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VIA ELECTRONIC MAIL

Mr. Joel Sacks, Director
Department of Labor and Industries
c/o Ms. Maggie Leland, Rules Coordinator
Department of Labor and Industries
maggie.leland@lni.wa.gov
housing@doh.wa.gov

Dr. John Wiesman, Secretary
Department of Health
secretary@doh.wa.gov
c/o Ms. Cynthia Ireland, Rules Coordinator
Department of Health
cynthia.ireland@lni.wa.gov

Re: Comments to Proposed Emergency Farmworker Housing Regulations

Dear Directors Sacks and Weisman:

We appreciate the work of both of your agencies to draft emergency rules for farmworker housing in response to the COVID-19 pandemic and the April 6, 2020 request for emergency rulemaking. As you know, since the unions requested emergency rules 42 H-2A farmworkers from Mexico tested positive at a labor camp in Wenatchee. The Chelan County Health District administrator, Barry Kling, stated that existing social distancing measures in these housing sites may not be enough to slow the spread of COVID-19.¹ Mr. Kling further stated that the test results were a warning: "It told us that even though the [company] w[as] doing a really conscientious job of observing all the social distancing measures, it wasn't enough."

We also know that another H-2A worker from Mexico has tested positive in Quincy, Washington. He resided in a labor camp consisting of five units with a total capacity of 99 workers. It is believed that the worker is in isolation, but it is unclear if the other workers have been quarantined. It is unknown how many workers are in each unit, whether bunkbeds are being used, or what social distancing requirements are in place for these workers. As far as we

¹ https://www.wenatcheeworld.com/news/coronavirus/expanded-testing-planned-after-remarkable-rate-of-cases-in-agriculture-housing/article_8f1809a2-84f5-11ea-be6a-dbdd2a598250.html.



know, the Grant County Health District has not tested the other farmworkers in the camp or any local farmworkers who worked in the same crew.

With the words of Mr. Kling in mind, we believe that the proposed emergency rules are a step in the right direction, however, there are significant problems with the current proposed rules that could exacerbate the current situation. Therefore, we provide the following comments to improve the proposal and urge the departments to make these changes to protect the lives of farmworkers.² The comments are provided in the same order of the draft emergency regulations.

Insufficient Education of COVID-19 Hazards – Section (1)(a)

Section (1)(a) requires the housing operator to educate farmworkers about COVID-19, and it does not mandate the language must be used to provide this education. Because operators of farmworker housing are not health experts, the proposed regulation needs to include working with local health districts and health providers to ensure that proper education is done in the primary language of the workers. This could be accomplished at orientation sessions where workers would also be provided with a phone number of the local medical health clinic. That number should also be posted prominently at the housing and common work and gathering areas.

Cots Should Not be Allowed Except as Permitted by Existing Cherry Housing Rules – Section (1)(b)(i)

Currently, cots are only permitted during the cherry harvest when tents are used. This regulation was developed when the cherry harvest in Washington State lasted about 6 weeks. Since that time, the cherry acreage has greatly increased and the season now lasts approximately 2.5 months with the end of cherry harvest moving from late July to late August.³

Sleeping on a cot is not the same as sleeping in a bed with a mattress. The current proposal would allow cots to be used in all housing. Because H-2A contracts extend into November and sometimes December, that would mean that farmworkers could be sleeping in a cot for over 6 months. Given the need for workers to have deep rest after working long days in the fields⁴, the rule must be amended to limit the use of cots to cherry harvest housing only.

Insufficient Space in Housing – Section (1)(b)(i)

Section (1)(b) provides that “the operator of temporary worker housing must develop and implement a social distance plan for maintaining six (6) feet of separation between occupants when at housing sites which includes cooking, eating, bathing, washing, and sleeping.” It then

² Our submission of these comments may not and should not be construed as having any bearing on the Skagit County lawsuit filed by Familias Unidas por la Justicia and United Farm Workers of America. Both unions will continue to advocate for emergency action by the Court because these proposed emergency rules are insufficient to carry out L&I’s duties under the Washington Industrial Safety and Health Act.

