

May 20, 2020

VIA ELECTRONIC MAIL

The Honorable Jay Inslee
Office of the Governor
PO BOX 40002
Olympia, WA 98504-0002

Re: Request for Repeal of Emergency Temporary Worker Housing Provisions

Dear Governor Inslee:

We write on behalf of our client, farmworker union Familias Unidas por la Justicia (FUJ), to request the immediate repeal of certain emergency farmworker housing rules. Parts of the rules as adopted are not based on the best available scientific evidence and ignore the state's duty to protect workers' health.¹ In particular, we object to the fact that farmworkers can be forced to sleep in bunkbeds in situations in which they have been involuntarily placed in 15-person "groups" by housing providers, despite the fact that the state acknowledges bunkbeds increase their risk of COVID-19 infection. We also object to the lack of proactive testing, the use of plastic sheeting as a barrier, the lack of training and protection for workers asked to clean their own housing, the failure to provide for additional cooking facilities, and the lack of inspection of housing that has been modified to meet COVID-19 standards after having been licensed.

Agricultural employers plan to bring in approximately 30,000 H-2A farmworkers from Mexico this year. This represents about a third of the hand-harvest workforce in the state. The COVID-19 threat in housing disproportionately affects H-2A temporary agricultural workers, as their only option is to live in employer-provided group housing.

¹ The Washington Industrial Safety and Health Act requires the adoption of rules that "most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health . . ." RCW 49.17.050(4). We request that the state repeal WAC 246-358-002(1)(d)(i)(B) and WAC 296-307-16102(1)(d)(i)(B), WAC 246-358-002(1)(e) and WAC 296-307-16102(1)(e), WAC 246-358-002(3) and WAC 296-307-16102(3) and that the state rewrite WAC 246-358-002(1)(d)(ii) and WAC 296-307-16102(1)(d)(ii); WAC 246-358-002(1)(d)(i)(C)(iii) and WAC 296-307-16102(1)(d)(i)(C)(iii); WAC 246-358-002(2)(c) and WAC 296-307-16102(2)(c), should be rewritten so that the rules protect worker health.



THE ALLIANCE
for Equal Justice

H-2A workers are the most vulnerable farmworkers as they have fewer legal rights than even undocumented farmworkers,² and they are far from home, isolated, and completely reliant on their employer for work, shelter, and transportation. Retaliation against H-2A workers who complain is easy and rampant; an employer can exclude a worker from future jobs in an instant by simply refusing to put the name of the worker on a list sent to labor recruiters in Mexico. H-2A visas tie workers to one employer, so if working and living conditions do not match what was promised, they have no legal right to change employers. Their only “choice” is to self-deport. However, H-2A workers rarely complain because of their extreme poverty, the fact that they borrow money to cover the costs of getting an H-2A job, and their complete dependence on their employer for their current and future livelihood.

H-2A workers come from some of the most impoverished rural communities in Mexico - from Oaxaca in the south, Tamaulipas on the Gulf Coast, Nayarit on the Pacific Coast, and Guanajuato in Central Mexico – just to name a few. None of these workers will be tested for COVID-19 before they leave Mexico nor upon arrival. Most have no health insurance at home, and they will not be provided with health insurance when they arrive in Washington. A tiny portion of those workers are related to each other; most are unrelated men, traveling without their families.

H-2A workers’ journey to Washington involves extensive contact with others. They make long trips on busses to get to the border and stay in motels for several nights before being issued visas to enter the United States. After entering the United States, they are transported again by bus to Washington state – another 20+-hour ride. Whether those workers have masks and are provided with sanitizing products is anyone’s guess. Whether physical distancing will be required or enforced at any time along that journey is unknown. There is no known system for contact tracing.

Use of Bunk Beds – Disregarding the Best Available Scientific Evidence

H-2A workers are housed in congregate facilities, primarily in bunkbeds that would provide a maximum of 3-3.5 feet between occupants of the upper and lower bunk. Attached are pictures of licensed H-2A labor camp housing in Washington that show how close bunkbeds are placed. Exhibit 1.

