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<input type="checkbox"/> Hearing set for:
Date: _____
Time: _____
Judge/Calendar: _____

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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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FAMILIAS UNIDAS POR LA JUSTICIA,
AFL-CIO, a labor organization,

10

Petitioner,

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vs.

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WASHINGTON STATE DEPARTMENT OF
LABOR & INDUSTRIES and
WASHINGTON STATE DEPARTMENT OF
HEALTH,

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Respondents.

No.

PETITION FOR JUDICIAL REVIEW,
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

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I. PRELIMINARY STATEMENT

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1. Familias Unidas por la Justicia, AFL-CIO (FUJ) seeks immediate injunctive relief to require the repeal of certain portions of emergency temporary farmworker housing rules adopted by the Department of Labor & Industries and the Department of Health related to the COVID-19 pandemic to protect the lives of all Washington farmworkers. FUJ also seeks immediate injunctive relief ordering the respondents to adopt rules consistent with duties imposed under RCW 49.17 *et seq.*

PETITION FOR JUDICIAL REVIEW,
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - 1

Columbia Legal Services
711 Capitol Way S #706
Olympia, WA 98501
(360) 943-6260
(360) 754-4578 (fax)

1 2. These emergency housing rules are WAC 296-307-16102 and WAC 246-358-002
2 which were filed with the Code Reviser on May 13, 2020. *See* Exhibit 1. These regulations are
3 duplicates, codified in both the Administrative Code Titles for the Department of Health and the
4 Department of Labor & Industries.

5 3. The way portions of the housing rules should be repealed and modified is set forth
6 in Exhibit 2. Specifically, Petitioner identifies the following arbitrary deficiencies in the rules:
7 failure to increase square footage per person, permitting the use of bunkbeds where both upper
8 and lower bunks are occupied by unrelated individuals, permitting the use of plastic sheeting as
9 “protective barriers,” failure to require proper ventilation, failure to assure adequate social
10 distancing in common cooking areas, and the failure to inspect housing modified to comply with
11 the emergency rules.

12 4. The emergency rules became effective on May 18, 2020. *Id.*

13 5. Washington adopted emergency rules allowing for bunkbeds despite the fact that
14 on May 11, 2020, Oregon implemented emergency housing rules for farmworkers that banned
15 the simultaneous use of upper and lower bunks of bunkbeds for unrelated workers. OAR 437-
16 001-0749(12)(aa)(K). <https://osha.oregon.gov/OSHARules/div1/437-001-0749.pdf>

17 6. FUJ asked Governor Inslee to repeal or modify certain provisions of the
18 emergency rules on May 20, 2020. *See* Exhibit 3.

19 7. Governor Inslee did not respond to this request.
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1 function as an autonomous Union . . .” Its principal mailing address is P.O. Box 1206,
2 Burlington, WA 98233.

3 12. Respondent Washington State Department of Labor & Industries (L&I) is
4 responsible for promulgating safety and health standards of general and specific application
5 governing the conditions of employment in all workplaces, including agriculture, pursuant to the
6 Washington Industrial Safety and Health Act, RCW 49.17 *et seq.*

7 13. Respondent Washington State Department of Health (DOH) is responsible for
8 licensing and inspecting temporary farmworker housing. RCW 43.70.334-.340 and RCW
9 70.114A *et seq.*

10 14. The principal mailing address for each respondent is P.O. Box 40121, Olympia,
11 WA 98504-0121 (L&I) and Town Center 3, 243 Israel Road SE, Tumwater, WA 98501 (DOH).

12 IV. STATUTORY AND REGULATORY BACKGROUND

13 15. DOH and L&I are required to adopt joint rules for the “licensing, operation, or
14 inspection of temporary worker housing [TWH], and the enforcement thereof.” RCW 49.17.310;
15 RCW 70.114A.065. These rules shall establish standards that are as effective as the standards
16 developed under the Washington Industrial Safety and Health Act (WISHA), chapter 49.17
17 RCW.

18 16. DOH adopted the challenged emergency rules, citing RCW 70.114A.065 as its
19 statutory authority.

20 17. L&I adopted the challenged emergency rules, citing as statutory authority the
21 following WISHA provisions: RCW 49.17.010, .040, .050 and .060.
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1 23. Washington agricultural employers plan to bring in approximately 30,000
2 farmworkers from rural, impoverished villages from all corners of Mexico this spring and
3 summer.

4 24. Agricultural employers will apply for non-immigrant, temporary H-2A work visas
5 for these workers from the United States government.

6 25. On information and belief, none of the H-2A workers will be tested for COVID-
7 19 before leaving their villages in Mexico, they will not be tested after a lengthy bus ride to the
8 border, nor will they be tested after being bussed from the border and their arrival in
9 Washington.

10 26. Agricultural employers typically house H-2A farmworkers in on-farm labor
11 camps that consist of dormitory-style housing where several hundred workers occupy tight
12 quarters (50 square feet per person). Upon arrival, the workers are assigned bedrooms with other
13 unrelated workers to sleep in bunkbeds. The labor camps have group cooking facilities (common
14 refrigerators; 10 workers per stove), and common bathing facilities (1 shower for each 10
15 workers; 6 workers per sink). They are commonly bussed to and from work daily in old school
16 buses or vans, and once a week to town for groceries and banking services.

17 27. H-2A workers are highly vulnerable for several reasons. Their work visas tie them
18 to a single employer, making them unable to seek work elsewhere if conditions are poor. There is
19 a large power imbalance between the workers and their employers because if a worker is fired,
20 they must return to their home country and pay their own transportation costs. They are
21 commonly and easily blacklisted from future employment if they speak up. They are far from
22 home, often isolated outside rural communities, and entirely dependent on their employers for
23

1 transportation and other basic needs. They almost always have significant language barriers and
2 lack knowledge of Washington-State systems and how to get help when they need it.

3 28. FUJ and others sent a plea to Governor Inslee on March 19, 2020 for emergency
4 orders to protect farmworkers from COVID-19 in their housing, transportation, and workplaces.
5 *See Exhibit 4.*

6 29. L&I and DOH responded on April 3, 2020 by putting forth non-binding guidance.
7 *See Exhibit 5.*

8 30. Frustrated by the failure to issue binding regulations to provide clear guidance to
9 protect farmworkers, FUJ and others petitioned L&I and DOH on April 6, 2020 to adopt
10 emergency rules pursuant to RCW 34.05.350(1)(a) no later than April 10, 2020 to protect
11 farmworkers' lives and their health. *See Exhibit 6.*

12 31. Instead of adopting emergency rules, L&I staff attended a public meeting on
13 farmworker issues on April 9, 2020 and provided updated drafts of non-binding "Fact Sheets"
14 largely consisting of suggested best practices. In that meeting, DOH admitted that it had already
15 licensed virtually all labor camps based on its existing rules, i.e., without taking into account the
16 existence of COVID-19. *See Exhibit 7.*

17 32. Drs. Anjum Hajat, Ph.D., MPH, and Catherine Karr, Ph.D, M.S., M.D., two
18 University of Washington epidemiologists, reviewed the April 9, 2020 Fact Sheets. Their
19 professional opinions on the Fact Sheets and other relevant matters were sent to the agencies on
20 April 14, 2020 and are attached as Exhibit 8.

21 33. As to the housing guidance, Drs. Hajat and Karr wrote:
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- 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.
- If individual rooms are impractical, the numbers of farmworkers per room should be reduced and beds should be separated by 6 feet.
- Bunk beds that cannot meet this standard should be disallowed.

34. On April 15, 2020, nearly four weeks after farmworker groups first wrote to Governor Inslee, and because the agencies' decided to pursue non-binding guidance instead of binding regulations, FUJ filed a petition for judicial review in Skagit County Superior Court. The cause number is 20-2-00368-29.

35. A copy of the Skagit County petition is Exhibit 9.

36. The purpose of the Skagit County case was to compel L&I and DOH to adopt emergency rules related to the COVID-19 to protect the lives of all Washington farmworkers.

37. The parties will soon execute a final order in the Skagit County case, as the state has now responded to the farmworkers' requests for safety mandates on farmworker housing, transportation, and workplaces.

38. On April 23, 2020, the agencies circulated draft emergency farmworker housing rules for comment. *See* Exhibit 10.

39. Drs. Hajat and Karr sent comments on these draft rules to the agencies on April 27, 2020. *See* Exhibit 11

40. Drs. Hajat and Karr opined in those comments, in part, that:

- Recent evidence regarding density and transmission of upper respiratory infections (URI) indicates that an increase in space by 100 square feet reduced URI by almost 13%. Thus from this

1 paper and other evidence, allowing no more than two people per
2 room of 150-200 square feet is needed to meaningfully reduce
the risk of transmission of COVID-19.

- 3 • More stringent protections are needed for farm workers at highest
4 risk of severe disease. The CDC recognizes individuals over age 65
5 years of age are higher risk of severe health consequences. In
6 addition, workers of any age with preexisting conditions including
7 chronic lung disease, moderate to severe asthma, serious heart
8 conditions, immunocompromised states, severe obesity, diabetes,
9 chronic kidney disease or liver disease are at highest risk of severe
10 health consequences. Research indicates that farmworkers have a
higher prevalence of TB and have higher exposure to agricultural
11 dust which has been shown to result in a variety of respiratory
12 conditions. These conditions which may be more unique to
13 farmworkers would put them at higher risk for complications of
14 COVID-19. We recommend that such high risk individuals not be
15 housed with more than 1 person per room of 150 square feet.
- 16 • Plastic barriers: The extent to which these barriers will impede
17 ventilation and air flow is unknown. However, this must be
18 monitored closely and if found that these barriers do impede
19 ventilation/air flow a new solution must be found.
- 20 • It is critical to ensure that the plastic barriers to be used for sinks are
21 robust and durable rather than thin plastic sheeting. The latter is
22 vulnerable to movement and will be more challenging to clean. The
23 risk is that these plastic barriers themselves will become a vector of
transmission.
- This rule does not appear to contemplate inspection of housing.
Providing a provision for inspection, including by video as a means
of protecting inspectors, would increase assurance that barriers used
and other unidentified “engineering controls,” achieve the intent of
this rule to reduce transmission.

41. After Skagit County Superior Court Judge Dave Needy scheduled a review
hearing for June 14, 2020 to examine the state’s progress, the agencies promulgated the
emergency housing rules on June 13, 2020. *See Exhibit 1.*

1 42. The adopted emergency rules ignored Drs. Hajat and Karr’s April 14th and April
2 27th expert opinions.

3 43. Contrary to Drs. Hajat and Karr’s expert opinions, the emergency rules permit:

- 4 • Workers to be required to sleep in top and bottom bunks;
- 5 • Workers to be required to sleep less than six feet apart;
- 6 • Workers to be housed in rooms that are too small;
- 7 • The use of thin plastic sheeting for protective barriers;
- 8

9 44. The emergency rules also failed to provide additional space in common cooking
10 facilities and failed to provide specific standards for ventilation in sleeping areas.

11 45. On information and belief, no DOH staff with expertise in epidemiology or public
12 health expertise disagreed with Drs. Hajat and Karr’s opinions.

13 46. In fact, DOH staff dismissed a request for permission to use bunkbeds with plastic
14 and fabric barriers, saying that plan “still has people less than 6 feet apart.” *See* Exhibit 12.

15 47. The emergency rules also ignore Dr. Hajat and Karr’s opinions about other living
16 conditions including common bathing and cooking facilities.

17 48. The emergency rules permit agricultural employers to unilaterally force H-2A
18 farmworkers to sleep in bunkbeds in rooms with up to fifteen unrelated persons.

19 49. Once assigned, these unrelated groups of workers are required to spend all their
20 time together.

1 50. On information and belief, H-2A workers will not be notified prior to leaving
2 Mexico or arriving in Washington State that being placed into mandatory fifteen-person groups
3 with dangerous housing conditions may be a requirement of their employment.

4 51. On information and belief, the agencies failed to gather adequate scientific
5 information about ventilation necessary to protect occupants of congregate housing.

6 52. Respondent L&I has a non-discretionary duty under chapter 49.17 RCW to
7 regulate conditions of employment and places of employment/workplaces. Respondent DOH has
8 a non-discretionary duty under RCW 70.114A.065 to promulgate standards in temporary
9 farmworker housing consistent with chapter 49.17 RCW.

10 53. The agencies developed a revised checklist to determine whether a facility
11 complies with the emergency regulations. There is nothing in the checklist that states the use of
12 both upper and lower bunks of bunkbeds is prohibited unless a housing operator fully complies
13 with all group housing requirements. *See* Exhibit 13.

14 54. No state agency plans to inspect farmworker housing before it is occupied to
15 determine if that housing meets the requirements of the emergency rules.

16 55. On information and belief, no state agency plans to enforce the requirements of
17 the emergency rules *unless* that agency receives a complaint.

18 56. H-2A workers are unlikely to make complaints due to the power imbalance
19 between them and their employers and their fear of retaliation for making complaints.

20 VI. EXHAUSTION, TIMELINESS OF PETITION, AND IRREPARABLE INJURY
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VIII. REQUEST FOR RELIEF

Petitioners respectfully request that the Court:

Assume jurisdiction of this case.

Enter declaratory judgment pursuant to RCW 34.05.574 and RCW 34.05.570(2) finding that the challenged portions of the emergency rules interfere with or impair or immediately threaten to interfere with or impair the legal rights or privileges of the petitioner, and that those challenged portions are arbitrary and capricious.

Enter declaratory judgment pursuant to RCW 34.05.574 finding that petitioner has met the requirements of RCW 34.05.570(1) and (2).

Enter a Permanent Injunction pursuant to RCW 34.05.574 requiring L&I and DOH to immediately adopt emergency rules that fulfill the requirements imposed on the agencies by chapter 49.17 RCW and chapter 70.114A RCW with respect to farmworker housing that are consistent with current science-based guidance on preventing exposure to COVID-19.

Award Plaintiffs their costs and reasonable attorneys' fees pursuant to RCW 4.84.350 or other applicable statute.

DATED this 4th day of June, 2020

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11 Attorneys for Petitioner Familias Unidas por la Justicia
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Exhibit 1



RULE-MAKING ORDER EMERGENCY RULE ONLY

CR-103E (December 2017) (Implements RCW 34.05.350 and 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: May 13, 2020

TIME: 10:52 AM

WSR 20-11-024

Agency: Department of Health

Effective date of rule:

Emergency Rules

- Immediately upon filing.
 Later (specify) 05/18/2020

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes No If Yes, explain:

Purpose: Chapter 246-358 WAC, Temporary worker housing. The Department of Health (DOH) in conjunction with the Department of Labor & Industries (L&I) are responding to the novel coronavirus disease 2019 (COVID-19) pandemic by adopting a new section to protect occupants from COVID-19 hazards in licensed temporary worker housing. The emergency rule requires operators: (1) Educate occupants in a language or languages understood by the occupants on COVID-19; (2) Provide occupants cloth face coverings; (3) Ensure physical distancing of occupants when at housing sites, which includes all cooking, eating, bathing, washing, recreational, and sleeping facilities; (4) Ensure frequent cleaning and disinfecting of surfaces; (5) Identify and isolate occupants with suspect and confirmed positive cases; and (6) Submit to the Department of Health a revised temporary worker housing management plan that demonstrates how the operator will comply with the emergency rule requirements.

In addition, the emergency rule includes an option for group shelters. A group shelter is where a cohort of up to 15 occupants stay together and separated from others for housing, work, and transportation. All dwelling units, facilities, and services must be only used by the group shelter members. If the operator is not the employer, the operator must ensure the employer will follow the group shelter requirements. Under the group shelter options, both the top and bottom bunk of bunk beds may be used, although the occupants must sleep head to toe. The physical distancing requirements of the emergency rule otherwise prohibit the use of the top bunk of bunk beds.

Citation of rules affected by this order:

New: WAC 246-358-002
Repealed: None
Amended: None
Suspended: None

Statutory authority for adoption: RCW 70.114A.065

Other authority: RCW 43.70.335

EMERGENCY RULE

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: DOH and L&I are taking action to help prevent the spread of COVID-19 and respond to the Governor's Proclamation 20-25, Stay Home, Stay Healthy. Under Proclamation 20-25, agriculture is an essential business and must comply with the social/physical distancing and sanitation requirements of the DOH, L&I, and the Centers for Disease Control and Prevention (CDC). The temporary worker housing rules have specific requirements for the minimum distance between beds that is inconsistent with social/physical distancing requirements requiring emergency rules to, at a minimum, address these requirements. Two farmworker labor unions also petitioned DOH and L&I to adopt emergency rules for temporary worker housing to protect occupants from COVID-19. This emergency rule is necessary for the preservation of public health, safety, and general welfare of occupants of temporary worker housing. The Governor's Stay Home, Stay Healthy order is currently in effect, and observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest and the Governor's order.

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Federal rules or standards:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Recently enacted state statutes:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>

The number of sections adopted at the request of a nongovernmental entity:

New	<u>1</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted on the agency's own initiative:

New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted using:

Negotiated rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Pilot rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Other alternative rule making:	New	<u>1</u>	Amended	<u>0</u>	Repealed	<u>0</u>

Date Adopted: 05/13/2020

Name: Jessica Todorovich for John Wiesman, DrPH, MPH

Title: Chief of Staff for Secretary of Health

Signature:



NEW SECTION

WAC 246-358-002 Additional requirements to protect occupants in temporary worker housing from 2019 novel coronavirus (COVID-19) exposure. (1) The operator of temporary worker housing (TWH) under this chapter must implement the following steps to protect occupants from 2019 novel coronavirus (COVID-19) hazards:

(a) Educate occupants in a language or languages understood by the occupants on COVID-19, including: How the virus is spread and how to prevent virus spread including the importance of handwashing, the use of cloth face coverings, proper respiratory etiquette, and the importance of prompt sanitizing of frequently touched items; common symptoms and risk factors; and what to do if they develop symptoms. The operator must also allow entry of community health workers and community-based outreach workers to provide additional information.

(b) Conspicuously post information regarding the facility's health and safety policies, how to identify symptoms, to whom to report if not feeling well, and where and how to secure medical treatment - all in a language commonly understood by the occupants.

(c) The operator must provide cloth face coverings for occupants to use in accordance with Washington department of health guidelines, or as required by Washington department of labor and industries (L&I) safety rules. The operator must instruct occupants to use cloth face coverings in public and at housing as recommended in the public health orders.

(d) Develop and implement a physical distancing plan for maintaining six feet of separation between occupants when at housing sites which includes all cooking, eating, bathing, washing, recreational, and sleeping facilities.

(i) Sleeping quarters. The operator must ensure:

(A) Beds are spaced at least six feet apart between frames in all directions and arranged so that occupants sleep head to toe; **OR**

(B) Beds are separated by a bed length, floor to near ceiling temporary nonpermeable barrier (e.g., plexiglass, plastic sheeting, etc.) placed perpendicular to wall such that a thirty-six inch minimum aisle exists between the bed and the temporary barrier and occupants sleep head toward wall. Materials must be fire resistant or fire retardant treated.

The operator must ensure that temporary barriers:

- Do not impede required egress;
- Do not compromise ventilation/air flow; and
- Are cleaned at least daily.

(C) Except as allowed under (e) of this subsection, only the bottom bed of bunk beds may be used.

(ii) The operator must use physical barriers (e.g., plastic shields) for fixtures such as sinks where occupants may come in close contact for short periods of time.

(iii) Provide additional facilities or services that meet the requirements of this chapter if needed to ensure social distancing in common areas, such as additional refrigeration or portable sinks.

(iv) The operator must discourage occupants from visiting buildings or sleeping quarters that are not their assigned living spaces, to minimize potential cross-contamination.

(e) Group shelters. If the TWH is set up to accommodate a group shelter and a group shelter is formed, the operator must designate which occupants are part of each group and maintain the same occupants

in each group shelter. "Group shelter" means a dwelling unit or cluster of dwelling units with sleeping facilities for up to fifteen occupants that includes toilet facilities, bathing facilities and, if applicable, food preparation and cooking facilities. All facilities and services within the group shelter are for the sole use of the occupants of the group shelter and must be marked as such.

(i) Sleeping quarters. In group shelters, the operator must:

(A) Arrange beds so that the heads of beds are as far apart as possible - at least six feet apart. Both beds of bunk beds may be used. Bunk bed occupants must sleep head to toe.

(B) Take steps to improve ventilation wherever possible.

(C) Maintain egress requirements.

(D) Provide all occupants suitable storage space including personal storage space for clothing and personal articles. Ensure all or a portion of the space is enclosed and lockable.

(ii) Common areas. In group shelters, the operator must instruct occupants to maintain physical distancing and wear cloth face coverings whenever possible.

(iii) Transportation and work. To utilize the group shelter option, the operator 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.

(iv) The operator must encourage each group shelter to designate one or two occupants to run errands if items cannot be provided by the operator. These designated occupants can be the main contact for procuring groceries or other items for the group shelter in order to limit public contact and potential disease transmission.

(v) The operator must 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.

(f) Clean and disinfect surfaces. The operator must:

(i) Clean and disinfect common areas on a regular schedule, at least as frequent as required by this chapter.

(ii) Wipe down and disinfect surfaces that are touched by multiple individuals at least daily using an EPA-approved disinfectant or diluted bleach solution.

(iii) Provide adequate supplies and instructions to occupants for cleaning and disinfecting of living spaces of dwelling units, family shelters, and group shelters. Occupants must be able to clean and disinfect frequent touched surfaces, bathroom, and cooking areas as needed.

(iv) Ensure adequate supplies of single-use soap and paper towels at all sinks to allow for frequent handwashing. Portable handwashing stations or hand sanitizer may be provided in addition to required facilities.

(v) Provide training in a language or languages understood by contracted workers regarding COVID-19 cleaning, disinfecting, and sanitizing protocols for any contracted cleaning labor prior to their arrival to clean temporary worker housing. In addition to any personal protective equipment required under L&I rules to perform the cleaning activities, provide and require that those contracted workers use disposable gloves and wear cloth face coverings covering nose and mouth while working at the site.

(g) Identify and isolate sick occupants. The operator must develop and implement a plan to identify and isolate sick occupants, including:

(i) A process to screen occupants for symptoms of COVID-19 as identified by the centers for disease control and prevention (CDC), including fever, cough, shortness of breath, difficulty breathing, chills, shaking with chills, muscle pain, headaches, and loss of taste or smell. The operator must provide each occupant with a thermometer or must designate and train a person to use a 'no touch' or 'no contact' thermometer to check all occupants' temperatures daily. All thermometers must be properly sanitized between each use or each day. Any worker with a temperature of 100.4°F or higher is considered to have a fever.

(ii) Upon identification of suspect COVID-19 cases, the operator must contact the local health officer immediately as required under WAC 296-307-16190 and provide transportation for any medical evaluation or treatment. Ensure individuals providing transportation have appropriate personal protective equipment.

(iii) Isolate suspect COVID-19 cases with sleeping, eating, and bathroom accommodations that are separate from others. If the suspect occupant resides in a room with family members, the sick occupant will have the option to isolate with the family members.

(iv) Confirmed COVID-19 cases must be isolated and only housed with other confirmed cases and must have separate bathroom, cooking and eating facilities from people who have not been diagnosed with COVID-19. If the confirmed occupant resides in a room with family members, the sick occupant will have the option to isolate with the family members.

(v) The operator must provide food and water and monitor for safety occupants in isolation at the operator's facility or ensure that these services are provided if isolated at another facility, such as a state or local government quarantine facility.

(h) Clean and disinfect areas where occupants with suspect COVID-19 exposure have been according to CDC guidelines and before the space is used by others.

(2) The operator must revise the facility's written TWH management plan to include implementation of the requirements in this section, as applicable.

(a) The plan must identify a single point of contact at the TWH for COVID-19 related issues.

(b) The operator must share the plan with all occupants on the first day the plan is operational or the first day the occupant arrives at the TWH. The operator must designate a person that will ensure all occupants are aware of all aspects of the plan and be available to answer questions.

(c) The operator must submit the revised TWH management plan to the state department of health within ten calendar days of the effective date of this section.

(d) Failure to submit a revised plan or properly implement the requirements of this section may result in administrative action, including license suspension or fines.

(3) Consistent with 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.

(4) In the event that any provisions of this section are in conflict with other regulations in this chapter, such other regulation shall be deemed superseded for purposes of this chapter.



RULE-MAKING ORDER EMERGENCY RULE ONLY

CR-103E (December 2017) (Implements RCW 34.05.350 and 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: May 13, 2020

TIME: 11:59 AM

WSR 20-11-025

Agency: Department of Labor & Industries (L&I)

Effective date of rule:

Emergency Rules

- Immediately upon filing.
- Later (specify) May 18, 2020

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes
 - No
- If Yes, explain:

Purpose: Chapter 296-307 WAC, Temporary worker housing. The Department of Labor & Industries (L&I) in conjunction with the Department of Health (DOH) are responding to the coronavirus disease 2019 (COVID-19) pandemic by adopting a new section to protect occupants from COVID-19 hazards in licensed temporary worker housing. The emergency rule requires operators:

- Educate occupants in a language or languages understood by the occupants on COVID-19;
- Provide occupants cloth face coverings;
- Ensure physical distancing of occupants when at housing sites, which includes all cooking, eating, bathing, washing, recreational, and sleeping facilities;
- Ensure frequent cleaning and disinfecting of surfaces;
- Identify and isolate occupants with suspect and confirmed positive cases; and
- Submit to the Department of Health a revised temporary worker housing management plan that demonstrates how the operator will comply with the emergency rule requirements.

In addition, the emergency rule includes an option for group shelters. A group shelter is where a cohort of up to 15 occupants stay together and separated from others for housing, work, and transportation. All dwelling units, facilities, and services must be only used by the group shelter members. If the operator is not the employer, the operator must ensure the employer will follow the group shelter requirements. Under the group shelter option, both the top and bottom beds of bunk beds may be used where the beds are at least feet 6 apart and the bunk bed occupants sleep head to toe. The physical distancing requirements of the emergency rule otherwise prohibit the use of the top bunk of bunk beds.

Citation of rules affected by this order:

New: WAC 296-307-16102
 Repealed:
 Amended:
 Suspended:

Statutory authority for adoption: RCW 49.17.010, RCW 49.17.040, RCW 49.17.050, and RCW 49.17.060

Other authority:

EMERGENCY RULE

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: L&I and DOH are taking action to help prevent the spread of COVID-19 and respond to the Governor's Proclamation 20-25, Stay Home, Stay Healthy. Under Proclamation 20-25, agriculture is an essential business and must comply with the social/physical distancing and sanitation requirements of the DOH, L&I, and the Center for Disease Control. The temporary worker housing rules have specific requirements for the minimum distance between beds that is inconsistent with social/physical distancing requirements requiring emergency rules to, at a minimum, address these requirements. Two farmworker labor unions also petitioned L&I and DOH to adopt emergency rules for temporary worker housing to protect occupants from COVID-19. This emergency rule is necessary for the preservation of public health, safety, and general welfare of occupants of temporary worker housing. The Governor's Stay Home, Stay Healthy order is currently in

effect, and observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest and the Governor's order.

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Federal rules or standards:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Recently enacted state statutes:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>

The number of sections adopted at the request of a nongovernmental entity:

New	<u>1</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted on the agency's own initiative:

New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted using:

Negotiated rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Pilot rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Other alternative rule making:	New	<u>1</u>	Amended	<u>0</u>	Repealed	<u>0</u>

Date Adopted: May 13, 2020

Name: Joel Sacks

Title: Director

Signature:



NEW SECTION

WAC 296-307-16102 Additional requirements to protect occupants in temporary worker housing from 2019 novel coronavirus (COVID-19) exposure. (1) The operator of temporary worker housing (TWH) under this chapter must implement the following steps to protect occupants from 2019 novel coronavirus (COVID-19) hazards:

(a) Educate occupants in a language or languages understood by the occupants on COVID-19, including: How the virus is spread and how to prevent virus spread including the importance of handwashing, the use of cloth face coverings, proper respiratory etiquette, and the importance of prompt sanitizing of frequently touched items; common symptoms and risk factors; and what to do if they develop symptoms. The operator must also allow entry of community health workers and community-based outreach workers to provide additional information.

(b) Conspicuously post information regarding the facility's health and safety policies, how to identify symptoms, to whom to report if not feeling well, and where and how to secure medical treatment - all in a language commonly understood by the occupants.

(c) The operator must provide cloth face coverings for occupants to use in accordance with Washington department of health guidelines, or as required by Washington department of labor and industries (L&I) safety rules. The operator must instruct occupants to use cloth face coverings in public and at housing as recommended in the public health orders.

(d) Develop and implement a physical distancing plan for maintaining six feet of separation between occupants when at housing sites which includes all cooking, eating, bathing, washing, recreational, and sleeping facilities.

(i) Sleeping quarters. The operator must ensure:

(A) Beds are spaced at least six feet apart between frames in all directions and arranged so that occupants sleep head to toe; **OR**

(B) Beds are separated by a bed length, floor to near ceiling temporary nonpermeable barrier (e.g., plexiglass, plastic sheeting, etc.) placed perpendicular to wall such that a thirty-six inch minimum aisle exists between the bed and the temporary barrier and occupants sleep head toward wall. Materials must be fire resistant or fire retardant treated.

The operator must ensure that temporary barriers:

- Do not impede required egress;
- Do not compromise ventilation/air flow; and
- Are cleaned at least daily.

(C) Except as allowed under (e) of this subsection, only the bottom bed of bunk beds may be used.

(ii) The operator must use physical barriers (e.g., plastic shields) for fixtures such as sinks where occupants may come in close contact for short periods of time.

(iii) Provide additional facilities or services that meet the requirements of this chapter if needed to ensure social distancing in common areas, such as additional refrigeration or portable sinks.

(iv) The operator must discourage occupants from visiting buildings or sleeping quarters that are not their assigned living spaces, to minimize potential cross-contamination.

(e) Group shelters. If the TWH is set up to accommodate a group shelter and a group shelter is formed, the operator must designate which occupants are part of each group and maintain the same occupants

in each group shelter. "Group shelter" means a dwelling unit or cluster of dwelling units with sleeping facilities for up to fifteen occupants that includes toilet facilities, bathing facilities and, if applicable, food preparation and cooking facilities. All facilities and services within the group shelter are for the sole use of the occupants of the group shelter and must be marked as such.

(i) Sleeping quarters. In group shelters, the operator must:

(A) Arrange beds so that the heads of beds are as far apart as possible - at least six feet apart. Both beds of bunk beds may be used. Bunk bed occupants must sleep head to toe.

(B) Take steps to improve ventilation wherever possible.

(C) Maintain egress requirements.

(D) Provide all occupants suitable storage space including personal storage space for clothing and personal articles. Ensure all or a portion of the space is enclosed and lockable.

(ii) Common areas. In group shelters, the operator must instruct occupants to maintain physical distancing and wear cloth face coverings whenever possible.

(iii) Transportation and work. To utilize the group shelter option, the operator 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.

(iv) The operator must encourage each group shelter to designate one or two occupants to run errands if items cannot be provided by the operator. These designated occupants can be the main contact for procuring groceries or other items for the group shelter in order to limit public contact and potential disease transmission.

(v) The operator must 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.

(f) Clean and disinfect surfaces. The operator must:

(i) Clean and disinfect common areas on a regular schedule, at least as frequent as required by this chapter.