³ <https://www.goodfruit.com/late-and-later-cherries/>.

⁴ <https://www.hindawi.com/journals/jir/2015/678164/>.

offers three ways of complying with bed spacing, including the use of plastic barriers when beds are not six feet apart.

None of the three methods of bed spacing change the existing square footage requirements, which allows housing with only 50 square feet of floor space per occupant. WAC 246-358-029. The best available evidence is that allowing no more than two people per room of 150-200 square feet is necessary to meaningfully reduce the risk of transmission of COVID-19, and that use of plastic barriers to separate beds may cause poor ventilation, increasing risk of respiratory infections.⁵ Some people may be more susceptible to contracting coronavirus during sleep, particularly in poorly ventilated rooms inhabited by infected individuals.⁶

For older workers (50+) and those with preexisting conditions (e.g., hypertension, diabetes, asthma, tuberculosis) the best available evidence requires strictly following housing guidelines of no less than 1 person per room of 150 square feet.⁷ The rules should be re-written so that operators are required to provide these high-risk workers with separate housing.

Six Foot Exemption Using Plexiglass and Plastic Sheeting Should Be Eliminated – Section (1)(b)(i)(B)

Subsection (1)(b)(i)(B), as it currently reads, is vague and unclear. It may allow for two beds to be positioned closer than 6 feet (“a bed length”) if there is a barrier between the two beds that allows for a minimum 36-inch aisle. This does not make sense. If both beds have a 36-inch aisle between the bed and the barrier, added together that is 72 inches, or, six feet. Because the rule is ambiguous, it should be removed or re-written to be understandable and enforceable.

Assuming the rule allows camp operators to place beds closer than six feet if plexiglass or plastic sheeting is used, it relies on “bed-length, floor to near-ceiling” plastic barriers which present multiple concerns and should not be allowed. First, “plastic sheeting” is likely to take the form of inexpensive shower curtains, which are easily damaged. Second, there is no requirement that the sheeting or other plastic be affixed to the wall at the head of the bed, creating an impermeable barrier. Third, the creation of such impermeable plastic cubicles, which would seem necessary to stop the movement of airborne droplets, would also nearly guarantee poor ventilation for those sleeping in the beds, causing occupants to modify the barriers in unsafe ways, especially concerning in housing that lacks air conditioning.

Finally, even if these barriers are installed properly and maintained throughout the season, the rule is also vague about the cleaning required. Section (1)(b)(iv), while stating they must be cleaned on a daily basis, fails to specify who should do the cleaning, what training they must have, and what protective equipment they must employ. Farmworkers should not be relied upon to conduct critical environmental cleaning because they lack proper training, protection, and supervision. Requiring these workers to clean without adequate training and protective

⁵ April 14, 2020 Hajat and Karr Declaration, PAR 0277 at ¶10; April 27, 2020 Hajat and Karr Comments, at pp. 1-2.

⁶ <https://www.cnn.com/2020/03/12/opinions/coronavirus-vulnerability-while-sleeping-bruce-davidson/index.html>.

⁷ PAR 0278 at ¶18.

equipment⁸ deviates from best practices and increases the likelihood that COVID-19 will be spread, workers will become infected, and some will become symptomatic with the attendant risks of serious illness or death.⁹

Insufficient Washing Facilities – Section (1)(b)(ii)

Section (1)(b)(ii) does not increase the current number of required sinks or showers per resident (currently 1 sink per six people and 1 shower per 10 people – WAC 246-358-029), but allows for plastic shields between “fixtures such as sinks where occupants may come in close contact for short periods of time.” As proposed in the initial request for emergency regulations, sink and shower ratios should be changed so that there is one sink for every three residents to allow for frequent handwashing while respecting social distancing, and the shower ratio should be 1 shower for each 5 residents to allow for bathing immediately upon returning from work. Experts from the University of Washington support increasing the number of sinks and showers to “help in reducing transmission [of COVID-19] and is recommended.”¹⁰ Portable sinks and shower facilities could be brought in to meet those ratios.

