statutory requirement that the work guarantee period continue "until the final termination of employment, as specified in the work agreement,[12]" DWD 301.06(8) allows the end of season period covered by the work agreement to be reduced by up to a week. Additionally, DWD 301.06(8)'s one size fits all determination that a delay of up to 10 days is always "reasonably related" to the approximate work agreement beginning date, reduces the period covered by the work guarantee up to an additional 10 days.

DWD 301.06(8)'s reduction of the applicable work guarantee period is also contrary to the work guarantee minimums of Wis. Stat. §103.915(4)(b) because the statutory work guarantee minimums already consider and address the uncertainty of seasonal agricultural employment. By way of example, the work guarantee requirements may be met over a two-week period –meaning a crop worker laid off a week early may not be entitled to any protections of the work guarantee if she worked 45 hours the prior week. Additionally, the statute also provides exceptions for seriously adverse circumstances beyond the employer's control. Wis. Stat. § 103.915(4)(b). DWD 301.06(8)'s reduction of the work guarantee period by over two weeks is contrary to the statute because it disrupts the statutory provision's existing balance of migrant worker and agricultural employer interests.

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[12] "The minimum work guarantee shall cover the period from the date the worker is notified by the employer to report for work, **which date shall be no later than 10 days from the approximate beginning date specified in the work agreemen**t, or the date the worker reports for work, whichever is later, and continuing until the date of the final termination of employment, which date shall be no sooner than **7 days before the approximate ending date specified in the work agreement**, or earlier if the worker is terminated for cause or due to seriously adverse circumstances beyond the employer's control. If a worker is notified by the employer to report for work or is employed prior to the approximate beginning date specified in the work agreement, the period of employment and the guarantee of minimum work shall begin on the date the worker is notified to report for work or the date the worker reports for work, whichever is later, and shall continue until the final termination of employment, as specified in the work agreement, signed at the time of recruitment, or earlier if the worker is terminated for cause or due to seriously adverse circumstances beyond the employer's control."

ii. In some circumstances, a conscious employer who goes to great lengths to comply with the requirements of Wis. Stat § 103.915(4)(b) and DWD 301.06(8) may still likely be in violation of requirements of the H-2A program and other federal law requirements. A revised DWD 301 could incorporate reference to federal provisions in order to prevent non-compliance.

Consider the requirements of the H-2A program work guarantee which requires that the ¾ work guarantee be calculated beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later and end on the date specified in the work contract. 20 C.F.R. **§** 655.122(i)(1). Assume an example of a crop worker work contract for a 10-week period with a work week of 6 days a week and 8 hours per day and no federal holidays during this period, to mirror the circumstances in the example in the H-2A regulations 20 C.F.R. **§** 655.122(i)(1)(iii). Also assume the worker arrived at the place of employment at the start date specified in the work agreement but that work did not begin until two weeks later and that the work ended a week prior to the date listed in the work agreement and disclosure.

In the calculation in the H-2A regulations, the work guarantee would be **360 hours**[13], but would only be **176.25 hours**[14] under the work guarantee of Wis. Stat § 103.915(4)(b) and DWD 301.06(8). Although this example is a hypothetical, it is a reality for too many of our clients.

Additionally, lower earnings during a migrant worker's first work week increase the likelihood of minimum wage violations. If a migrant worker incurred expenses for the benefit of the employer, the Fair Labor Standards Act requires that any unreimbursed expenses cannot bring a worker's pay below the federal minimum wage. See, 29 C.F.R. § 531.35; See also *Jimenez v. GLK Foods LLC*, No. 12-CV-209, 2015 WL 13898852, at *11 (E.D. Wis. Mar. 24, 2015) (employer responsible for workers' transportation expenses and visa and border crossing expenses, to the extent necessary to avoid reducing a workers' first week's wages below the federal minimum wage).

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[13] Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks × 48 hours/week = 480 hours × 75 percent = 360).

[14] Under Wis. Stat. **§** 103.915, the work guarantee for crop workers is 45 hours every two weeks and the period can be reduced by 1/12 of the guarantee (3.75) x number of days employed.
In this example, the first 10 days of delay from the date guaranteed in the work contract date are not included in the calculation and the minimum guarantee would be calculated for four days only using the formula 3.75x4=15 hours
+Three two-week periods with a minimum of 45 hours each=135 hours
Under DWD 301, because the work guarantee does not include the early ending date, the pro-rated days would be used to count the work guarantee for the last two weeks. 3.75(pro-rated guarantee) x 7 days=26.25
26.25+135+15=**178.25**

IV. Comments related to DWD 301.07, Migrant labor camps.

Generally, Wis. Stat. § 103.905(2) requires the DWD to coordinate its enforcement and administration with all other state and federal enforcement agencies and Departments. As noted in the Statement of Scope, the current federal standards have differing requirements based on the time period in which the housing was contracted for construction, with the OSHA standards applying to all housing under contract of construction after March 1980. 29 C.F.R. **§** 500.132. The DWD could consider aligning 301 with the OSHA standards for uniformity.