(ii) Wipe down and disinfect surfaces that are touched by multiple individuals at least daily using an EPA-approved disinfectant or diluted bleach solution.

(iii) Provide adequate supplies and instructions to occupants for cleaning and disinfecting of living spaces of dwelling units, family shelters, and group shelters. Occupants must be able to clean and disinfect frequent touched surfaces, bathroom, and cooking areas as needed.

(iv) Ensure adequate supplies of single-use soap and paper towels at all sinks to allow for frequent handwashing. Portable handwashing stations or hand sanitizer may be provided in addition to required facilities.

(v) Provide training in a language or languages understood by contracted workers regarding COVID-19 cleaning, disinfecting, and sanitizing protocols for any contracted cleaning labor prior to their arrival to clean temporary worker housing. In addition to any personal protective equipment required under L&I rules to perform the cleaning activities, provide and require that those contracted workers use disposable gloves and wear cloth face coverings covering nose and mouth while working at the site.

(g) Identify and isolate sick occupants. The operator must develop and implement a plan to identify and isolate sick occupants, including:

(i) A process to screen occupants for symptoms of COVID-19 as identified by the centers for disease control and prevention (CDC), including fever, cough, shortness of breath, difficulty breathing, chills, shaking with chills, muscle pain, headaches, and loss of taste or smell. The operator must provide each occupant with a thermometer or must designate and train a person to use a 'no touch' or 'no contact' thermometer to check all occupants' temperatures daily. All thermometers must be properly sanitized between each use or each day. Any worker with a temperature of 100.4°F or higher is considered to have a fever.

(ii) Upon identification of suspect COVID-19 cases, the operator must contact the local health officer immediately as required under WAC 296-307-16190 and provide transportation for any medical evaluation or treatment. Ensure individuals providing transportation have appropriate personal protective equipment.

(iii) Isolate suspect COVID-19 cases with sleeping, eating, and bathroom accommodations that are separate from others. If the suspect occupant resides in a room with family members, the sick occupant will have the option to isolate with the family members.

(iv) Confirmed COVID-19 cases must be isolated and only housed with other confirmed cases and must have separate bathroom, cooking and eating facilities from people who have not been diagnosed with COVID-19. If the confirmed occupant resides in a room with family members, the sick occupant will have the option to isolate with the family members.

(v) The operator must provide food and water and monitor for safety occupants in isolation at the operator's facility or ensure that these services are provided if isolated at another facility, such as a state or local government quarantine facility.

(h) Clean and disinfect areas where occupants with suspect COVID-19 exposure have been according to CDC guidelines and before the space is used by others.

(2) The operator must revise the facility's written TWH management plan to include implementation of the requirements in this section, as applicable.

(a) The plan must identify a single point of contact at the TWH for COVID-19 related issues.

(b) The operator must share the plan with all occupants on the first day the plan is operational or the first day the occupant arrives at the TWH. The operator must designate a person that will ensure all occupants are aware of all aspects of the plan and be available to answer questions.

(c) The operator must submit the revised TWH management plan to the state department of health within ten calendar days of the effective date of this section.

(d) Failure to submit a revised plan or properly implement the requirements of this section may result in administrative action, including license suspension or fines.

(3) Consistent with WAC 296-307-16120(1), an operator may request a temporary variance from the requirements of this section when another means of providing equal protection is provided.

(4) In the event that any provisions of this section are in conflict with other regulations in this chapter, such other regulation shall be deemed superseded for purposes of this chapter.

Exhibit 2

WAC 246-358-002 Additional requirements to protect occupants in temporary worker housing from 2019 novel coronavirus (COVID19) exposure.

(1) The operator of temporary worker housing (TWH) under this chapter must implement the following steps to protect occupants from 2019 novel coronavirus (COVID19) hazards:

(a) Educate occupants in a language or languages understood by the occupants on COVID19, including: How the virus is spread and how to prevent virus spread including the importance of handwashing, the use of cloth face coverings, proper respiratory etiquette, and the importance of prompt sanitizing of frequently touched items; common symptoms and risk factors; and what to do if they develop symptoms. The operator must also allow entry of community health workers and community-based outreach workers to provide additional information.

(b) Conspicuously post information regarding the facility's health and safety policies, how to identify symptoms, to whom to report if not feeling well, and where and how to secure medical treatment – all in a language commonly understood by the occupants.

(c) The operator must provide cloth face coverings for occupants to use in accordance with Washington department of health guidelines, or as required by Washington department of labor and industries (L&I) safety rules. The operator must instruct occupants to use cloth face coverings in public and at housing as recommended in the public health orders.

(d) Develop and implement a physical distancing plan for maintaining six feet of separation between occupants when at housing sites which includes all cooking, eating, bathing, washing, recreational, and sleeping facilities.

(i) Sleeping quarters. The operator must ensure:

(A) Each occupant has a minimum of 75 square feet of space, or 150 square feet of space for occupants at high risk of COVID-19; AND

(B) Ventilation sufficient to meet CDC standards for fresh air flow and air cleaning for the type of ventilation used in the housing; AND

(B) Beds are spaced at least six feet apart between frames in all directions and arranged so that occupants sleep head to toe; OR

(CB) Beds are separated by a bed length, floor to near ceiling temporary nonpermeable, durable, rigid barrier (e.g., plexiglass, ~~plastic sheeting~~, etc.) placed perpendicular to wall such that a thirty-six inch minimum aisle exists between the bed and the temporary barrier and occupants sleep head toward wall. Materials must be fire resistant or fire retardant treated. The operator must ensure that temporary barriers:

- Do not impede required egress;
- Do not compromise ventilation/air flow; and
- Are cleaned at least daily.

~~(DC) Except as allowed under (e) of this subsection, o~~ Only the bottom bed of bunk beds may be used.

(ii) The operator must use physical barriers (e.g., durable, rigid plastic shields) for fixtures such as sinks where occupants may come in close contact for short periods of time.

(iii) Provide additional facilities or services that meet the requirements of this chapter if needed to ensure social distancing in common areas, such as additional refrigeration or portable sinks.

(iv) The operator must discourage occupants from visiting buildings or sleeping quarters that are not their assigned living spaces, to minimize potential cross-contamination.

(v) In common food-handling facilities, the operator must provide:

(A) A room, building, or space within a building adequate in size, separate from any sleeping quarters for workers to prepare and cook their own food while maintaining physical distancing of 6 feet;

(B) An operable cook stove or electric hotplate with four cooking surfaces for every five workers through any combination of cooking surfaces including burners, one foot in length of burner surface, microwave ovens, stove ovens, or convection ovens.

~~(e) Group shelters. If the TWH is set up to accommodate a group shelter and a group shelter is formed, the operator must designate which occupants are part of each group and maintain the same occupants in each group shelter. "Group shelter" means a dwelling unit or cluster of dwelling units with sleeping facilities for up to fifteen occupants that includes toilet facilities, bathing facilities and, if applicable, food preparation and cooking facilities. All facilities and services within the group shelter are for the sole use of the occupants of the group shelter and must be marked as such.~~

~~(i) Sleeping quarters. In group shelters, the operator must:~~

~~(A) Arrange beds so that the heads of beds are as far apart as possible—at least six feet apart. Both beds of bunk beds may be used. Bunk bed occupants must sleep head to toe.~~

~~(B) — Take steps to improve ventilation wherever possible.~~

~~(C) — Maintain egress requirements.~~

~~(D) — Provide all occupants suitable storage space including personal storage space for clothing and personal articles. Ensure all or a portion of the space is enclosed and lockable.~~

~~(ii) Common areas. In group shelters, the operator must instruct occupants to maintain physical distancing and wear cloth face coverings whenever possible.~~

~~(iii) Transportation and work. To utilize the group shelter option, the operator 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.~~

~~(iv) The operator must encourage each group shelter to designate one or two occupants to run errands if items cannot be provided by the operator. These designated occupants can be the main contact for procuring groceries or other items for the group shelter in order to limit public contact and potential disease transmission.~~

~~(v) The operator must quarantine or test all members of a group shelter if a member of the group shelter develops symptoms of COVID19, as directed by the local health agency.~~

(ef) Clean and disinfect surfaces. The operator must:

(i) Clean and disinfect common areas on a regular schedule, at least as frequent as required by this chapter.

(ii) Wipe down and disinfect surfaces that are touched by multiple individuals at least daily using an EPA approved disinfectant or diluted bleach solution.

(iii) Provide adequate supplies and instructions to occupants for cleaning and disinfecting of living spaces of dwelling units and, family shelters, ~~and group shelters~~. Occupants must be able to clean and disinfect frequent touched surfaces, bathroom, and cooking areas as needed.

(iv) Ensure adequate supplies of single-use soap and paper towels at all sinks to allow for frequent handwashing. Portable handwashing stations or hand sanitizer may be provided in addition to required facilities.

(v) Provide training in a language or languages understood by contracted workers regarding COVID19 cleaning, disinfecting, and sanitizing protocols for any contracted cleaning labor prior to their arrival to clean temporary worker housing. In addition to any personal protective equipment required under L&I rules to perform the cleaning activities, provide and require that those contracted workers use disposable gloves and wear cloth face coverings covering nose and mouth while working at the site.

(fg) Identify and isolate sick occupants. The operator must develop and implement a plan to identify and isolate sick occupants, including:

(i) A process to screen occupants for symptoms of COVID19 as identified by the centers for disease control and prevention (CDC), including fever, cough, shortness of breath, difficulty breathing, chills, shaking with chills, muscle pain, headaches, and loss of taste or smell. The operator must provide each occupant with a thermometer or must designate and train a person to use a 'no touch' or 'no contact' thermometer to check all occupants' temperatures daily. All thermometers must be properly sanitized between

each use or each day. Any worker with a temperature of 100.4°F or higher is considered to have a fever.

(ii) Upon identification of suspect COVID19 cases, the operator must contact the local health officer immediately as required under WAC 29630716190 and provide transportation for any medical evaluation or treatment. Ensure individuals providing transportation have appropriate personal protective equipment.

(iii) Isolate suspect COVID19 cases with sleeping, eating, and bathroom accommodations that are separate from others. If the suspect occupant resides in a room with family members, the sick occupant will have the option to isolate with the family members.

(iv) Confirmed COVID19 cases must be isolated and only housed with other confirmed cases and must have separate bathroom, cooking and eating facilities from people who have not been diagnosed with COVID19. If the confirmed occupant resides in a room with family members, the sick occupant will have the option to isolate with the family members.

(v) The operator must provide food and water and monitor for safety occupants in isolation at the operator's facility or ensure that these services are provided if isolated at another facility, such as a state or local government quarantine facility.

(gh) Clean and disinfect areas where occupants with suspect COVID19 exposure have been according to CDC guidelines and before the space is used by others.

(2) The operator must revise the facility's written TWH management plan to include implementation of the requirements in this section, as applicable.

(a) The plan must identify a single point of contact at the TWH for COVID19 related issues.

(b) The operator must share the plan with all occupants on the first day the plan is operational or the first day the occupant arrives at the TWH. The operator must designate a person that will ensure all occupants are aware of all aspects of the plan and be available to answer questions.

(c) The operator must submit the revised TWH management plan to the state department of health within ten calendar days of the effective date of this section.

(d) Failure to submit a revised plan or properly implement the requirements of this section may result in administrative action, including license suspension or fines.

(3) Consistent with 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.

(4) In the event that any provisions of this section are in conflict with other regulations in this chapter, such other regulation shall be deemed superseded for purposes of this chapter.

Exhibit 3

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).

COLUMBIA LEGAL SERVICES

s/ Andrea Schmitt

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

cc: Ramon Barba Torres, President, Familias Unidas por la Justicia

enclosures

Exhibit 1







Exhibit 2

We, Anjum Hajat and Catherine Karr, declare the following under penalty of perjury under the laws of the State of Washington.

1. I, Anjum Hajat, received my PhD in Epidemiology from the University of North Carolina and my Master in Public Health (MPH) degree from the University of Michigan. I worked in public health practice, at a local health department and the Centers for Disease Control, for seven years prior to joining academia. I have been a public health professional for 14 years. My current research focuses on the health of low wage workers.
2. I, Catherine Karr, received my PHD in Epidemiology, my Masters of Science (MS) in Environmental Health, and my Medical Degree (MD) from the University of Washington. I have been on faculty at the University of Washington in the School of Medicine and School of Public Health since 2004. I am also a practicing general pediatrician at UW Medicine Pediatric Care Center. My current research includes a focus on the health of farm worker children.
3. The Corona virus (COVID-19) is transmitted mainly through respiratory droplets. This means that if an infected person talks, sneezes or coughs on another person in close proximity they may be spreading the virus through tiny droplets in the air. Maintaining good social distancing (about 6 feet) may reduce person-to-person transmission. In addition, it is possible that persons coming into contact with infected surfaces or objects may become infected. Hand washing and disinfecting surfaces is recommended for this reason. Evidence suggests that the virus can spread easily and quickly if appropriate prevention measures are not taken.¹
4. We give these opinions relying upon our education, experience and materials that are reasonably relied upon in our professions.
5. We base our analysis below on the following information:
 - a. Farm labor camp housing typically consists of dormitory-style housing with common bathroom and kitchen facilities.
 - b. The bedrooms are often a minimum of two bunkbeds per room but can often have more depending on the size of the room. Much farmworker housing has open-style large rooms, with no separate space available for isolation of sick or exposed workers.
 - c. Washington temporary worker housing regulations ([WAC 246-358-029](#)) set a minimum of only 50 square feet of floor space per occupant. That amounts to about a seven-foot square. A standard-size twin bed occupies close to half of that space. Temporary worker housing regulations also allow beds to be closer together than six feet and within three feet of cooking surfaces. ([WAC 246-358-135](#))
 - d. H-2A temporary agricultural visa holders do not have their own transportation and rely on their employer to be transported to work daily on busses or vans. They also rely on that same transportation to be taken to the store to do grocery shopping and banking in rural towns throughout the state.
 - e. Some H-2A workers who work for large agricultural employers can sometimes spend up to 3 hours per day in close proximity to others commuting round-trip from their labor camps to various orchards throughout eastern Washington.

¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

- f. Grocery shopping and banking trips usually happen on Friday evenings or weekends and can involve large groups of workers (50-100) being dropped off in parking lots of shopping areas and being given an hour or two to complete their shopping and banking needs.
 - g. Depending on the type of crop and type of work, farm workers are regularly asked to work in close proximity to (less than 6 feet away from) each other, both in packinghouse and harvest settings.
 - h. Farmworkers are often instructed to clean their own housing, buses, and workplaces. Industry representatives have stated in public meetings that cleaning supplies necessary for cleaning farmworker housing are backordered for long periods of time.
 - i. It is well documented that farmworkers, both domestic and H-2A workers, are fearful of making health and safety complaints due to a wide-spread fear of retaliation.
 - j. A recent Seattle Times article outlined worker complaints that handwashing supplies are not being provided in the fields. The same article included accounts of employers who did not provide information about prevention of COVID-19 or available paid sick leave to which workers are entitled.
 - k. The Department of Labor & Industries has released draft “fact sheets” about agriculture generally, packinghouses, and worker housing, dated April 8, 2020, which we have reviewed.
 - l. State agency staff has stated in public meetings that enforcement of the “fact sheets” will be complaint-driven, mostly due to limited enforcement staff. Farmworkers will have to complain before L&I attempts to determine whether their employer is complying.
6. Most farmworkers are living and working in rural areas, in which medical infrastructure can quickly be overwhelmed. Not only does infection of groups of farmworkers cause risk of overwhelming medical infrastructure, but visits from large groups of farmworkers to rural communities’ stores and other businesses poses a risk of transmission in those communities as a whole.
 7. Farmworkers may come to work sick with increased frequency due to fear of retaliation, economic hardship, and lack of knowledge about paid leave available to them.²
 8. Clear, specific, mandatory standards are needed to protect against the risk of COVID-19. Current draft guidance provided by the Department of Labor & Industries is unclear and in some cases contradictory. Rules should be specific and measurable. In the absence of clear, specific rules workers are unable to identify violations and thus will be unable to file complaints. (per 3l above).
 9. CDC now recommends the use of protective masks for anyone who is in close contact with others, where social distancing (at less than 6 feet distance) is difficult to maintain.³ For farmworkers this may occur in packinghouses and harvest settings as well as in living quarters. Therefore, employers should provide masks that cover workers nose and mouth and request that all workers wear masks when social distancing is difficult to maintain.

² <https://www.seattletimes.com/seattle-news/as-farm-work-carries-on-some-worry-about-becoming-the-states-new-coronavirus-epicenter/>

³ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>

10. Housing facilities that ensure one person or no more than two people per room of 150 - 200 square feet⁴ are necessary to meaningfully reduce the risk of transmission of COVID-19 in farmworker housing. People living in congregate housing such as the typical farmworker housing described above are at unique risk for the spread of COVID-19 because they are consistently in close contact with others and share bathroom and cooking facilities. Several research studies confirm that crowding increases the risk of transmission of influenza and similar illnesses.^{5 6}
 - a. If individual rooms are impractical, the number of farmworkers per room should be reduced and beds should be separated by 6 feet. Bunk beds that cannot meet this standard should be disallowed. Some have suggested using plastic sheeting on three sides of the bed and a curtain on the fourth side. This is likely to create poor ventilation which may result in abandoning the sheeting. Furthermore, studies have shown that poor ventilation increases the risk of respiratory infections.⁶
11. The number of people in vans and buses should be reduced so individuals can practice social distancing. Furthermore, employers should disinfect high-touch areas (handles, buttons, seat rests) with a bleach solution after every use to reduce the viability of the virus on surfaces. Since transportation on buses or vans puts people into close contact with one another, this may increase the likelihood of spread of COVID-19.
12. 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.
13. Employers should be responsible for providing housing units with bleach solutions, hand soap and additional needed cleaning supplies. Although an initial shortage of these supplies was reported, most local stores are selling these materials again.
14. Worker education about several aspects of COVID-19, i.e., how to prevent it and what to do if you think you are infected, should be provided in the language understood by the workers.
15. Employers must provide hand sanitizer/soap and water in the fields and ensure supplies are reliably replenished. A study in the military setting shows that hand-washing while working in field settings helps prevent acute respiratory infections.⁷
16. In the event a farmworker is diagnosed with COVID-19, the individual must immediately be isolated in their own housing unit with a bathroom. This will help reduce further spread of the virus.

⁴ Cedeno Laurent JG, Allen JG, McNeely E, Dominici F, Spengler JD. Influence of the residential environment on undergraduate students' health. *J Expo Sci Environ Epidemiol*. 2020 Mar;30(2):320-327.

⁵ Tsuang W M, Bailar JC, Englund JA. Influenza-like symptoms in the college dormitory environment: a survey taken during the 1999-2000 influenza season. *J Environ Health*. 2004 Apr;66(8):39-42, 44.

⁶ Sun Y, Wang Z, Zhang Y, Sundell J. In China, students in crowded dormitories with a low ventilation rate have more common colds: evidence for airborne transmission. *PLoS One*. 2011;6(11):e27140.

⁷ Kim HS, Ko RE, Ji M, Lee JH, Lee CS, Lee H. The usefulness of hand washing during field training to prevent acute respiratory illness in a military training facility. *Medicine (Baltimore)*. 2018 Jul;97(30):e11594.

17. Farmworkers who demonstrate symptoms consistent with COVID-19, such as cough, fever, shortness of breath, fatigue, body ache, should be tested for COVID-19, put in isolation and prevented from further work until test results are known. The CDC recommendations for when to discontinue self-isolation can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>
18. For older workers (50 +) and those with preexisting conditions (e.g., hypertension, diabetes, asthma, tuberculosis) we recommend strictly following housing guidelines (1 person per room of 150 square feet) and providing work that allows for effective social distancing. These individuals should seek medical care immediately as potential for COVID-19 related complications is higher. In WA State the highest number of COVID-19 cases (35%) is among those 40 - 59 years old, indicating middle-aged individuals are at higher risk.⁸ One report suggests that about 34% of farmworkers are older than 45 years old.⁹ Some research indicates that farmworkers have a higher prevalence of TB¹⁰ and have higher exposure to agricultural dust which has been shown to result in a variety of respiratory conditions.¹¹ These conditions which may be more unique to farmworkers would put them at higher risk for complications of COVID-19.
19. Given the possibility of asymptomatic transmission, that is an infected person with no symptoms spreads the virus to others, it is possible that infections among farmworkers will spread undetected within the farmworker community for many days. Furthermore, asymptomatic persons who visit public places on weekends risk spreading the virus to the neighboring community.¹²
20. Because H-2A workers are dependent on their employers for transportation, these employers should be responsible for immediately transporting workers who show symptoms for testing. If testing facilities are unavailable or at capacity, employers should make every effort to facilitate contact between the worker and the health care provider. Employers should also provide workers who are subsequently isolated or quarantined with adequate food and water.
21. Farm workers have limited financial resources and loss of work can have devastating economic consequences. According to the most recent data from the National Agricultural Workers Survey, farmworkers' mean and median personal incomes the previous year were \$17,500 and \$19,999, respectively. Fourteen percent of workers said their total personal income was less than \$10,000, 29% said they had personal incomes of \$10,000 to \$19,999, another 29% had personal incomes of \$20,000 to \$29,999, and 14% reported that their total personal income was \$30,000 or more.⁹ As such, to the extent possible, symptomatic workers with COVID-19 diagnosis should be supported financially until their illness passes.

⁸ <https://www.doh.wa.gov/Emergencies/Coronavirus>

⁹ Hernandez T, Gabbard S. Findings from the national agricultural workers survey (NAWS) 2015-2016: a demographic and employment profile of United States farmworkers. JBS International, Research Report; 2019.

¹⁰ The National Center for Farmworker Health. Tuberculosis fact sheet. 2018

¹¹ Schenker MB, Pinkerton KE, Mitchell D, Vallyathan V, Elvine-Kreis B, Green FH. Pneumoconiosis from agricultural dust exposure among young California farmworkers. Environmental health perspectives. 2009 Jun;117(6):988-94.

¹² Mizumoto K, Kagaya K, Zarebski A, Chowell G. Estimating the asymptomatic proportion of coronavirus disease 2019 (COVID-19) cases on board the Diamond Princess cruise ship, Yokohama, Japan, 2020. Eurosurveillance. 2020 Mar 12;25(10):2000180.

Signed April 14, 2020 at Seattle, Washington.



Anjum Hajat, PhD, MPH



Catherine Karr, MD, PHD

Exhibit 3

From: [Hartfield, Douglas E \(DOH\)](#)
To: [Gierach, Kimberly \(DOH\)](#)
Subject: RE: Bunk bead idea
Date: Tuesday, April 7, 2020 2:15:53 PM
Attachments: [image007.png](#)
[image001.png](#)
[image003.png](#)

It's a nice idea, but the person on the bottom bunk will be in a hotbox...

My concerns would be:

- 1- The lack of ventilation for the bottom bunk- the occupant will be uncomfortable, and will end up with a higher likelihood of mold or other growth on the mattress (or the entire enclosure, really).
- 2- The curtain would provide a hindrance to emergency egress. Not a huge one, but an issue nonetheless.
- 3- It does nothing for the ladder as a contact point.
- 4- The curtain and the space around the top mattress aren't a filtration system- this still has people less than 6 feet apart, and will not somehow stop or slow the virus transmission. Cloth masks allow for a 97% transmission rate (which is why they're not worth it), and a curtain isn't going to do any better when it's not form-fitting.

Doug Hartfield MPH, REHS

Public Health Advisor 3
Transient Accommodations Program
Environmental Public Health Division
Washington State Department of Health
Douglas.Hartfield@doh.wa.gov
360-480-1062 | www.doh.wa.gov



From: Gierach, Kimberly (DOH)
Sent: Tuesday, April 7, 2020 1:25 PM
To: Hartfield, Douglas E (DOH) <douglas.hartfield@doh.wa.gov>
Subject: FW: Bunk bead idea

I would appreciate your input on this.

Thank you
Kimberly

Kimberly Gierach

Lodging Programs Supervisor – TA & TWH
Division of Environmental Public Health
Washington State Department of Health
kimberly.gierach@doh.wa.gov
360-236-3366 | www.doh.wa.gov



From: Gifford, David (DOH)
Sent: Tuesday, April 7, 2020 12:42 PM
To: Cardenas, Maira (DOH) <Maira.Cardenas@doh.wa.gov>; Gierach, Kimberly (DOH) <kimberly.gierach@doh.wa.gov>
Subject: FW: Bunk bead idea

Thoughts?

David Gifford, RS
Local Health Support Section Manager
Environmental Public Health Division
Washington State Department of Health
dave.gifford@doh.wa.gov
360-236-3074 | www.doh.wa.gov



From: Mike Gempler [<mailto:mgempler@growersleague.org>]
Sent: Tuesday, April 7, 2020 12:36 PM
To: Gifford, David (DOH) <Dave.Gifford@DOH.WA.GOV>; Soiza, Anne M (LNI) <soiz235@LNI.WA.GOV>; Jeff Gomes <jeff.gomes@cityofcashmere.org>; Killip, Jeffrey (LNI) <kilp235@LNI.WA.GOV>
Cc: DeVaney, Jon (ESD Partner) <jon@wstfa.org>
Subject: Bunk bead idea

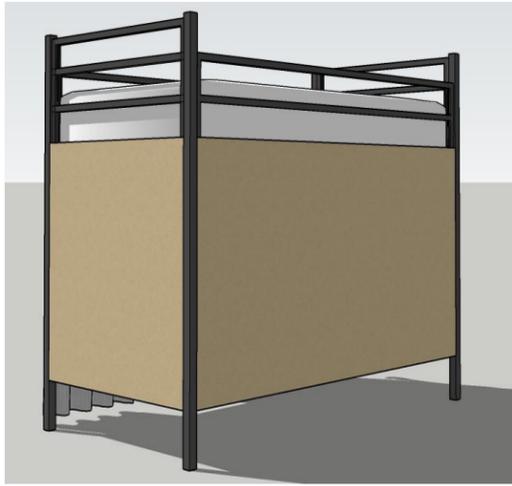
David

Here is a rendering of what I have in mind for a bunk bed that has adequate physical barriers to prevent transmission of Covid-19 virus. There is 3 to 3.5 feet between the top and bottom bunk depending on the model of bunkbed. We would also have people sleep with heads on opposite ends,

Please let me know if this design would be acceptable.

Regards,

Mike Gempler



**WGL TEMPORARY WORKER HOUSING BUNKBEDS
PROPOSED MITIGATION FOR COVID-19 RESPONSE:**

- INSTALL REMOVABLE / CLEANABLE SHEET PRODUCT OR SOLID PANELS TO ENCLOSE 2 ENDS AND WALL SIDE OF LOWER BUNK
- INSTALL WASHABLE CURTAINS ON ACCESS SIDE OF BEDS
- MAINTAIN SOCIAL DISTANCING WITH BED SPACING IN ROOMS
- SLEEPING ROOMS HAVE DEDICATED HVAC UNITS

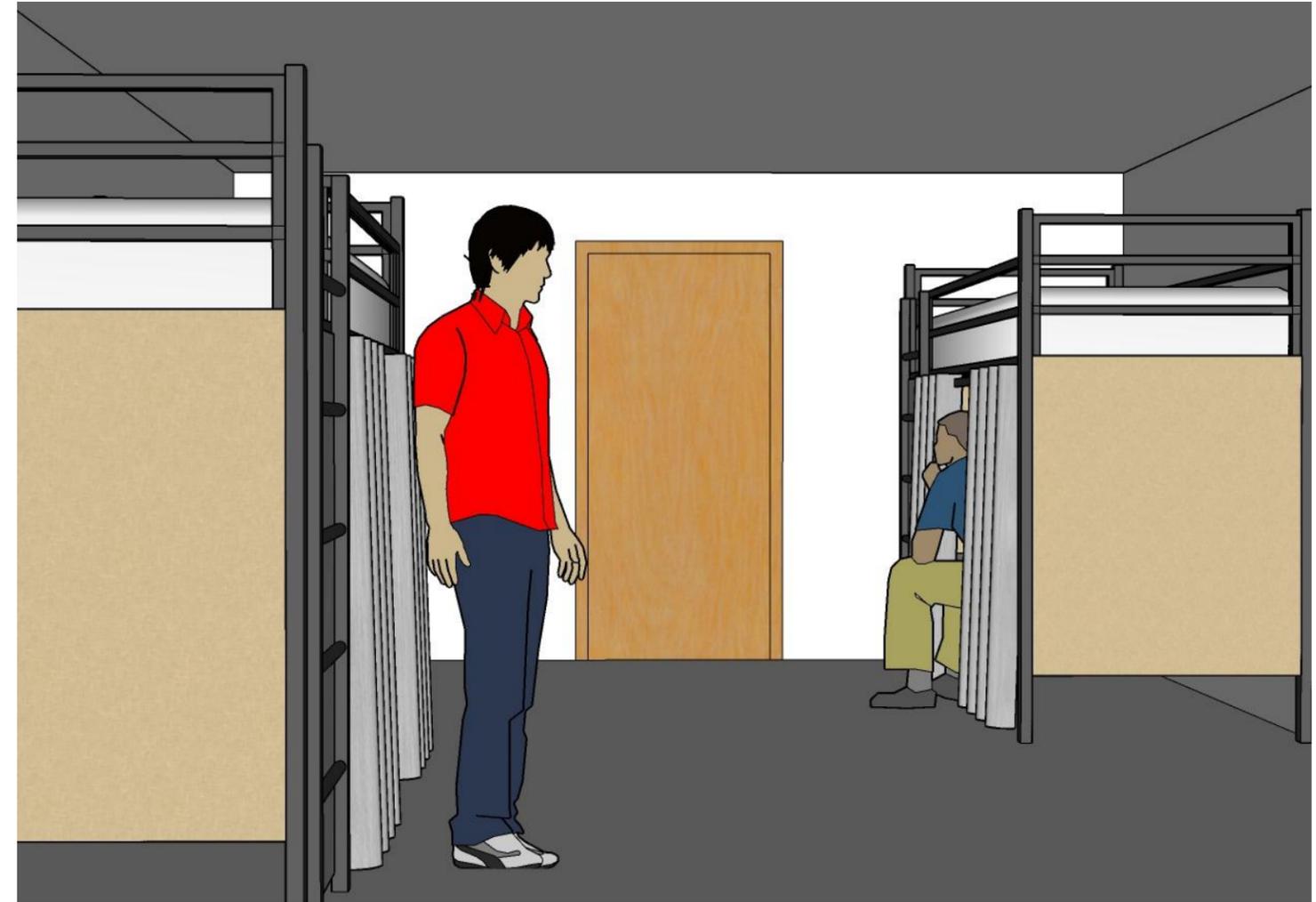


Exhibit 4

April 27, 2020

housing@doh.wa.gov
cynthia.ireland@lni.wa.gov

RE: Request from WA DOH and WA LNI for comments on draft emergency rules for Temporary Worker Housing

Thank you for the opportunity to comment on the Department of Health (DOH) and the Department of Labor & Industries (L&I) draft emergency rules for Temporary Worker Housing in response to the current COVID-19 pandemic. We are writing as academic public health professionals.

Anjum Hajat received her PhD in Epidemiology from the University of North Carolina and her Master 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.

Catherine 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

We applaud the decision to develop emergency rules to ensure the health and safety of farm workers living in temporary housing given concern for vulnerability of this subpopulation to exposure to SARS-CoV-2. We find many aspects of the draft rule helpful in ensuring their protection. We would like to highlight a few areas that we feel may be insufficient and merit additional consideration prior to finalizing.