Additionally, the “plastic shields” to be used between sinks have no size requirements and the term plastic shield is vague. Camp operators could potentially use a cheap shower curtain, which would be difficult to keep in place and clean on a daily basis. The rule should be rewritten to provide operators with more clarification on specific requirements that promote farmworkers’ health and safety.

Essential Outreach to Farmworkers in Labor Camps Should Not Be Discouraged – Section (1)(b)(ii)

Outreach work is a vital service to farmworkers living in isolated, rural labor camps. Both state and federal law allow outreach workers to access labor camps and H-2A employers are required to affirm under oath that access will be permitted.¹¹ As written, section (1)(b)(ii) could be used to prevent outreach workers from any entry into labor camps. The proposal should be rewritten to enable continued outreach if social distancing is employed and visitors have masks and gloves to protect against the spread of COVID-19.

Tents Should Not Be Permitted as Alternative Housing – Section (1)(b)(v)

Section (1)(b)(v) allows tents to be used as alternative housing for farmworkers during the COVID-19 crisis. This section should be eliminated and the only alternative housing that should be allowed is in FEMA-type trailers or hotel housing. The best available evidence shows that the use of tents will increase the danger of the spread of COVID-19 for a multitude of reasons as

⁸ April 27, 2020 Hajat and Karr Comments, at p. 2.

⁹ PAR 0277 at ¶12.

¹⁰ April 27, 2020 Hajat and Karr Comments, at p. 2.

¹¹ *State v. Fox*, 82 Wn.2d 289, 510 P.2d 230 (1973) (union worker and lawyer right to visit labor camp); *Najewitz v. Seattle*, 21 Wn.2d 656, 658, 152 P.2d 722, 723 (1944) (employee who lives on land in exchange for labor considered a tenant); 20 CFR § 653.501(3).

outlined below. Moreover, Washington law prohibits the use of tents for H-2A workers under the existing cherry harvest temporary labor camp regulations.¹²

The proposed emergency regulations would allow farmworkers to be housed in tents from May to November – the span of many H-2A contracts in Washington. Although the proposed temporary rules stand to remain in effect for 120 days, there is no possibility of a vaccine for COVID-19 being developed by that time, and health experts predict a second wave of infections in the fall.¹³ Given this reality, potentially hundreds if not thousands of H-2A workers could be housed in tents when emergency rules would be set to expire in August with no alternative housing plan in place. Thus, there will be tremendous pressure to extend the emergency use of tents until the end of the harvest season. Therefore, once tents are implemented it will be difficult to take them away.

The use of tents from May through November means that they would be used both in hot and cold temperature months, with no provision for either cooling or heating. Under current regulations, tents used only during the cherry harvest are exempt from WAC 296-307-16145(18), which requires camp operators to provide all habitable rooms with equipment capable of maintaining a temperature of at least 70 degrees Fahrenheit during cold weather. Using tents during cold weather would violate OSHA regulations which require that “[i]f a camp is used during cold weather, adequate heating equipment shall be provided.” 29 CFR § 1910.142(b)(11).¹⁴

Additionally, under current WAC 296-207-16147(9)(c), which only requires one separate floor-type or wall-type convenience outlet, workers would likely use space heaters and overload electrical circuits thereby creating a fire and safety hazard. Moreover, there is no requirement in either existing or proposed regulations that camp operators provide warm bedding, thus, workers would be at risk for hypothermia during cold desert nights in eastern Washington where 90% of H-2A workers reside.

