
Assembly Committee on Workforce Development and Economic Opportunities

Joint public hearing with the Senate Committee on Labor, Regulatory Reform, Veterans and Military Affairs

Tuesday, September 26, 2023
10:00 AM
417 North (GAR Hall)

Department of Workforce Development Testimony on Clearinghouse Rule 23-030: Relating to migrant labor and affecting small business.

Thank you, Chair Testin and Chair Petryk, and committee members, for having me here today.

My name is Jennifer Wakerhauser. I am the Chief Legal Counsel for the Department of Workforce Development (DWD). With me today are Michele Carter, Administrator of DWD's Division of Employment and Training, Steve Laesch, Assistant Administrator of DWD's Division of Employment and Training; and Caitlin Madden, Deputy Legal Counsel, to serve as subject matter experts and address any questions you may have for DWD.

As you know, DWD is the state agency charged with the administration of state and federal laws regarding unemployment insurance, workers compensation, vocational rehabilitation, worker employment and training, and state employment laws, including migrant worker regulations.

Among the programs overseen by DWD are services to Migrant and Seasonal Farm Workers (MSFW). Under this program, DWD provides outreach to migrant and seasonal farm workers in their living, working, and gathering areas to inform seasonal farm workers about services available at local job centers and to provide them with referrals to agricultural and non-agricultural employment and training opportunities as well as supportive and job development services. DWD's MSFW program also oversees the federal Foreign Labor Certification program administration and the federal Monitor Advocate Services program. The Foreign Labor Certification programs allow employers to hire foreign workers if employers can demonstrate that there are not enough U.S. workers available that are willing and qualified to perform the work at wages that meet or exceed the prevailing wage for the occupation in that area of employment. Through the Monitor Advocate Services, DWD ensures employer compliance with U.S. Department of Labor (USDOL) regulations and ensures that issues raised by seasonal farmworkers through the Job Service Complaint System are either addressed by DWD or referred to partners (such as the Occupational Safety and Health Administration).

Section 103.905 (1) of Wisconsin Statutes requires DWD to promulgate rules to enforce and implement ss. 103.90 to 103.97, which relate to migrant labor. DWD's migrant labor rules are codified in Chapter DWD 301 of Wisconsin's Administrative Code.

DWD has not made any substantive revisions to chapter DWD 301 since 2007. The proposed updates address the following:

- Some rules in the current chapter do not align with Wisconsin statutes or updated federal guidance.
- The current chapter contains inconsistencies and outdated language.
- Based on feedback from stakeholders, some of the rules are unclear.

- When DWD promulgated emergency rules to protect workers' health and safety during the COVID-19 pandemic, the agency gained valuable insight about the importance of updating its permanent rules to be able to address potential future public health emergencies.

In developing proposed rule CR 23-030, DWD reviewed ch. DWD 301, the Migrant Labor Law, OSHA regulations, and federal regulations on migrant recruitment, migrant work agreements, payroll records, and provision of other information to migrant workers. DWD also reviewed migrant worker agreements and other records relating to migrant labor contractors and migrant labor camps submitted to the DWD in the course of DWD's duties in regulating migrant labor contractors and migrant labor camps.

DWD engaged with key stakeholders in drafting the proposed rule through the Governor's Council on Migrant Labor ("Migrant Labor Council"), including the Ad Hoc Committee on Migrant Seasonal Farmworkers. The ad hoc committee held three public meetings to review comments from committee members, other stakeholders, and members of the public regarding DWD's proposed changes to the rule. DWD also consulted with the Department of Health Services, the Department of Safety and Professional Services, and the Department of Natural Resources regarding the intersection of authority related to public health concerns, building inspection requirements, and pollution and water quality standards.

Pursuant to Wis. Stat. § 103.968, which requires DWD to submit proposed permanent rules to the Migrant Labor Council for review, DWD submitted CR 23-030 to the Migrant Labor Council on July 31, 2023, the same date it filed the notice of its intent to promulgate the rule with the legislature. The Council met on August 9, 2023; at which time it took no action to disapprove of the rule, therefore, under the statute DWD was authorized to move forward with the permanent rule.