Ensuring space requirements match need for distancing including for most high risk groups

- The draft rule asks for the development and implementation of a social distance plan. It then offers three ways of complying with bed spacing, including the use of plastic barriers when beds are not six feet apart.
 - We are concerned that these options may not align with the existing square footage requirements, which allows housing with only 50 square feet of floor space per occupant. ([WAC 246-358-029](#)).
 - Recent evidence regarding density and transmission of upper respiratory infections (URI) indicates that an increase in space by 100 square feet reduced URI by almost 13%. Thus from this paper and other evidence, allowing no more than two people per room of 150-200 square feet is needed to meaningfully reduce the risk of transmission of COVID-19.¹
 - More stringent protections are needed for farm workers at highest risk of severe disease. The CDC recognizes individuals over age 65 years of age are higher risk of severe health consequences. In addition, workers of any age with preexisting conditions including chronic lung disease, moderate to severe asthma, serious heart conditions, immunocompromised states, severe obesity, diabetes, chronic kidney disease or liver disease are at highest risk of severe health consequences. Research indicates that farmworkers have a higher prevalence of TB ² and

¹ Cedeno Laurent JG, Allen JG, McNeely E, Dominici F, Spengler JD. Influence of the residential environment on undergraduate students' health. J Expo Sci Environ Epidemiol. 2020 Mar;30(2):320-327.

² The National Center for Farmworker Health. Tuberculosis fact sheet. 2018

have higher exposure to agricultural dust which has been shown to result in a variety of respiratory conditions.³ These conditions which may be more unique to farmworkers would put them at higher risk for complications of COVID-19. We recommend that such high risk individuals not be housed with more than 1 person per room of 150 square feet.

Cleaning and Plastic Barriers

- **Cleaning:** Additional language to specify who will conduct the cleaning and ensure that these individuals have adequate training, protective equipment and supervision is needed. If it is workers who are intended to do the training, adequate time and cleaning materials to conduct this activity need to be ensured.
- **Plastic barriers:** The extent to which these barriers will impede ventilation and air flow is unknown. However, this must be monitored closely and if found that these barriers do impede ventilation/air flow a new solution must be found.

Insufficient washing facilities

- It is critical to ensure that the plastic barriers to be used for sinks are robust and durable rather than thin plastic sheeting. The latter is vulnerable to movement and will be more challenging to clean. The risk is that these plastic barriers themselves will become a vector of transmission.
- It is our understanding that the current rule states 1 sink per six people and 1 shower per ten people; (<https://app.leg.wa.gov/WAC/default.aspx?cite=246-358-029>). Increasing the numbers of sinks and showers can also help in reducing transmission and is recommended.

Lack of inspection

- This rule does not appear to contemplate inspection of housing. Providing a provision for inspection, including by video as a means of protecting inspectors, would increase assurance that barriers used and other unidentified “engineering controls,” achieve the intent of this rule to reduce transmission.

Lack of Isolation Option for Families

- We are pleased to see the rule gives exceptions for family housing to isolation requirements for suspected or diagnosed SARS-CoV-2-positive people. These are challenging decisions for families. We recommend families residing together be provided with the option of housing to isolate suspected or confirmed positive family members, if they so desire.

Education

- The rule provides that the operator of temporary worker housing provides occupants with education about COVID-19, how to prevent virus spread, and what to do if they develop symptoms. It is important to include a statement that such training is available in the language best understood by individual workers and that the content of the information is derived from a reliable source such as the CDC or Washington State Department of Health.

³ Schenker MB, Pinkerton KE, Mitchell D, Vallyathan V, Elvine-Kreis B, Green FH. Pneumoconiosis from agricultural dust exposure among young California farmworkers. Environmental health perspectives. 2009 Jun;117(6):988-94.

Again, thank you for your attention to this important concern and the alignment of the Departments of Health and Labor & Industries.

Sincerely,



Catherine Karr MD PHD
Professor, Pediatrics and Environmental & Occupational Health Sciences
Adjunct Professor, Epidemiology
University of Washington



Anjum Hajat MPH PHD
Assistant Professor, Epidemiology
University of Washington



Exhibit 4

March 19, 2020

Delivered by electronic mail

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

Dear Governor Inslee:

We write to request immediate protection for Washington State's farmworkers during this dire health care crisis. In the near future, we face the real possibility that hospitals will be unable to provide sufficient beds and ventilators for those who need acute, emergency treatment due to novel coronavirus (COVID-19). We also currently lack sufficient health care personnel and testing to ensure all receive the care they need. Many Washingtonians who work in agriculture are highly vulnerable to COVID-19 illness because they lack legal status, access to medical care, and sufficient finances, thus, they are much more likely to forego COVID-19 testing and suffer in silence or go to work even though they are symptomatic.¹

Meanwhile, there is a major hole in the Governor's pandemic containment plan. Washington's agricultural industry is in the process of bringing in thousands of workers from Mexico under the H-2A temporary agricultural visa program in the coming months. Some 7,500 of these workers are already here. None of these workers will be tested for COVID-19 prior to entry, and the vast majority will live on isolated, rural farms in packed dormitory-style housing. Few, if any, of these workers will arrive with, or be provided, health insurance. Besides living, cooking, and bathing in common facilities, they will also be bussed to and from work daily in old school buses or vans, and will regularly be transported into rural towns to buy groceries, cash checks, and send money to their families.

In light of this background, specific steps must be immediately implemented to protect the public health of all Washingtonians, the farmworker community, as well as the 30,000 largely Mexican H-2A workers. Without immediate steps, our rural health care providers, already likely overtaxed, could soon be overrun and further undermine the State's emergency plans.

We recognize and commend the Governor's office for all the proactive steps it has taken to date to protect public health. With that in mind, we provide a reminder that the above concerns are not merely hypothetical as a quarantine of 100 H-2A workers took place in Grant County just last spring. In April of 2019, one hundred H-2A workers from Mexico and Central America needed to be placed in a "limited quarantine" in their Mattawa, Washington labor camp because several contracted mumps.² They lived in 16, on-farm row houses. Below is a picture of the locked entrance and guard house.

¹ March 18, 2020, New York Times, "'We're Petrified': Immigrants Afraid to Seek Medical Care for Coronavirus," (<https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html?action=click&module=Top%20Stories&pgtype=Homepage>)

² May 17, 2019, KUOW, "They Came To Washington To Work, Then They Got The Mumps," (<https://www.kuow.org/stories/they-came-to-washington-to-work-then-they-got-the-mumps>)



Mumps is remarkably similar to COVID-19, in that it is a viral disease spread by water droplets from coughing or sneezing, and symptoms can take two to three weeks to appear after infection.³ This outbreak occurred despite the fact that Mexico, according to World Health Organization data, has a higher measles-mumps-rubella vaccination rate than the United States.⁴ To contain the spread of mumps, Grant County health officials coordinated a mass vaccination and imposed the quarantine.⁵ Not only are vaccinations not available for COVID-19, but rural counties are unlikely to have adequate resources to devote to outbreaks such as these, with the magnitude of the current crisis.

In the context of the current pandemic, we need to ensure that no one is put at risk. The preventative measures below must be put in place as a condition before any additional H-2A workers are brought into the state of Washington, and these same measures need to be implemented to protect the workers already here.

- 1. Enact Emergency Orders to Ensure All Medical Treatment and Costs for All COVID-19 Related Treatment and Medical Expenses Will Be Covered and No Worker Will Be Sent Home with Any COVID-19 Symptoms.**

In order to help stop the spread of COVID-19, all H-2A workers need to know their medical treatment and expenses related to COVID-19 will be fully covered during the time they are working and residing in Washington State. This should include assurances that any worker who is tested for COVID-19 will have those costs covered even if the result is negative for COVID-19. A designated hotline capable of receiving information or messages 24 hours a day should be established within the Department of Health to allow H-2A workers to report potential symptoms and request medical assistance, and the Department should have ready access to COVID-19 testing. Workers' compensation coverage needs to cover H-2A workers who contract COVID-19 or must be quarantined due to the virus. These workers would not be exposed to the virus if they had not come to Washington to work in agriculture.

Finally, recognizing that most H-2A workers come from impoverished rural communities and in order to protect the families, communities, and citizens of sending countries, Washington should pledge to fully treat all H-2A workers in Washington State until all COVID-19 symptoms have been fully resolved. Under

³ April 26, 2019, Good Fruit Grower, "Mumps Hits Farmworkers," (<https://www.goodfruit.com/mumps-hits-farmworkers/>).

⁴ *Id.*

⁵ *Id.*

no circumstances should growers or their agents be allowed to terminate and send home H-2A workers who are sick with or have been exposed to COVID-19.

2. Require Transparent Recruitment Information and Housing Protections Related to COVID-19.

In addition to informing workers about the terms and conditions of employment when workers are still in their hometowns, all persons who are recruiting workers for agricultural employment in Washington in 2020 must provide detailed information about the risks of COVID-19. That information should include how employers will protect their safety while transporting, housing, and employing them in the United States. Prospective workers shall also be advised that they will not be required to pay for any cleaning and sanitizing products and the agricultural employer will have an approved health plan for all workers that includes regular sanitizing of the housing and buses and other communal areas. All prospective H-2A employees shall also be informed that they will receive health care at no cost should they develop COVID-19 symptoms and need to be tested, how they will be quarantined if they develop symptoms or test positive, and that they will not be sent home until all COVID-19 symptoms have been fully resolved.

H-2A employers control workers' housing, and have, in the past, revoked workers' access to that housing on short notice. In Sumas, Washington in 2017, 65 H-2A workers were evicted from their housing with one hour's notice and spent weeks living in the yard of a local resident.⁶ In our current situation, such eviction from housing could cause a public health crisis. No H-2A farmworkers should be evicted or in any way removed from their housing without prior review and approval of the Department of Health and written notification provided to the Mexican Consulate.

3. All Farmworker Housing Must Have Designated Quarantine Living Facilities and COVID-19 Plans Approved by Department of Health Prior to Issuing Any Housing License.

The Washington State Department of Health (DOH) must review and license farmworker housing. In addition to its current checklist, DOH shall add additional COVID-19 plans prior to the issuance of any license. See the CDC COVID-19 Preparedness Checklist for Nursing Homes and other Long-Term Care Settings for guidance on steps to sanitize living facilities.

Those requirements shall include, but not be limited to:

- Provide separate living facilities for workers that are over 60 or have underlying health conditions and have these workers work within 6 feet of other workers.
- Designated quarantine sleeping areas with separate cooking and bathing facilities for quarantined workers.
- Proof of sufficient sanitizing and handwashing supplies.
- Proof of sufficient masks for all quarantined workers who develop COVID-19 symptoms or test positive for COVID-19.
- Designate a specific individual responsible for ensuring workers comply with health and sanitation requirements.
- Designate a specific individual to receive reports from workers who may have COVID-19 symptoms and be able to coordinate and transport such workers to obtain medical services.
- Designate a specific individual whose sole responsibility is to care for quarantined workers and ensure they have sufficient food, that the quarantine is enforced, and that transportation to medical care is provided.

⁶ January 25, 2018, KUOW, "They Were Ordered to Work 'Unless on Their Death Bed,'" (<https://www.kuow.org/stories/they-were-ordered-to-work-unless-on-their-deathbed-blueberry-pickers-claim>)

- Provide unemployment insurance for H2A workers who are going to be quarantined.

4. Ensure Appropriate Social Distancing at Work and in Communities.

To the extent feasible, growers must plan work crew activity to ensure proper distancing to avoid unnecessary transmission of the disease at work. Additionally, most H-2A worker housing is located in rural areas, and employers normally bus workers into small towns to purchase groceries and obtain banking and financial services. Sufficient vehicles must be available such that workers are not sitting directly next to other workers and sufficient ventilation exists.

Given the recent hoarding of essential supplies and food, it is possible that small grocery stores could run out of such items and leave workers or members of the community vulnerable. Moreover, a busload of 50 to 100 or so H-2A workers all entering stores at busy times for local shoppers could drastically increase the likelihood of spreading COVID-19. Therefore, advance arrangements must be made with these services to avoid creating a scarcity of essential food and supplies at grocery stores and to protect against the spread of the virus in these small communities already stressed by the impacts of this global pandemic.

Conclusion

The undersigned organizations and persons request a meeting to discuss prompt implementation of the above to ensure the protection of all H-2A workers, their families and communities, and the residents of Washington State. Again, we appreciate all your administration has done to date and look to your prompt response to continue to refine and improve all aspects of the State's COVID-19 emergency planning.

Sincerely,

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NORTHWEST JUSTICE PROJECT

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FAMILIAS UNIDAS POR LA JUSTICIA

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cc: The Honorable Karen Keiser, Chair, Senate Labor and Commerce
The Honorable Curtis King, Ranking Member, Senate Labor and Commerce
The Honorable John McCoy, Senate Majority Caucus Chair
The Honorable Mike Sells, Chair, House Labor and Workforce Standards
The Honorable Gina Mosbrucker, Ranking Member, House Labor and Workforce Standards
The Honorable Héctor Iván Godoy Priske, Consul, Mexican Consulate, Seattle
Farid Soberanis Garcia, Consul for Legal Protection, Mexican Consulate, Seattle
Caitlyn Jekel, Senior Policy Advisor for Labor, Office of the Governor

Exhibit 5

(COVID-19) Prevention in Agriculture, Temporary Worker Housing and Related Operations

Employers and workers can help limit the spread of coronavirus and keep workers safe and healthy.

Prevent Worker Exposure to Coronavirus (COVID-19)

As of this date, COVID-19 is known to spread from person to person, primarily through respiratory droplets produced when an infected person coughs or sneezes. The Coronavirus virus also spreads by people touching surfaces or objects and then touching one's mouth, nose, and eyes.

The Department of Labor & Industries (L&I) requires employers to implement the Governor's Proclamation: <https://www.governor.wa.gov/news-media/inslee-announces-stay-home-stay-healthy%C2%A0order>. Employers must ensure social distancing for employees and customers; frequent and adequate handwashing; and that sick employees stay home or in the case of employer owned housing, move to isolation away from other employees. Additionally, employers must provide basic workplace hazard education regarding Coronavirus (COVID-19) and how to prevent transmission. This basic workplace hazard education must be in the language best understood by employees.

Workplace Discrimination

It is against the law for any employer to take any adverse action such as firing or threatening a worker for exercising safety and health rights such as raising safety and health concerns to their employer, participating in union activities concerning safety and health matters, filing a safety and health complaint or participating in a DOSH investigation. Workers have 30 days from the date of any such discriminatory action by the employer to file their complaint with L&I DOSH and/or with Federal OSHA. <https://lni.wa.gov/workers-rights/workplace-complaints/discrimination-in-the-workplace>

Employers Must Create and Implement an Effective Social Distancing Plan

You must arrange work areas to facilitate social distancing with a minimum of 6 feet between staff and ensure your staff follow social distancing protocols.

Ideas for Social Distancing (at least 6 feet) in Agricultural Work:

- Stagger tasks and work shifts.
- Limit work to only necessary tasks, to maintain distance over six feet.
- In the field, assign and enforce tasks in which the workers can maintain a distance of at least six (6) feet apart.
- Reorganize work to break up tasks in a manner that facilitates social distancing or other protective measures.
- While maintaining social distancing, employers may need to schedule multiple smaller meetings for crews: safety meetings, trainings, and rest/lunch breaks with no more than 10 workers at any one time in one place.
- You must arrange lunch, common areas, and break rooms to ensure a minimum distance of 6 feet between occupants.

- For field workers, ensure adequate shade areas for breaks with minimum distance of 6 feet between occupants.
- Hold gatherings of no more than 10 employees and hold them outdoors.
- Establish a 'physical distance monitor' – similar to a safety monitor but whose job it is to reinforce the minimum six foot separation.
- Ensure supervisors lead by example.
- Evaluate both the size of vehicles used to transport employees and how many will be transported in order to maintain 6 foot distance between passengers.
- Commuting to/from worksite, limit occupancy during mass transit or carpooling in accordance with six-foot rule. For example, when a bus is used, put one worker per seat or row.
- Modify work so that pick up/drop off points are separated or increase the number to reduce number of employees going to one location.
- Inform workers about the steps being taken in the workplace to establish social distancing to prevent the spread of the coronavirus.
- Discourage nonessential visitation to facilities, and it is advised to maintain a record of all visitors

Employers Must Ensure Frequent and Adequate Handwashing

Ideas for an Effective Handwashing Plan:

- Ensure all workers know why and how to effectively wash hands with soap and water for at least twenty seconds.
- Employers must provide enough hand washing facilities/stations to promote frequent hand washing. There must be enough fixed or portable stations so all employees can wash their hands with soap and hot and cold running water at all worksites and in the Temporary Worker Housing area.
- Require workers to wash hands frequently with soap and water for at least twenty seconds such as when they arrive at work, leave their workstations for breaks, use the bathroom, or after touching any surfaces suspected of being contaminated.
- Require handwashing before and after consumption of food, drink or using tobacco products.
- Make sure handwashing stations have an adequate supply of soap, water and towels whenever they are or could be used by employees.
- Set up a schedule to ensure frequent re-supply of soap and running water on all jobsites and emptying of trash.
- To facilitate more frequent cleaning, secondary handwashing or sanitizing stations can be provided with either hand sanitizer, soap and tepid water, or wipes/towelettes.
- Gloves may be provided, but also must be washed regularly to prevent the spread of the virus. This may help for workers whose hands are bothered by frequent washing.
- Portable hand washing stations are required in fields.

Employers Must Ensure that Sick Employees Stay Home or in the Case of Employer- Owned Housing, Isolation Protocols from ALL Other Employees.

Ideas for Ensuring that Sick Employees are not at Work:

- Ensure employees know the signs and symptoms of COVID-19 caused by coronavirus exposure.

- For field workers, ensure adequate shade areas for breaks with minimum distance of 6 feet between occupants.
- Hold gatherings of no more than 10 employees and hold them outdoors.
- Establish a 'physical distance monitor' – similar to a safety monitor but whose job it is to reinforce the minimum six foot separation.
- Ensure supervisors lead by example.
- Evaluate both the size of vehicles used to transport employees and how many will be transported in order to maintain 6 foot distance between passengers.
- Commuting to/from worksite, limit occupancy during mass transit or carpooling in accordance with six-foot rule. For example, when a bus is used, put one worker per seat or row.
- Modify work so that pick up/drop off points are separated or increase the number to reduce number of employees going to one location.
- Inform workers about the steps being taken in the workplace to establish social distancing to prevent the spread of the coronavirus.
- Discourage nonessential visitation to facilities, and it is advised to maintain a record of all visitors

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- Require workers to wash hands frequently with soap and water for at least twenty seconds such as when they arrive at work, leave their workstations for breaks, use the bathroom, or after touching any surfaces suspected of being contaminated.
- Require handwashing before and after consumption of food, drink or using tobacco products.
- Make sure handwashing stations have an adequate supply of soap, water and towels whenever they are or could be used by employees.
- Set up a schedule to ensure frequent re-supply of soap and running water on all jobsites and emptying of trash.
- To facilitate more frequent cleaning, secondary handwashing or sanitizing stations can be provided with either hand sanitizer, soap and tepid water, or wipes/towelettes.
- Gloves may be provided, but also must be washed regularly to prevent the spread of the virus. This may help for workers whose hands are bothered by frequent washing.
- Portable hand washing stations are required in fields.

Employers Must Ensure that Sick Employees Stay Home or in the Case of Employer- Owned Housing, Isolation Protocols from ALL Other Employees.

Ideas for Ensuring that Sick Employees are not at Work:

- Ensure employees know the signs and symptoms of COVID-19 caused by coronavirus exposure.

- Require sick workers to stay home or go home if they feel or look ill.
- Have a process for identifying and isolating people workers who shows signs of COVID-19 or potential or confirmed COVID-19 cases.
- Encourage workers to report concerns and use paid sick leave.
- Conduct daily COVID-19 symptoms checks of employees, contractors, suppliers, customers and visitors entering the worksite – many employers are using short questionnaires.
- Develop a procedure if a worker becomes ill while at work or if a worker notifies the employer they have become ill while not at work.
- Maintain a process to check-in on sick workers to determine if emergency transport is required.

Establish Increased Frequency for Cleaning and Disinfecting the Worksite and TWH Facilities
Make sure you pay close attention to disinfecting common areas and touch points including:

- Establish increased frequency and maintain regular disinfection at the site, particularly clean objects handled extensively by more than one worker when the items are transferred and in common areas and touch points including:
 - Taps and washing facilities
 - Toilet flush and seats
 - Door handles and push plates
 - Hand rails on staircases and corridors
 - Lift and hoist controls
 - Vehicles
 - Machinery and equipment controls
 - Food preparation and eating surfaces
 - Telephone equipment
 - Food prep areas
 - Common or community dining areas
 - Toilets, bathrooms, sinks, tubs and showers
 - Door handles and push plates
 - Hand rails on staircases and corridors
 - Shared or common telephone equipment
 - Keyboards, photocopiers and other office equipment.
- The first step in cleaning is to remove buildups of dirt and other materials on surfaces. Water and soap or other cleaning fluids are used with cloths, brushes or other physical means of removing these materials so that there is no visible build-up, smears, or streaks on the surface.
- Disinfecting is the second step and is primarily needed for high touch surfaces including vehicles. An EPA approved disinfectant must be used to make sure this is effective:
<https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.
- Surfaces that are commonly touched with the hands but difficult to clean (fabric, rough surfaces, and so forth) may need to be covered to make sure the environment is hygienic.
- Cleaning supplies need to be available to workers to do spot cleaning when necessary.
- Surfaces that are regularly touched by workers must be cleaned regularly to maintain a visibly clean state (no obvious soiling, smearing, or streaks).
- Follow CDC guidelines for cleaning and disinfection

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

- Update Safety Data Sheets (SDS) of all disinfectants on site

Employers Must Provide Basic Workplace Hazard Education Regarding Coronavirus (COVID-19) and How to Prevent Transmission in the Language Best Understood by Employees

Ideas for Providing Basic Workplace Hazard Education About Preventing Coronavirus Transmission:

- Instruct all workers on social distancing, handwashing, and other safety procedures related to coronavirus.
- Educate workers with up-to-date guidelines on COVID-19 risk factors, protective behaviors (e.g., cough etiquette and care of PPE), and how to prevent the spread.
- Advise workers about not touching eyes, noses, and mouths with unwashed hands or gloves.
- Post information from the local health department, state department of health, Center for Disease Control and Prevention, and other authorities.
- Teach workers the importance of hand washing before eating, drinking, or using tobacco.
- Communicate important safety messages/updates daily etc.
- Post large signs throughout the worksite with social distancing guidance; frequent hand washing; required PPE; symptoms reporting.
- Make sure written Accident Prevention Programs, Safety and Health Plans and policies, including plans to protect workers from biological hazards, are communicated to employees in a language they understand, and that they are easily accessible.
- Inform workers about the steps being taken in the workplace to establish social distancing and prevent the spread of the virus.

Personal Protective Equipment

Personal protective equipment may be helpful to prevent transmission of the disease or provide protection from cleaning and disinfecting materials.

- Face shields can prevent direct exposure to expelled droplets and provide protection from disinfectants.
- Respirators require care in use and management under a program covered by the Respirator Rule, Chapter 296-842 WAC. Respirators are not normally recommended for social distancing purposes, but may be appropriate where workers must have close proximity to others.
- Surgical face masks (loose fitting cloth covers over the mouth and nose) do not prevent respiration inhalation of fine aerosols and are not protective in close proximity. The primary purpose for these devices are to prevent exposures to others and may have a use when individuals enter the workplace with a cough or sneezing
- Non-medical face coverings, such as scarves or homemade face masks may be helpful in preventing the wearer from transmitting a non-symptomatic infection to others.
- Care should be used to prevent touching mouth, nose, or eyes when donning, doffing or adjusting the covering. When removing the covering the individual should prevent contaminating themselves, others, or nearby objects with the covering.

Employers Who Provide Worker Housing

The employer's social distancing obligations includes Temporary Worker Housing. The Washington State Department of Health developed guidance to assist temporary worker housing facilities in response to the COVID-19 outbreak.

<https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/TemporaryWorkerHousingGuidance.pdf>

Employer-Provided Temporary Worker Housing is temporary housing provided by the employer in some circumstance such as agricultural guest workers.

- Social distancing must be supported for occupants during the time workers are housed, which may require additional resources. This includes accommodation of the six feet separation of social distancing during recreating time, cooking, and sleeping.
- Workers may have limited control over their environment in some worker housing situations and to the extent that the employer controls conditions the basic program elements should be maintained as feasible during non-working time.
- Transportation provided for workers must also allow for social distancing.
- Housing occupants **must be provided** cleaners and equipment to maintain a hygienic living space.

If a housing occupant becomes sick

- Provide sick employees with isolation plans that prevent further spread of the disease
 - Separate food and bathroom access is also strongly advised.
- Arrange for medical access.
 - Telemedicine resources should be utilized first to determine appropriate care.
 - Provide transportation, if necessary in a manner that does not expose others.
- The employer needs to consult with a physician or public health authority to monitor the situation and provide guidance on treatment and continued housing of workers.
- Establish a process for deep cleaning after any worker leaves the workplace reporting a suspected or confirmed case of COVID-19.
 - Thoroughly clean areas where the worker worked or would have stayed more than 10 minutes.
 - Wipe all accessible surfaces
 - Clean up any visible soiling including any smears or streaks.
 - Sanitize common touch surfaces in the vicinity.
 - Do not allow other workers into these areas until the cleaning is complete

Employee responsibilities:

- Don't go to work if you are sick.
- Wash hands just before consumption or use of food, water, and tobacco.
- Cover your mouth and nose with tissues if you cough or sneeze, or cough/sneeze into your elbow.
- Do not shake hands or bump elbows with others.
- Avoid touching your eyes, nose, or mouth.
- Wash your hands often with soap and water for at least 20 seconds.
- Pay attention to official sources of information such as the CDC and the Washington State Department of Health.
- Do not share tools, phones, or PPE.
- Do not share food with others on the jobsite.

- Wear appropriate PPE for jobsite hazards.

Other Protective Measures

- Provide ways for workers to express any concerns and ideas to improve safety.
- Update store Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.
- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

Resources

Call a consultant near you or email DOSHConsultation@Lni.wa.gov for help Lni.wa.gov/doshconsultation

Employers should reference the CDC's [Interim Guidance for Businesses and Employers](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) :

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

Exhibit 6

April 6, 2020

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

Dr. John Wiesman, Secretary
Department of Health
secretary@doh.wa.gov
c/o Ms. Tami Thompson, Rules Coordinator
Department of Health
tami.thompson@doh.wa.gov

Re: Emergency Rule Request – Protection of Farmworkers

Dear Directors Sacks and Weisman:

This is a formal request for your agencies to file and publish emergency rules pursuant to RCW 34.05.350(1)(a) no later than April 10, 2020 to protect the lives of essential farmworkers from the COVID-19 health emergency.

On February 29, 2020, Governor Inslee exercised his emergency powers and declared a State of Emergency in all counties in the state of Washington citing:

The worldwide outbreak of COVID-19 and the effects of its **extreme risk of person-to-person transmission throughout the United States and Washington State significantly impacts the life and health of our people**, as well as the economy of Washington State, **and is a public disaster** that affects life, health, property or the public peace.

Proclamation 20-05 (emphasis added). On March 23, 2020, Governor Inslee issued Proclamation 20-25 amending his initial Proclamation and issuing a Stay Home order prohibiting all people in Washington State from leaving their homes, effective March 25, 2020, except to conduct essential activities citing:

The COVID-19 disease, caused by a virus **that spreads easily from person to person which may result in serious illness or death and** has been classified by the World Health Organization as a worldwide pandemic, **has broadly spread throughout Washington State, significantly increasing the threat of serious associated health risks statewide.**



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Amended Proclamation 20-25 (emphasis added). Agriculture was designated an essential industry and farmworkers were designated as essential workers. Appendix, Proclamation 20-25 at 3-4. The Stay Home order was to remain in effect until April 6, 2020. On April 2, 2020, Governor Inslee amended both of the above Proclamations and extended the Stay Home order until May 4, 2020 citing:

Since Proclamation 20-25 was issued on March 23, **the number of confirmed cases and deaths in Washington State has more than doubled**, and there are currently at least 5,984 cases of COVID-19 in Washington State with 247 associated deaths; **and**, furthermore, **models predict that many hospitals in Washington State will reach capacity or become overwhelmed with COVID-19 patients within the next few weeks** unless we significantly slow its spread throughout the state

Proclamation 20-25.1 (emphasis added).

On April 4, 2020, Dr. Deborah Birx, the White House's coronavirus response coordinator stated: **"The next two weeks are extraordinarily important.** This is the moment to not be going to the grocery store, not going to the pharmacy, but **doing everything you can to keep your family and your friends safe and that means everybody doing the six-foot distancing, washing their hands."**¹

On April 3, 2020, in response to our March 19, 2020 letter to Governor Inslee requesting immediate protection of all Washington farmworkers, including regulations and requirements to protect workers in their housing, transportation, and field activities, the Department of Labor and Industries sent out draft guidance for the agricultural industry to implement Proclamation 20-25.

The April 3rd draft guidance contains a contradictory mix of statements. Agricultural employers are told they must implement social distancing at the workplace, but the guidance is couched in suggestions, not mandates ("Ideas for social distancing," "Ideas for an effective handwashing plan," etc.) that present more as best practices, not enforceable regulations. There is nothing in the document referencing specific Washington Administrative Code sections, nothing about emergency rulemaking, and nothing to indicate that fines can be imposed or licenses suspended for non-compliance. At best, the guidance mandates general end goals without requiring specific actions; at worst, it is merely aspirational. Even if some of the April 3rd guidance is enforceable, that is entirely insufficient given the life and death stakes facing workers on the front line of this pandemic.

In order to provide clarity to all agricultural employers and farmworkers, it is imperative that your departments adopt enforceable emergency rules pursuant to RCW 34.05.350. Issuing rules makes the mandate clear. The statute provides your agencies with the authority to immediately implement emergency rules where there is good cause to:

Adopt, amend, or repeal a rule **for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.**

RCW 34.05.350(1)(a) (emphasis added).² Such emergency rules would take immediate effect and last for 120 days – until early August. RCW 34.05.350(2). Given the Governor's Proclamations

¹ "Trump Warns of 'a Lot of Death' While Also Revisiting Easter Sunday Services," *New York Times*, April 4, 2020 (<https://www.nytimes.com/2020/04/04/world/coronavirus-live-news-updates.html>).