Even if tents were restricted to use during hot summer months under the emergency regulations, they would pose significant health and safety problems. Under existing regulations for cherry harvest tent housing, tents are exempt from WAC 296-307-16145(c), which requires “mechanical ventilation [in all habitable rooms] in accordance with applicable standards from the American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE).” The proposed emergency regulation has no provision for cooling *any* habitable room, let alone sleeping areas. Given that daytime temperatures can routinely sit above 90 degrees F and often

¹² RCW 70.114A.110(2); *see also*

<https://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/TemporaryWorkerHousing/PermittedLandUse/Tents> (stating “it’s prohibited to use tents to house workers brought in by the H-2A Program”).

¹³ <https://www.cnn.com/2020/03/31/us/coronavirus-vaccine-timetable-concerns-experts-invs/index.html> (COVID-19 vaccine within 1 year to 18 months is optimistic); <https://newsnetwork.mayoclinic.org/discussion/why-a-mayo-clinic-expert-has-concerns-about-second-wave-of-covid-19/> (Mayo clinic worried second wave of COVID-19 that could emerge later this year and make for an even more dire health crisis).

¹⁴ While the State may make substitute housing arrangements using rental or public housing, tents are not contemplated as such a substitute. *See* 20 CFR § 655.1304(d)(7).

exceed 100 degrees F, especially in Eastern Washington, this means canvass-style military tents will be extremely hot inside without any air conditioning.

In cherry labor camps with tents, farmworkers often stay outside their tents until very late at night due to the excessive temperatures in tents that build up over the day. Some farmworkers even sleep outside their tents for this reason. This may lead workers to congregate outside in available shade waiting for tents to cool down at night. Farmworkers require adequate rest, which is impossible to achieve in hot tents. Proper rest is a critical component to maintaining one's health and wellbeing, and studies have shown proper sleep leads to improved immunity against infections.¹⁵

Washington state officials are predicting that Washington will have a significant drought in 2020 and that there is the potential for large wildfires in eastern Washington by July.¹⁶ Experts from the University of Washington have also begun to link an increase in mortality rates from exposure to wildfire smoke.¹⁷ Again, even assuming tents are somehow limited to the end of August, the use will occur right in the middle of Washington's wildfire season. This would create a crisis on top of a crisis as farmworkers living in hot tents with no air conditioning would lack a place to shelter from the smoke.¹⁸

Moreover, existing tent housing regulations only require one ventilation window per tent. WAC 296-207-16147(8)(a). That window must be located opposite the tent door and only requires that it open half-way. If there are forest fires this summer, even minimal ventilation will be lost as workers will keep windows and doors closed to prevent smoke from filling the inside of the tent. Thus, workers will likely seek shelter from the smoke in congregate facilities, if available, with no social distancing, increasing the risk of COVID spread. Workers' health will also be at risk in tents since tent doors would have to open for ingress and egress on a regular basis, enabling smoke to enter the interior of the tent and occupants to inhale smoke.

The proposed emergency rules' reliance on existing tent regulations also means that up to 15 workers may be housed in a tent. WAC 296-207-16147(1). Those same regulations only require one electrical outlet per tent, WAC 296-207-16147(9)(c), which in a tent housing more than one person will lead to use of extension cords and multiple power strips to power phones and other electronic devices, creating electrical fire hazards as well as dangerous tripping hazards.

In addition, existing tent regulations only require 50 square feet per person, WAC 296-207-16147(6)(b), which as discussed above is insufficient to prevent COVID spread under best

¹⁵ <https://www.hindawi.com/journals/jir/2015/678164/>.

¹⁶ <https://www.kuow.org/stories/looking-ahead-to-washington-s-summer-hotter-and-drier-than-normal> (state meteorologist predicts bigger threat from wildfires in 2020); <https://www.kdrv.com/content/news/National-fire-agency-predicts-significant-large-fire-potential-for-Oregon-and-Washington-this-summer-569455711.html> (federal fire agency predicts large potential wildfires in eastern WA in July 2020).