A. DWD 301.07(8) could adopt 29 C.F.R §1910.142(a)(3)'s[15] requirement that areas surrounding housing be maintained in clean and sanitary conditions.

The OSHA standard requirement that areas surrounding housing be maintained in generally sanitary conditions requires labor camp conditions which are conducive to good health. The use of both 'clean' and 'sanitary' in 29 C.F.R. §1910.142(a)(3) permits only the conclusion that distinct meanings are assigned to each word –they are not being used interchangeably. The word "sanitary" is defined as "of or relating to health"[16].

To clarify this distinction, an area will be unclean when some debris is littering it, but it may nevertheless remain sanitary where that debris does not pose danger to or concern health. On the other hand, an area that is littered with some waste paper or garbage that poses danger to or concerns health will be both unclean and unsanitary, the greater concern being the risks posed to health by the unsanitary conditions.

The distinction between cleanliness and sanitation is ever more important today as Wisconsin continues to battle with the Covid-19 pandemic and as the DWD works to develop regulations necessary to prevent transmission of new COVID 19 variants and other communicable diseases. Accordingly, including a general duty provision that would require camps to be maintained in a "clean and sanitary condition" prior to listing the specific actions in 301.07(8)(a)(b) and (c), would articulate that the overall requirement is protecting the health of labor camp occupants. Similar reference to overall sanitary conditions could also be added to the camp operator

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[15] 29 C.F.R. §1910.142(a)(3) provides "The grounds and open areas surrounding the shelters shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other refuse."

[16] Definition of 'sanitary'; https://www.merriam-webster.com/dictionary/sanitary.

duties enumerated in 301.07(22). This would not only benefit Legal Action's clients by protecting their health and safety, it would also prevent outbreaks that harm employers' ability to keep up with the market demand for their products.

B. The current water quality standards in DWD 301.07(9)(a)(2) are not in alignment with Wisconsin Department of Health Services recommendations.

If a camp's water supply nitrate-nitrogen level exceeds 10 milligrams per liter, DWD 301.07(9)(a)(2) currently requires warnings and an alternative drinking water supply only for pregnant women and infants. But, more recent reports from the Wisconsin Department of Health Services emphasize[17] that drinking water with high levels of nitrate may cause thyroid problems and increase the risk of certain types of cancers and is unsafe for everyone. To reflect these updated recommendations and to ensure the safety of Legal Action's clients when drinking water, the standard could be updated to require notice and an alternate supply water with nitrate-nitrogen level not exceeding 10 milligrams per liter for all camp occupants.

Additionally, Wisconsin Department of Natural resources provides a maximum of 20 mg/L as well as a limitation on combined nitrate and nitrite content of 10 mg/l. Wis. Admin Code NR § 809.11(3). The current version of DWD 301.07(9)(a)(2) only limits the amount of nitrate in a camp's water supply and does not consider the health risks posed by nitrite content, nor does it impose a limitation on the combined allowable amount of nitrate and nitrite. The DWD could consider whether to include both standards for nitrite and nitrate in its revisions of DWD 301.

C. DWD 301.07(11) could include provisions to prevent communicable disease transmission.

DWD 301.07(11) could be revised to include requirements for the availability of personal protective equipment (PPE) and cleaning gear to be used in case of an onsite public health emergency. This could include incorporating a version of EMR2204's requirement regarding the availability of face masks but also include availability of some PPE that is appropriate for cleaning bodily fluids without creating a risk of transmission by contact. Migrant workers occupy housing during nighttime, when there may be no recourse but to clean up after a sick worker who has vomited or otherwise released bodily fluids onto a floor or elsewhere in a housing unit or on camp grounds. Requiring camp operators to make appropriate PPE and cleaning gear available to workers would go a long way to preventing exposing workers to a high risk of contracting disease.

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[17] Wisconsin Department of Health Services. Nitrate in Private Well Water, April 2019; https://www.dhs.wisconsin.gov/publications/p02128.pdf.