² It is noteworthy that attorneys for agricultural employers are already advising their clients to immediately implement social distancing protocols, strongly indicating that the need for comment from the regulated industry

declaring a state-wide COVID-19 emergency with “extreme risk” that “may result in serious illness or death” guidance is insufficient and will not protect the lives of agricultural workers. A recent University of Texas at Austin study concludes that even though many eastern Washington counties have relatively low reported COVID-19 cases, those areas have an extremely high probability of having an epidemic – an undetected outbreak.^{3 4}

COUNTY	NUMBER OF REPORTED COVID-19 CASES	PROBABILITY OF COMMUNITY TRANSMISSION
YAKIMA	216	100%
GRANT	74	100%
BENTON	133	100%
FRANKLIN	43	100%
ADAMS	20	99%
CHELAN	19	98%
OKANOGAN	4	84%

Vulnerable farmworkers deserve clear, enforceable regulations that provide real workplace protections. The failure to immediately implement emergency regulations would amount to an abuse of discretion and subject your departments to legal exposure. *Rios v. Washington Dep't of Labor & Indus.*, 145 Wn.2d 483, 507–08, 39 P.3d 961, 973–74 (2002)(rejection of farmworkers’ rulemaking request for pesticide regulations was arbitrary given the Department of Labor & Industries had already issued draft “nonmandatory guidelines” to attempt to accomplish the same goal). In *Rios*, the Washington Supreme Court ruled that in failing to act on the farmworkers’ request for rulemaking, the Department violated RCW 49.17.050(4), the requirement that the Department “**set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health.**” *Id.* (emphasis added).

We include the statement of Dr. Victoria Breckwich Vasquez from the University of Washington in support of these emergency rules. We doubt that any reputable public health expert would disagree with Dr. Breckwich Vasquez’s recommendations.

is not necessary.

(<https://nam10.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.stokeslaw.com%2Fnews-and-insights%2Fstokes-law-briefs%2Fready-work-force-for-continued-operations-in-the-face-of-covid19&data=01%7C01%7Clori.isley%40columbialegal.org%7C144466eebcd64c4d8e7e08d7d32efc85%7Cba70ca6351c6479aa777d724ac5d1539%7C0&data=1FUef9Iv8JLz7qpZYypjQlfCkQOPUhw66fXbvS1H3c%3D&reserved=0>).

³ “Does My County Have an Epidemic? Estimates Show Hidden Transmission,” *New York Times*, April 3, 2020. (<https://www.nytimes.com/interactive/2020/04/03/us/coronavirus-county-epidemics.html>).

⁴ Western Washington agricultural counties such as Skagit and Whatcom also have a 100% probability of an epidemic. *Id.*

We also attach a draft set of rules for the Department of Health that would cover labor camp housing and transportation of farmworkers. We believe the guidance provided for the workplace in the April 3rd draft document, along with other measures, could similarly be converted into emergency regulations for the Department of Labor and Industries.

The health of the state's farmworkers cannot rest on the hope that agricultural employers will follow agency guidance. Adopt enforceable rules and then enforce them. Workers who put food on our tables deserve nothing less.⁵

Please contact us at your earliest convenience so that we may assist in this joint endeavor to protect the lives of farmworkers and their families.

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Enclosures:

- April 3, 2020 L&I draft guidelines
- Farmworker proposed emergency WAC housing & transportation regulations
- April 6, 2020 letter from Dr. Victoria Breckwich Vasquez
- March 19, 2020 Farmworker advocate letter to Governor Inslee
- Copy of *Rios v. Washington Dep't of Labor & Indus.* Supreme Court decision

⁵ 338 Washingtonians have died of COVID-19 as of April 4, 2020. Two days earlier, when the Governor extended his proclamations, 247 Washingtonians had died. In just forty-eight hours, that number rose by nearly 100 deaths. [.https://www.arcgis.com/apps/opsdashboard/index.html#/3614241b1c2b4e519ae1cf52e2c3d560](https://www.arcgis.com/apps/opsdashboard/index.html#/3614241b1c2b4e519ae1cf52e2c3d560)

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(COVID-19) Prevention in Agriculture, Temporary Worker Housing and Related Operations

Employers and workers can help limit the spread of coronavirus and keep workers safe and healthy.

Prevent Worker Exposure to Coronavirus (COVID-19)

As of this date, COVID-19 is known to spread from person to person, primarily through respiratory droplets produced when an infected person coughs or sneezes. The Coronavirus virus also spreads by people touching surfaces or objects and then touching one's mouth, nose, and eyes.

The Department of Labor & Industries (L&I) requires employers to implement the Governor's Proclamation: <https://www.governor.wa.gov/news-media/inslee-announces-stay-home-stay-healthy%2%A0order>. Employers must ensure social distancing for employees and customers; frequent and adequate handwashing; and that sick employees stay home or in the case of employer owned housing, move to isolation away from other employees. Additionally, employers must provide basic workplace hazard education regarding Coronavirus (COVID-19) and how to prevent transmission. This basic workplace hazard education must be in the language best understood by employees.

Workplace Discrimination

It is against the law for any employer to take any adverse action such as firing or threatening a worker for exercising safety and health rights such as raising safety and health concerns to their employer, participating in union activities concerning safety and health matters, filing a safety and health complaint or participating in a DOSH investigation. Workers have 30 days from the date of any such discriminatory action by the employer to file their complaint with L&I DOSH and/or with Federal OSHA. <https://lni.wa.gov/workers-rights/workplace-complaints/discrimination-in-the-workplace>

Employers Must Create and Implement an Effective Social Distancing Plan

You must arrange work areas to facilitate social distancing with a minimum of 6 feet between staff and ensure your staff follow social distancing protocols.

Ideas for Social Distancing (at least 6 feet) in Agricultural Work:

- Stagger tasks and work shifts.
- Limit work to only necessary tasks, to maintain distance over six feet.
- In the field, assign and enforce tasks in which the workers can maintain a distance of at least six (6) feet apart.
- Reorganize work to break up tasks in a manner that facilitates social distancing or other protective measures.
- While maintaining social distancing, employers may need to schedule multiple smaller meetings for crews: safety meetings, trainings, and rest/lunch breaks with no more than 10 workers at any one time in one place.
- You must arrange lunch, common areas, and break rooms to ensure a minimum distance of 6 feet between occupants.

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- For field workers, ensure adequate shade areas for breaks with minimum distance of 6 feet between occupants.
- Hold gatherings of no more than 10 employees and hold them outdoors.
- Establish a 'physical distance monitor' – similar to a safety monitor but whose job it is to reinforce the minimum six foot separation.
- Ensure supervisors lead by example.
- Evaluate both the size of vehicles used to transport employees and how many will be transported in order to maintain 6 foot distance between passengers.
- Commuting to/from worksite, limit occupancy during mass transit or carpooling in accordance with six-foot rule. For example, when a bus is used, put one worker per seat or row.
- Modify work so that pick up/drop off points are separated or increase the number to reduce number of employees going to one location.
- Inform workers about the steps being taken in the workplace to establish social distancing to prevent the spread of the coronavirus.
- Discourage nonessential visitation to facilities, and it is advised to maintain a record of all visitors

Employers Must Ensure Frequent and Adequate Handwashing

Ideas for an Effective Handwashing Plan:

- Ensure all workers know why and how to effectively wash hands with soap and water for at least twenty seconds.
- Employers must provide enough hand washing facilities/stations to promote frequent hand washing. There must be enough fixed or portable stations so all employees can wash their hands with soap and hot and cold running water at all worksites and in the Temporary Worker Housing area.
- Require workers to wash hands frequently with soap and water for at least twenty seconds such as when they arrive at work, leave their workstations for breaks, use the bathroom, or after touching any surfaces suspected of being contaminated.
- Require handwashing before and after consumption of food, drink or using tobacco products.
- Make sure handwashing stations have an adequate supply of soap, water and towels whenever they are or could be used by employees.
- Set up a schedule to ensure frequent re-supply of soap and running water on all jobsites and emptying of trash.
- To facilitate more frequent cleaning, secondary handwashing or sanitizing stations can be provided with either hand sanitizer, soap and tepid water, or wipes/towelettes.
- Gloves may be provided, but also must be washed regularly to prevent the spread of the virus. This may help for workers whose hands are bothered by frequent washing.
- Portable hand washing stations are required in fields.

Employers Must Ensure that Sick Employees Stay Home or in the Case of Employer- Owned Housing, Isolation Protocols from ALL Other Employees.

Ideas for Ensuring that Sick Employees are not at Work:

- Ensure employees know the signs and symptoms of COVID-19 caused by coronavirus exposure.

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- Require sick workers to stay home or go home if they feel or look ill.
- Have a process for identifying and isolating people workers who shows signs of COVID-19 or potential or confirmed COVID-19 cases.
- Encourage workers to report concerns and use paid sick leave.
- Conduct daily COVID-19 symptoms checks of employees, contractors, suppliers, customers and visitors entering the worksite – many employers are using short questionnaires.
- Develop a procedure if a worker becomes ill while at work or if a worker notifies the employer they have become ill while not at work.
- Maintain a process to check-in on sick workers to determine if emergency transport is required.

Establish Increased Frequency for Cleaning and Disinfecting the Worksite and TWH Facilities Make sure you pay close attention to disinfecting common areas and touch points including:

- Establish increased frequency and maintain regular disinfection at the site, particularly clean objects handled extensively by more than one worker when the items are transferred and in common areas and touch points including:
 - Taps and washing facilities
 - Toilet flush and seats
 - Door handles and push plates
 - Hand rails on staircases and corridors
 - Lift and hoist controls
 - Vehicles
 - Machinery and equipment controls
 - Food preparation and eating surfaces
 - Telephone equipment
 - Food prep areas
 - Common or community dining areas
 - Toilets, bathrooms, sinks, tubs and showers
 - Door handles and push plates
 - Hand rails on staircases and corridors
 - Shared or common telephone equipment
 - Keyboards, photocopiers and other office equipment.
- The first step in cleaning is to remove buildups of dirt and other materials on surfaces. Water and soap or other cleaning fluids are used with cloths, brushes or other physical means of removing these materials so that there is no visible build-up, smears, or streaks on the surface.
- Disinfecting is the second step and is primarily needed for high touch surfaces including vehicles. An EPA approved disinfectant must be used to make sure this is effective:
<https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.
- Surfaces that are commonly touched with the hands but difficult to clean (fabric, rough surfaces, and so forth) may need to be covered to make sure the environment is hygienic.
- Cleaning supplies need to be available to workers to do spot cleaning when necessary.
- Surfaces that are regularly touched by workers must be cleaned regularly to maintain a visibly clean state (no obvious soiling, smearing, or streaks).
- Follow CDC guidelines for cleaning and disinfection

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<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

- Update Safety Data Sheets (SDS) of all disinfectants on site

Employers Must Provide Basic Workplace Hazard Education Regarding Coronavirus (COVID-19) and How to Prevent Transmission in the Language Best Understood by Employees

Ideas for Providing Basic Workplace Hazard Education About Preventing Coronavirus Transmission:

- Instruct all workers on social distancing, handwashing, and other safety procedures related to coronavirus.
- Educate workers with up-to-date guidelines on COVID-19 risk factors, protective behaviors (e.g., cough etiquette and care of PPE), and how to prevent the spread.
- Advise workers about not touching eyes, noses, and mouths with unwashed hands or gloves.
- Post information from the local health department, state department of health, Center for Disease Control and Prevention, and other authorities.
- Teach workers the importance of hand washing before eating, drinking, or using tobacco.
- Communicate important safety messages/updates daily etc.
- Post large signs throughout the worksite with social distancing guidance; frequent hand washing; required PPE; symptoms reporting.
- Make sure written Accident Prevention Programs, Safety and Health Plans and policies, including plans to protect workers from biological hazards, are communicated to employees in a language they understand, and that they are easily accessible.
- Inform workers about the steps being taken in the workplace to establish social distancing and prevent the spread of the virus.

Personal Protective Equipment

Personal protective equipment may be helpful to prevent transmission of the disease or provide protection from cleaning and disinfecting materials.

- Face shields can prevent direct exposure to expelled droplets and provide protection from disinfectants.
- Respirators require care in use and management under a program covered by the Respirator Rule, Chapter 296-842 WAC. Respirators are not normally recommended for social distancing purposes, but may be appropriate where workers must have close proximity to others.
- Surgical face masks (loose fitting cloth covers over the mouth and nose) do not prevent respiration inhalation of fine aerosols and are not protective in close proximity. The primary purpose for these devices are to prevent exposures to others and may have a use when individuals enter the workplace with a cough or sneezing
- Non-medical face coverings, such as scarves or homemade face masks may be helpful in preventing the wearer from transmitting a non-symptomatic infection to others.
- Care should be used to prevent touching mouth, nose, or eyes when donning, doffing or adjusting the covering. When removing the covering the individual should prevent contaminating themselves, others, or nearby objects with the covering.

Employers Who Provide Worker Housing

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The employer's social distancing obligations includes Temporary Worker Housing. The Washington State Department of Health developed guidance to assist temporary worker housing facilities in response to the COVID-19 outbreak.

<https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/TemporaryWorkerHousingGuidance.pdf>

Employer-Provided Temporary Worker Housing is temporary housing provided by the employer in some circumstance such as agricultural guest workers.

- Social distancing must be supported for occupants during the time workers are housed, which may require additional resources. This includes accommodation of the six feet separation of social distancing during recreating time, cooking, and sleeping.
- Workers may have limited control over their environment in some worker housing situations and to the extent that the employer controls conditions the basic program elements should be maintained as feasible during non-working time.
- Transportation provided for workers must also allow for social distancing.
- Housing occupants **must be provided** cleaners and equipment to maintain a hygienic living space.

If a housing occupant becomes sick

- Provide sick employees with isolation plans that prevent further spread of the disease
 - Separate food and bathroom access is also strongly advised.
- Arrange for medical access.
 - Telemedicine resources should be utilized first to determine appropriate care.
 - Provide transportation, if necessary in a manner that does not expose others.
- The employer needs to consult with a physician or public health authority to monitor the situation and provide guidance on treatment and continued housing of workers.
- Establish a process for deep cleaning after any worker leaves the workplace reporting a suspected or confirmed case of COVID-19.
 - Thoroughly clean areas where the worker worked or would have stayed more than 10 minutes.
 - Wipe all accessible surfaces
 - Clean up any visible soiling including any smears or streaks.
 - Sanitize common touch surfaces in the vicinity.
 - Do not allow other workers into these areas until the cleaning is complete

Employee responsibilities:

- Don't go to work if you are sick.
- Wash hands just before consumption or use of food, water, and tobacco.
- Cover your mouth and nose with tissues if you cough or sneeze, or cough/sneeze into your elbow.
- Do not shake hands or bump elbows with others.
- Avoid touching your eyes, nose, or mouth.
- Wash your hands often with soap and water for at least 20 seconds.
- Pay attention to official sources of information such as the CDC and the Washington State Department of Health.
- Do not share tools, phones, or PPE.
- Do not share food with others on the jobsite.

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- Wear appropriate PPE for jobsite hazards.

Other Protective Measures

- Provide ways for workers to express any concerns and ideas to improve safety.
- Update store Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.
- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Employers should reference the CDC's [Interim Guidance for Businesses and Employers](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) :

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

Increased Protection Needed During COVID:

A. WAC is 246-358-025: Licensure.

(13) No license shall be issued unless the following additional emergency regulations related to the COVID-19 health emergency have been complied with.

The Department is authorized to provide a temporary TWH license on an expedited basis for housing required for workers quarantined as a result of COVID-19 exposure or COVID-19 symptoms, or to isolate workers with a positive COVID-19 diagnosis.

B. WAC 246-358-029: Maximum TWH capacity.

Reduce the maximum capacity of the dwelling unit as necessary to ensure that:

1. Beds shall be spaced at least 6 feet apart and no bunkbeds shall be permitted. In no case should beds be spaced such that the head or foot of the bed is less than 6 feet from the head or foot of another bed.
2. At least one sink shall be provided for each 3 residents, to allow for frequent handwashing while respecting social distancing.
3. At least 1 shower shall be provided per every 5 occupants, to allow for bathing immediately upon returning from work while respecting social distancing.

C. WAC 246-358-050: Camp Management Plan

Add emergency provisions:

The key components of a prevention plan for occupants of worker housing shall include 1) minimizing the risk for exposure to the virus, 2) early detection of people with symptoms of COVID-19, and 3) caring for individuals with COVID-19 while ensuring that they do not give the infection to anyone else.

(3) The provider must have an emergency plan for how they will care for and isolate COVID-19 infected occupants.

1. Make sure that you have the phone number of your local health department. OSHA requires "camp superintendents" to report immediately to the local health officer the name and address of any individual in the camp known or suspected of having a communicable disease. (29 CFR 1910.142(l)(1)). The health department will help to guide you on your specific situation, including how, if and when to test farmworkers with symptoms.
2. Designate a specific individual responsible for implementation of the COVID-19 plan, including the responsibility to receive reports from occupants who may have COVID-19 symptoms, with the ability to coordinate and transport such occupants to obtain medical services, as well as ensuring housing and care for quarantined or isolated occupants.

3. People with symptoms of COVID-19 (e.g. fever, cough, shortness of breath) are considered suspect cases and must be housed in a separate room with a separate bathroom from people who are not sick. Under no circumstances shall they be allowed to share cooking or eating facilities.
4. Confirmed COVID-19 cases shall be isolated and only housed with other confirmed cases. They should have separate bathroom, cooking and eating facilities from people who have not been diagnosed with COVID-19.
5. When available, provide disposable facemasks and store them near the doors for people with suspected and confirmed COVID-19 infections. Facemasks and other personal protective equipment (disposable gloves) shall be worn by both groups when they are outside of their room, when people are in their rooms, and by the people who enter their rooms to care for them.
6. Provide adequate ventilation in the room where persons with COVID-19 are housed on regular intervals.
7. Assign a person who will be responsible for paying for, obtaining, and providing food, water, and medical supplies to all quarantined or isolated occupants as they may be unable to provide for themselves during this time.
8. Assign a person who will be responsible for transportation of all ill workers who need medical evaluation or treatment. You must consider how the person doing the transporting is to be protected, where the closest facilities are located and how testing and/or care will be paid for.
9. Create and implement a plan in conjunction with medical professionals for what to do if many workers are sick at the same time.

D. Current WAC 246-358-175 Disease prevention and control.

1. Screen arriving workers for symptoms of COVID-19 such as fever, cough, or shortness of breath.
 - a. Occupants of the housing with symptoms shall be housed separately, as set out in WAC 246-358-050 (3), and the housing provider shall immediately contact the local health district for a consult. If the worker needs to be seen at a healthcare facility, the housing provider shall transport the worker to the medical facility, in coordination with medical provider. Everyone in the vehicle, including the patient, must wear a disposable face mask.
 - b. Instruct co-workers to self-monitor for symptoms of COVID-19 for 14 days. Exposed workers shall be separated from non-exposed workers for 14 days (e.g. sleep in a separate room, work in a separate area, use a separate bathroom and cooking facility.) If they develop symptoms of COVID 19, the rules in 1(a) shall be followed.
2. Provide separate living facilities for workers that are over 60 or have underlying health conditions.
3. Provide sufficient supplies of sanitizing products (using the EPA's approved list of disinfectants for use against the virus that causes COVID-19: <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>) at no cost to the occupants of the housing to sanitize their living spaces daily. Provide workers with guidance on how to disinfect their spaces by

referring to relevant CDC guidance (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html>)

4. Provide readily accessible handwashing supplies in sufficient quantities at no cost to all the occupants of the housing to be able to wash hands regularly.
5. Place chairs and dining tables so as to maintain 6 foot social distances. Set a schedule for shifts for cooking and dining so as to allow for social distancing.
6. Housing providers shall clean and disinfect the common spaces at least daily and after every cooking/dining shift.
7. Provide signs in the primary language and at the appropriate literacy level of the occupants of the housing about proper handwashing technique, physical distancing of at least 6 feet, need to cough and sneeze into an elbow instead of a hand to protect against infection.
8. Transport all workers in ways that allow them to stay at least 6 feet apart on the bus or van even though this may mean multiple trips are required. Disinfect the interior seats and hand areas of the bus or van at the beginning or end of each day and after each bus trip to the fields or into town for personal needs (groceries, banking, etc.)

E. WAC 246-358-075. Building Requirements and Maintenance

1. (13) Need to maintain social distancing; therefore, revoke the waivers granted from the requirement that housing provide 100 sq. feet per worker in rooms with cooking and sleeping
2. Disinfecting Schedule:
 - a. Clean and disinfect shared areas of farmworker housing, bathrooms and transportation vehicles at least daily and in compliance with WAC 246-358-175 above.



UNIVERSITY *of* WASHINGTON | BOTHELL
SCHOOL OF NURSING AND HEALTH STUDIES

April 6, 2020

To Washington State Department of Labor & Industries and Department of Health,

I am writing this in support of an emergency rulemaking petition to the Washington State Department of Health. Currently, I am an affiliate faculty with the Department of Environmental and Occupational Health Sciences and the Pacific Northwest Agricultural Safety and Health Center at University of Washington. I also teach Public Health and Nursing at the University of Washington Bothell. I was recently Vice President of Preventive Health Services, Education & Training at Sea Mar Community Health Centers and continue as a volunteer with the Sea Mar MSAW Promotores Program in Skagit and Whatcom counties. I have been working in occupational health for the past 20 years and completed several research projects with farmworkers in Yakima on childhood asthma, pesticide safety, and sexual harassment prevention for the past seven years. I have a Doctorate in Public Health from UC Berkeley (2005), a Masters in Public Health and a Masters in Latin American Studies from UCLA (1994 and 1993, respectively). In this letter, I draw upon my academic, research and professional experiences.

At this time in the Coronavirus pandemic, ensuring a steady supply of farmworkers and keeping them healthy are of great importance to sustaining a viable food supply chain with minimal interruption. While all farmworkers are at risk, H-2A temporary agricultural visaholders are in particular danger of contracting and spreading the virus due to a lack of firm standards capable of stopping spread of COVID-19. And while there are 5,000 or more H-2A workers here in Washington already, we expect 20,000 more to arrive this year, starting as soon as this month. Outlined below is evidence to suggest that farmworkers are highly vulnerable to coronavirus, and a few priorities we should consider immediately in creating a healthy farmworker workforce.

We know that crowded housing and transportation can easily spread the virus. First, we know that Covid-19 is a new disease that is thought to spread mainly from person-to-person, in particular between people who are in close contact with one another (within about 6 feet) and through respiratory droplets produced when an infected person coughs or sneezes.¹ The contagiousness (or Reproductive number) of Covid-19 is higher (~ 2.2, compared to seasonal flu ~ 1.2) as compared to other viruses, which means it is more easily spread in community and work settings, especially those that expose people to high density working and living quarters.² Farmworkers are living in

¹ https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html

² World Health Organization, COVID-19 Situation Reports [accessed: April 1, 2020]; Zhang, S. et al. 2020. Estimation of the reproductive number of novel coronavirus (COVID-19) and the probably outbreak size on the Diamond

labor camps on farms in close quarters, often sleeping four to a bedroom while sharing bathrooms and cooking tools.

Current WA State DOH housing guidelines, issued on March 25, 2020, say that if a person is sick they should sleep on the other side of the room from healthy people, but this is insufficient. When a person who is confirmed infected with coronavirus, CDC guidance³ recommends the person stay in a separate room away from other people, use a separate bathroom, and not share personal household items like dishes.

Issues involving transportation are paramount to stopping the community spread of COVID-19. Farmworkers are transported to and from labor camp housing to the fields while crammed into school busses. They are also being bussed into rural communities to shop for their own needs. And if a farmworker gets sick, there is no current requirement for employers to transport them to medical care. Because it is highly contagious, a lot more needs to be done in the everyday transportation of workers to mitigate infection. Regulations that include less dense and more frequent bus trips for supplies, separating the driver from the workers to ensure safe distance, making hand sanitizer, tissues and means of disposal on the bus available, and culturally-appropriate signage on board would all be ways to ensure worker safety and comply with regulatory mandates. Employers need clear regulations to communicate with local hospitals about workers with serious and unmanageable symptoms of COVID-19 and provide transportation of their workers to emergency services as needed so that workers are not increasing community exposure to the virus.

Additional regulations about providing access to culturally-tailored and language/literacy-appropriate prevention information is vital. This includes training demonstrations and signage in a format that workers can easily understand and put to use. Workers themselves point to a lack of information from employers about efforts to mitigate spreading the virus. A worker recently interviewed said that in Washington, he received no information from his employer about strategies to protect himself and others from coronavirus.⁴

Some farms across the United States are taking steps to safeguard their workers' health. A recent article⁵ highlights some of the remedies that employers are taking on their own to mitigate farmworker's unnecessary exposure. Some limit workers' trips to nearby towns, and instead provide for grocery and personal item deliveries to workers living on their farms. Other farm owners are arranging for food trucks offering prepared

Princess cruise ship: A data-driven analysis. *International Journal of Infectious Diseases*. Vol. 93, P. 201-204; M. McFall-Johnsen and H. Secon. 2020. "The Average Coronavirus Patient Infects at Least 2 Others, Suggesting the Virus is Far More Contagious Than Flu." *Business Insider*, March 17, 2020:

<https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3>

³ <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/care-for-someone.html>

⁴ Newman, J. "The Coronavirus Challenges Facing U.S. Farms: Get Workers, Keep Them Healthy." *Wall Street Journal*, March 31, 2020

⁵ *Ibid.*

meals so the workers can remain at work, adding hand-washing stations to the fields, searching for additional busses to carry fewer workers to the field sites, collaborating closely with nurses and other health care organizations to monitor workers' health, setting aside rooms to isolate sick workers, and cutting crew sizes and staggering schedules to reduce workers' exposure to one another in fields. While these are all good ideas, implementation is hasty and there is no present public health regulation to support these mitigation-friendly efforts in Washington state.

Thank you for doing all you do to protect the health of Washingtonians. Please let me know if you have any additional questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Victoria Breckwich V." with a stylized flourish at the end.

Victoria Breckwich Vasquez, DrPH, MPH, MA
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March 19, 2020

Delivered by electronic mail

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

Dear Governor Inslee:

We write to request immediate protection for Washington State's farmworkers during this dire health care crisis. In the near future, we face the real possibility that hospitals will be unable to provide sufficient beds and ventilators for those who need acute, emergency treatment due to novel coronavirus (COVID-19). We also currently lack sufficient health care personnel and testing to ensure all receive the care they need. Many Washingtonians who work in agriculture are highly vulnerable to COVID-19 illness because they lack legal status, access to medical care, and sufficient finances, thus, they are much more likely to forego COVID-19 testing and suffer in silence or go to work even though they are symptomatic.¹

Meanwhile, there is a major hole in the Governor's pandemic containment plan. Washington's agricultural industry is in the process of bringing in thousands of workers from Mexico under the H-2A temporary agricultural visa program in the coming months. Some 7,500 of these workers are already here. None of these workers will be tested for COVID-19 prior to entry, and the vast majority will live on isolated, rural farms in packed dormitory-style housing. Few, if any, of these workers will arrive with, or be provided, health insurance. Besides living, cooking, and bathing in common facilities, they will also be bussed to and from work daily in old school buses or vans, and will regularly be transported into rural towns to buy groceries, cash checks, and send money to their families.

In light of this background, specific steps must be immediately implemented to protect the public health of all Washingtonians, the farmworker community, as well as the 30,000 largely Mexican H-2A workers. Without immediate steps, our rural health care providers, already likely overtaxed, could soon be overrun and further undermine the State's emergency plans.

We recognize and commend the Governor's office for all the proactive steps it has taken to date to protect public health. With that in mind, we provide a reminder that the above concerns are not merely hypothetical as a quarantine of 100 H-2A workers took place in Grant County just last spring. In April of 2019, one hundred H-2A workers from Mexico and Central America needed to be placed in a "limited quarantine" in their Mattawa, Washington labor camp because several contracted mumps.² They lived in 16, on-farm row houses. Below is a picture of the locked entrance and guard house.

¹ March 18, 2020, New York Times, "'We're Petrified': Immigrants Afraid to Seek Medical Care for Coronavirus," (<https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html?action=click&module=Top%20Stories&pgtype=Homepage>)

² May 17, 2019, KUOW, "They Came To Washington To Work, Then They Got The Mumps," (<https://www.kuow.org/stories/they-came-to-washington-to-work-then-they-got-the-mumps>)



Mumps is remarkably similar to COVID-19, in that it is a viral disease spread by water droplets from coughing or sneezing, and symptoms can take two to three weeks to appear after infection.³ This outbreak occurred despite the fact that Mexico, according to World Health Organization data, has a higher measles-mumps-rubella vaccination rate than the United States.⁴ To contain the spread of mumps, Grant County health officials coordinated a mass vaccination and imposed the quarantine.⁵ Not only are vaccinations not available for COVID-19, but rural counties are unlikely to have adequate resources to devote to outbreaks such as these, with the magnitude of the current crisis.

In the context of the current pandemic, we need to ensure that no one is put at risk. The preventative measures below must be put in place as a condition before any additional H-2A workers are brought into the state of Washington, and these same measures need to be implemented to protect the workers already here.

- 1. Enact Emergency Orders to Ensure All Medical Treatment and Costs for All COVID-19 Related Treatment and Medical Expenses Will Be Covered and No Worker Will Be Sent Home with Any COVID-19 Symptoms.**

In order to help stop the spread of COVID-19, all H-2A workers need to know their medical treatment and expenses related to COVID-19 will be fully covered during the time they are working and residing in Washington State. This should include assurances that any worker who is tested for COVID-19 will have those costs covered even if the result is negative for COVID-19. A designated hotline capable of receiving information or messages 24 hours a day should be established within the Department of Health to allow H-2A workers to report potential symptoms and request medical assistance, and the Department should have ready access to COVID-19 testing. Workers' compensation coverage needs to cover H-2A workers who contract COVID-19 or must be quarantined due to the virus. These workers would not be exposed to the virus if they had not come to Washington to work in agriculture.

Finally, recognizing that most H-2A workers come from impoverished rural communities and in order to protect the families, communities, and citizens of sending countries, Washington should pledge to fully treat all H-2A workers in Washington State until all COVID-19 symptoms have been fully resolved. Under

³ April 26, 2019, Good Fruit Grower, "Mumps Hits Farmworkers," (<https://www.goodfruit.com/mumps-hits-farmworkers/>).

⁴ *Id.*

⁵ *Id.*



no circumstances should growers or their agents be allowed to terminate and send home H-2A workers who are sick with or have been exposed to COVID-19.

2. Require Transparent Recruitment Information and Housing Protections Related to COVID-19.

In addition to informing workers about the terms and conditions of employment when workers are still in their hometowns, all persons who are recruiting workers for agricultural employment in Washington in 2020 must provide detailed information about the risks of COVID-19. That information should include how employers will protect their safety while transporting, housing, and employing them in the United States. Prospective workers shall also be advised that they will not be required to pay for any cleaning and sanitizing products and the agricultural employer will have an approved health plan for all workers that includes regular sanitizing of the housing and buses and other communal areas. All prospective H-2A employees shall also be informed that they will receive health care at no cost should they develop COVID-19 symptoms and need to be tested, how they will be quarantined if they develop symptoms or test positive, and that they will not be sent home until all COVID-19 symptoms have been fully resolved.

H-2A employers control workers' housing, and have, in the past, revoked workers' access to that housing on short notice. In Sumas, Washington in 2017, 65 H-2A workers were evicted from their housing with one hour's notice and spent weeks living in the yard of a local resident.⁶ In our current situation, such eviction from housing could cause a public health crisis. No H-2A farmworkers should be evicted or in any way removed from their housing without prior review and approval of the Department of Health and written notification provided to the Mexican Consulate.

3. All Farmworker Housing Must Have Designated Quarantine Living Facilities and COVID-19 Plans Approved by Department of Health Prior to Issuing Any Housing License.

The Washington State Department of Health (DOH) must review and license farmworker housing. In addition to its current checklist, DOH shall add additional COVID-19 plans prior to the issuance of any license. See the CDC COVID-19 Preparedness Checklist for Nursing Homes and other Long-Term Care Settings for guidance on steps to sanitize living facilities.