The rules as published allow housing operators to use bunkbeds with groups of 15 workers, destroying the basic protections created in the emergency rules and contradicting the scientific evidence the agencies had before them in drafting the rules.

On April 14, 2020, and again on April 27, 2020, we provided to both the Department of Labor and Industries and the Department of Health detailed comments to proposed temporary housing regulations that included a declaration and, later, a letter from two University of Washington epidemiological experts, Drs. Hajat and Karr, Exhibits 2 and 4.

² H-2A workers are excluded from the protections of the federal Migrant and Seasonal Agricultural Worker Protection Act – the primary farmworker protection law in the country. Undocumented workers are protected by this law.

Dr. Hajat received her PhD in Epidemiology from the University of North Carolina and her Masters in Public Health (MPH) degree from the University of Michigan. She worked in public health practice, at a local health department, and the Centers for Disease Control, for seven years prior to joining academia. She has been a public health professional for 14 years. Her current research focuses on the health of low wage workers.

Dr. Karr received her PhD in Epidemiology, Masters of Science (MS) in Environmental Health, and Medical Degree (MD) from the University of Washington. She has been on faculty at the University of Washington in the School of Medicine and School of Public Health since 2004. She is also a practicing general pediatrician at UW Medicine Pediatric Care Center. Her current research includes a focus on the health of farm worker children.

Their April 14, 2020 declaration concluded that migrant farmworkers, such as H-2A workers from Mexico described above, should not be allowed to sleep in bunkbeds (with workers occupying both the upper and lower bed) and that additional space was necessary (75-100 square feet per worker rather than 50 square feet) to protect farmworkers from COVID-19. The report specifically stated:

- “Housing facilities that ensure one or no more than two persons per room of 150-200 square feet are necessary to meaningfully reduce the risk of transmission of COVID-19 in farmworker housing.” Exhibit 2, p.3, ¶ 10.
- “If individual rooms are impractical, the numbers of farmworkers per room should be reduced and beds should be separated by 6 feet.” *Id.*
- “Bunk beds that cannot meet this standard should be disallowed.” *Id.*

The emergency rules start by stating “only the bottom bed of bunk beds may be used,” but that is paired with a large loophole. Without explanation, and despite having the above expert opinions from independent epidemiologists who work with low wage workers and farmworker families, state agencies adopted final rules that allow agricultural employers to house up to 15 unrelated migrant farmworkers in one bedroom, in top and bottom bunks, with no additional square footage. WAC 296-307-16102(1)(e) and WAC 246-358-002(1)(e) (hereinafter (1)(e)).

The Department of Health’s own staff does not support the use of bunkbeds. In an April 7, 2020 email, Douglas Hartfield from the DOH’s Environmental Public Health Division wrote, in response to a request from agricultural employers to use a modified bunkbed with plastic shields on three sides of the lower bunk and a curtain for privacy: **“this still has people less than 6 feet apart, and will not somehow stop or slow the virus transmission.”** Exhibit 3 (emphasis added). DOH’s own staff would not support the use of bunkbeds even with extra barriers, thus these same bunkbeds cannot be safe without any barriers at all, as the emergency rules allow for “group housing.”

The agencies may argue that because the regulations contemplate the use of cloth masks in the housing, this will help prevent the spread of COVID-19. However, the final emergency rules simply state that the housing operator “instruct occupants to . . . wear cloth face coverings

whenever possible,” (1)(e)(D)(ii), and occupants surely can’t be expected to wear them in their sleep.

Not only are the bunkbed rules bad science, they are bad policy. The “15-person group” loophole means that some housing residents who are not put in “group housing” will be protected by the best available science, while others forced into “groups” will not. That unequal treatment is exacerbated by the fact that H-2A employers can unilaterally choose to designate which employees receive less protection. There is no provision in the rules that permits a worker to object to such arrangements, no requirement that workers be told in advance that they will be put in higher-risk housing, no anti-retaliation protections for workers who do speak up, and no proactive on-the-ground governmental oversight.³ Thus, an H-2A worker with an underlying health condition⁴ and no health insurance could be unilaterally forced to sleep in the upper bunk in a room with 14 strangers, none of whom have been tested for COVID-19.

