
Report From Agency

DATE: July 31, 2023

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FROM: Amy Pechacek, Secretary-designee
Department of Workforce Development

SUBJECT: **Notice and Report for Final Draft Form of Proposed Rule
Clearinghouse Rule 23-030: Migrant Labor**

Pursuant to s. 227.19 (2), Stats., the Department of Workforce Development is submitting for legislative review the attached proposed rule in final draft form for Clearinghouse Rule 23-030. The governor approved this proposed rule on July 27, 2023. The analysis required under s. 227.14 (2), Stats., is included in the proposed rule. Also attached is the Fiscal Estimate & Economic Impact Analysis and the Rules Clearinghouse report and comments.

Basis and Purpose

Section. 103.905 (1), Stats., requires the Department to promulgate rules to enforce and implement ss. 103.90 to 103.97, Stats., which relate to migrant labor. The Department's migrant labor rules are codified in ch. DWD 301. The Department has not made any substantive revisions to chapter DWD 301 since 2007. Some rules in the chapter do not align with federal law and Wisconsin statutes. The chapter also contains inconsistencies and outdated language and some of the rules are unclear. In addition, the Department has had to rely on emergency rules to protect migrant workers from the COVID-19 pandemic. In this proposed rule, the Department revises the chapter to better align its requirements with federal law and Wisconsin statutes, correct inconsistencies, update outdated language, and provide clarification. The Department also proposes new requirements for disease and illness prevention in migrant labor camps that may obviate the need for emergency rules. These requirements include reporting certain diseases and symptoms to local health

officials and isolating sick workers. In addition, the Department proposes new field sanitation standards for preventing heat illnesses. Finally, the Department proposes to make various other revisions to the chapter to promote health and safety in migrant labor camps.

Public Hearings

On April 12, 2022, the Department held a preliminary public hearing and comment period on the proposed rule's Statement of Scope, SS 004-22. The plain language analysis of the proposed rule summarizes the comments received at the preliminary hearing and the Department's responses to them. The Department held a public hearing on the proposed rule on July 10, 2023. Attached to this notice and report is a public hearing summary that identifies the individuals who commented on the proposed rule, summarizes their comments, and provides the Department's responses to those comments.

Changes to the Analysis or Fiscal Estimate

The Department revised the analysis to indicate the deadline for comments and to reflect modifications the Department made to the proposed rule in response to the Rules Clearinghouse and public comments. The Department made no other changes to the analysis or fiscal estimate.

Responses to Rules Clearinghouse

The Rules Clearinghouse made recommendations and comments related to the following:

Form, Style and Placement in the Administrative Code: The Department revised the proposed rule as recommended by the Rules Clearinghouse, except that the Rules Clearinghouse agreed with the Department that no revisions are necessary for comment 2a.

Adequacy of References to Related Statutes, Rules and Forms: The Department rephrased the proposed rule as recommended by the Rules Clearinghouse.

Clarity, Grammar, Punctuation and Use of Plain Language: The Department revised the proposed rule as recommended by the Rules Clearinghouse, except as follows:

Comment 5c.: The Rules Clearinghouse agreed with the Department that no revisions are necessary in response to the first sentence of this comment.

Comment 5g. "The proposed rule and current rule use the terms `family', `same family', `individual family units', `single family', and `immediate family', but the only defined term is `immediate family'. Consider reviewing and revising the use of these terms for consistency and appropriate intended meaning."

Response: As noted in proposed s. DWD 301.015 (15) (Note), the Department is defining "immediate family" for only two purposes. First, the Department is interpreting the meaning of that term in s. 103.90 (4), Stats., which defines "migrant labor contractor" as "any person, who, for a fee or other consideration, on behalf of another person, recruits, solicits, hires, or furnishes migrant workers, excluding members of the contractor's immediate family, for employment in this state." Second, the Department is providing a definition for purposes of s. DWD 301.07 (23) (b), which requires a migrant labor inspector to make the inspector's presence known to a camp operator or "an adult member of the operator's immediate family." All other references to "family" in the chapter do not include the limitation to "immediate" family and the Department has determined that no definitions are necessary for those other references. Furthermore,

the Department is concerned that a definition of family that is either too broad or narrow may have unintended consequences and make it more difficult for migrant camp operators to comply with the rule when providing family housing. Therefore, the Department declines to revise the terms as recommended in the comment.