Those requirements shall include, but not be limited to:

- Provide separate living facilities for workers that are over 60 or have underlying health conditions and have these workers work within 6 feet of other workers.
- Designated quarantine sleeping areas with separate cooking and bathing facilities for quarantined workers.
- Proof of sufficient sanitizing and handwashing supplies.
- Proof of sufficient masks for all quarantined workers who develop COVID-19 symptoms or test positive for COVID-19.
- Designate a specific individual responsible for ensuring workers comply with health and sanitation requirements.
- Designate a specific individual to receive reports from workers who may have COVID-19 symptoms and be able to coordinate and transport such workers to obtain medical services.
- Designate a specific individual whose sole responsibility is to care for quarantined workers and ensure they have sufficient food, that the quarantine is enforced, and that transportation to medical care is provided.

⁶ January 25, 2018, KUOW, "They Were Ordered to Work 'Unless on Their Death Bed,'" (<https://www.kuow.org/stories/they-were-ordered-to-work-unless-on-their-deathbed-blueberry-pickers-claim>)

- Provide unemployment insurance for H2A workers who are going to be quarantined.

4. Ensure Appropriate Social Distancing at Work and in Communities.

To the extent feasible, growers must plan work crew activity to ensure proper distancing to avoid unnecessary transmission of the disease at work. Additionally, most H-2A worker housing is located in rural areas, and employers normally bus workers into small towns to purchase groceries and obtain banking and financial services. Sufficient vehicles must be available such that workers are not sitting directly next to other workers and sufficient ventilation exists.

Given the recent hoarding of essential supplies and food, it is possible that small grocery stores could run out of such items and leave workers or members of the community vulnerable. Moreover, a busload of 50 to 100 or so H-2A workers all entering stores at busy times for local shoppers could drastically increase the likelihood of spreading COVID-19. Therefore, advance arrangements must be made with these services to avoid creating a scarcity of essential food and supplies at grocery stores and to protect against the spread of the virus in these small communities already stressed by the impacts of this global pandemic.

Conclusion

The undersigned organizations and persons request a meeting to discuss prompt implementation of the above to ensure the protection of all H-2A workers, their families and communities, and the residents of Washington State. Again, we appreciate all your administration has done to date and look to your prompt response to continue to refine and improve all aspects of the State's COVID-19 emergency planning.

Sincerely,

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cc: The Honorable Karen Keiser, Chair, Senate Labor and Commerce
The Honorable Curtis King, Ranking Member, Senate Labor and Commerce
The Honorable John McCoy, Senate Majority Caucus Chair
The Honorable Mike Sells, Chair, House Labor and Workforce Standards
The Honorable Gina Mosbrucker, Ranking Member, House Labor and Workforce Standards
The Honorable Héctor Iván Godoy Priske, Consul, Mexican Consulate, Seattle
Farid Soberanis Garcia, Consul for Legal Protection, Mexican Consulate, Seattle
Caitlyn Jekel, Senior Policy Advisor for Labor, Office of the Governor

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Roskelley v. Washington State Parks and Recreation Commission](#), Wash.App. Div. 2, March 28, 2017

145 Wash.2d 483
Supreme Court of Washington,
En Banc.

Juan RIOS and Juan Farias, individually and on
behalf of all others similarly situated,
Respondents,

v.

WASHINGTON DEPARTMENT OF LABOR AND
INDUSTRIES and Gary Moore, in his official
capacity of Director of the Washington
Department of Labor and Industries, Petitioners.

No. 70294-2.

|
Feb. 7, 2002.

Synopsis

Agricultural pesticide handlers filed class action for declaratory judgment that the Department of Labor and Industries was required to promulgate rule mandating a blood-testing program to monitor handlers' exposure to cholinesterase-inhibiting pesticides. After bench trial, the Superior Court, Thurston County, [Richard Strophy, J.](#), issued oral ruling against handlers, and they sought discretionary review. On transfer from the Supreme Court, the Court of Appeals,  [103 Wash.App. 126, 5 P.3d 19](#), reversed and remanded. Department petitioned for review. The Supreme Court, [Owens, J.](#), held that Department acted arbitrarily when it denied handlers' request to promulgate rule implementing cholinesterase monitoring.

Court of Appeals affirmed in part, reversed in part, and case remanded.

Alexander, C.J., filed a concurring opinion.

[Madsen, J.](#), filed a dissenting opinion.

[Sanders, J.](#), filed a dissenting opinion.

West Headnotes (7)

^[1] **Labor and Employment** Exposure in general

Department of Labor and Industries' duty under the Washington Industrial Safety and Health Act (WISHA) to promulgate standards "to the extent feasible" that protect workers against exposure to toxic agents means "to the extent the standard is capable of being economically and technologically accomplished." [West's RCWA 49.17.050\(4\)](#).

^[2] **Labor and Employment** Exposure in general

In determining economic feasibility under Washington Industrial Safety and Health Act (WISHA) of standard to protect workers against exposure to toxic agents, Department of Labor and Industries must consider the degree to which the standard will affect the regulated industry's competitive stability; in other words, the economic feasibility analysis must focus on the effect of the particular toxic agent standard on the regulated industry, not on the inadequacy of the Department's fiscal resources for rulemaking. [West's RCWA 49.17.050\(4\)](#).

^[3] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

When there is room for two opinions, an action of an agency taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.

 [West's RCWA 34.05.570\(2\)\(c\)](#).

26 Cases that cite this headnote

^[4] **Labor and Employment** Chemicals; fumes;

vapors; gases

Department of Labor and Industries did not violate its duty under Washington Industrial Safety and Health Act (WISHA) when it did not include mandatory cholinesterase monitoring of agricultural pesticide handlers in the regulations it promulgated in 1993; Department's decision was rational at the time, as it was based on fact that there was no such monitoring program in the federal pesticide regulations.  West's RCWA 34.05.570(2)(c), 49.17.050(4); Wash. Admin. Code § 296-306-40011 (1993).

3 Cases that cite this headnote

- ^[5] **Administrative Law and Procedure**  Review for arbitrary, capricious, unreasonable, or illegal actions in general

Neither the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.  West's RCWA 34.05.570(2)(c).

21 Cases that cite this headnote

- ^[6] **Labor and Employment**  Chemicals; fumes; vapors; gases

Department of Labor and Industries acted arbitrarily when it denied agricultural pesticide handlers' request that it exercise its authority under the Washington Industrial Safety and Health Act (WISHA) and promulgate rule implementing cholinesterase monitoring, where report of Department's technical advisory group indicated that cholinesterase-inhibiting pesticides could materially harm handlers, and that simple blood test was a feasible method to conduct medical monitoring.  West's RCWA 34.05.570(4)(c)(iii), 49.17.050(4).

- ^[7] **Administrative Law and Procedure**  Agency discretion in general

Ordinarily, an agency is accorded wide discretion in deciding to forgo rulemaking in an area, and fiscal constraints may reasonably determine whether an agency takes action.

2 Cases that cite this headnote

Attorneys and Law Firms

****963 *486** Robert Gibbs, Seattle, Chadbourne & Parke, David M. Raim, Tracey Laws, M. Katherine Montgomery, Washington, DC, amicus curiae.

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Todd Dale True, Daniel Ford, John Matthew Geyman, Sean M. Phelan, Seattle, for Respondents.

Opinion

OWENS, J.

At issue in this case is whether the Court of Appeals properly concluded that the Washington Department of Labor and Industries (the Department) had violated a statutory duty to promulgate a rule requiring mandatory blood testing for agricultural pesticide handlers. Although the Court of Appeals acknowledged that differing standards of review applied to the Department's rulemaking ***487** in 1993 and its denial of rulemaking in 1997, it did not review the two challenges separately. We agree with the Department that the plaintiffs failed to show that the 1993 rule was arbitrary and capricious. However, we have determined that the Department's denial of the plaintiffs' 1997 request was arbitrary in light of the Department's post 1993 investigation, and we therefore conclude that the Department's failure to act was contrary to the requirements of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW.

The Court of Appeals decision is therefore affirmed in part and reversed in part. We remand this matter to the

Department with our order to initiate rulemaking.

FACTS

The plaintiffs in this class action lawsuit are agricultural pesticide handlers, farm workers directly engaged in mixing, loading, and applying pesticides. Because exposure to pesticides containing organophosphate and carbamate compounds is known to inhibit levels of cholinesterase, a blood enzyme essential to the proper functioning of the nervous system,¹ the pesticide handlers asked the Department in 1986 and again in 1991 to adopt a mandatory blood testing program to monitor their cholinesterase levels. The Department initiated rulemaking and, in March 1993, adopted WAC 296-307-14520 (originally codified as WAC 296-306-40011 (1993)),² which recommends but does not require a blood testing program for monitoring cholinesterase levels. Stephen M. Cant, the Department's "industrial hygiene program manager," "made the initial decision not to require mandatory cholinesterase monitoring, and the Assistant Director for WISHA and the Director for the Department accepted that recommendation." Clerk's Papers (CP) at 508, 516.

The pesticide handlers informed the Department that they intended to seek judicial review. In response, the Department set up a Technical Advisory Group (TAG) "to assist the Department ... in determining an appropriate response" and "to identify the essential components of a successful monitoring program in Washington State." CP at 273. The TAG, comprised of three health care professionals from the University of Washington, along with two representatives from the Department, completed a 20 page report in August 1995. See CP at 271-91. Although the heading to section II of the TAG report termed cholinesterase monitoring "the most well developed and feasible method among available worker monitoring approaches for cholinesterase-inhibitor exposure," the TAG "recommend[ed] the following" in its September 1995 cover letter to the report: "Cholinesterase monitoring on a voluntary basis for those working in occupations involved with handling cholinesterase-inhibiting pesticides within the specific trigger levels described in this document." CP at 274, 202. The TAG explained that, "[g]iven the current limitations of various resources vital for the implementation of some of the recommendations described in this document, we are not advising mandatory cholinesterase monitoring programs." CP at 202.

In letters dated June 19 and July 18, 1997, the pesticide handlers' counsel asked the Department to "state its intent to adopt a mandatory medical monitoring rule for pesticide handlers." CP at 492. Michael Silverstein, the Department's Assistant Director for industrial safety and health, responded by letter of August 29, 1997. Silverstein explained that "[t]he primary rationale for not making ChE [(cholinesterase)] monitoring mandatory at this time grows out of the technical limitations involved with ChE testing," CP at 215, but he also discussed the constraints placed on the Department by competing priorities and limited resources. While Silverstein concluded that the Department had correctly decided in 1993 to recommend nonmandatory cholinesterase monitoring and had properly adhered to the voluntary recommendations in light of the 1995 TAG report, he nevertheless recognized "that additional review of technical issues related to cholinesterase monitoring was warranted both in light of the Technical Advisory Group advice to this effect, and also in light of the Governor's Executive Order on Regulatory Improvement (EO 97-02)." CP at 493. Consequently, the Department included "the voluntary monitoring recommendations in the Rule Review Plan ... submitted to the Governor in August 1997." *Id.*

The pesticide handlers filed the present declaratory judgment action in October 1997 in Thurston County Superior Court. CP at 5-15. They stated causes of action for the Department's alleged violation of WISHA, RCW 49.17.050(4) and 49.17.240(2); the Washington Administrative Procedure Act (APA), RCW 34.05.570(4)(b) and 34.05.570(2)(c); the Washington Law Against Discrimination, RCW 49.60.030; article I, section 12 of the Washington State Constitution; and Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000d. In January 1998, the case was certified as a class action on behalf of "all persons who are or will be employed as pesticide handlers in the agriculture industry in Washington State." CP at 21. At a bench trial in June 1998, the trial court issued an oral ruling based on the oral argument of counsel, the testimony from witnesses, and "the rule-making file required by RCW 34.05.370, as well as all pleadings, briefs and evidence which were called to the Court's attention." CP at 2221. The trial court ruled against the pesticide handlers on all causes of action.

This court denied the pesticide handlers' request for discretionary review and transferred the matter to the Court of Appeals. Division Two reversed, and we granted the Department's petition for review.

rule-making procedures; or the rule is arbitrary and capricious.

ISSUE

When the Department decided not to include mandatory cholinesterase monitoring in the agricultural pesticide regulations promulgated in 1993, and then rejected in 1997 the pesticide handlers' renewed request for rulemaking on such a program, did the Department violate its statutory duty under WISHA or otherwise act arbitrarily or capriciously?

ANALYSIS

Standard of Review. The pesticide handlers have challenged the validity of the 1993 rule,³ as well as the *491 Department's subsequent failure to initiate rule making in 1997. The two challenges are based on distinct provisions in the APA.

The APA provides that "[t]he *validity of any rule* may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner." RCW 34.05.570(2)(b) (emphasis added). The APA places "[t]he burden of demonstrating the invalidity of agency action ... on the party asserting invalidity" and further provides that "[t]he validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken." RCW 34.05.570(1)(a), (b). The following standard of review is applicable to the pesticide handlers' challenge to the Department's 1993 rule:

(c) In a proceeding involving *review of a rule*, the court shall declare the rule invalid only if it finds that: The rule *violates constitutional provisions*; the rule *exceeds the statutory authority of the agency*; the rule *was adopted without compliance with statutory*

RCW 34.05.570(2)(c) (emphasis added).

Whereas the pesticide handlers' challenge of the 1993 rule falls under RCW 34.05.570(2), their challenge to the Department's 1997 denial of their rulemaking request comes under RCW 34.05.570(4), the subsection governing actions other than rules or orders: "A person whose rights are violated by *an agency's failure to perform a duty that is *492 required by law to be performed* may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance." RCW 34.05.570(4)(b) (emphasis added). As with the challenge to the 1993 rule, the pesticide handlers bear the burden of demonstrating their entitlement to relief, and judicial review must be based on the standard prescribed in the APA. Here, the standard applicable to the Department's alleged "failure to perform" in 1997 is very similar to the standard of review governing the challenge to the 1993 rule:

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection [subsection (4)] can be granted only if the court determines that the action is:

(i) *Unconstitutional*;

(ii) *Outside the statutory authority of the agency or the authority conferred by a provision of law*;

(iii) *Arbitrary or capricious*; or

**966 (iv) *Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.*

RCW 34.05.570(4)(c) (emphasis added).

Thus, in broadest terms, the APA's standards of judicial review require that we make two inquiries: first, whether the pesticide handlers met their burden of demonstrating that the 1993 rule was unconstitutional, exceeded the Department's statutory authority, was adopted without compliance with rulemaking procedures, or was arbitrary and capricious; and, second, whether the pesticide handlers met their burden of demonstrating that the Department's 1997 decision to forgo rulemaking was unconstitutional, outside the Department's statutory

authority, arbitrary or capricious, or made by unauthorized persons.

Not all of the statutory standards apply to our review of the 1993 rule and the 1997 denial of rulemaking. Although the pesticide handlers claimed that the Department's 1993 rule violated state and federal constitutional provisions, exceeded the Department's statutory authority, and was *493 arbitrary and capricious, the Court of Appeals declined to address the pesticide handlers' inadequately developed constitutional argument and focused exclusively on whether the 1993 rule was "invalid for failure to comply with WISHA requirements." *Rios v. Dep't of Labor & Indus.*, 103 Wash.App. 126, 136, 5 P.3d 19 (2000). We conclude that we may declare the omission in the 1993 rule invalid only upon the pesticide handlers' demonstration that the omission of a mandatory requirement violated the Department's duty under WISHA or was otherwise arbitrary and capricious.

Regarding the Department's 1997 refusal to initiate the requested rulemaking, the pesticide handlers' complaint made no specific reference to the grounds for review set forth in RCW 34.05.570(4)(c)(i)-(iv). Focusing solely on option (ii), the Court of Appeals analyzed only whether the Department had failed to perform a duty required under WISHA. As with our review of the 1993 rule, we conclude that the pesticide handlers will be entitled to relief only if they demonstrate that the Department's failure to initiate rulemaking in 1997 violated a duty under WISHA or was otherwise arbitrary or capricious.

The Department's Duty under WISHA. Given the applicable standards of review, our threshold task in reviewing both the 1993 rule and the 1997 refusal to initiate rulemaking is to define the nature of the Department's statutory duty under WISHA. Exercising its police power and respecting "the mandates of Article II, section 35 of the state Constitution," the Washington legislature enacted WISHA in 1973 "to create, maintain, continue, and enhance the industrial safety and health program of the state."⁴ The statute provides that the "program shall equal or exceed the standards prescribed by the Occupational Safety and *494 Health Act of 1970," (OSHA), 29 U.S.C. § 651. RCW 49.17.010 (emphasis added).

Pivotal in this case is the WISHA provision regarding safety and health standards for exposure to toxic agents:

[T]he director shall:

....

(4) Provide for the promulgation of health and safety standards and the control of conditions in all work places concerning gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents which shall set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life; any such standards shall require where appropriate the use of protective devices or equipment and for monitoring or measuring any such gases, vapors, dust, or other airborne particles, toxic materials, or *967 harmful physical agents.^[5]

The statute is not well drafted. In skeletal form, it states that "the director shall ... [p]rovide for the promulgation of ... standards and the control of conditions ... which shall set a standard which most adequately assures ... that no employee will suffer material impairment of health." It is anybody's guess what the relative pronoun "which" refers to in the clause "which shall set a standard"—"promulgation," "standards," or "control of conditions." In contrast to the WISHA provision, the first sentence in the seminal OSHA provision virtually sings with clarity: "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents *495 under this subsection, shall set the standard which most adequately assures, ... that no employee will suffer material impairment of health." 29 U.S.C. § 655(b)(5).

As a preliminary step in our analysis of RCW 49.17.050(4), we must correct a distinction between the state and federal provisions that the pesticide handlers urged and that the Court of Appeals adopted. The pesticide handlers maintained that OSHA says "may" where WISHA says "shall" and that, consequently, the state provision curtails the director's discretion. But this position is based on a misleading distinction. The federal statute actually uses the permissive "may" in an introductory statement lacking in WISHA. Because OSHA gives the secretary a series of optional means for developing safety and health standards, Congress necessarily used "may" to introduce the eight subsections delineating those options: "The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner." 29 U.S.C. § 655(b) (emphasis added). From those eight subsections (the first of which, for example, permits the secretary to appoint an advisory committee), Washington adopted

only subsections (5) and (7), which pertain to the requirements of the standards that *are* promulgated. See RCW 49.17.050(4), .240(2). We simply do not find the permissive “may” in the overarching OSHA framework pertinent to our analysis of RCW 49.17.050(4), which we have previously described as “mirroring” 29 U.S.C. § 655(b)(5). *Aviation W. Corp. v. Dep’t of Labor & Indus.*, 138 Wash.2d 413, 431, 980 P.2d 701 (1999).

In fact, other than the greater coherence in the federal provision, we can see no significant difference between RCW 49.17.050(4), which states that “the director *shall* ... [p] rovide for the promulgation of health and safety standards ... which shall set a standard,” and 29 U.S.C. § 655(b)(5), which states that “[t]he Secretary, *in promulgating* standards ..., *shall* set the standard.” (Emphasis added.) While it may not be entirely clear what our legislature intended when it said “shall provide for the promulgation *496 of” rather than “shall promulgate,” the chosen language makes the director’s duty not a duty to promulgate, but a duty to make promulgation possible, a duty to create an opportunity for such rulemaking. In sum, we decline to conclude that the director’s rulemaking discretion under WISHA is more circumscribed than that of the Secretary under OSHA. And, in any case, the issue presented is not whether the Department breached the statutory command that the director “provide for the promulgation of” rules, but whether the Department, having committed its energies to regulating the exposure of agricultural workers to pesticides, met the statutory requirements for such regulation. What this case thus demands is our close consideration of the specific requirements set forth in RCW 49.17.050(4).

****968** We must determine whether the pesticide handlers have shown that the Department, in failing to require mandatory cholinesterase monitoring, failed to “set a standard [that] most adequately assure[d], to the extent feasible, on the basis of the best available evidence, that no employee [would] suffer material impairment of health.”⁶ The essence of the pesticide handlers’ challenges to the 1993 rule and the 1997 denial of rulemaking is that the Department underregulated the significant risk of pesticide exposure—more specifically, that the Department did not set the standard that regulated the risk “to the extent feasible.” The definition of “feasible” in an underregulation challenge is an issue of first impression in this state.

***497** In our relatively recent decision in *Aviation West*, we confronted an overregulation challenge under RCW 49.17.050(4). In that case, cigarette manufacturers and other affected companies contended that the Department’s regulation of smoking in private workplaces had gone

beyond the Department’s statutory authority. Our primary focus in that overregulation case was RCW 49.17.020(7), the general definition of “safety and health standard”: “The term ‘safety and health standard’ means a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment.”⁷

To better understand not only the distinction between our review of overregulation and underregulation challenges but also the interplay between the general definition of a safety and health standard and the more specific requirements of a toxic exposure standard, we may find guidance in federal cases interpreting the mirror image OSHA provisions, although plainly we are not bound by such cases. *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 147, 750 P.2d 1257 (1988); *Aviation W. Corp.*, 138 Wash.2d at 424, 980 P.2d 701.

Federal cases have focused on the phrase “to the extent feasible” in 29 U.S.C. § 655(b)(5), the OSHA precursor to RCW 49.17.050(4). In construing “feasible,” the United States Supreme Court took as its starting point the dictionary definition “ ‘capable of being done, executed, or effected.’ ” *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508–09, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) [hereinafter *ATMI*] (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 831 (1976)); see also *Aviation W. Corp.*, 138 Wash.2d at 433 n. 11, 980 P.2d 701 (quoting ***498** *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 719, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (Marshall, J., dissenting)). Although the *ATMI* court refused to make the feasibility assessment of § 655(b)(5) dependent upon a compulsory cost-benefit analysis, the court acknowledged that the legislative history of OSHA indicated that a “feasible” standard must nevertheless be one “capable of economic and technological accomplishment”: “Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be *capable of economic and technological accomplishment.*” *ATMI*, 452 U.S. at 514, 101 S.Ct. 2478 (emphasis added); see also *AFL CIO v. OSHA*, 965 F.2d 962, 980 (11th Cir.1992) (stating that “[t]he Supreme Court has defined ‘feasibility’ as ‘capable of being done, executed, or effected,’ ... both technologically and economically”). While the *ATMI* court cautioned that the general definition of a safety and

health standard in § 652(8), which suggests a cost-benefit analysis, should not nullify the feasibility requirement, the court recognized that the “reasonably necessary or appropriate” language in the general definition nevertheless “might ... impose additional restraints” on the feasibility analysis:

[I]f the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five respirators was “technologically and economically feasible,” and OSHA thus insisted on the use of five, then the “reasonably necessary or appropriate” limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard.

ATMI, 452 U.S. at 514 n. 32, 101 S.Ct. 2478. The *ATMI* court also recognized that “any standard that was not economically or technologically feasible would *a fortiori* not be ‘reasonably necessary or appropriate’ under the Act.” *Id.* at 513 n. 31, 101 S.Ct. 2478 (citing *Indus. Union Dep’t v. Hodgson*, 499 F.2d 467, 478 (1974) (“Congress does not appear to have intended to protect employees by putting their employers out of business....”)).

¹¹ ¹² In sum, in light of the guidance provided in *ATMI*, we conclude that the phrase “to the extent feasible” in RCW 49.17.050(4) means “to the extent the standard is capable of *499 being economically and technologically accomplished.” Two points regarding economic feasibility warrant emphasis. First, in determining economic feasibility under WISHA, the director must consider the degree to which a standard will affect the regulated industry’s “ ‘competitive stability.’ ” *ATMI*, 452 U.S. at 530 n. 55, 101 S.Ct. 2478 (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1265 (D.C.Cir.1980)). This analysis of economic feasibility under RCW 49.17.050(4) must not be confused with the Department’s exercise of discretion in prioritizing among the many areas that could potentially benefit from rulemaking. In other words, the economic feasibility analysis must focus on the effect of the particular toxic agent standard on the regulated industry, not on the inadequacy of the Department’s fiscal resources for

rulemaking.⁸

Second, the Department’s analysis of economic feasibility cannot be limited by the distinction in the federal cases between cost-benefit analysis and cost effectiveness,⁹ for our state’s APA expressly requires a cost-benefit analysis.¹⁰ We likewise embrace the principle of cost effectiveness and acknowledge here that the critical language in the general *500 definition of safety and health standard—“reasonably **970 necessary or appropriate”—works in tandem with the economic feasibility analysis to set a limit on the adoption of feasible methods. RCW 49.17.020(7). Applying the respirator hypothetical from *ATMI*, we conclude that the director has a duty under RCW 49.17.050(4) to continue adding “respirators” so long as the additions are feasible, but only up to the point where additional ones are no longer necessary to protect against the worker’s “material impairment of health.” See *ATMI*, 452 U.S. at 513 n. 32, 101 S.Ct. 2478; *Bldg. & Const. Trades Dep’t v. Brock*, 838 F.2d 1258, 1269 (D.C.Cir.1988) (concluding that “it is [the Secretary’s] duty to keep adding measures so long as they afford benefit and are feasible”). In effect, to outstrip what is “reasonably necessary” is to go beyond “the extent feasible.” Clearly, whether the Department has fulfilled its mandatory duty under WISHA will depend upon whether the Department has properly exercised its discretion in making the feasibility analysis.

Returning to the discussion of our previous decision in *Aviation West*, we note that our analysis in that overregulation challenge naturally focused on whether the regulation had been “reasonably necessary or appropriate,” for there, the appellants had maintained that the Department engaged in overkill, promulgating, in effect, a “five-respirator” standard, one that exaggerated the statutorily defined risk to worker health. In contrast to the overregulation challenge, the pesticide handlers do not say that what *was* done was not “reasonably necessary or appropriate”; rather, they focus on RCW 49.17.050(4) and contend that the Department underestimated—again, in our hypothetical terms—the number of “respirators” necessary to protect against the “material impairment of health.” In the pesticide handlers’ view, even with the enactment of the other agricultural pesticide regulations, a risk of “material impairment of health” remained. They contend that the addition of a monitoring program was feasible—that is, capable of economic and technological accomplishment—and that the addition was necessary to achieve the statutorily mandated level of worker protection.

***501 Review of the Department’s 1993 Rule.** We must decide whether the Department violated its statutory duty

under WISHA or otherwise acted arbitrarily and capriciously when it decided not to include mandatory cholinesterase monitoring in the agricultural pesticide regulations promulgated in 1993. As is evident from our analysis of WISHA, the narrower question here is whether the Department in its 1993 rulemaking added measures “to the extent feasible” to protect against the pesticide handlers’ “material impairment of health.” RCW 49.17.050(4).

^[3] Applicable to the Department’s feasibility analysis is but one standard of review—whether its feasibility decision was “arbitrary and capricious.”¹¹ We have explained that “[a]gency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Hillis v. Dep’t of Ecology*, 131 Wash.2d 373, 383, 932 P.2d 139 (1997). More specifically, “[w]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Id.* When reviewing in *Aviation West* whether the Department’s WISHA regulation had been “reasonably necessary or appropriate,” we defined our inquiry as “a question for the fact finder [i.e., the agency] to determine on a case-by-case basis, subject to only limited review by this court,” and we repeated that “the standard is that ‘[t]he court must scrutinize the record to determine if the result was reached through a process of reason, *not whether the result was itself reasonable in the judgment of the court.*’”¹² Further, in ***971* scrutinizing the record, we ask whether the decision “was **502* rational at the *time* it was made.” *Aviation W. Corp.*, 138 Wash.2d at 427, 980 P.2d 701.

In 1993, Stephen M. Cant, the Department’s industrial hygiene program manager, determined that a mandatory monitoring program “was not justified” in light of the Department’s adoption of “extensive other mandatory requirements to protect pesticide workers.” CP at 516. Those requirements included “personal protective clothing, respiratory protection, gloves, training, posting, first aid, emergency facilities, washing facilities, eye-wash requirements, and other provisions designed to protect workers.” CP at 515. It was Cant’s belief that, if the 1993 standards were “correctly followed, pesticide workers [would] be protected” and the necessity for cholinesterase monitoring would be “obviate [d].” *Id.* Cant also considered “technical and practical problems associated with the test” that “had not been resolved” and could be only with “an additional expenditure of resources.”¹³ In sum, Cant concluded that the 1993 package of regulations protected agricultural pesticide workers “to the extent [economically and technologically]

feasible” and that “to layer a burdensome blood test on top of the comprehensive worker protection requirements in place” would have produced a standard that was not cost **503* effective and thus not “reasonably necessary or appropriate.” RCW 49.17.050(4); CP at 518; *RCW 49.17.020(7)*.

The primary evidence on which Cant relied was from the Environmental Protection Agency (the EPA). The EPA, rather than OSHA, has responsibility for setting the standards for pesticide protection. In fact, the Department’s 1993 package of pesticide regulations was “adapted from the final draft of EPA’s then proposed pesticide work protection standards.” CP at 513. While initially endorsing cholinesterase monitoring, the EPA ultimately concluded that too many implementation difficulties remained to permit inclusion of the requirement in its final rule. Cant considered the EPA’s decision not to require cholinesterase monitoring and “read their comments on this issue in the Federal Register before deciding this issue.” CP at 516. Cant likewise noted his reliance on “data from the Pesticide Incident Review and Tracking Panel created by the Legislature to compile data on pesticide exposures.” CP at 518.

The pesticide handlers assert that the Department neglected the evidence derived from California’s mandatory monitoring program. The only such program in the country, California’s program was adopted in 1974 through its Department of Agriculture. A 1989 study of the California program, based on a 1985 worker survey, showed that “23 percent of the 542 handlers in the study had cholinesterase levels indicating overexposure.” CP at 2125; *see also* CP at 277 (citing Richard G. Ames et al., *Cholinesterase Depression Among Pesticide Applicators: Results from the 1985 California Medical Monitoring Program*, 15 AM. J. INDUS. ***972* MED. 143–50 (1989)). Cant acknowledged his familiarity with the California program prior to his 1993 decision, but he maintained that the existence of the California program did not ipso facto make such a program necessary in Washington: “[T]here is no justification in Washington State to support the notion that, because California did something, that somehow, whatever the ‘something’ was should be adopted here.” CP at 514. In his view, because states are different, there will be “variation in approaches **504* to problem solving.” CP at 514. Indeed, no other state labor department has a mandatory program, nor does an OSHA standard even exist, given the EPA’s jurisdiction over such pesticide regulations. Moreover, while the results in the 1989 study were significant, what the pesticide handlers did not show was that a comparable exposure rate would occur in Washington after its implementation of the 1993 protective regulations.¹⁴

¹⁴¹ ¹⁵¹ As we demonstrated in *Aviation West*, neither the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious. [Aviation W. Corp.](#), 138 Wash.2d at 429, 980 P.2d 701 (citing [ATMI](#), 452 U.S. at 523, 101 S.Ct. 2478 (quoting [Consolo v. Fed. Mar. Comm'n](#), 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966))). In *Aviation West*, we concluded that the Department's fundamental reliance on the EPA report on environmental tobacco smoke met the "best available evidence" requirement of RCW 49.17.050(4). [Aviation W. Corp.](#), 138 Wash.2d at 427–29, 980 P.2d 701. Just as we could not declare the Department's action unreasoning in *Aviation West*, we cannot in the present case conclude that the Department's 1993 rulemaking decision was not "rational at the time it was made." [Aviation W. Corp.](#), 138 Wash.2d at 427, 980 P.2d 701. The Department based its determination that a mandatory cholinesterase program was unnecessary on the EPA's decision not to include such a program among its federal pesticide protections. In sum, the pesticide handlers have not met their burden of showing that the absence of a mandatory program in the 1993 pesticide regulations rendered *505 the 1993 rule "arbitrary and capricious" under [RCW 34.05.570\(2\)\(c\)](#). Review of the Department's 1997 Decision Not to Act. We review the Department's 1997 denial of the pesticide handlers' request under the standards set forth in [RCW 34.05.570\(4\)\(c\)](#). The pesticide handlers have the burden of showing that Silverstein's August 1997 decision was "arbitrary or capricious" in light of the record at that time.¹⁵

The critical post–1993 evidence in the record is the August 1995 TAG report. The basic tenets of the report are that cholinesterase-inhibiting pesticides can materially harm workers, that medical monitoring by means of a simple blood test is "the most well developed and feasible method" for monitoring such exposure, and that the California program and the Washington nonmandatory guidelines provide a substantial model for a mandatory Washington rule. CP at 274.