In this proposed rule, CR 23-030, DWD revises the chapter to better align its requirements with Wisconsin statutes and federal guidance, correct inconsistencies, update outdated language, and provide clarification. DWD also proposes new requirements for disease and illness prevention in migrant labor camps with the intent of having a permanent rule in place in the event of a future public health emergency that may avert the need for emergency rules. These requirements include reporting certain diseases and symptoms to local health officials and isolating sick workers. In addition, DWD proposes new field sanitation standards for preventing heat illnesses. Finally, DWD proposes to make various other revisions to the chapter to promote health and safety in migrant labor camps.

Thank you for the opportunity to provide this information, and for your time and consideration.

DWD CONTACT: Legislative Liaison Arielle Exner, (608) 770-5223, Arielle.exner@dwd.wisconsin.gov



TO: Members
Senate Committee on Labor, Regulatory Reform, Veterans & Military Affairs
Assembly Committee on Workforce Development & Economic Opportunities

FROM: Jason Culotta
President
Midwest Food Products Association

DATE: September 26, 2023

RE: MWFEPA Comments on Proposed Changes to DWD 301

The Midwest Food Products Association (MWFEPA) would like to submit the following comments on the proposed changes to DWD 301, the administrative code governing migrant and seasonal workers.

MWFEPA represents food processors that operate approximately 100 facilities throughout Illinois, Minnesota, and Wisconsin. Member companies employ nearly 4,000 seasonal and migrant workers each in Wisconsin, many of which are housed by employers during the growing season.

Our Association would like to thank the Department of Workforce Development (DWD) for engaging stakeholders through the Ad Hoc Subcommittee of the Governor's Council on Migrant Labor before issuing the proposed rule language as well as the public hearing process. DWD's outreach to understand stakeholder perspectives provides for more informed rulemaking and several improvements were adopted in the current proposed rule as a result.

Despite this engagement, two areas remain where the proposed rule needs improvement:

- **Grandfathering of Plumbing Code Changes** – The proposed rule lowers the urinal ratio for men from one per 40 to one per 25 (p. 33, line 24) and the showerhead ratio to one per 8 occupants of a migrant labor camp (p. 34, lines 23-24). The proposed changes reflect updates in the commercial building code that would normally be grandfathered in, as existing facilities met prior code when they were constructed or substantially

remodeled. The new rule would require DWD to issue annual variances for employers to continue providing the existing facilities to migrant and seasonal workers.

Our industry's experience with the turnaround time by Department staff on variances has been inconsistent, even during 2020 when it was critical. Requiring a variance for each housing structure will likely cause substantial difficulty for both the Department in not issuing the variances in a timely manner and the industry in not having them prior to the housing being needed.

Grandfathering of existing facilities would remove the potential for substantial remodeling costs. Alternately, the rule could provide time for a realistic plan by camp operators to make improvements. A 5-year time frame would allow food processors to plan and budget for the needed building improvements to meet the new code. For example, by spring of 2028, all camps could be fully compliant with the revised plumbing standards.

- **Heat Illness Prevention Plan** (p. 46, line 16 to p. 49, line 3) – The heat illness prevention plan in state code should align with the federal OSHA rule that is expected to be issued soon. By codifying a standard in DWD 301 without allowing for harmonization with the impending OSHA rule, employers will ultimately need to comply with two differing standards. Language should be added allowing the new state standard until a federal one is promulgated, at which point the state would align with the federal code.

As has been done in prior emergency rulemaking, our industry stands ready to work with the Department in drafting appropriate rule language to strike the correct balance needed.

Most fruit and vegetable plants that utilize seasonal workers are located in rural communities where workers are scarce. The industry highly values the role that these workers provide in returning year after year to support American food production.

Thank you for the opportunity to comment on this administrative rule.



TO: Members, Senate Committee on Labor, Regulatory Reform, Veterans & Military Affairs and Assembly Committee on Workforce Development & Economic Opportunities

FROM: Rachel Ver Velde, Senior Director of Workforce, Education and Employment Policy

DATE: September 26, 2023

RE: Comments on CR 23-030, Proposed Changes to DWD 301

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to submit comments on the proposed changes to DWD 301, relating to migrant labor and seasonal workers.