Additionally, the revision could require an onsite coordinator who would be responsible for emerging public health issues such as cleanliness and sanitation in congregate housing, and for responding to any need for emergency cleanup. The onsite coordinator could also work to ensure that common areas are cleaned, disinfected, and sanitized daily—benefiting the health and safety of our clients as well as everyone at the worksite.

D. DWD 301.07(16)(o) could be revised to require washing machines in every migrant labor camp at a ratio that improves cleanliness and sanitation and reduces the risk of exposure to harmful chemicals.

DWD 301.07(16)(o) can be revised to require automatic washing machines in every migrant labor camp to improve general cleanliness and sanitation, and to reduce the risk of exposure of occupants to harmful chemicals found in pesticides and herbicides. The current minimum ratio is one washing machine for every thirty workers. Legal Action's clients have reported that an inadequate ratio of occupants to washing machines makes cleanliness difficult. Our migrant worker clients often work from ten to eleven hours every day. A poor ratio of washing machines to workers disincentivizes workers from routinely cleaning their clothing due to long wait times. A poor ratio also promotes cluttering and gathering around laundry facilities and can hinder worker efforts to socially distance during outbreaks and pandemics generally.

Regarding removal of pesticides from clothing, a poor ratio can hinder worker efforts to promptly sanitize contaminated clothing. Agricultural workers are at high risk of pesticide exposure, which is known to have harmful health effects, as workers are consistently exposed to them[18]. Additionally, workers' family members or other camp occupants face exposure due to take-home contamination[19], which occurs when a worker carries pesticide residue, usually on their clothing, into their housing. Because migrant workers who are directed to handle and apply pesticides and herbicides are often housed with workers or family members who do not, the number of workers exposed to take-home contamination is likely very high. Adding to the need for extreme caution regarding pesticide exposure, there is a lack of research on and understanding of the risks posed by low doses of exposure[20]. And an article published in 2016 warns of the presumed but largely unknown risks

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[18] *Farmers' Exposure to Pesticides: Toxicity Types and Ways of Prevention,* January 8, 2016; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5606636/.

[19] OSHA Factsheet on hazards and controls, pesticide exposure in agricultural setting; https://www.osha.gov/agricultural-operations/hazards.

[20] *Large Effects from Small Exposures. I. Mechanisms for Endocrine-Disrupting Chemicals with Estrogenic Activity,* June 2003*;* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241550/pdf/ehp0111-000994.pdf.

posed by synergetic effects when individuals are exposed to combinations of multiple types of pesticides and/or herbicides[21].

Notably, the DATCP suggests washing pesticide contaminated clothing with a heavy-duty detergent and hot water, separately from household laundry[22] and a how-to guide by Montana State University warns that mixing pesticide contaminated garments in the washer or laundry basket with other clothes "can transfer the residue to the other garments and unwittingly to other family members."[23] Increasing the number of available washers in migrant housing could provide workers with more resources to launder any pesticide contaminated clothing separately.

Additionally, a revised version of EmR2204's DWD 301.07(16)(s) could be permanently incorporated. A revised version of EmR2204's DWD 301.07(16)(s) could read, "Camp operators shall provide lockers or other storage devices for soiled laundry to keep individual worker's clothing separate."

E. DWD 301.07(16) is not in alignment with 29 C.F.R. §1910.142(f)(5) and could be revised to require both clotheslines and automatic dryers be provided in migrant labor camps.

Currently, DWD 301.07(16) does not reflect the need for drying facilities that exists in migrant labor camps nor does the regulation align with the requirements of 29 C.F.R. §1910.142(f)(5). 29 C.F.R. §1910.142(f)(5) requires that facilities for drying clothes be provided in migrant labor camps. No such requirement exists under DWD 301.07(16). Current public health information indicates clothesline and automatic dryers may provide important protections for migrant farmworkers.

Migrant workers are often exposed to bed bug and scabies outbreaks due to the particularities of congregate living arrangements that bring people from different states and countries together into the same working and living spaces[24]. Bed bugs are considered a worldwide, resurging problem by the Wisconsin Department of

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[21] *Chemical Pesticides and Human Health: The Urgent Need for a New Concept in Agriculture,* July 18, 2016; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4947579/.
[22] DATCP Factsheet on proper use and disposal of pesticides, September 2016; https://datcp.wi.gov/Documents/HTCGenUseDisposal.pdf.
[23] Montana State University Factsheet on the safe laundering of pesticide contaminated clothing; https://pesticides.montana.edu/reference/laundering.html.
[24] *See* Cornell Farmworker Program noting "[Bedbugs] are not an indicator of poor hygiene, and can be a problem for the rich, poor, young and old. However, the migrant nature of farmworkers puts them at risk for picking up bed bugs in one location, or in a vehicle, and transferring them to another location."