¹⁷ http://www.dailyuw.com/science/article_16af908e-722b-11ea-a91e-3b85b2dda22a.html (UW study finds wildfire smoke poses mortality risk to some in Washington).

¹⁸ See <https://www.doh.wa.gov/CommunityandEnvironment/AirQuality/SmokeFromFires> (discussing dangers from overheating and, if air condition is lacking, recommending closing windows, curtains or shades, using portable fans or tracking air quality, none of which are viable options for H-2A workers during the COVID-19 pandemic, particularly as use of fans can increase spread of disease).

available evidence. Further, there is no requirement that tents meet 296-307-16145(13)(c), which requires a minimum of 100 square feet if occupied as a family shelter. Therefore, tents used under the proposed emergency regulations would prohibit families from using those shelters or require them to live in less protective housing given there would be less social distancing allowed than under non-tent housing regulations.

Lack of Isolation Option for Families – Section (1)(d)

Section (1)(d) states that persons suspected of having COVID-19 must be isolated, unless the person resides with family members. This would appear to exclude those residing in family housing from accessing isolation sites if they have COVID-19 symptoms or test positive. The rules should be re-written to allow families residing together to have the option of moving into isolated housing, if they so choose.

This section also requires operators to isolate workers suspected of having COVID-19, to contact the local health officer, and to transport these workers for medical evaluation or treatment. By referring to compliance with WAC 296-307-16190, immediacy is implied, at least with regards to contacting the local health officer and providing transportation for evaluation and treatment. The rules would be clearer if re-written to include “immediately” or “as soon as practicable” for all provisions under section (1)(d).

Lack of Housing Inspections – Section (2)

Section (2) requires “Operators must revise their written TWH management plan to include implementation of the above requirements. The plan must identify a single point of contact for COVID-19 related issues. The revised TWH plan must be submitted to the Department of Health for the initial review by May XX, 2020. Failure to submit a revised plan will result in license revocation.” This rule does not appear to require any inspection of housing. This is in violation of H-2A rules requiring that the states inspect housing to ensure that “the housing meets the statutory criteria applicable to the type of housing provided . . .” See 20 CFR § 655.1304(d)(6)(iii). Moreover, the kinds of permissible housing modifications in the proposed rules, particularly temporary barriers constructed of plexiglass or plastic sheeting, or as in section (1)(b)(i)(C) some other unidentified “engineering controls,” are susceptible to faulty installation and should be inspected before use is allowed. DOH should re-inspect all licensed farmworker housing and any unoccupied housing should be required to meet all standards before a certificate of occupancy is granted.

Under federal rules, states, through their State Workforce Agencies (SWAs), must inspect H-2A housing and certify that it meets housing requirements under the H-2A program prior to occupation. “The SWA *must* make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under INA sec. 218(c)(3)(A), which is 30 days before the employer’s date of need.” 20 CFR § 655.1304(d)(6)(iii) (emphasis added). Not only is Washington required to inspect and certify housing, but federal rules expressly provide that “SWAs must not adopt rules or restrictions on housing inspections that unreasonably prevent inspections from being completed in the required time frame, such as rules that no inspections will be conducted where the housing is already occupied or is not yet leased.” *Id.* The proposed

rule does not provide for inspection of housing and is therefore in express conflict with federal law. Indeed, even if “the SWA has failed to complete a housing inspection by the statutory deadline of 30 days prior to date of need The SWA *must* in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards.” 20 CFR § 655.1304(d)(6)(iii) (emphasis added). The State’s proposed rule to provide for no inspection or re-inspection of housing adopted under these emergency rules as proposed is therefore in clear conflict with federal H-2A requirements.

Need to Specify Who Pays for Food in Isolation – Section (1)(d)(iv)

Section (1)(d)(iv) provides that the “operator must provide food and water” for isolated workers. The rules must be re-written in order to make clear that the housing operator is required to pay for the food and water supplied. Many workers will presumably be without income and otherwise unable to obtain food or water for themselves during isolation.