WMC is the joint statewide chamber of commerce and state manufacturing association. Additionally, WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, and from every sector of the economy. Since 1911, our mission has been to make Wisconsin the most competitive state in the nation to do business.

WMC is happy that the Department of Workforce Development (DWD) engaged stakeholders before releasing the language of the proposed rule and made some changes due to stakeholder feedback. However, WMC and our members continue to be concerned about two provisions in the proposed rule.

First, WMC is concerned with the heat illness prevention plan in the proposed DWD rule. The Occupational Safety and Health Administration (OSHA) published an Advance Notice of Proposed Rulemaking (ANPRM) on October 27, 2021, for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. The comment period for the ANPRM closed on January 26, 2022. OSHA received just under 1,000 comments from stakeholders and is continuing to work through the rulemaking process.

WMC is concerned that once the OSHA rule is finalized there will be two different standards for employers to compile with regarding heat illness prevention – one at the federal level and one at the state level. Employers want to provide a safe environment for their workers, but having two standards is confusing and overly burdensome for Wisconsin employers. WMC asks that the state code align with the federal OSHA rule once finalized.

Secondly, the proposed DWD rule makes changes to the plumbing code. We understand that these changes reflect updates in the commercial building code, but there is no grandfathering provision in

the proposed rule. This is concerning since existing facilities when constructed or remodeled met the prior code and were in compliance.

The proposed rule does allow DWD to issue annual variances in order for employers to continue to use their existing facilities for migrant workers, but WMC is concerned with length of time it will take DWD to issue the variances due to the extra workload this will create for DWD. This may cause employers to be unable to provide the necessary housing for migrant workers. Therefore, WMC believes that it is in the best interest of all parties to add a grandfathering provision in the rule for existing facilities.

Thank you for holding a hearing on the proposed changes to DWD 301. WMC appreciates the opportunity to share our comments and concerns on this administrative rule.

Wisconsin Potato & Vegetable Growers Association, Inc.

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MEMORANDUM

TO: Members of the Senate Committee on Labor, Regulatory Reform, Veterans and Military Affairs and Members of the Assembly Committee on Workforce Development and Economic Opportunities

FROM: Jordan Lamb, The Welch Group – Legislative Counsel for WPVGA

DATE: September 26, 2023

RE: Opposition to DWD 301 (CR 23-030) – Insurance Requirements for Transporting Migrant Laborers

On behalf of the Wisconsin Potato & Vegetable Growers Association (WPVGA), I write to provide the following comments on the proposed changes to DWD 301 contained in CR 23-030, the administrative code that governs migrant and seasonal workers in Wisconsin.

Our members include farmers and food processors across the State of Wisconsin. We, like all industries, are struggling with workforce shortages. As such, we are very concerned with any regulations that could worsen our access to seasonal farm workers and food processing workers without adding value to protecting our workers.

Accordingly, we have repeatedly urged the Department of Workforce Development to make necessary revisions to DWD 301 to align state standards with federal law related to insurance requirements for motor vehicles used to transport H2A migrant workers.

Wisconsin's current interpretation of its requirements is that farm labor contractors – even those transporting only H2A workers – must have workers compensation coverage, general liability coverage AND an additional \$100,000 in coverage for each seat in the vehicle. *See* Wis. Admin. Code § DWD 301.05(8)(c).

Under federal law, no additional per-seat coverage is required if the workers are transported only under circumstances for which there is coverage under “state law” or for which they are covered under workers compensation insurance. It is our understanding that workers compensation policies that are purchased and issued to H2A farm labor contractors cover the workers from the moment they enter the United States until the moment they leave. For purposes of those policies, those workers are “at work” the entire time they are in this county. As such, there is no need for additional per-seat coverage on vehicles transporting these workers.

We oppose any more stringent state insurance requirements because this has greatly affected the costs and availability of H2A migrant workers in Wisconsin. Wisconsin law should NOT require additional, redundant liability insurance coverage. The State of Wisconsin should allow the same options offered under federal law, 29 CFR §§ 500.122, and other states.