Rules that effectively allow housing operators to carry on as though it is “business as usual” tell farmworkers that their lives are not worth the economic impact of protective rules. The racial undertones of this situation are stark. Farmworkers are overwhelmingly non-white, are non-English speakers, and have historically been excluded from basic labor protections. It is impossible not to conclude that these rules were adopted because they benefit an agricultural industry that is almost exclusively owned and operated by politically powerful white individuals, while the rules’ effects fall squarely on impoverished people of color.

Group Shelter – A Fundamentally Flawed Housing Alternative

The group housing rules are further premised on the unwarranted assumption that housing operators can control an employer’s behavior. TWH group housing operators must ensure “that members of each shelter group stay together and separate from other groups, occupants, or workers, including during transportation and work. If the operator is not the employer, *the operator must ensure the employer will follow the group shelter requirements.*” (1)(e)(iii) (emphasis added). Because the rules do not provide a clear path to liability for violations when an employer ignores a housing operator’s instruction to keep groups together, it is likely that no one will be held accountable for workplace failure to adhere to housing groups.

The regulations also simply “encourage” each cohort to designate one or two occupants to run errands (shopping and banking) for the group. (1)(e)(D)(iv). As applied, these standards fail to acknowledge the reality of being a farmworker living in temporary housing. H-2A temporary farmworkers do not have their own transportation and rely on their employer to be transported to the stores and banks in rural towns throughout the state. It is unreasonable for an employer to encourage the group housing occupants to assign one or two persons to run

³ The final rules only require a housing operator to submit a revised management plan to DOH, with no agency re-inspection. WAC 246-358-002 (2)(c) and WAC 296-307-16102(2)(c).

⁴ The final rules also ignore the UW expert report that states: “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.” Ex. 2, ¶ 18. This provision should be added to the final rules.

errands when most workers need to make financial transactions to send money to their families.

Lack of Proactive Testing Endangers Workers

The group housing rules are premised on the unwarranted assumption that H-2A workers who have traveled together on a bus from Mexico to Washington will arrive COVID-19 free. This assumption is unwarranted because neither the State of Washington nor the federal government require COVID-19 testing for H-2A workers before they enter the United States or occupy temporary worker housing. Because there will be no testing, each fifteen-worker group may contain one or more asymptomatic workers thus placing every group at risk.

In fact, COVID-19 testing as contemplated by the rules, is reactive, not proactive. The group housing rules require TWH group housing operators “to quarantine *or* test all members of a group shelter *if a member of the group shelter develops symptoms of COVID-19*, as directed by the local health agency.” (1)(e)(v)(emphasis added). (1)(e) is silent about whether asymptomatic group members will be allowed or required to work pending testing results. Proactive testing is necessary to make group housing a viable alternative.

Plastic Sheeting Should Not Be Allowed; Plexiglass Should Not Be Used in Sleeping Quarters; Responsibility for Cleaning Must Be Clear

The final rules allow for certain protections--social distancing and six-foot separation between bunkbeds--to be ignored if plexiglass or plastic sheeting is used, and the temporary barriers are cleaned at least daily, at least daily, WAC 246-358-002(1)(d)(i)(B) and WAC 296-307-16102(1)(d)(i)(B), and allows for plastic barriers between sinks, WAC 246-358-002(1)(d)(ii) and WAC 296-307-16102(1)(d)(i). The regulations are silent as to who must clean these barriers, how cleaning should be performed, whether protective equipment is required, and whether cleaning time should be compensated. It is likely, given the power imbalances outlined above, that those cleaning tasks will fall on farmworkers despite the express opinion that these tasks should not be left to the workers by the UW experts.

