

STATEMENT OF SCOPE
Department of Workforce Development

Rule No.

DWD 301

Relating to

Migrant labor

Rule Type

Permanent

Finding of Emergency

Not applicable

Detailed Description of the Objective of the Proposed Rule

The objective of the proposed rule is to review ch. DWD 301 and make revisions that are necessary to better align its requirements with federal law and ss. 103.90 to 103.97, Stats. The Department's revisions may also correct inconsistencies, update outdated language, and provide clarification where appropriate, including clarification on granting variances. An additional objective is to explore creating additional requirements in ch. DWD 301 for ensuring that employers follow best practices in protecting the health and safety of migrant workers in camps, fields, and employer-provided transportation.

Description of Existing Policies Relevant to the Rule, New Policies Proposed to be Included in the Rule, and an Analysis of Policy Alternatives

Currently, ch. DWD 301 includes requirements for all of the following: 1) certification of migrant labor contractors; 2) certification of migrant labor camps; 3) migrant labor work agreements; 4) housing conditions in migrant labor camps; 5) payment of wages to migrant workers; 6) field sanitation standards; 7) assessment of penalties for violations of the chapter; and 8) notice of migrant labor rights. In addition, s. 103.917, Stats., requires employers to provide safe and adequate transportation for migrant workers and s. 103.905, Stats., requires the Department to promulgate rules to enforce those migrant labor laws, including s. 103.917, Stats. The Department has made no substantive revisions to ch. DWD 301 since 2007.

Regarding best practices for protecting migrant worker health and safety, the Department promulgated two emergency rules, EmR2014 and EmR2109, that were limited to the SARS-CoV-2 virus that causes the coronavirus disease. (In this Statement of Scope, the virus and disease will be referred to as "COVID-19.") EmR2014 imposed requirements for migrant workers in

camps, fields, and employer-provided transportation. After EmR2014 expired, the Department promulgated EmR2019 based on more recent public health guidance related to the benefits of wearing face coverings, distancing, and otherwise preventing the transmission of COVID-19. EmR2109 expired on December 13, 2021.

Consistent with the Department's rulemaking authority under s. 103.905, Stats., the Department proposes to review and revise ch. DWD 301 as necessary to better align with federal law and state statutes, correct inconsistencies, and update outdated language. For example, ch. DWD 301 and federal law impose different insurance requirements for motor vehicles used to transport migrant workers. The Department also proposes to provide clarification where appropriate, including clarification on the granting of variances. Currently, the variance procedures in ch. DWD 301 apply only to requirements related to migrant labor camps and field work handwashing facilities. The Department proposes to explore clarifying the circumstances under which other variances may be granted. In addition, the Department proposes to explore creating new requirements for ensuring that employers follow best practices in protecting the health and safety of migrant workers in camps, fields, and employer-provided transportation. In creating those requirements, the Department will consider the recommendations of the U.S. Centers for Disease Control and Prevention (CDC), the federal Occupational Safety and Health Administration (OSHA), and the Wisconsin Department of Health Services (DHS).

The policy alternative is to do nothing, which would leave unchanged rules in ch. DWD 301 that do not align with federal law and state statutes and which may contain inconsistencies and outdated language and lack clarification. Also, if permanent rules in ch. DWD 301 lack adequate best practice requirements for protecting migrant worker health and safety the Department may have to rely on promulgating emergency rules to ensure that protection.

Detailed Explanation of Statutory Authority for the Rule (Including the Statutory Citation and Language)

103.905 Department's duties. The department shall:

(1) Promulgate rules for the enforcement and implementation of ss. 103.90 to 103.97.

...

(5) Enforce, or cause to be enforced, ss. 103.90 to 103, and cooperate with other officers, departments, boards, agencies or commissions of this state, or of the United States, or of any other state, or of any local government in the enforcement of such sections.

Estimate of Amount of Time that State Employees Will Spend Developing the Rule and of Other Resources Necessary to Develop the Rule

The estimated time is 120 hours.

List with Description of All Entities that May Be Affected by the Proposed Rule

The proposed emergency rule will affect migrant workers, migrant worker employers, and migrant labor camp operators.

Summary and Preliminary Comparison with Any Existing or Proposed Federal Regulation that is Intended to Address the Activities to be Regulated by the Proposed Rule

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 USC 1801, et. seq., and its implementing regulations under 20 CFR Part 500, establish employment standards for migrant and seasonal agricultural workers regarding wages, housing, transportation, health and safety, disclosures, and recordkeeping. MSPA also requires farm labor contractors to register with the U.S. Department of Labor (DOL).

The Immigration and Nationality Act (INA), 8 USC 1101 et seq., provides for the temporary admission of nonimmigrant agricultural workers to the United States through the H-2A visa program. Before hiring H-2A workers, employers must apply to DOL for labor certification. DOL's Employment and Training Administration (ETA) has promulgated regulations regarding H-2A labor certifications, including requirements for worker housing.

Federal regulations under the MSPA impose requirements for migrant worker housing that depend on the date of construction of the housing. For housing that was completed or under construction prior to April 3, 1980, the housing must comply with either the above ETA regulations or regulations of the federal Occupational Safety and Health Administration (OSHA) regarding temporary labor camps. Housing that was under a contract for construction prior to March 4, 1980 can also comply with either the ETA or OSHA regulations. For housing that was constructed after April 3, 1980, the housing must comply with the OSHA regulations. Likewise, housing that was not under a contract for construction as of March 4, 1980 must comply with the OSHA regulations. See 29 CFR s. 500.132.

Regarding COVID-19, the CDC has issued guidance on shared or congregate housing and the CDC and DOL have issued guidance on agricultural workers and employers. OSHA has issued recommendations for additional considerations for workers who reside in communal living arrangements. The CDC, DOL, and OSHA continue to review their guidance for the purpose of making any necessary updates.

Anticipated Economic Impact of Implementing the Rule (Note if the Rule is Likely to Have a Significant Economic Impact on Small Businesses)

The rule is expected to have an economic impact on migrant worker employers and migrant labor camp operators, which may include small businesses, who will have to comply with the rule. Regarding the protection of migrant worker health and safety, the Department expects the long-term net economic impact to be positive because the rule will protect migrant workers from threats such as the spread of COVID-19. Without that protection, there may be significant negative economic impacts on the production of produce.

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