Under the current state rule, farm labor contractors are leaving Wisconsin and doing business in states that follow the federal standard. We ask that this rule be amended to make this change and remove any additional per-seat liability insurance requirement for H2A workers.



The Welch Group
PUBLIC AFFAIRS

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July 10, 2023

VIA EMAIL ONLY TO DWDAdminRules@dwd.wisconsin.gov and
Kathryn.Mueller@dwd.wisconsin.gov

Ms. Kathryn Mueller
Program and Planning Section Chief
Migrant and Seasonal Farmworker Programs and Job Service Call Center
Department of Workforce Development
201 East Washington Avenue
P.O. Box 7972
Madison, WI 53707

RE: **WPVGA and WFBF Joint Comments on Clearinghouse Rule CR 23-030 Ch. DWD
301, Wis. Admin. Code Migrant Labor**

Dear Ms. Mueller:

On behalf of the Wisconsin Potato & Vegetable Growers Association (WPVGA) and the Wisconsin Farm Bureau Federation (WFBF), I write to provide the following comments on the proposed changes to DWD 301, the administrative code that governs migrant and seasonal workers in Wisconsin.

Our members include farmers and food processors across the State of Wisconsin. We, like all industries, are struggling with workforce shortages. As such, we are very concerned with any regulations that could worsen our access to seasonal farm workers and food processing workers without adding value to protecting our workers. Accordingly, we offer the following comments:

Insurance Requirements for Migrant Labor Contractors (pg. 16, lines 12-21). We urge the Department to make necessary revisions to DWD 301 to align state standards with federal law related to insurance requirements for motor vehicles used to transport migrant workers. We do not support more stringent state insurance requirements, as this has greatly affected the costs and availability of migrant workers in Wisconsin. It is our understanding that H2-A workers are covered by workers' compensation plan benefits the ENTIRE time that they are in the United States, including during off hours. Under federal law, these workers are considered "working" from the moment they enter the country – not just the hours that they are on the farm or at their place of employment. As such, they are already covered by workers compensation insurance and, like the federal law, Wisconsin law should NOT require additional, redundant liability insurance coverage. The State of Wisconsin should allow the same options offered under federal law, 29 CFR §§ 500.122, like other states. We ask that this rule be amended to make this change.

First Aid Kits (pg. 40, lines 4-23). Creating state specific standards for regulations that are adequately addressed under federal law can cause confusion and unnecessary burdens on employers. Accordingly, we respectfully request that DWD 301 reflect federal standards for first



aid kits. Specifically, we ask that Wisconsin simply reference OSHA code Appendix A, Section 1910.266 for first aid kit requirements.

Isolation Rooms (pg. 43, lines 8-9). We understand that the Department has stated that hotel rooms may serve as temporary isolation rooms for sick workers. We respectfully request that this be specifically stated in the rule language. Accordingly, we ask that the rule include an explicit statement that hotel rooms may be used as temporary isolation rooms for workers.

Window Area that Opens (pg. 32, line 13). We ask that the proposed change to increase the required total window area which opens from at least 45% to 50% be maintained at 45%. Many existing windows in worker housing are double hung windows. By design, these windows cannot physically be opened to 50% of the total window area. As an alternative, we ask that the Department retain the 45% standard for worker housing facilities that have air conditioning.

Heat Illness Prevention Plan (pg. 46, line 16 et seq., and pg. 49, line 3). Again, we ask that the heat illness prevention plan be consistent with federal law. We ask that DWD 301 align with the federal OSHA rule, which we expect to be issued as a workplace standard for employers shortly. By creating a state specific standard that is different from a federal standard, employers will be forced to comply with two different standards. This will create undue burdens and expense and will not result in any measurable benefits for workers. Accordingly, we ask that the Department simply reference the OSHA standard once it becomes available.

Thank you for considering our comments. If you have any questions, please contact me directly at jordan@thewelchgroup.org or (608) 819-0150.

Sincerely,

Jordan Lamb

cc. Tamas Houlihan, Executive Director, WPVGA
Jason Mugnaini, Director of Governmental Relations, WFBF