The TAG report relies on significant post 1993 research. The report cites two 1995 articles supporting its straightforward observation that "[t]he surveillance system in California has succeeded in reducing the number **973 of work-related pesticide illnesses." CP at 272, 287; see also CP at 2088–89. According to the report, the TAG contacted the medical coordinator of the California program, a medical supervisor involved in the

program, and "other organizations and individuals representing workers in California." CP at 281–82. The report addressed "[t]he difficulties" prompting the EPA to reverse its original decision to initiate a mandatory nationwide requirement, CP at 275, and the TAG also reviewed information from the World Health Organization and the National Institute on Safety and Health, as well as the annual reports from Washington's Pesticide Incident Reporting and Tracking panel *506 (PIRT). See CP at 2091. The 1991–97 PIRT data showed that, of 279 reported pesticide incidents for which cholinesterase testing had been done, 43 workers (15 percent) had depressed cholinesterase levels. CP at 498. Also available to the TAG was a 1995 Washington study showing that 10 percent of workers who were tested had cholinesterase levels low enough to meet the California trigger levels. CP at 278.

The tenor of the TAG report is proactive. The TAG outlined the essential requirements of a mandatory monitoring program, the "resources required, and technical issues that must be addressed to ensure that these primary goals are accomplished and maintained." CP at 280–81; see also CP at 283–84. The TAG identified the ways in which the California model would have to be modified to meet the TAG's goals. Consistent with the report's description of its recommended monitoring program as "the most well developed and feasible method," the report does not conclude that the suggested modifications are not technologically or economically capable of accomplishment.

The Department can do little to parry the thrust of the TAG report. In explaining his 1997 decision not to go forward with the requested rulemaking, Michael Silverstein, the Department's Assistant Director for the WISHA Services Division, did not claim that a mandatory rule was not technologically or economically feasible. Rather, he admitted that "it might be possible to demonstrate feasibility for a cholinesterase monitoring program," but simply cautioned that it "[would] be a challenging and complex undertaking." CP at 502. Silverstein focused primarily on the Department's limited resources, noting in particular the budget and staff constraints in the rulemaking section of his division, and he stressed the importance of setting priorities for the allocation of scarce resources. In his view, "any substantial new rulemaking project would require new budget or the displacement of other agency activities," and he speculated that, because "regulation in the agricultural sector has been controversial *507 and contentious," the Department "would need to prepare for this by securing additional technical and legal resources to develop and evaluate a voluminous record, and to prepare

for likely litigation.” CP at 494, 502. Surmising that it was “unlikely” that the Department would “have any capacity to do rulemaking for medical surveillance in the foreseeable future,” Silverstein went on to observe that, should the Department “nevertheless ... choose a specific chemical exposure or group of workers for medical surveillance rulemaking, [the Department] would consider cholinesterase monitoring for farm workers as one of many possibilities.” CP at 497. He emphasized that cholinesterase had no special claim by noting that “[t]here are literally hundreds of such chemicals to which millions of workers are exposed.” *Id.*

[6] Ordinarily, an agency is accorded wide discretion in deciding to forgo rulemaking in an area, and fiscal constraints may reasonably determine whether an agency takes action (and, if so, how). But an agency’s allusion to fiscal considerations and prioritizing cannot be regarded as an unbeatable trump in the agency’s hand; on review, a plaintiff has the opportunity to show that the agency’s failure to act was “[a]rbitrary or capricious.” [RCW 34.05.570\(4\)\(c\)\(iii\)](#); see [Hillis, 131 Wash.2d at 390–91, 932 P.2d 139](#). This case presents an extraordinary circumstance: even though we recognize the Department’s wide discretion in choosing and scheduling its rulemaking efforts, we conclude that the Department’s denial of the pesticide handlers’ 1997 request was arbitrary. At the time of their request in 1997, the pesticide handlers were not asking the ***974** Department to embark on a new enterprise—they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds. In fact, the Department had already made cholinesterase monitoring enough of a priority to draft the nonmandatory guidelines and to convene a team of experts “to identify the essential components of a successful monitoring program.” CP at 273. And that report announced in its introductory summary that “[t]he TAG ***508** recommends cholinesterase monitoring for all occupations handling Class I or II organophosphate or carbamate pesticides.”¹⁶ Because the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department’s 1997 denial of the pesticide handlers’ request was “unreasoning and taken without regard to the attending facts or circumstances.” [Hillis, 131 Wash.2d at 383, 932 P.2d 139](#). Consequently, in failing to act on the request for rulemaking, the Department violated [RCW 49.17.050\(4\)](#), the requirement that the Department “set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health.”

CONCLUSION

Under [RCW 34.05.574](#), a court reviewing agency action has an array of options: “the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.” While we affirm the validity of the Department’s 1993 rule, we conclude that the pesticide handlers met their burden of showing that the Department’s 1997 denial of the pesticide handlers’ request for rulemaking was unreasonable. We therefore order the Department to initiate rulemaking on a mandatory cholinesterase monitoring program for agricultural pesticide handlers.

***509** We affirm in part, reverse in part, and remand to the Department for further proceedings consistent with this opinion.

SMITH, JOHNSON, IRELAND, BRIDGE and CHAMBERS, JJ., concur.

ALEXANDER, C.J. (concurring).

I fully subscribe to the conclusion Justice Owens has enunciated in the majority opinion to the effect that the pesticide handlers satisfied their burden of showing that the Department of Labor and Industries (L & I) unreasonably denied their 1997 request for rule making. In that regard, I agree with the majority that by virtue of its failure to promulgate mandatory rules for cholinesterase monitoring after it deemed cholinesterase monitoring both necessary and feasible, L & I violated the provisions of [RCW 49.17.050\(4\)](#) that require L & I to “set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health.”

I write separately simply to indicate my disagreement with Justice Sanders’s view that the situation before us is “on all fours with the one we faced in [Hillis v. State, Department of Ecology, 131 Wash.2d 373, 932 P.2d 139](#)

(1997).” Dissent at 983. In *Hillis*, the plaintiff filed a lawsuit against the Department of Ecology (DOE) to compel the processing of his application for groundwater rights. The record there showed that DOE was engaged in the ongoing task of processing those applications and did not dispute that it had a statutory duty to do so. Rather, it claimed that it had discretion to establish its own schedule for carrying out its duties. We agreed with DOE, notwithstanding a dissent authored by me, and concluded **975 that DOE had considerable discretion over the manner in which it carried out its statutory duties. In reaching that conclusion the majority held that it was not arbitrary or capricious for DOE to consider fiscal constraints in ordering priorities for processing applications for groundwater rights. Thus, our concern in *Hillis* focused on the amount of procedural discretion *510 that DOE had over the manner in which it carried out its statutorily prescribed duties.

The fact that an agency has discretion over the manner in which it carries out its statutorily prescribed duties does not mean that the agency has the discretion to refuse to carry out those duties. L & I interprets RCW 49.17.050 in a way that supports its conclusion that it had discretion to decide whether or not to initiate rule making on mandatory cholinesterase monitoring for agricultural pesticide handlers. Such an interpretation of that statute is, in my view, contrary to the law because an agency does not have discretion to determine the scope or extent of its own authority.  *In re Elec. Lightwave, Inc.*, 123 Wash.2d 530, 540, 869 P.2d 1045 (1994). While, as I noted above, an agency has wide discretion as to the manner it carries out its duties, its discretion is limited to the terms of the statutory scheme that provides the agency its authority. Because the challenge in *Hillis* concerned the amount of procedural discretion an agency has when carrying out its statutorily prescribed duties, and did not concern discretion to determine the scope of the agency’s authority, *Hillis* does not command us to reverse the Court of Appeals.

Accordingly, I concur with the majority opinion.

MADSEN, J. (dissenting).

The majority claims that this case presents an extraordinary circumstance justifying the conclusion that the Director of the Department of Labor and Industries acted arbitrarily in denying the pesticide handlers’ 1997 request for a mandatory rule requiring blood testing of

pesticide handlers’ cholinesterase levels. If this case represents such extraordinary circumstance, then this court, itself, has set an extraordinary precedent that will result in courts directing that untold numbers of mandatory rules be promulgated by the Director, notwithstanding the Department’s limited resources and funding, and notwithstanding the separation of powers doctrine.

I respectfully dissent because the majority opinion fails to accord due deference to the Director’s decision, particularly *511 where the decision not to adopt a mandatory rule rests to a large extent on availability of agency resources and funding, and the agency’s decisions on priorities. It fails to heed the principle that substantial judicial deference is to be accorded agency views based heavily on factual matters which are complex, technical, and close to the heart of the agency’s experience. It gives undue weight to an advisory report, while at the same time fails to give appropriate weight to aspects of that report that support the Director’s decision. The majority’s analysis provides a huge disincentive to agency’s consideration of issues for possible rule making. If consideration of rule making will ultimately require rule making, an agency will think very carefully before investigating possible subjects of rule making. In the end, the majority has substituted its factual determinations and judgment for that of the agency. This the court should not do.

I.

Failure to Petition for Rule Making

Before turning to the heart of this case, i.e., whether the Director acted arbitrarily in declining to promulgate a mandatory rule, one significant procedural issue bears comment—the failure of the pesticide handlers to petition for rule making in 1997, as required by RCW 34.05.330(1), and as they were encouraged to do by the Department. Unfortunately, this issue is not addressed by the majority, and the Court of Appeals, which did address it, decided it wrongly. The majority’s acceptance of the proposition that review is appropriate under  RCW

34.05.570(4)(c) despite the pesticide handlers' failure to petition is bound to reverberate in future administrative law appeals, given the Court of Appeals published decision. Moreover, the failure to comply with the petition **976 requirement should preclude review in this case of the 1997 refusal to adopt a mandatory rule, ending this case.

*512 RCW 34.05.330(1) provides that "[a]ny person may petition an agency requesting the adoption, amendment, or repeal of any rule." Within 60 days, the agency must either (1) deny the petition in writing, stating the reasons for the denial and specifically addressing the concerns raised in the petition, and, if appropriate, stating alternative means by which the agency will address those concerns, or (2) initiate rule making. *Id.* Analogous federal cases are persuasive that the failure to petition for rule making precludes judicial review of the refusal to engage in rule making. The federal counterpart states that "each agency shall give an interested person the right to petition for the issuance ... of a rule." 5 U.S.C. § 553(e) (1996). Under 5 U.S.C. § 555(e), the agency must provide "a brief statement of the grounds for denial." *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C.Cir.1987). Where a petition for rule making is properly filed, and the agency refuses to engage in rule making, review is then appropriate under 5 U.S.C. § 706, which describes the scope of review. See *Am. Horse Prot.*, 812 F.2d at 4; *Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165, 172 & n. 22 (D.C.Cir.1976). However, where a petition is not filed, judicial review is generally precluded. See *S. Hills Health Sys. v. Bowen*, 864 F.2d 1084, 1095 (3d Cir.1988); *Kappelmann*, 539 F.2d at 171-73; *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 117 F.Supp.2d 211, 236 & n. 50 (N.D.N.Y.2000); *Midwater Trawlers Co-op. v. Mosbacher*, 727 F.Supp. 12, 15 (D.D.C.1989); *Hoffmann-La Roche, Inc. v. Harris*, 484 F.Supp. 58, 60 (D.D.C.1979).² *513 The doctrines of exhaustion and primary jurisdiction have been applied as the bases for courts to decline to review cases where plaintiffs have failed to petition for rule making under 5 U.S.C. § 553(e). See *Brown v. Sec'y of Health & Human Servs.*, 46 F.3d 102, 113-15 (1st Cir.1995); *Skubel v. Sullivan*, 925 F.Supp. 930, 936 (D.Conn.1996).

I would hold that a petition under RCW 34.05.330(1) is a necessary predicate to seeking judicial review of an agency's refusal to engage in rule making. Among other things, compliance with the statute increases the likelihood that a more developed administrative record will likely exist, provides that the agency will state

reasons for denying rule making, thus clarifying its particular policy reasons for denial, and will assure that the agency will state how it intends, where appropriate, to meet the petitioner's concerns, thus providing additional information as to the agency's refusal to engage in rule making. Thus, compliance with RCW 34.05.330 will in general greatly facilitate judicial review, see *Brown*, 46 F.3d at 114, and in particular will also help assure that a court does not unduly interfere in an agency's decision making. And, more fundamentally, it will give the agency the opportunity to address the petition for rule making in a structured fashion in the first place. The requirement of filing a petition for rule making is not onerous, and the benefits to be derived far outweigh any burden. Further, because the agency must respond within 60 days to a petition, the requirement does not unduly delay review of a denial.

**977 The Court of Appeals reasoned, however, that under RCW 34.05.534(1), the pesticide handlers were not required to petition for adoption of a rule. RCW 34.05.534(1) states that "[a] petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon *514 which that rule is based, have petitioned for its amendment or repeal, have petitioned the joint administrative rules review committee for its review, or have appealed a petition for amendment or repeal to the governor." The Court of Appeals held that this provision applies in this case, and thus the pesticide handlers' failure to petition for rule making in 1997 did not preclude review of their request. However, by its plain terms, RCW 34.05.534(1) applies where the challenge is to a rule, or the amendment or repeal of a rule. It does not apply where the challenge is to the failure to engage in rule making. This conclusion is reinforced by the specific language used in RCW 34.05.330(1), which allows any person to petition for "adoption, amendment, or repeal" of any rule. RCW 34.05.534(1), in contrast, refers only to existing rules, and their amendment and repeal. The omission of any language relating to adoption of a rule indicates legislative intent that exhaustion is not excused where adoption of a rule is sought.

Here, the pesticide handlers have not exhausted their administrative remedies as required because they did not petition for rule making, see *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 866, 947 P.2d 1208 (1997), nor do they contend that they are excused from exhausting their administrative remedies.

Finally, on this procedural issue, I disagree with the Court of Appeals conclusion that RCW 34.05.570(4)(b) "trumps" the petition requirement of RCW 34.05.330(1).

RCW 34.05.570 addresses the burden of proof and the standards of judicial review. Along with review of rules and agency orders in adjudicative proceedings, the statute provides for the method for seeking review of “other agency action,” RCW 34.05.570(4), and states that “[a]ll agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection,” RCW 34.05.570(4)(a). Thus, where an agency has failed to perform a duty required by law, subsection (4)(b) directs that a petition for review may be filed in accordance with the procedures in RCW 34.05.514, states how and when the *515 agency is to respond, and states that the court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact. RCW 34.05.570(4)(b) does not, by its terms, preclude or excuse the filing of a petition for rule making where a challenge is the failure to promulgate a rule. Moreover, as explained, bypassing the petition process can severely handicap judicial review because the opportunity for a more complete record and a clear explanation of the reasons for denying rule making would also be bypassed. Finally, as also noted, the petition requirement is a predicate to review of denial of rule making in the federal system, but, if the petition is denied, then review proceeds according to the federal counterpart to RCW 34.05.570, 5 U.S.C. § 706.

This court should hold that judicial review of the failure to promulgate a mandatory blood testing rule in 1997 is precluded because the pesticide handlers did not petition for the adoption of a rule at that time as required under RCW 34.05.330(1).

II.

Whether the Director Must Promulgate a Mandatory Rule

With regard to the 1997 decision by the Director not to adopt a rule, the majority concludes that this case involves an extraordinary circumstance justifying this court in requiring the Director to promulgate a mandatory blood testing rule. In my view, this holding represents a serious encroachment by the judiciary into the responsibilities of

the executive branch of government.

When reviewable, an agency decision not to adopt a rule is reviewable under RCW 34.05.570(4), as the majority says. See *Hillis v. Dep’t of Ecology*, 131 Wash.2d 373, 393–94, 932 P.2d 139 (1997). The standard of review is whether the decision not to promulgate was arbitrary or capricious. “Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending *516 facts or circumstances.” **978 *Hillis*, 131 Wash.2d at 383, 932 P.2d 139. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Id.*

Federal courts have appropriately explained that the degree of deference to the agency under the arbitrary and capricious standard, where agency inaction is the refusal to adopt a rule, depends in part upon the reason that the agency declines to adopt the rule. For example, where the reason lies in the agency’s construction of statute, i.e., a question of law, there is less reason for deference than in the case where the agency’s decision not to regulate is based upon factors not inherently susceptible to judicial review, such as internal management considerations relating to budget or personnel, the agency’s assessment of its own competence, or the weighing of competing policies in an extensive statutory scheme. *Pub. Citizen v. Heckler*, 653 F.Supp. 1229, 1239 (D.D.C.1986). The court in *Maier v. United States Environmental Protection Agency*, 114 F.3d 1032, 1040 (10th Cir.1997) noted that within the range of deference embodied in the “arbitrary and capricious” standard of review, an agency’s refusal to initiate rule making is at the high end, adding that

[c]ourts are ill-equipped and poorly situated to address important reasons for agency inaction, such as the decision that “a problem is not sufficiently important to justify the allocation of significant scarce resources given the nature of the many other problems the agency is attempting to address.” 1 KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.9, at 280 (3d ed.1994).

Thus, federal courts have concluded that a refusal to adopt a rule should be overturned “only in the rarest and most compelling of circumstances ... primarily involv[ing] ... plain errors of law, suggesting that the agency has been blind to the source of its delegated power.” *Am. Horse Prot.*, 812 F.2d at 5 (citations and quotation marks omitted). This court should take the same approach.

Unfortunately, the majority has not accorded the agency's decision the deference that is due.

***517** Setting aside concerns about exhaustion requirements and separation of powers concerns, the majority's analysis under the arbitrary and capricious standard is highly questionable. The majority's analysis turns largely on its view of whether a health and safety standard on mandatory blood monitoring for pesticide handlers' cholinesterase levels is "feasible." Although not acknowledged by the majority, there is a significant question about whether the "to the extent feasible" language of [RCW 49.17.050\(4\)](#) even applies as the yardstick by which to measure the Director's decision not to adopt a mandatory blood testing rule. [RCW 49.17.050\(4\)](#) contains essentially two directives, first, that the Director shall

Provide for the promulgation of health and safety standards and the control of conditions in all work places concerning gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents which shall set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity....

The second directive is that any "such standards shall require *where appropriate* ... monitoring or measuring any such gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents." [RCW 49.17.050\(4\)](#) (emphasis added). A related statute also uses the term "where appropriate" when referring specifically to medical monitoring. [RCW 49.17.240\(2\)](#) states that "[w]here appropriate, such [safety and health standards] ... shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be reasonably necessary for the protection of employees," and "[i]n addition, *where appropriate*, any such rule shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure." (Emphasis added.)

****979 *518** Thus, there is compelling reason to conclude that the proper measure of medical monitoring required is whether it is "appropriate," not whether it is "feasible." This does not mean that Washington workers would receive less protection than required by law. Anytime a protective standard is adopted by the federal Occupational Safety and Health Administration (OSHA), [RCW 49.17.010](#) requires that this state program "shall equal or exceed the standards." Thus, where OSHA adopts a standard that includes mandatory medical monitoring, this state must do the same. In the absence of an OSHA rule, it appears that such monitoring is required only "where appropriate,"—a standard obviously relegated to agency discretion by the Legislature.

Even accepting the "feasibility" standard applied by the majority does not, however, lead to the majority's result. Despite nearly identical language in the federal Occupational Safety and Health Act of 1970 (OSH Act), [29 U.S.C. § 655\(b\)\(5\), \(7\)](#), federal courts have not concluded that every feasible safety or health standard must be adopted. Instead, the courts have recognized that the agency must have discretion to decide the means for carrying out the statutory mandate, discretion to determine priorities for rule making, and discretion as to the speed with which the agency considers a problem. *See Bldg. & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1271 (D.C.Cir.1988) (the feasibility principle may not be applied in a way which would deprive OSHA of the almost unlimited discretion to devise means to achieve the goal mandated by Congress; nor is there any requirement that every possible tightening of a regulation must be made); *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1269 (11th Cir.1999) (OSHA's choice to limit rule making by excluding certain policy pertaining to atmospheric contamination from consideration, regardless of feasibility, found to be a valid exercise of the agency's authority to set priorities); [AFL CIO v. OSHA](#), 965 F.2d 962, 985 (11th Cir.1992) (OSHA's decision to defer issuing standards on permissible exposure limits to air contaminants ***519** within discretion of agency to set priorities for the use of the agency's resources, and to promulgate standards sequentially). Moreover, as the United States Supreme Court has observed, the allocation of funds from a lump-sum appropriation is a discretionary administrative decision, given that such an appropriation is designed to allow the agency to adapt to changing circumstances and meet statutory duties in the way it sees as most effective or desirable. [Lincoln v. Vigil](#), 508 U.S. 182, 192, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993). This court has also recognized that problems of priority setting and resource allocation may result in agency inaction, and that accordingly in such cases a court should proceed with great caution, as these are valid reasons for

concluding that the agency has not acted arbitrarily or capriciously, even in the face of a statutory duty.

 [Hillis](#), 131 Wash.2d at 393–94, 932 P.2d 139.

Under the arbitrary and capricious standard, the Director’s action—the decision not to promulgate a mandatory rule—was not arbitrary and capricious. First, as Dr. Michael Silverstein, the Assistant Director for the Washington Industrial Safety and Health Act (WISHA) Services Division, testified, and as the majority acknowledges, the Department is restricted by limited resources, in terms of both budget and staff. Silverstein explained that any new rule making project would either require additional funding, or the displacement of other agency activities. He also pointed out that “[t]here are literally hundreds of such chemicals to which millions of workers are exposed.” Clerk’s Papers (CP) at 497. He explained that pesticide rule making would be procedurally complex, and would require extensive use of limited professional staff and a fixed budget. He said other agency work would not be done, and, significantly, other workers would not be protected. Silverstein noted the limited options available, should the Department focus on pesticide protection. The Department could, for example, forgo rule making to protect workers from [musculoskeletal disorders](#), which are the cause of more than half of the workplace injuries in the state, or ***520** forgo further rule making concerning hundreds of chemicals causing workplace [asthma](#), or reduce workplace inspections and consultations.

Dr. Silverstein also noted that nearly all of the work of the rule making section of his division involves nondiscretionary tasks: (1) ****980** the statutory requirement to promulgate and enforce rules at least as effective as those of OSHA; (2) rule making specifically required by the Legislature; (3) and rule making activities under the Governor’s Executive Order on Regulatory Improvement. The Assistant Director did not foreclose future rule making on cholinesterase monitoring, however. He specifically noted the possibility of future consideration of a mandatory rule.

In short, these reasons offered by the department for not promulgating a mandatory rule are precisely those that this court, and the federal courts, have recognized as valid justifications for not taking action, i.e., limited resources and priority setting.

In addition, where there are “hundreds of such chemicals,” I cannot fathom how the majority can conclude that the decision not to require mandatory testing with respect to one is arbitrary and capricious. It is also important to remember that OSHA has not

promulgated any cholinesterase monitoring rules, nor has any labor department in any state—California’s monitoring is required by the state’s agriculture rules. More importantly, it also must be remembered that there are many rules that actually have been promulgated in this state that are designed to protect the pesticide workers from pesticide contamination in the first place. If the rules adopted in Washington are followed, as is required by law, exposure to pesticides will be reduced or eliminated. The Director has not failed to promulgate rules to protect pesticide handlers, and this court should defer to his decision as to the means of regulation. Given the protections afforded, the failure to additionally monitor blood for pesticide exposure, under all the facts and circumstances in this case, can hardly be said to be arbitrary and capricious.

***521** The majority says, however, that the agency had already made cholinesterase monitoring a priority, had invested its resources in studying cholinesterase-inhibiting pesticides, and its own team of technical experts had deemed a monitoring program both necessary and doable. Given this “extraordinary circumstance,” the majority says, the agency’s refusal to adopt a mandatory rule was arbitrary and capricious.

The danger in this holding is that anytime an agency embarks on an investigation whether to engage in rule making, on its own initiative or by petition, and obtains any information which will guide its determination whether to engage in rule making, it could then be required to engage in rule making because it has already made studying the issue a priority and has invested its resources. Also, to say this case involves an “extraordinary circumstance” is to say that a great number of routine agency studies will constitute “extraordinary circumstances” warranting this court’s intervention in the administrative process.³

****981 *522** Here, the agency considered rule making when the pesticide handlers originally petitioned for rule making. After considerable effort, and adoption of numerous rules for protecting pesticide handlers, the Department declined to adopt a mandatory blood monitoring rule. The Department did not completely drop the matter, however, but arranged for a team of experts to identify what would be required for a successful monitoring program. In 1995, the Technical Advisory Group (TAG) issued a report that recommended a *nonmandatory program*, particularly because there were limitations of various resources vital to implementation of recommendations made in the report. (Not only was the recommendation for a nonmandatory rule, there is nothing that indicates that the TAG report constituted an *agency*

determination about rule making.)

Moreover, despite the majority's implication that the agency has all but adopted a rule, the reality is far from it. As Dr. Silverstein explained, rule making requires a formal analysis of alternatives to rule making and consideration of consequences of not adopting a rule; a cost-benefit analysis, which would be technically difficult where a cholinesterase blood testing rule is concerned; and a determination that the rule adopted is the least burdensome. He explained that the Department has had *no experience* in adopting rules for medical monitoring because all previous medical monitoring requirements that have been adopted are identical to OSHA rules based upon OSHA regulatory analyses. He explained there are no two sets of medical monitoring rules *523 that are the same, and no template to follow. (As mentioned, the federal agency does not monitor cholinesterase levels in pesticide handlers' blood, and no state in the nation had adopted such a requirement, with the exception of California, and that adoption was not by a labor agency.)

Thus, as Dr. Silverstein noted, the Department would have to address various options including eligibility of workers, frequency of tests, qualifications of testers, record-keeping requirements, laboratory quality control, medical removal testing, medical confidentiality, and resolution of disputes among providers. These options would have to be considered even in light of existence of this state's recommended program under WAC 296-307-14520 and California's existing program, because, as the TAG report indicated, these programs are lacking in several respects. The report noted needs for standardization of laboratory testing methods, accreditation of participating medical supervisors, expansion of workers covered, development of guidelines for follow-up monitoring, and modification of baseline measurement criteria. Dr. Silverstein explained that the agency's experience has been that safety and health regulation in the agricultural sector has been controversial and contentious, and anticipated this would be true for a medical monitoring rule. Thus, to adequately prepare, additional technical and legal resources would be required to develop and evaluate what would be a voluminous record.

Dr. Silverstein noted that it is not unusual for an OSHA rule of this complexity to require *10 to 15* years from start to finish, and thus the Department does not undertake lightly to engage in rule making for which there is no OSHA standard. Finally, Dr. Silverstein identified a number of technical problems associated with cholinesterase testing.

In light of the heavy demands upon the Department's limited resources, the wide range of other areas of worker protection that call for attention, the fact that there are numerous rules that have actually been promulgated **982 to protect pesticide workers from exposure in the first place, *524 the absence of any comparable rule in the federal system or 48 of the other states, and the complexity of the rule making required, including factual complexity, it cannot be said that the Director's decision was arbitrary or capricious. Allocation of resources and the setting of priorities are decisions which must lie within the agency's discretion, and decisions respecting use of those resources and the setting of priorities are decisions to which this court should apply a particularly deferential arbitrary and capricious standard where the failure to adopt a rule is concerned.

Finally, the role of adequate funding cannot be overlooked. As this court said in *Hillis*:

The judiciary is the branch of government that is empowered to interpret statutes, not enact them. While there are special situations when the courts can and should order the expenditure of funds, specific appropriation to fund a statutory right, not involving constitutional rights or judicial functions, is normally beyond our powers to order. If every time we decided that the Legislature had not appropriated enough funds to an agency for a given purpose we could rule that the agency was "arbitrary or capricious" for failing to act and order the agency to act, then the funding of all agency action would be effectively shifted from the Legislature to the courts.

 *Hillis*, 131 Wash.2d at 390, 932 P.2d 139.

I would hold that the Director's 1997 decision not to adopt a mandatory cholinesterase testing rule was not arbitrary or capricious.⁴

III.

1993 Recommendation for Testing

Finally, the majority holds that the Director did not act arbitrarily in refusing to enact a mandatory rule in 1993. Although I agree with the result, I do not agree that this *525 issue involves a deficiency in the rules that were enacted and thus do not agree with the majority's analysis. Contrary to the majority's conclusion, there was no rule making in 1993 that is reviewable under RCW 34.05.570(2)(b). The nonmandatory recommendations for blood testing, see WAC 296-307-14520, did not comprise a rule, as the majority implicitly acknowledges. See RCW 34.05.010(16).⁵ The majority says, though, that the failure to adopt a mandatory rule in 1993 was a deficiency in the rules that were enacted, and thus subject to review under RCW 34.05.570(2)(b). Majority at 965 n. 3. This analysis means that an agency's decision to delay or deny rule making with regard to virtually any subject the agency considers in connection with the rules it actually adopts will be reviewable as rule making. This broad expansion of appellate review is unwarranted.

The case the majority cites, *Consumers Union of U.S., Inc. v. Federal Trade Commission*, 801 F.2d 417, 422 (D.C.Cir.1986), does not support the majority's conclusion. In that case, the Federal Trade Commission promulgated a "Used Car Rule" requiring dealers to post several consumer warnings, the terms of any warranty, and a list of known specific mechanical defects on a standard window sticker. Before the rule was final, see *id.* at 423, it was revised to delete the known-defects provision. When the rule was challenged on appeal because it did not include this provision, the Commission argued that the gravamen of the appeal was the failure to engage in rule making. The court disagreed, and said that the case involved an issue of the rationality of the rule that was adopted, given the alternatives that were suggested and rejected. *Id.* at 422.⁶

**983 *526 Here, in contrast, the Director promulgated a series of rules to protect agricultural workers from pesticides, including, as the majority notes, at page 971 (quoting CP at 515), " 'personal protective clothing, respiratory protection, gloves, training, posting, first aid, emergency facilities, washing facilities, eye-wash requirements, and other provisions designed to protect workers.' " These rules concern preventive practices,

warnings, and emergency practices when contamination occurs, but do not concern medical blood monitoring to determine pesticide exposure. While in *Consumers Union* the rule challenged, including the omitted provision, directly related to consumer information to be provided in a window sticker on used cars, here none of the rules actually promulgated by the Director in this case can be said to have omitted a naturally related provision concerning medical blood monitoring. Unlike the case in *Consumers Union*, the gravamen of the pesticide handlers' challenge with regard to 1993 is the failure to promulgate a mandatory rule for blood testing, i.e., the failure to engage in rule making.