Health Services[25]. A Department of Agriculture Trade and Consumer Protection factsheet lists heating at above 120 degrees Fahrenheit and the use of automatic dryers in the hottest setting as measures that effectively combat bed bugs[26]. Scabies is considered a fairly common condition of the skin caused by a microscopic mite that can spread rapidly in crowded conditions[27]. A DHS factsheet recommends that clothing and bed linen worn or used by a person infested with scabies be dried at the highest temperature[28]. These considerations highlight the need for a requirement for automatic dryers at a reasonable machine to worker ratio to maintain our clients' safety and to prevent outbreaks of bed bugs and scabies.

On the other hand, recommendations for drying pesticide contaminated clothes suggest that clotheslines should be used because repeatedly using an automatic dryer to dry contaminated clothes risks causing pesticide residue to accumulate in the machine[29]. Accordingly, DWD 301.07(16) could be revised to consider all the above and establish requirements for the availability of a reasonable number of both automatic dryers and clotheslines in a way that would most strongly protect our clients' health and safety.

V. Comment pertaining to DWD 301.08 Wages: The DWD could Clarify enforcement coordination with Equal Rights Division regarding investigation of wage and other labor standards violations.

Currently, in cases in which underpayment of a migrant worker's wages involve multiple wage violations under Wisconsin law, Legal Action of Wisconsin attorneys have filed both Migrant Labor Complaints and wage claims with the Department's Equal Rights Division. It may be helpful to revise DWD 301.08(7) to emphasize that migrant farmworkers are also entitled to the protections of Wis. Stat. § 109.

VI. Comments Pertaining to DWD 301.09: Field Sanitation Standards

In its review of this section, the DWD could provide information regarding its coordinated enforcement with the OSHA and other agencies charged with enforcement of field sanitation standards. Wis. § Stat. 103.905.

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[25] DHS Factsheet on bed bugs in Wisconsin; https://www.dhs.wisconsin.gov/disease/bed-bugs.htm.
[26] DATCP Factsheet on bed bugs in Wisconsin; https://datcp.wi.gov/Documents/BedBugsWI.pdf.
[27] DHS Factsheet on Scabies in Wisconsin; https://www.dhs.wisconsin.gov/disease/scabies.htm.
[28] DHS Factsheet on scabies disease; https://www.dhs.wisconsin.gov/publications/p4/p42089.pdf.
[29] *Supra* note 23.

A. Revisions could provide more instruction regarding recommended amounts of water in the fields.

Currently, DWD 301.09(3) requires "sufficient amounts to meet worker need." The OSHA standard adds requirements that the water be "suitably cool" and the amount of water take into account "air temperature, humidity and nature of work performed." 29 C.F.R.§1928.110(c)(1)(ii). Other states have included requirements that the employer provide water sufficient to ensure that workers can drink water at a rate recommended by the Centers for Disease Control and prevention, 32 ounces per hour[30]. Accordingly, DWD 301.09(3) could be revised to require that the employer provide workers with an amount sufficient to provide workers with 32 ounces of water every hour.

B. The OSHA recommendations, as well as best practice information from other states, incorporate training, or at a minimum, a duty to inform workers of heat stress and safety.

In light of these training recommendations, the OSHA has developed materials to assist employers in providing recommended training[31]. In its review of DWD 301 and/ or coordination with OSHA, DWD could consider ways to ensure that employers of hand harvest workers have an emergency response procedure for employees suffering from heat illness, provide training on heat stress in a language that workers understand, implement acclimatation plans to ensure workers can adjust to their working conditions, and ensure workers exposed to high heat are paid breaks in cool or shaded environments and to access water for hydration.

VII. Closing and next steps

Thank you for the opportunity to share these comments and please do not hesitate to reach out if you have any questions. I look forward to more discussion with Migrant Council members and DWD staff regarding these important provisions.