Lack of Masks

The proposed rules lack a requirement to provide masks to occupants. The CDC now recommends, based on the best available evidence, that individuals use protective masks if the person will be in close contact with others, or where social distancing (at less than 6 feet distance) is difficult to maintain.¹⁹ Based on the proposed rules, it is clear that social distancing may be challenging for farmworkers due to provisions enabling close quarters and shared cooking and bathing facilities. Therefore, housing operators should provide masks that cover workers’ noses and mouths and request that all workers wear masks when social distancing is difficult to maintain.

No Increased Protections in Common Cooking Areas

The current regulations for farmworker housing related to common cooking areas are incompatible with social distancing and the best available evidence to prevent the spread of COVID-19. Those regulations only require refrigeration that provides for two cubic feet of storage space per occupant and will mean multiple workers are sharing common refrigerators, thus increasing the spread of COVID-19. WAC 296-307-16165(2)(g). It will also require workers to shop more frequently due to space limitations in refrigerators, thus increasing contact with the general public. Additionally, WAC 296-307-16165(3)(c) only requires four cooking surfaces for every ten workers and will lead to multiple workers sharing common stoves, making it highly impracticable for workers to maintain social distancing during mealtimes.

The emergency regulations should require additional stoves and refrigeration to allow for social distancing at mealtimes. Again, if FEMA-approved trailers were brought in, those additional facilities would be included. Or, if workers were housed at motels, it is possible that there would be kitchen facilities available in those units. Another alternative would be to bring in portable facilities for the 2020 season to ensure proper distancing actually happens.

¹⁹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.

Insufficient On-Site Laundry Facilities

Current labor camp regulations only require one washing machine or laundry tub/tray for every 30 occupants. WAC 296-307-16150(1)(a). There is no requirement to provide dryers. This is insufficient to allow workers to launder clothing without having to go to a public laundromat, thus increasing the spread of COVID-19 in the community. It also does not allow for frequent washing of clothes and bedding to minimize the spread of the disease.

Lack of Worker Notification

The proposed rules lack a requirement for employers or housing operators to ensure that co-workers be informed when others test positive for COVID-19. The rules should require that operators or employers immediately notify all workers who have been in contact with confirmed COVID-19 case, isolate them if they are still employed at the work site, and test them, following CDC guidelines for contact tracing.

Additional Materials for the Emergency Rulemaking Record

In addition to the above comments and related supporting articles, we include the entire set of communications that we provided to your agencies with the initial request for emergency rulemaking and filed with the Skagit County Superior Court and labeled as PAR 0001-0304.

Conclusion

Again, we appreciate your departments have taken a significant step forward to protect farmworkers by agreeing to promulgate emergency rules for housing, but based on best available evidence and our own expertise we do not find these proposed rules to be sufficient. We urge you to adopt the above changes to your proposed emergency rules to protect farmworkers from the grave health dangers from COVID-19.

COLUMBIA LEGAL SERVICES

s/ Andrea Schmitt
Andrea Schmitt, Attorney
711 Capitol Way South, Suite 706
Olympia, WA 98501
(360) 943-6260

COMMUNITY TO COMMUNITY

s/ Rosalinda Guillen
Rosalinda Guillen, Executive Director
203 West Holly Street, Suite 311
Bellingham, WA 98225
(360) 738-0893

FAMILIAS UNIDAS POR LA JUSTICIA

s/ Ramon Torres
Ramon Torres, President
P.O. Box 1206
Burlington, WA 98233
fuj@qwestoffice.net

UNITED FARM WORKERS

s/ Erik Nicholson
Erik Nicholson, National Vice President
29700 Woodford-Tehachapi Road
P.O. Box 62
Keene, CA 93531
(661) 823-6105