The majority's equation of the *failure to adopt a rule* to a rule significantly alters appellate review and fails to accord the considerable deference that applies to an agency's decision not to adopt a rule.

Lastly, the pesticide handlers argued to the Court of Appeals that their petition for rule making in 1991 satisfies the requirement under RCW 34.05.330(1) for a petition to adopt a rule. That petition led to a number of rules, as *527 noted, but did not result in a rule regarding testing blood for cholinesterase levels. The 1993 action on that petition did not result in a rule, but rather resulted in the refusal to adopt a rule. The 1991 petition does not satisfy RCW 34.05.330(1) with regard to the 1997 decision.

I would reverse the Court of Appeals.

SANDERS, J. (dissenting).

Once the ... well has been poisoned, we all must drink from it lest the incentive to correct our mistakes in a principled fashion be lost by inconsistently imposing them.⁽¹⁾

Yet another governmental agency claims it is unable to carry out its statutory duties because of inadequate financial ability. The situation is on all fours with the one we faced in *Hillis v. State, Department of Ecology*, 131 Wash.2d 373, 932 P.2d 139 (1997) where the Department of Ecology (Department) acknowledged it had a statutory duty to process water permit applications but complained it did not have the resources necessary to process them in a timely manner, if at all. *Id.* at 378, 387, 932 P.2d 139. This court, however, excused the Department's violation of the applicants' legal rights based on its asserted "governmental poverty."

There the dissent complained, in vain, that the court's decision allowed agencies to operate outside, rather than under, the law. However, that was the *dissent*. Now it must be acknowledged the court's holding in *Hillis* and the Department's claim in this case are without distinction.

If our current majority will not overrule *Hillis*, it must apply it. The luxury of applying one rule to one party and a different rule to another party is a luxury the rule of law can ill afford. We must guard against impoverishment of principle even more diligently than the executive is concerned about impoverishment **984 of the public fisc. Since *Hillis* holds lack of financial resources excuses

governmental violations of legal rights, the Department's failure to provide *528 the pesticide handlers the protection they are allegedly guaranteed by statute must be condoned for the same reason. See RCW 49.17.010, .050(4), .240(2).

I therefore dissent.

All Citations

145 Wash.2d 483, 39 P.3d 961, 32 Envtl. L. Rep. 20,532

Footnotes

- ¹ The pesticides' interference with cholinesterase causes an accumulation of the chemical acetylcholine in the synapses between nerves and muscles, glands, and other nerves; the acetylcholine thus "continues to stimulate or overstimulate the effector organs, and we get the manifestations of toxicity." Clerk's Papers (CP) at 2114–15. Overexposure to such pesticides can be fatal. The common symptoms of overexposure include headaches, sweating, weakness, diarrhea, vomiting, increased salivation, respiratory distress, repetitive muscle contractions, blurred vision, cognitive difficulties, seizures, and loss of consciousness. Long-term effects may include "delayed peripheral neuropathy, ... a dying back of the nerves in the body as a result of the toxicity of the pesticide," as well as impairment of "relatively basic neurological function." *Id.* at 2115, 2119.
- ² "(1) We recommend that you implement a screening program for cholinesterase monitoring for employees handling organophosphate and carbamate pesticides.
"(2) Red blood cell and plasma cholinesterase testing of employees who handle toxicity class 1 or 2 carbamate or organophosphate pesticides is an acceptable bioassay method for determining the extent and effects of exposure to these types of pesticides. The schedule of testing should include a preexposure baseline level, followed by periodic monitoring during the period of exposure.
"(3) You should provide baseline cholinesterase tests for all employees handling carbamate or organophosphate pesticides for 30 hours or more in any 30 day period.
"(4) Employees should be given baseline tests before actual exposure, at the beginning of the growing season, or upon first hire. These baseline tests should be repeated every two years.
"(5) Periodic tests should be conducted every 30 days after the initial baseline for the next three months, and every 60 days thereafter until organophosphate or carbamate pesticide exposure ceases.
"(6) You should not allow a monitored employee to be further exposed to carbamate or organophosphate pesticides if any cholinesterase test in comparison to the baseline is less than 70% of red blood cell baseline levels or 60% of plasma baseline levels. These employees should not be further exposed to organophosphate pesticides until their cholinesterase levels return to 80% or more of their baseline levels.
"(7) Employees should be monitored for plasma or red blood cell cholinesterase levels.
"(8) Monitoring programs should include appropriate follow-up and referrals to health care providers as needed, and should include a mechanism for recordkeeping and report tracking." WAC 296–307–14520.
- ³ We agree with the conclusion of the Court of Appeals that, because the Department's decision to make cholinesterase monitoring nonmandatory was closely related to the rules promulgated in 1993, the decision not to include a mandatory cholinesterase program is reviewable as a deficiency in the rules.  [Rios v. Dep't of Labor & Indus.](#), 103 Wash.App. 126, 132–33, 5 P.3d 19 (2000) (citing [Consumers Union of U.S., Inc. v. F.T.C.](#), 801 F.2d 417, 422

(D.C.Cir.1986)). Thus, by “the 1993 rule” under review, we mean the 1993 pesticide regulations, chapter 296–307 WAC, Parts I J, which did not include a mandatory cholinesterase program. *Id.* at 133, 5 P.3d 19.

⁴ RCW 49.17.010. Article II, section 35, of the Washington State Constitution provides that “[t]he legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health.”

⁵ RCW 49.17.050(4). Cf. 29 U.S.C. § 655(b)(5), (7): “The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, *shall* set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.... Where appropriate, such standard shall also prescribe suitable protective equipment, and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees.” (Emphasis added.)

⁶ RCW 49.17.050(4). WISHA further mandates that, “[w] here appropriate, such [safety and health standards] ... shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be *reasonably necessary* for the protection of employees,” and that, “[i]n addition, where appropriate, any such rule shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure.” RCW 49.17.240(2) (emphasis added). Cf. 29 U.S.C. § 655(b)(7): “Where appropriate, such standard ... shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be *necessary* for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure.” (Emphasis added.)

⁷ RCW 49.17.020(7) (emphasis added). Cf. 29 U.S.C. § 652(8): “The term ‘occupational safety and health standard’ means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment.” (Emphasis added.)

⁸ This distinction-between weighing the economic feasibility of a proposed standard and prioritizing rulemaking due to budgetary constraints-is perhaps somewhat clearer under OSHA because the federal statute includes a specific provision acknowledging that the secretary will necessarily have to set priorities. See 29 U.S.C. § 655(g) (“Priority for establishment of standards”). Although § 655(g) was not included among the WISHA provisions, the indisputable reality is that the Department’s finite fiscal resources require the director to exercise discretion in prioritizing among potential rulemaking initiatives.

⁹ “Although the practical effect of the [ATMI] decision was the elimination of cost-benefit analysis as a tool of judicial review, the doctrine of cost effectiveness was not abolished. Cost-benefit analysis determines whether the social benefits of the regulation outweigh the costs to the industry of imposing it and, therefore, whether standards ought to be imposed at all. On the other hand, cost effectiveness merely compels the choice of a less costly alternative in the case where there are multiple methods of effectively reducing the significant risk.” David R. Cherrington, Comment, *The Race to the Courthouse: Conflicting Views Toward the Judicial Review of OSHA Standards*, 1994 B.Y.U. L.REV. 95, 111 (1994) (footnote omitted).

¹⁰ “Before adopting a rule ..., an agency shall ... [d]etermine that the probable benefits of the rule are greater than its

probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.” [RCW 34.05.328\(1\)\(c\)](#).

¹¹ [RCW 34.05.570\(2\)\(c\)](#). Where the Department assesses the feasibility of a toxic agent standard arbitrarily and capriciously, it thereby violates the mandatory language of [RCW 49.17.050\(4\)](#) (“shall set a standard which most adequately assures, to the extent feasible”). The resulting rule would arguably meet another basis for judicial review (“exceed[ing] the statutory authority of the agency”). [RCW 34.05.570\(2\)\(c\)](#).

¹² [Aviation W. Corp.](#), 138 Wash.2d at 432, 980 P.2d 701 (quoting and adding emphasis to [Neah Bay Chamber of Commerce v. Dep’t of Fisheries](#), 119 Wash.2d 464, 474, 832 P.2d 1310 (1992)). Prior to the 1995 amendment to [RCW 34.05.570\(2\)\(c\)](#), a reviewing court could invalidate a rule upon finding that the rule “could not conceivably have been the product of a rational decision-maker.” Laws of 1995, ch. 403, § 802(2)(c). The *Neah Bay* court observed that this standard “involve[d] an inquiry into the reasonableness of regulations analogous to the application of the arbitrary and capricious standard.” [119 Wash.2d at 473, 832 P.2d 1310](#); see also William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L.REV. 781, 835 (1989) (expressing doubt “that a judge can distinguish [the rational decision-maker standard] from the arbitrary and capricious standard”). Indeed, the 1995 amendment substituted the arbitrary and capricious standard. That standard is consistent with the APA provision that, “[i]n reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” [RCW 34.05.574\(1\)](#). And we have registered agreement with Professor Andersen’s opinion that “substantial judicial deference” should be accorded “when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency’s expertise.” Andersen, *supra*, at 832, cited in [Hillis](#), 131 Wash.2d at 396, 932 P.2d 139.

¹³ CP at 516. Whether Cant was referring to additional costs to the employers, a permissible consideration in the feasibility analysis, or to the Department’s resources is unclear.

¹⁴ It appears that California did not have in place in 1985 a package of protections comparable to Washington’s 1993 regulations. Although California had “closed systems for mixing and loading Category I pesticides,” CP at 2180, “[w]orkers handling cholinesterase-inhibiting chemicals in closed mixing and loading systems exclusively [were] not subject to routine cholinesterase monitoring, and the time spent using only closed mixing and loading apparatus [was] excluded from the hours which trigger routine cholinesterase monitoring.” Richard G. Ames et al., *Protecting Agricultural Applicators from Over Exposure to Cholinesterase Inhibiting Pesticides: Perspectives from the California Programme*, 39 J. SOC. OCCUP. MED. 85, 88 (1989). Thus, the 1985 Ames study apparently did not measure the benefits of the closed system, California’s most important protective measure.

¹⁵ [RCW 34.05.570\(4\)\(c\)\(iii\)](#). If our review reveals that the Department’s 1997 decision was “arbitrary or capricious,” then the Department’s denial of the pesticide handlers’ request will have contravened the mandatory language of WISHA and will have provided another basis for relief under the APA’s judicial review statute as an action “[o]utside the statutory authority of the agency or the authority conferred by a provision of law.” [RCW 34.05.570\(4\)\(c\)\(ii\)](#).

¹⁶ CP at 272. That the TAG recommended in its September 1995 cover letter a nonmandatory program rather than a mandatory one requires some qualification. The TAG deferred to the Department’s financial straits and attributed the group’s endorsement of a nonmandatory program to “the current limitations of various resources vital for the implementation of some of the recommendations described in this document.” CP at 202.

¹ The word “may” means petitioning is permissive in that a person is not required to petition for rule making. However, it does not mean that if rule making is sought, a petition is optional. [RCW 34.05.330\(1\)](#) is the only avenue

in the state Administrative Procedure Act for “any person” to initiate rule making. Thus, insofar as the Court of Appeals suggested that the use of “may” in [RCW 34.05.330\(1\)](#) means that a petition need not be filed before seeking judicial review of the failure to engage in rule making, it misreads the statute.

² Other jurisdictions also refuse to consider the failure to engage in rule making under state provisions which permit “any person” to submit a petition ‘requesting the adoption ... of a rule’ ” (quoting [N.C. Admin. Code tit.4 rule 3B.0101](#)) where no such petition was filed, on the basis that “ ‘when the legislature has established an effective administrative remedy, it is exclusive.’ ” [Beneficial N.C., Inc. v. State ex rel. N.C. Banking Comm’n](#), 126 N.C.App. 117, 123, 484 S.E.2d 808 (1997) (quoting [Porter v. Dep’t of Ins.](#), 40 N.C.App. 376, 379, 253 S.E.2d 44 (1979)); cf. [In re the Application of Hawaiian Elec. Co.](#), 81 Hawai’i 459, 470, 918 P.2d 561 (1996) (court rejects argument that particular matter should have been addressed by rule making, on the ground, among other things, that the appellants failed to petition for the adoption of such a rule as required by statute).

³ Examples of truly extraordinary cases show how far afield the majority’s analysis is. In [Public Citizen v. Heckler](#), 653 F.Supp. 1229 (D.D.C.1986), the Secretary of Health and Human Services declined to promulgate a rule banning the interstate sales of raw milk. She based the decision on the fact that a greater amount of raw milk was marketed and consumed within the producing state, and most illness accordingly occurred there. She concluded the issue was best resolved at the state level. The court found this denial arbitrary and capricious and ordered rule making. The record showed a serious risk of illness resulting from interstate shipments of raw milk, and this risk was not reduced because the amount of milk sold interstate was less than that consumed within the producing state. [Id.](#) at 1239. The court also noted that there were formal rule making proceedings in 1973 followed by 12 years of agency information gathering, a public hearing in 1984, and the compilation of a full administrative record. It was undisputed that all types of raw milk are unsafe and pose a significant health risk. [Id.](#) at 1240, 1241. As to the agency’s explanation, the court noted that the evidence in the record showed that the states had been unsuccessful in individual attempts to regulate the sale of raw milk, that the states did not have authority to prohibit sales of raw milk beyond their borders, and that only the federal government, under its commerce clause power, could institute a nationwide ban. [Id.](#) at 1241.

In [American Horse Protection Ass’n v. Lyng](#), 812 F.2d 1 (D.C.Cir.1987), the challenge was to existing regulations relating to “soring” show horses, i.e., deliberately using weighted devices to injure the horses so that their gait would improve. The Secretary of Agriculture declined to revise the regulations after he reviewed studies and other materials relating to devices used to “sore” the horses. [Id.](#) at 5. The agency also submitted an affidavit showing fewer findings of violations. *Id.* The court found the agency’s conclusory reasons for refusing to initiate rule making were not the result of reasoned decision-making. The court noted that the agency had noted earlier that the existing regulations, which prohibited use of devices of certain weights, but not devices of lesser weight, were inconsistent with the law—Congress had banned soring—and inconsistent with research. *Id.* at 6. Also, counsel for the agency appeared to resist the proposition that Congress’ act was intended to prohibit devices reasonably likely to cause soring. *Id.* The Court found nothing ambiguous in the federal act banning soring, concluding that it was designed to end the practice. *Id.* at 6. Further, Congress had amended the act to stop the practice it thought would end with the original act. *Id.* at 6–7.

These two cases show extraordinary circumstances warranting a court’s intervention in the decision not to engage in rule making. The present case is not of the same kind.

⁴ Finally, *even if* rule making is appropriately ordered by this court, the majority has far exceeded its judicial role when it not only directs rule making but directs the precise nature of the rule that must be adopted.

⁵ Nor do the recommendations comprise a “safety and health standard” under the Washington Industrial Safety and Health Act (WISHA), since a standard must *require* the “adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” [RCW 49.17.020\(7\)](#).

- ⁶ None of the cases cited by the court for this proposition, *Consumers Union of U.S., Inc. v. Federal Trade Commission*, 801 F.2d 417, 422–23 (D.C.Cir.1986), appears to support the principle stated, and the cases clearly do not support application of that principle in this case. See  *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (addressing alternatives to the proposed action in an environmental impact statement); *Am. Fin. Servs. Ass'n v. Fed. Trade Comm'n*, 767 F.2d 957, 988 (D.C.Cir.1985) (determining that agency's decision to reject certain interpretation of the record evidence was not unreasonable; addressing challenge to rule actually promulgated that remedy in rule was too broad and agency should have chosen narrower remedy, and concluding that rule's adoption was not an abuse of discretion because the choice of remedy was reasonable after consideration of alternative remedies and determination that they failed to address the full range of problems involved);  *Pub. Citizen v. Steed*, 733 F.2d 93, 103–04 (D.C.Cir.1984) (involving failure to consider alternatives to suspension of rule relating to tire tread-wear grading).
- ¹ *CLEAN v. City of Spokane*, 133 Wash.2d 455, 478, 947 P.2d 1169 (1997) (Sanders, J., concurring). If it is worth saying, it is worth repeating.

Exhibit 7

Coronavirus (COVID-19) Prevention in Agriculture

Prevent Worker Exposure to Coronavirus (COVID-19)

Coronavirus causes COVID-19 and spreads when an infected person coughs or sneezes. Coronavirus also spreads by touching surfaces or objects and then touching one's mouth, nose, or eyes. Coronavirus is recognized as a very serious workplace hazard.

The Department of Labor & Industries (L&I) requires employers to implement the Governor's proclamation . <https://www.governor.wa.gov/news-media/inslee-announces-stay-home-stay-healthy%2%A0order> Employers must ensure social distancing for employees and customers; frequent and adequate employee handwashing; and that sick employees stay home/go home. Employers must also provide basic workplace hazard education about coronavirus and how to prevent transmission in the language best understood by the employee. [WAC 296-307-030]

Workplace Discrimination

It is against the law for any employer to take any adverse action such as firing, demotion, or otherwise retaliate against a worker they suspect of exercising safety and health rights such as raising safety and health concerns to their employer, participating in union activities concerning safety and health matters, filing a safety and health complaint or participating in a DOSH investigation. Workers have 30 days to file a complaint with L&I DOSH and/or with Federal OSHA.

<https://lni.wa.gov/workers-rights/workplace-complaints/discrimination-in-the-workplace>

Expectations: Employers Must Create and Implement an Effective Social Distancing Plan

Employers must assess the risk of exposure from the public, co-workers, individual workers' risk factors (such as age and underlying health conditions), and other factors throughout their worksites, considering all job tasks, and then develop a plan to address those risk factors. This plan must ensure that work areas and activities occur with at least six feet between staff, and that all staff follow social distancing protocols. [WAC 296-307-030]

Suggestions: Ideas to Achieve Social Distancing (at least 6 feet) in Agricultural Work:

- Stagger tasks and work shifts.
- Limit work to only necessary tasks.
- In the field, assign and enforce tasks to maintain a distance of at least six feet between people.
- Reorganize work, break up tasks to facilitate social distancing.
- Provide radios for workers to communicate without having to come together.
- Set up staging areas where tools or other materials can be dropped and picked up by workers.
- Find alternatives to group meetings for sharing information (e.g. telephone conference).
- Ensure adequate shade areas for breaks with minimum distance of six feet between people.
- Hold gatherings (of no more than 10) outdoors while maintaining required distancing.
- Establish physical distance monitors to reinforce the minimum six-foot separation.
- Stress the importance of social distancing off the job

Suggestions: Ideas for Alternate Protections When six foot Spacing Is Infeasible

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- Use barriers between workers to block direct face-to-face pathways and create at least six foot indirect pathways.
- Use fans or take advantage of natural breezes. Air pushed towards the worker’s breathing zone must be from a clean source. Avoid blowing air exhaled by one worker directly to another.
- Review jobs that use more than one person to see if one person do them.
 - Consider shifting workers and/or tools used.
 - Consider reducing the size of the material being worked (e.g.lifted or processed).

Expectations: Employers Must Ensure Frequent and Adequate Handwashing

- Ensure all workers know how to wash hands with soap and water for at least twenty seconds, drying hands with disposable paper towels with proper used towel disposal during work time.
- Portable hand washing stations are required in fields and must contain water, liquid soap, disposable paper towels and a trash can.

Suggestions: Ideas for an Effective Handwashing Plan:

- Set up a schedule to ensure frequent re-supply of soap, running water, and paper towels on all jobsites and emptying of trash.
- Provide secondary handwashing or sanitizing stations (hand sanitizer or wipes/towelettes).
- If gloves are used, they must also be washed regularly.[WAC Part H 296-307-10005]

Expectations: Employers Must Ensure that Sick Employees Stay Home

- Require sick workers to stay home or go home if they feel or look ill. The main symptoms of COVID-19 include fever (100 or higher), cough and shortness of breath. Other symptoms may include body aches, fatigue, diarrhea, and loss of smell or taste.[WAC 296-307-030]

Suggestions: Ideas for Ensuring that Sick Employees are not at Work:

- Have a plan for identifying who exhibits symptoms of the disease (fever, sore throat, cough, difficulty breathing, etc.)
- Encourage workers to report concerns. Explain to workers that there are programs so workers can be paid if they are sick and can’t work.
- Have flexible sick leave policies and tell workers about paid sick leave.
- Tell older workers (60 or older) and workers with underlying health conditions that if they stay home on furlough they will not suffer adverse employment consequences.
- Conduct daily COVID-19 symptoms checks of employees, contractors, suppliers, customers and visitors entering the worksite –consider a physical test or even a short questionnaire.
- Develop a process if a worker becomes ill while at work or outside of work.
- Notify co-workers who have come within six feet of COVID-19 sick worker, without identifying the sick worker.
- Notify the workers at the site that someone has fallen sick, and inform them of the measures you have taken to clean and sanitize the worksite.

Expectations: Employers Must Provide Basic Workplace Hazard Education Regarding Coronavirus (COVID-19) and How to Prevent Transmission in the Language Best Understood by Employees [WAC 296-307-030]

- Instruct all workers on COVID-19 preventive behaviors such as social distancing, handwashing, facial touching avoidance, cough etiquette, and PPE.

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- Emphasize cleaning and sanitizing items that are frequently touched, such as cell phones.
- Ensure written Accident Prevention Programs, Safety and Health Plans and policies, including plans to protect workers from biological hazards, are communicated to employees in a language they understand and are easily accessible. Include information about emergency services such as **911**, local hospital emergency room <https://www.wsha.org/our-members/member-listing> and community health centers. <https://www.wacommunityhealth.org/member-health-centers>

Suggestions: Ideas for Providing Basic Workplace Hazard Education About Preventing Coronavirus Transmission:

- Post information from the health authorities (CDC, OSHA, DOSH, WA DOH, etc.).
- Communicate important safety messages/updates daily etc.
- Post signs throughout the worksite about how to prevent coronavirus transmission.

Personal Protective Equipment - Personal protective equipment may prevent coronavirus transmission.

- Face masks/shields or cloth face coverings can prevent direct exposure to coronavirus droplets.
- Respirators require care in use and management under a program covered by the Respirator Rule. [Agriculture employers must comply with Part Y-5 Respirators under WAC 307-594 through 622](#). Respirators are not normally recommended for social distancing purposes, but may be appropriate where workers must be near to others.
- Avoid touching mouth, nose, or eyes when donning, doffing or adjusting the face covering.

Other Protective Measures

- Provide ways for workers to express any concerns and ideas to improve safety.
- Update your Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.
- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.
- Regular cleaning of all items frequently touched

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

From WA DOSH: <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus> includes resources from CDC, OSHA, and WA DOH

[Yakima Health District : https://www.yakimacounty.us/2323/COVID-19](https://www.yakimacounty.us/2323/COVID-19)

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**Temporary Worker Housing Supplemental Fact Sheet for
Coronavirus (COVID-19) Prevention in Agriculture**

This supplemental fact sheet should be read in conjunction with the “Coronavirus (COVID-19) Prevention in Agriculture” publication.

This supplemental fact sheet is directed to agriculture operations that have temporary worker housing.

Expectations for Employers Who Provide Temporary Worker Housing

An employer’s social distancing obligations include temporary worker housing. The Washington State Department of Health developed guidance to assist temporary worker housing facilities during the COVID-19 outbreak. (WAC 296-307-030)

<https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/TemporaryWorkerHousingGuidance.pdf>

- Update store Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses. (WAC's 296-307-030 APP or WAC 296-307-16127 TWH management plan)

Employer-provided temporary worker housing is temporary housing provided by the employer in some circumstances, such as for agricultural guest workers.

- Social distancing must be supported for occupants during the time workers are housed, which may require additional resources. This includes maintaining six-foot separation for recreation, cooking, and sleeping.
- The employer shall continuously exercise reasonable efforts to ensure that the coronavirus prevention protocols, including social distancing elements, are maintained within the temporary worker housing environment.
- Transportation provided for workers must also allow for social distancing. This includes retrofitting buses with screens and keeping workers from sitting next to each other.
- Employers must provide cleaners and equipment to maintain a hygienic living space.

Suggestions to Meet 6’ Social Distancing Expectations

- Physical solutions, such as plastic flexible screens, should be added between sinks and other areas where workers are in close contact.
- Housing should be evaluated, and its initial set up modified to encourage social distancing, including the removal and/or spacing of chairs and furniture.
- Air conditioner units should be cleaned, always on at least fan, and filters changed weekly.
- Units without air conditioners should be provided with air filters.
- Transportation to and from housing should be cleaned on a daily basis.

Expectations - If a housing occupant becomes sick

- Provide sick employees with isolation plans that prevent further spread of the disease.
 - Separate food and bathroom access is also strongly advised.

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- Arrange for medical access.
 - Telemedicine resources should be utilized first to determine appropriate care.
 - Provide transportation, if necessary, in a manner that does not expose others.
- The employer must consult with a physician or public health authority to monitor the situation and provide guidance on treatment and continued housing of workers.
- Establish a process for deep cleaning temporary worker housing following a report and isolation of a worker with a suspected or confirmed case of COVID-19. (WAC 296-307-16145-8)
 - Thoroughly clean areas where a worker was for more than 10 minutes.
 - Wipe all accessible surfaces.
 - Clean up any visible soiling including any smears or streaks.
 - Sanitize common touch surfaces in the area.
 - Do not allow other workers into these areas until cleaning is complete.

Expectations - Establish Increased Frequency for Cleaning and Disinfecting TWH Facilities

- Make cleaning supplies available to workers to do spot cleaning when necessary.
- Follow CDC guidelines for cleaning and disinfection
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
- Update Safety Data Sheets (SDS) of all disinfectants on site.

Suggestions to Meet Cleaning/Disinfection Expectations:

- Increase frequency of regular disinfection at the site, particularly clean objects handled extensively by workers in common areas and touch points.
- Clean using soap water/other cleaning fluids and cloths and brushes to remove dirt buildups.
- Disinfect high touch surfaces including vehicles using an EPA approved disinfectant:
<https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.
- Consider covering surfaces difficult to clean or disinfect (fabric, rough surfaces, etc.).

Employee responsibilities:

- **Don't go** to work if you are sick and **tell the employer representative** you are not well.
- Wash hands just before consumption or use of food, water, and tobacco.
- Cover mouth and nose with tissues if you cough or sneeze, or cough/sneeze into your elbow.
- Do not shake hands or bump elbows with others.
- Avoid touching your eyes, nose, or mouth.
- Wash your hands often with soap and water for at least 20 seconds.
- Pay attention to official sources of information such as the CDC and the Washington State Department of Health.
- Do not share unsanitized cooking utensils, work tools, phones, or PPE.
- Do not share food with others on the jobsite.
- Wear appropriate PPE for jobsite hazards and sanitize and store it properly after each use.

Other Protective Suggestions

- Provide and encourage ways for workers to express any concerns and ideas to improve safety. (WAC 296-307-030).

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- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Employers should reference the CDC's [Interim Guidance for Businesses and Employers](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) :

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

From WA DOSH: <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus>

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Resources

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Employers should reference the CDC's [Interim Guidance for Businesses and Employers](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) :
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

From WA DOSH: <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus>

Food Processing/Warehouse Workers Supplemental Fact Sheet

For Corononavirus (COVID-19) Prevention in Agriculture

This supplemental fact sheet addresses agriculture food processing warehouse operations and should be read in conjunction with the “Coronavirus (COVID-19) Prevention in Agriculture” publication.

Suggestions to Achieve Social Distancing Plan for 6 feet of physical separation [WAC 296-307-030]

- Facilitate physical (social) distancing at warehouse entrances, processing floors, maintenance shops, cold storages, breakrooms, and all other potential exposure areas.
- Limit the number of visitors and time spent by them in warehouse.
- Arrange work areas to facilitate social distancing with a minimum of six feet between staff where feasible, and ensure your staff follow social distancing protocols.
- Arrange lunch and employee break rooms to ensure a minimum distance of six feet or more.
- Temporarily mark 6-foot increments (using adhesive colored tape, chalk, etc.) on the ground or processing floor to ensure social distancing.
- Post signs readable from a far distance (or use portable, electronic reader boards) that inform visitors and workers of social distancing practices.
- Designate workers to monitor and facilitate distancing on process floor lines.

Suggestions for physical controls where social distancing is not feasible

- Use barriers between employees to create an effective 6-foot air path between workers. Barriers should be able to stop airflow, so curtains or plastic sheeting may be effective, or more solid materials can be used.
- Set up fans to blow clean air at the workers’ breathing zone. Ensure air is not blown from one worker directly to another.
- Extend production lines so workers can be farther apart.
- Reduce production speed to reduce the number of workers needed on the line. Running multiple shifts may allow for additional production.

Suggestions for interacting with Visitors

- Ensure visitor logs are accurate and maintained.
- Train visitors on your company’s site-specific COVID-19 safety procedures. [WAC 296-307-030]
- Limit visitor’s time and scope of visit to essential business only.
- Stagger shipping and receiving orders to reduce potential COVID-19 exposure of transport personnel.
- Train clerical personnel on how to protect themselves when interacting with visitors.

Suggestions for an Effective Handwashing Plan:

- Install hand washing stations or hand-sanitizing dispensers at warehouse entrances and at key locations inside for visitors and workers. Hand sanitizer is not a substitute for hand washing. [WAC 296-307-24021; WAC 296-307-24024]
- Appoint a designated worker to replenish water in portable wash stations, single-use towels, and soap, along with emptying the trash.

Suggestions to Ensure Sick Workers Are Not at Work:

- Monitor employees for signs of illness and require sick workers to stay home.
- Ensure employees know the signs and symptoms of COVID-19 caused by coronavirus exposure. [WAC 296-307-030]
- If an employee is sent home, strongly recommend that employee follow Washington State Department of Health Guidelines for COVID-19 (Link: doh.wa.gov). [WAC 296-307-030]

Suggestions for Basic Workplace Hazard Education to Prevent Coronavirus Transmission:

- Instruct all workers on social distancing, handwashing, and other employee and food safety procedures related to coronavirus.
- Advise on respiratory etiquette, including covering coughs and sneezes and not touching eyes, noses, and mouths with unwashed hands or gloves.
- Limit the sharing of utensils, phones, work tools, and other workplace items.
- Communicate important safety messages/updates daily with methods such as posters, meetings, reader boards, etc. that will reach all workers.
- Educate workers on the importance of hand washing before eating, drinking, using tobacco.
- Educate workers on how to report potential COVID-19 exposures, symptoms and signs.
- Educate workers on how to report unsatisfactory sanitation of work areas.