Very best regards,

s/ Erica Sweitzer-Beckman

Member, Governor's Council on Migrant Labor
Farmworker Attorney
Legal Action of Wisconsin

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[30] Centers for Disease Control and Prevention. Heat Stress: Hydration, DHHS (NIOSH) Publication No. 2017-12. Available at https://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/2017-126.pdf

[31] Occupational Safety and Health Administration. Available at https://www.osha.gov/heat-exposure/resources

TO: **Katie Mueller**
Program and Planning Section Chief
Migrant and Seasonal Farmworker Programs
Department of Workforce Development

FROM: **Jason Culotta**
President
Midwest Food Products Association

DATE: **April 12, 2022**

RE: **MWFPA Comments on Scope Statement SS 004-22**

Submitted Electronically via dwdadminrules@wisconsin.gov

The Midwest Food Products Association (MWFPA) would like to offer the following comments on the scope statement SS 004-22 regarding updates to DWD 301, which regulates migrant worker practices.

MWFPA represents 20 food processors that operate 100 facilities throughout Illinois, Minnesota, and Wisconsin. Member companies provide housing for nearly 4,000 seasonal and migrant workers in Wisconsin and employ others who make their own housing arrangements during the growing season.

Our members now have two years' experience in dealing with several strains of the Covid virus and have invested in providing improved safety and protection for workers this year as well as in the prior two.

DWD Stakeholder Engagement

Our Association would like to thank the Department of Workforce Development (DWD) for engaging stakeholders in a collaborative manner while devising the language of the past three emergency rules.

As with drafting EmR2014 in 2020 and EmR2109 in 2021, DWD's outreach to understand the perspectives of migrant and seasonal workers, employers, and worker advocates provides the Department with the best information in issuing informed rulemaking with EmR2204.

In each of the prior three emergency rules, we are pleased that DWD recognized the interconnected nature of the employer-provided housing, the workplace, and employer-provided transportation elements of the rule working in concert with one another.

Changing Nature of Covid

Given the changing nature of the strains of Covid, the industry is uncertain that addressing Covid practices through permanent rule changes would accomplish much long-term. Such rulemaking would require frequent amendments to remain current.

DWD 301 Updates

However, there are likely areas in DWD 301 that need modernization, including federalizing state standards where appropriate. We look forward to further conversation with DWD staff after the rulemaking process begins in earnest.

As has been done over the past two years, our industry stands ready to work with the Department in providing sound and appropriate worker standards for the employment, transportation, and housing of the valued seasonal and migrant worker population in Wisconsin.

Thank you for the opportunity to comment on SS 004-22.

Specific to DWD 301

Comments from
Aimee Jo Castleberry
Vice President - Human Resources
Seneca Foods Corporation
418 East Conde Street
Janesville, WI 53546

DWD 301.05(8)(d) Migrant Labor Contractors

- 301.05(1) – refers to Migrant Labor Contractor
    - 301.05(8)(a) – refers to Farm Labor Contractor
    - Seneca Foods is an Agricultural Employer and therefor:
        - Our Employees hired as Recruiters are not registered as Farm Labor Contractors and are excluded from the statutory definition of Migrant Labor Contractor and registration as a Federal Farm Labor Contractor.
        - Our Employees hired as Recruiters should be able to transport workers without providing information required in WH-514 for the Migrant Labor Contractor certification.
        - Our Employees hired as Recruiters are not transporting workers in their personal vehicles.
            - Seneca vans are used to transport workers.
            - Seneca vans are not considered passenger vehicles under state regulations
            - Seneca vans are not subject to requirements under form WH-514 and do not require inspection performed by an independent company not affiliated with the applicant.
        - Seneca Foods should be exempt from being required to complete form WH-514 for the vehicles we transport workers in.
            - Form WH-514 references that Farm Labor Contractors are subject to completing form WH-514, in accordance with the Migrant Labor Contractor certification.
        - If Seneca Foods (Agricultural employer) is required to complete the DETM-5234-E application for our Employees hired as Recruiters,
            - Seneca Foods needs to be exempt from completing part of section 24, specific vehicle inspection, Proof of Insurance (POI) and Vehicle Inspection reports.
        - *Based on this information (needing clarification), section DWD 301.05(8)(d) would need to be updated or clarified for Agricultural employers like Seneca Foods.
        - “Certain persons and organizations, such as small businesses meeting the exemption criteria of 29 U.S.C. § 213(a)(6)(A), are exempt from the Act and are not required to register as farm labor contractors. In addition, establishments meeting

the MSPA definition of an "agricultural association" or "agricultural employer," are not required to register as a farm labor contractor".

- There are also several sections of the Regs that refer to Migrant Labor Contractors and then also reference Farm Labor Contractors. I can go into further detail but it adds confusion to the regs.

DWD 301.06(1) Work Agreements –

- Is this something currently acceptable? "Single work agreement for a family member…"?
- Does this cover all working family members under one work agreement? We have not run into this that I'm aware of.