Farmworkers should not be relied upon to conduct critical environmental cleaning because they lack proper training, protection, and supervision. Requiring these workers to clean deviates from best practices and will likely contribute to the spread of COVID-19 in farmworker workplaces, housing, and transportation.

Ex. 2, ¶ 12 (emphasis added).

The state must recognize that where housing operators are allowed to use “plastic shields,” or “plastic sheeting,” they will endeavor to use the least expensive shower curtains they can obtain. In the context of plastic sheeting in bathrooms, the experts noted: “[Thin plastic sheeting] is vulnerable to movement and will be more challenging to clean [than robust plastic].”

The risk is that these plastic barriers themselves will become a vector of transmission.” Exhibit 4, p. 3. Any provision allowing plastic sheeting must be eliminated.

Lack of Increased Cooking and Food Preparation Facilities

Under group housing, “all facilities and services within the group shelter are for the sole use of the occupants of the group shelter.” (1)(e). TWH group housing operators, however, are not required to establish private cooking facilities for these separate cohorts. Instead, it appears that TWH group housing operators can establish common kitchen and food preparation areas as long as the operator figures out a way to keep the groups separate at mealtimes. As a result, housing operators will necessarily establish cooking and cleaning schedules that are an extraordinary burden on workers who are hungry and tired after working a long day in the fields. Or, housing operators will not establish any schedules and group housing workers will intermingle with other group housing cohorts, and potentially, with workers not in group housing if a farm has both types of housing. Allowing a housing operator to provide a shared kitchen for group housing units can range from impractical to impossible.

(1)(e) is also not clear about whether workers in group housing would be allowed to share cooking and food preparation areas with workers who are not in group housing. (1)(e) requires group shelter to provide sleeping, toilet, and bathing facilities for each group designated for their use alone, but as far as food preparation and cooking facilities go, it is not clear whether food facilities are reserved for the group’s sole use. While the final rules encourage the provision of additional refrigeration or portable sinks, (1)(d)(i)(C)(iii), there is no mandate to do so.

Lack of Inspection

Despite allowing conditions that may require significant changes in housing from previous years or that was approved pre-COVID-19, the rules do not require re-inspection of housing facilities for licensing to be maintained. The rule only requires an operator to submit a revised management plan to the Department of Health—a “trust, but don’t verify” system. WAC 246-358-002(2)(c) and WAC 296-307-16102(2)(c). Farmworker advocates requested that all licensed labor camps be re-inspected for compliance as they were previously licensed without any COVID-19 protections in place, and the UW experts noted that lack of inspections was problematic. Exhibit 4, p. 3.

Rather than verifying that changes to housing have been made in a safe and compliant way, the system relies entirely on complaints from vulnerable H-2A workers, who, for the reasons explained above, are extremely unlikely to raise issues. Inspection should be required.

Variances a Threat to Safety

The rules also allow that: “[c]onsistent with WAC 296-307-16120(1) [and WAC 246-358-040(1)], an operator may request a temporary variance from the requirements of this section when another means of providing equal protection is provided.” WAC 296-307-16102(3) and WAC

246-358-002(3). In other words, the agencies may grant temporary variances from any requirement. Given that (1)(e) is at odds with UW's experts' advice as well as the agencies' own staff's analysis, and because, from a practical standpoint, (1)(e)'s provisions will be very difficult to enforce, no further variances should be allowed.

In light of the glaring deficiencies of the group housing rules, we respectfully request that you require DOH and LNI to immediately repeal WAC 246-358-002(1)(d)(i)(B) and WAC 296-307-16102(1)(d)(i)(B), WAC 246-358-002(1)(e), WAC 296-307-16102(1)(e), WAC 246-358-002(3) and WAC 296-307-16102(3). Additionally, the following rules should be rewritten: WAC 246-358-002(1)(d)(ii) and WAC 296-307-16102(1)(d)(ii), and WAC 246-358-002(1)(d)(i)(C)(iii) and WAC 296-307-16102(1)(d)(i)(C)(iii), and WAC 246-358-002(2)(c) and WAC 296-307-16102(2)(c).

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enclosures