Final Regulatory Flexibility Analysis

Small business compliance costs. As of May 2023, approximately 281 businesses are subject to ch. DWD 301's requirements. The businesses consist of approximately 207 employers and approximately 74 migrant labor contractors or agents of employers. In addition, 125 of the businesses operate 261 migrant labor camps located throughout the state. Many of the foregoing businesses are small businesses as defined in s. 227.114 (1), Stats. Although the proposed rule may impose implementation and compliance costs on both small and large businesses, the Department expects those costs to be minimal for the following reasons. Except for the application fee for an annual certificate to operate a migrant labor camp, the proposed rule does not increase other fees required under current ch. DWD 301 or penalty fees the Department is allowed to assess under the current chapter. In addition, many of the proposed rule's new requirements are consistent with requirements of other state and federal agencies that apply on their own to small and large businesses and, therefore, do not introduce new compliance standards. Finally, as under the current ch. DWD 301, the proposed rule allows the Department to issue variances from migrant labor camp and field sanitation requirements. Therefore, a business of any size can apply for a variance that reduces implementation and compliance costs, which the Department may grant if the variance is necessary to prevent a practical difficulty or unnecessary hardship and other requirements are satisfied.

As for small businesses, some of the proposed rule's new requirements impose compliance costs that are proportional based on the number of occupants in a migrant labor camp. Because migrant labor camps operated by small businesses have fewer occupants than those operated by large businesses, those costs are anticipated to have only minimal impact on small businesses. For example, the proposed rule requires that in toilet facilities used by at least 10 males, a urinal must be provided for every 25 males, instead of every 40 males, as required under the current chapter. However, based on the Department's review, the change is not anticipated to impact most small businesses because the occupants of their camps do not meet the next threshold of 50 males, which would require installation of a second urinal under the proposed rule, so only one will be required. The economic impact of this requirement is less for small businesses that operate migrant labor camps with smaller numbers of occupants, as their number of occupants may be below the new ratios and no change at their facilities may be required.

Reports. The proposed rule imposes the following reporting requirements: 1) applicants for migrant labor camp certificates must submit fire inspection documentation and written procedures for isolating sick or injured occupants; 2) certain diseases and symptoms must be reported to local health officials; 3) camp operators must submit to DWD well construction reports that the operator submitted to the Department of Natural Resources (DNR); and 4) a camp operator may have to demonstrate that it has complied with DNR rules for certain drinking water maximum contaminant levels. For the first requirement, fire inspection requirements and fees differ by municipality and based on the Department's existing staff and resources, the Department is not able to estimate the cost of compliance for small businesses. Based on existing staff and resources, the Department is also not able to estimate the cost of preparing written procedures regarding isolation. For the second requirement, reports must be made to local health officials as required under current law and not to the Department. The third and fourth requirements pertain to reports required to be made to DNR under current law. The cost of providing copies of those reports to the Department will be minimal.

Small business impact reduction methods. The Department is required under s. 103.905 (1), Stats., to promulgate rules to enforce and implement ss. 103.90 to 103.97, Stats. Those statutes impose requirements on migrant labor camp operators and migrant labor contractors and employers without regard to the size of their businesses. Accordingly, the Department lacks authority under those statutes to impose less stringent

requirements on small businesses using the methods specified under s. 227.114 (2). However, as noted above, the Department is allowed to issue variances from migrant labor camp and field sanitation requirements. In addition, some of the proposed rule's new reporting requirements are consistent with reporting requirements of other state and federal agencies that apply on their own to businesses regardless of their size. For example, the reporting requirements for certain diseases and symptoms are consistent with regulations of the Occupational Safety and Health Administration (OSHA) and rules of the Department of Health Services (DHS). In this proposed rule, the Department cannot affect the impact on small businesses already imposed by OSHA and DHS. Instead, in this proposed rule, the Department is clarifying that these requirements apply to businesses of any size.

Issues raised by small businesses. The Department received comments at the public hearing on the proposed rule on behalf of the following business organizations: 1) the Wisconsin Potato & Vegetable Growers Association (WPVGA); 2) the Wisconsin Farm Bureau Federation; and 3) the Midwest Food Products Association (MWFPA). The members of these organizations include farmers and food processors in this state. In addition, the MWFPA, WPVGA, and a migrant labor contractor submitted comments at the preliminary hearing on the Statement of Scope for the proposed rule. Although the comments did not indicate a small business perspective, some members of the organizations and the migrant labor contractor may qualify as small businesses under s. 227.114 (1), Stats. As noted above, the Department's responses to the public hearing comments are included in the attached summary. The Department's response to the comments at the preliminary hearing are summarized in the plain language analysis of the proposed rule.

Response to SBRRB

On June 5, 2023, the Department submitted the proposed rule to the Small Business Regulatory Review Board (SBRRB). Because the Department did not receive a report back from the SBRRB under s. 227.14 (2g), Stats., no response is necessary.