Warehouse Sanitation [WAC 296-307-24001]

- Appoint a designated sanitation worker(s) to continuously clean and disinfect surfaces on a significantly increased schedule. Use the environmental cleaning guidelines set by the CDC. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
- Move deep cleaning activities during closing hours. If running a 24-hour operation, deep clean during the slowest period of the night with the least amount of workers on duty.
- When disinfecting for coronavirus, the EPA recommends using the longest recommended contact time and/or most concentrated solution per the label.
- Be sure to follow the label directions for FOOD CONTACT SURFACES when using the chemical near or on utensils and food contact surfaces.
- Be sure to wash and rinse visible dirt/debris from equipment before sanitizing.
- Ensure workers use appropriate personal protective equipment (PPE) for work tasks. [WAC 296-307-10005]

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- Use protective gloves and eye/face protection (e.g. face shields and/or goggles) when mixing, spraying, and wiping with liquid cleaning products, like diluted bleach; you must provide a functioning eyewash station. [WAC 296-307-10005] [WAC **296-307-03930**]

Other Protective Measures

- Alert warehouse managers or shift supervisors of strategies for handling visitors or workers who are not following physical distancing practices or who demonstrate signs of illness.
- Provide ways for workers to express any concerns and ideas to improve safety.
- Update warehouse Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Posters, alerts, and more workplace safety information relating to COVID-19 are available on L&I DOSH's webpage <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus> includes resources from CDC, OSHA, and WA DOH

Yakima Health District : <https://www.yakimacounty.us/2323/COVID-19>

WA Department of Agriculture: <https://agr.wa.gov/about-wsda/news-and-media-relations/covid-19>

Recommendations during a COVID-19 Outbreak

Temporary Worker Housing Facilities

The Washington State Department of Health has developed this guidance to assist temporary worker housing facilities in response to the 2019 novel coronavirus disease (COVID-19) outbreak. While the situation is evolving, at this time we believe that people over 60, immune-compromised people and those with chronic medical conditions are at higher risk for severe illness from COVID-19.

Stay up-to-date.

Monitor public health updates from:

- [Local Public Health Department](#)
- [Washington State Department of Health](#)
- [Centers for Disease Control and Prevention Situation Summary](#)

Protect employees and occupants.

- 1. Educate employees and occupants about COVID-19.** Make sure they know the potential risks and basic prevention measures, such as:
 - Wash hands often with soap and water for 20 seconds or use alcohol-based hand sanitizer. Require everyone to wash their hands upon entering the housing, before meals, after time outside, and prior to leaving for work.
 - Avoid touching your face with unwashed hands especially your eyes, nose, or mouth.
 - Cough and sneeze into elbow or into a tissue. Throw away the tissue immediately after use and wash hands. (For employees tips, see [Respiratory Hygiene/Cough Etiquette in Healthcare Settings](#).)
 - Maintain a minimum of six feet of distance between yourself and others when feasible.
 - Frequently clean and disinfect high contact surfaces like doorknobs, tables, furniture, shared bathrooms, and countertops.
- 2. Provide employees and occupants with what they need to prevent transmission.**
 - Consider providing masks to sick people, if available.
 - Ensure adequate supplies of soap, hand sanitizer, and tissues are readily available.
- 3. Post signs** sharing how employees and occupants can protect themselves and others at the facility. Consider posting signs at entrances and in bathrooms.
 - [DOH Coronavirus Factsheet](#)
 - [DOH Education Materials](#)
 - [CDC Print Resources](#)
- 4. Increase the distance between people in sleeping accommodations, where feasible.** Offering individual rooms for groups or families is ideal, but not typically available. In shared

spaces, a “head-to-toe” sleeping arrangement with a minimum of six feet of distance between beds is recommended.

5. **Encourage occupants to report illnesses and exposure to COVID-19** prior or upon entry to the facility.
6. **Conduct daily health checks** of employees when they arrive. Look for signs of illness and ask about the employee’s health.
7. **Provide guidance for employees if they develop symptoms of COVID-19 (such as a sore throat, cough, or difficulty breathing) at work.** Ask them to:
 - Immediately self-isolate (separate themselves from others)
 - Notify their supervisor, if applicable
 - Go home and stay home until 7 days after symptoms onset or 72 hours after symptoms resolve, whichever is longer
 - If symptoms persist or worsen, call their health care provider for further guidance
8. **Separate sick occupants from those without symptoms.** Facilities with a single room should assign sick occupants to one side and occupants without symptoms to the opposite side.
 - Encourage employees and occupants to remain home if they are sick with cough, sneezing and/or fever. Inform them about sick leave policies.
 - If you have one or more occupants or employees exhibiting symptoms and you would like further guidance you should contact:
 - Your [local health department](#)
 - **Or** the state coronavirus hotline at 1-800-525-0127 and press # (Note: The hotline may be experiencing high traffic and may be temporarily unavailable, and keep trying.)
9. **Incorporate social distancing.** For example, eliminate all large group activities, increase the distance between workers during meals/free time, plan activities that do not require close physical contact, stagger outdoor time.
10. **Discourage visitation.** Discourage visitation at your facility and offer alternative methods of visitation (Skype, FaceTime, etc.), if available.
 - Maintain a record of all visitors. Collect contact information, date, and travel from visitors, including vendors, inspectors, etc.

Additional COVID-19 Resources

WHAT TO DO IF YOU ARE EXPOSED TO OR SUSPECT YOU HAVE COVID-19

- [What to do if you have confirmed or suspected coronavirus disease \(COVID-19\) \(PDF\)](#)
- [What to do if you were potentially exposed to someone with confirmed coronavirus disease \(COVID-19\) \(PDF\)](#)
- [What to do if you have symptoms of coronavirus disease 2019 \(COVID-19\) and have not been around anyone who has been diagnosed with COVID-19 \(PDF\)](#)

To request this document in another format, call 1-800-525-0127. Deaf or hard of hearing customers, please call 711 ([Washington Relay](#)) or email civil.rights@doh.wa.gov.

ADDITIONAL WORKPLACE GUIDANCE

- [L&I Novel Coronavirus Outbreak \(COVID-19\) Resources](#)
 - Department of Labor & Industries (L&I) information on sick leave and worker's compensation.
- [COVID-19: Review of Respiratory Protection for Workers \(CDC\)](#)
 - Check for Spanish availability.
- [Biological Hazards](#) – resources
- [Cornell Agriculture Workforce Development \(Novel Coronavirus Prevention & Control for Farms\)](#)

GENERAL RESOURCES

- [DOH Coronavirus \(COVID-19\) webpage](#) – updated information and resources daily
- [Workplace and Employers](#)
- [Persons Who are at Higher Risk for Serious Illness](#)
- [Communities and Community Organizations](#)
- [The U.S. Department of Housing and Urban Development](#)
- [Stigma Reduction](#)
- [How Can I Be Prepared for a COVID-19 Outbreak?](#)

Exhibit 8

We, Anjum Hajat and Catherine Karr, declare the following under penalty of perjury under the laws of the State of Washington.

1. I, Anjum Hajat, received my PhD in Epidemiology from the University of North Carolina and my Master in Public Health (MPH) degree from the University of Michigan. I worked in public health practice, at a local health department and the Centers for Disease Control, for seven years prior to joining academia. I have been a public health professional for 14 years. My current research focuses on the health of low wage workers.
2. I, Catherine Karr, received my PHD in Epidemiology, my Masters of Science (MS) in Environmental Health, and my Medical Degree (MD) from the University of Washington. I have been on faculty at the University of Washington in the School of Medicine and School of Public Health since 2004. I am also a practicing general pediatrician at UW Medicine Pediatric Care Center. My current research includes a focus on the health of farm worker children.
3. The Corona virus (COVID-19) is transmitted mainly through respiratory droplets. This means that if an infected person talks, sneezes or coughs on another person in close proximity they may be spreading the virus through tiny droplets in the air. Maintaining good social distancing (about 6 feet) may reduce person-to-person transmission. In addition, it is possible that persons coming into contact with infected surfaces or objects may become infected. Hand washing and disinfecting surfaces is recommended for this reason. Evidence suggests that the virus can spread easily and quickly if appropriate prevention measures are not taken.¹
4. We give these opinions relying upon our education, experience and materials that are reasonably relied upon in our professions.
5. We base our analysis below on the following information:
 - a. Farm labor camp housing typically consists of dormitory-style housing with common bathroom and kitchen facilities.
 - b. The bedrooms are often a minimum of two bunkbeds per room but can often have more depending on the size of the room. Much farmworker housing has open-style large rooms, with no separate space available for isolation of sick or exposed workers.
 - c. Washington temporary worker housing regulations ([WAC 246-358-029](#)) set a minimum of only 50 square feet of floor space per occupant. That amounts to about a seven-foot square. A standard-size twin bed occupies close to half of that space. Temporary worker housing regulations also allow beds to be closer together than six feet and within three feet of cooking surfaces. ([WAC 246-358-135](#))
 - d. H-2A temporary agricultural visa holders do not have their own transportation and rely on their employer to be transported to work daily on busses or vans. They also rely on that same transportation to be taken to the store to do grocery shopping and banking in rural towns throughout the state.
 - e. Some H-2A workers who work for large agricultural employers can sometimes spend up to 3 hours per day in close proximity to others commuting round-trip from their labor camps to various orchards throughout eastern Washington.

¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

- f. Grocery shopping and banking trips usually happen on Friday evenings or weekends and can involve large groups of workers (50-100) being dropped off in parking lots of shopping areas and being given an hour or two to complete their shopping and banking needs.
 - g. Depending on the type of crop and type of work, farm workers are regularly asked to work in close proximity to (less than 6 feet away from) each other, both in packinghouse and harvest settings.
 - h. Farmworkers are often instructed to clean their own housing, buses, and workplaces. Industry representatives have stated in public meetings that cleaning supplies necessary for cleaning farmworker housing are backordered for long periods of time.
 - i. It is well documented that farmworkers, both domestic and H-2A workers, are fearful of making health and safety complaints due to a wide-spread fear of retaliation.
 - j. A recent Seattle Times article outlined worker complaints that handwashing supplies are not being provided in the fields. The same article included accounts of employers who did not provide information about prevention of COVID-19 or available paid sick leave to which workers are entitled.
 - k. The Department of Labor & Industries has released draft “fact sheets” about agriculture generally, packinghouses, and worker housing, dated April 8, 2020, which we have reviewed.
 - l. State agency staff has stated in public meetings that enforcement of the “fact sheets” will be complaint-driven, mostly due to limited enforcement staff. Farmworkers will have to complain before L&I attempts to determine whether their employer is complying.
6. Most farmworkers are living and working in rural areas, in which medical infrastructure can quickly be overwhelmed. Not only does infection of groups of farmworkers cause risk of overwhelming medical infrastructure, but visits from large groups of farmworkers to rural communities’ stores and other businesses poses a risk of transmission in those communities as a whole.
 7. Farmworkers may come to work sick with increased frequency due to fear of retaliation, economic hardship, and lack of knowledge about paid leave available to them.²
 8. Clear, specific, mandatory standards are needed to protect against the risk of COVID-19. Current draft guidance provided by the Department of Labor & Industries is unclear and in some cases contradictory. Rules should be specific and measurable. In the absence of clear, specific rules workers are unable to identify violations and thus will be unable to file complaints. (per 3l above).
 9. CDC now recommends the use of protective masks for anyone who is in close contact with others, where social distancing (at less than 6 feet distance) is difficult to maintain.³ For farmworkers this may occur in packinghouses and harvest settings as well as in living quarters. Therefore, employers should provide masks that cover workers nose and mouth and request that all workers wear masks when social distancing is difficult to maintain.

² <https://www.seattletimes.com/seattle-news/as-farm-work-carries-on-some-worry-about-becoming-the-states-new-coronavirus-epicenter/>

³ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>



10. Housing facilities that ensure one person or no more than two people per room of 150 - 200 square feet⁴ are necessary to meaningfully reduce the risk of transmission of COVID-19 in farmworker housing. People living in congregate housing such as the typical farmworker housing described above are at unique risk for the spread of COVID-19 because they are consistently in close contact with others and share bathroom and cooking facilities. Several research studies confirm that crowding increases the risk of transmission of influenza and similar illnesses.^{5 6}
 - a. If individual rooms are impractical, the number of farmworkers per room should be reduced and beds should be separated by 6 feet. Bunk beds that cannot meet this standard should be disallowed. Some have suggested using plastic sheeting on three sides of the bed and a curtain on the fourth side. This is likely to create poor ventilation which may result in abandoning the sheeting. Furthermore, studies have shown that poor ventilation increases the risk of respiratory infections.⁶
11. The number of people in vans and buses should be reduced so individuals can practice social distancing. Furthermore, employers should disinfect high-touch areas (handles, buttons, seat rests) with a bleach solution after every use to reduce the viability of the virus on surfaces. Since transportation on buses or vans puts people into close contact with one another, this may increase the likelihood of spread of COVID-19.
12. 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.
13. Employers should be responsible for providing housing units with bleach solutions, hand soap and additional needed cleaning supplies. Although an initial shortage of these supplies was reported, most local stores are selling these materials again.
14. Worker education about several aspects of COVID-19, i.e., how to prevent it and what to do if you think you are infected, should be provided in the language understood by the workers.
15. Employers must provide hand sanitizer/soap and water in the fields and ensure supplies are reliably replenished. A study in the military setting shows that hand-washing while working in field settings helps prevent acute respiratory infections.⁷
16. In the event a farmworker is diagnosed with COVID-19, the individual must immediately be isolated in their own housing unit with a bathroom. This will help reduce further spread of the virus.

⁴ Cedeno Laurent JG, Allen JG, McNeely E, Dominici F, Spengler JD. Influence of the residential environment on undergraduate students' health. *J Expo Sci Environ Epidemiol*. 2020 Mar;30(2):320-327.

⁵ Tsuang W M, Bailar JC, Englund JA. Influenza-like symptoms in the college dormitory environment: a survey taken during the 1999-2000 influenza season. *J Environ Health*. 2004 Apr;66(8):39-42, 44.

⁶ Sun Y, Wang Z, Zhang Y, Sundell J. In China, students in crowded dormitories with a low ventilation rate have more common colds: evidence for airborne transmission. *PLoS One*. 2011;6(11):e27140.

⁷ Kim HS, Ko RE, Ji M, Lee JH, Lee CS, Lee H. The usefulness of hand washing during field training to prevent acute respiratory illness in a military training facility. *Medicine (Baltimore)*. 2018 Jul;97(30):e11594.



17. Farmworkers who demonstrate symptoms consistent with COVID-19, such as cough, fever, shortness of breath, fatigue, body ache, should be tested for COVID-19, put in isolation and prevented from further work until test results are known. The CDC recommendations for when to discontinue self-isolation can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>
18. For older workers (50 +) and those with preexisting conditions (e.g., hypertension, diabetes, asthma, tuberculosis) we recommend strictly following housing guidelines (1 person per room of 150 square feet) and providing work that allows for effective social distancing. These individuals should seek medical care immediately as potential for COVID-19 related complications is higher. In WA State the highest number of COVID-19 cases (35%) is among those 40 - 59 years old, indicating middle-aged individuals are at higher risk.⁸ One report suggests that about 34% of farmworkers are older than 45 years old.⁹ Some research indicates that farmworkers have a higher prevalence of TB¹⁰ and have higher exposure to agricultural dust which has been shown to result in a variety of respiratory conditions.¹¹ These conditions which may be more unique to farmworkers would put them at higher risk for complications of COVID-19.
19. Given the possibility of asymptomatic transmission, that is an infected person with no symptoms spreads the virus to others, it is possible that infections among farmworkers will spread undetected within the farmworker community for many days. Furthermore, asymptomatic persons who visit public places on weekends risk spreading the virus to the neighboring community.¹²
20. Because H-2A workers are dependent on their employers for transportation, these employers should be responsible for immediately transporting workers who show symptoms for testing. If testing facilities are unavailable or at capacity, employers should make every effort to facilitate contact between the worker and the health care provider. Employers should also provide workers who are subsequently isolated or quarantined with adequate food and water.
21. Farm workers have limited financial resources and loss of work can have devastating economic consequences. According to the most recent data from the National Agricultural Workers Survey, farmworkers' mean and median personal incomes the previous year were \$17,500 and \$19,999, respectively. Fourteen percent of workers said their total personal income was less than \$10,000, 29% said they had personal incomes of \$10,000 to \$19,999, another 29% had personal incomes of \$20,000 to \$29,999, and 14% reported that their total personal income was \$30,000 or more.⁹ As such, to the extent possible, symptomatic workers with COVID-19 diagnosis should be supported financially until their illness passes.

⁸ <https://www.doh.wa.gov/Emergencies/Coronavirus>

⁹ Hernandez T, Gabbard S. Findings from the national agricultural workers survey (NAWS) 2015-2016: a demographic and employment profile of United States farmworkers. JBS International, Research Report; 2019.

¹⁰ The National Center for Farmworker Health. Tuberculosis fact sheet. 2018

¹¹ Schenker MB, Pinkerton KE, Mitchell D, Vallyathan V, Elvine-Kreis B, Green FH. Pneumoconiosis from agricultural dust exposure among young California farmworkers. *Environmental health perspectives*. 2009 Jun;117(6):988-94.

¹² Mizumoto K, Kagaya K, Zarebski A, Chowell G. Estimating the asymptomatic proportion of coronavirus disease 2019 (COVID-19) cases on board the Diamond Princess cruise ship, Yokohama, Japan, 2020. *Eurosurveillance*. 2020 Mar 12;25(10):2000180.

Signed April 14, 2020 at Seattle, Washington.



Anjum Hajat, PhD, MPH



Catherine Karr, MD, PHD



Exhibit 9

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

FAMILIAS UNIDAS POR LA JUSTICIA,
AFL-CIO and UNITED FARM WORKERS
OF AMERICA,
labor organizations,

Petitioners,

vs.

WASHINGTON STATE DEPARTMENT OF
LABOR & INDUSTRIES and
WASHINGTON STATE DEPARTMENT OF
HEALTH,

Respondents.

No.

**EMERGENCY PETITION FOR
JUDICIAL REVIEW, DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF**

I. PRELIMINARY STATEMENT

1.00 Familias Unidas por la Justicia, AFL-CIO (FUJ) and the United Farm Workers of America (UFW) seek immediate injunctive relief to require the Department of Labor & Industries and the Department of Health to adopt emergency rules related to the COVID-19 pandemic to protect the lives of all Washington farmworkers.

1 1.01 FUJ, UFW, and others sent a plea to Governor Inslee on March 19, 2020 for
2 emergency orders to protect farmworkers. This plea asked for specific mandates, but L&I and
3 DOH responded on April 3, 2020 by putting forth non-binding guidance—the worst of which
4 was the DOH guidance suggesting that labor camp operators could “isolate” farmworkers by
5 putting sick workers on one side of a bedroom and healthy workers on the other side of the same
6 room. (April 3, 2020 guidance is attached as Exhibit 1.)

7 1.02 Following the issuance of this guidance, FUJ, UFW, and others petitioned L&I
8 and DOH on April 6, 2020 to adopt emergency rules pursuant to RCW 34.05.350(1)(a) no later
9 than April 10, 2020 to protect farmworkers’ lives and their health.

10 1.03 At an April 9, 2020 public meeting, L&I provided updated drafts of non-binding
11 agency “Fact Sheets” and DOH admitted that it had already licensed virtually all labor camps
12 based on its existing rules, i.e., without taking into account the existence of COVID-19. (Fact
13 Sheets are Exhibit 2.)

14 1.04 Grower and farmworker representatives expressed frustration about the Fact
15 Sheets’ lack of clarity on what was required. The president of the Washington State Tree Fruit
16 Association stated: “I do want to point out, I know there was some frustration about things that
17 are or are not happening. **I want to remind everyone that we are talking about looking at**
18 **draft guidance that hasn’t even gone out yet.**”

19 1.05 Drs. Anjum Hajat, Ph.D., MPH, and Catherine Karr, M.D., Ph.D. reviewed the
20 Fact Sheets. Their professional opinions on the Fact Sheets and other relevant matters were sent
21 to the agencies on April 15, 2020 and are attached as Exhibit 3.
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23

1 generally; to protect and extend democratic institutions, civil rights and liberties, and the
2 traditions of social and economic justice; to function as an autonomous Union . . .” Its principal
3 mailing address is P.O. Box 1206, Burlington, WA 98233.

4 3.01 Founded in 1962, the United Farm Workers of America (“UFW”) is the nation’s
5 oldest and largest farmworkers’ union, with members in the State of Washington. To promote a
6 just food supply, UFW works to protect the health and safety of farmworkers from occupational
7 injuries due to unsafe working conditions, sexual harassment, physical violence, and violations
8 of labor and human rights. UFW vindicates farmworkers’ rights through, among other things,
9 assisting in investigating and documenting violations of the law, filing complaints with state and
10 federal agencies, assisting farmworkers in finding attorneys to represent them in civil litigation
11 against agricultural employers, assisting in organizing farmworkers for collective-bargaining
12 purposes, educating the public regarding farm-related issues of public concern, and engaging
13 with retailers regarding social-justice, food safety, and health issues affecting the food supply
14 chain. UFW has thousands of members, many of whom are highly vulnerable migrant and
15 seasonal farmworkers, and serves farmworkers across the country, including in Washington
16 state. Its principal mailing address in Washington State is 1761 George Washington Way, #106,
17 Richland, WA 99354.

18 3.02 Respondent Washington State Department of Labor & Industries is responsible
19 for promulgating safety and health standards of general and specific application governing the
20 conditions of employment in all workplaces, including agriculture, pursuant to the Washington
21 Industrial Safety and Health Act, RCW 49.17 *et seq.*

1 3.03 Respondent Washington State Department of Health is responsible for licensing
2 and inspecting temporary farmworker housing. RCW 43.70.334-.340 and RCW 70.114A *et seq.*

3 3.04 The principal mailing address for each respondent is P.O. Box 40121
4 Olympia, WA 98504-0121 (L&I) and Town Center 3, 243 Israel Road SE, Tumwater, WA
5 98501 (DOH).

6 **IV. STATUTORY AND REGULATORY BACKGROUND**

7 4.00 The Washington State Industrial Safety and Health Act (WISHA) requires that the
8 director of L&I “shall provide for the promulgation of health and safety standards and the control
9 of conditions in all workplaces concerning . . . vapors . . . or other airborne particles, . . . or
10 harmful physical agents which shall set a standard which most adequately assures, to the extent
11 feasible, on the basis of the best available evidence, that no employee will suffer material
12 impairment of health.” RCW 49.17.050(4).

13 4.01 DOH is required to establish rules for the licensing, operation, and inspection of
14 temporary farmworker housing, that “are as effective as the standards developed under the
15 [WISHA], chapter 49.17 RCW.” RCW 70.114A.065.

16 4.02 These statutory directives constitute a duty to act by both agencies.

17 **V. FACTUAL ALLEGATIONS**

18 5.00 The COVID-19 disease is caused by a virus that spreads easily from person to
19 person which may result in serious illness or death and has been classified by the World Health
20 Organization as a worldwide pandemic. It has broadly spread throughout Washington State,
21

1 significantly increasing the threat of serious associated health risks statewide. Proclamation 20-
2 25 by Governor Jay Inslee issued March 23, 2020.

3 5.01 On February 29, 2020, Governor Jay Inslee issued his first COVID-19-related
4 Proclamation—Proclamation 20-05.

5 5.02 On March 19, 2020, FUJ, Community to Community Development, UFW,
6 Northwest Justice Project, and Columbia Legal Services wrote to Governor Inslee requesting
7 “immediate protection for Washington State’s farmworkers during this dire health care crisis.”

8 5.03 The March 19, 2020 letter noted that Washington’s agricultural industry was in
9 the process of bringing in thousands of workers from Mexico under the H-2A temporary
10 agricultural visa program; 7,500 of these workers were already in Washington. Up to 30,000 H-
11 2A workers would arrive from Mexico in the coming months. In addition to not being tested for
12 COVID-19 prior to entry, the letter said that the vast majority of H-2A workers will be living on
13 isolated, rural farms in crowded dormitory-style housing. Besides living, cooking, and bathing in
14 common facilities, they will also be bussed to and from work daily in old school buses or vans.
15 These same modes of transportation will also be used to get the workers into towns to shop at
16 local stores, cash checks, and send money to their families.

17 5.04 The March 19, 2020 letter went on to request several steps be taken to protect
18 farmworkers.

19 5.05 The Governor subsequently issued several additional COVID-19-related
20 Proclamations. On March 23, 2020, the Governor issued Proclamation 20-25 entitled “Stay
21 Home – Stay Healthy.” The Proclamation noted there had been 110 COVID-19-related deaths
22 and at least 2,221 cases of COVID-19 in Washington State.

1 5.06 Proclamation 20-25 required non-essential businesses to cease operations no later
2 than midnight on March 25, 2020.

3 5.07 An Appendix to Proclamation 20-25 declared that farmworkers were “Essential
4 Critical Infrastructure Workers.” Essential Workers were not subject to the Stay at Home
5 directive.

6 5.08 In response to the March 19, 2020 letter, L&I sent out *draft* guidance to the
7 agricultural industry to implement Proclamation 20-25 on April 3, 2020.

8 5.09 This guidance does not have the force of agency rules.

9 5.10 The guidance is unenforceable by L&I or DOH.

10 5.11 On April 4, 2020, the Governor issued Proclamation 20-25.1. Proclamation 20-
11 25.1 said that since Proclamation 20-25 was issued on March 23, 2020 the number of confirmed
12 COVID-19 cases and deaths in Washington State had more than doubled, and there were
13 currently at least 5,984 cases of COVID-19 in Washington State with 247 associated deaths; and,
14 furthermore, models predicted that many hospitals in Washington State would reach capacity or
15 become overwhelmed with COVID-19 patients within the following few weeks unless we
16 significantly slowed its spread throughout the state.

17 5.12 On April 6, 2020, FUJ, UFW, and others sent a petition to L&I and DOH asking
18 the agencies to adopt emergency rules pursuant to RCW 34.05.350(1)(a) no later than April 10,
19 2020 to protect farmworkers’ lives and their health.

20 5.13 The state acknowledged the receipt of the April 6, 2020 rulemaking petition but
21 has not substantively responded to it to date.
22

1 5.14 A staffer from the Governor’s office sent an email to FUJ and others on April 11,
2 2020. It said:

3 We have received your latest correspondence regarding the status
4 of your petitions for emergency rulemaking to the Departments of
5 Labor & Industries and Health. Please know that we are actively
6 and expeditiously reviewing all materials that we have received
7 and will be able to provide further updates on our overall direction
8 by Wednesday, April 15, 2020.

9 5.15 The April 6, 2020 petition for emergency rulemaking details the inadequacies of
10 the April 3, 2020 draft guidance.

11 5.16 On April 9, 2020, the Employment Security Department’s Agricultural and
12 Seasonal Workforce Services Advisory Committee held a virtual meeting that was open to the
13 public. At this meeting, L&I provided updated drafts of non-binding agency “Fact Sheets.” *See*
14 Exhibit 1.

15 5.17 Representatives from L&I and DOH participated in the public meeting.

16 5.18 L&I’s Assistant Director, Anne Soiza, participated in the public meeting and
17 spoke extensively about L&I’s guidance documents.

18 5.19 Voting members of the Committee representing the interests of the agricultural
19 industry and agricultural workers participated in this meeting.

20 5.20 FUJ president, Ramon Torres, is a voting member of the Committee but was
21 unable to attend the April 9, 2020 meeting.

22 5.21 Both agricultural industry and agricultural worker voting members of the
23 Committee stated that they were confused as to whether L&I’s draft guidance (three “Fact

1 Sheets” covering agricultural fields, housing, and packing operations) were requirements or
2 suggestions.

3 5.22 An L&I senior manager stated at the public meeting: “We’re just trying to make
4 sure, as [Assistant Director] Anne [Soiza] said, that the Fact Sheets are clear as to what is
5 required versus what is a suggestion, an idea, to achieve the expectations that are delineated.”

6 5.23 At the end of the meeting, Rosalinda Guillen, Executive Director of Community
7 to Community Development and a Committee voting member representing agricultural workers
8 stated: “What I’m most concerned about is trying to see what is actually enforceable and trying
9 to drill down on that. The farmers are waiting about what are the requirements. The longer that
10 takes the more people are being exposed.”

11 5.24 These April 9, 2020 Fact Sheets are quasi-rule-like, but do not carry the force of
12 rules, nor were they adopted by the agencies as emergency rules.

13 5.25 The April 9, 2020 Fact Sheets do not fulfill L&I’s duties under RCW
14 49.17.050(4).

15 5.26 Todd Phillips, a non-voting member of the Advisory Committee who represents
16 DOH attended the meeting.

17 5.27 Mr. Phillips stated that DOH has already licensed virtually all agricultural labor
18 camps in Washington under state codes that have not changed and “are not set up for this
19 [COVID-19] situation” and DOH has no plan to re-inspect them to protect farmworkers from
20 COVID-19.

1 5.28 Based on a review of ESD public records, Rosalinda Guillen, Executive Director
2 of Community to Community Development and a voting member of the Committee stated:
3 “According to what we know of approved applications from the Employment Security
4 Department, there will be a total of almost 11,000 [H-2A] workers here by May 1st and there are
5 already 8,500, almost 9,000, already here.”

6 5.29 Rosalinda Guillen also stated: “This is very concerning. I mean, there are 204 [H-
7 2A] applications already approved by ESD with a total of 19,829 workers planned or scheduled
8 to be here by June 1st. So, I would imagine . . . that’s a big concern of ours. How are you going
9 to backtrack and ensure the safety of the workers now?”

10 5.30 Mr. Phillips responded: “Today I don’t have that answer because I have not been
11 able to connect with L&I or others in that respect.”

12 5.31 Canada also employs seasonal, foreign farmworkers.

13 5.32 These seasonal workers must come from Mexico or participating Caribbean
14 countries. [https://www.canada.ca/en/employment-social-development/services/foreign-
15 workers/agricultural/seasonal-agricultural.html](https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html).

16 5.33 Canadian authorities are presently dealing with a COVID-19 outbreak involving
17 several dozen Mexican seasonal farmworkers near Kelowna, B.C.

18 5.34 According to the Canadian Broadcasting Corporation, as of March 31, 2020, the
19 nursery employing the seasonal workers is shut down, fourteen of the migrant workers have
20 tested positive for COVID-19, and twelve local workers are in isolation, as are sixty-three
21 additional seasonal workers. *See Exhibit 4.*

1 5.35 Kelowna, B.C. is included in the larger, geographic area known as the Okanogan
2 Valley which stretches several hundred miles, including into Washington State where, like the
3 British Columbia Okanogan region, there are many farms.

4 5.36 Seasonal farmworkers entering Canada, like everyone entering the country, are
5 required to isolate for fourteen days. Seasonal farmworkers, however, are permitted to isolate at
6 their work sites.

7 5.37 H-2A workers from Mexico have already arrived in the Washington State
8 Okanogan region, 80 miles from Kelowna, B.C.

9 5.38 In addition to H-2A workers already in Okanogan County, H-2A workers from
10 Mexico have also arrived in the following Washington counties: Chelan, Douglas, Grant, Skagit,
11 and Douglas.

12 5.39 Several thousand additional H-2A workers are expected to arrive in the coming
13 weeks.

14 5.40 Unlike workers entering Canada, these H-2A workers are not required to isolate
15 for fourteen days.

16 5.41 Respondent L&I has a non-discretionary duty under RCW 49.17.050(4) to
17 promulgate health and safety standards to protect farmworkers from vapors and other airborne
18 particles so that no employee will suffer material impairment of health.

19 5.42 Respondent DOH has a non-discretionary duty under RCW 70.114A.065 to
20 promulgate standards in temporary farmworker housing consistent with RCW 49.17.
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1 5.43 Petitioners have continued to send additional materials to L&I and DOH to
2 support its request for emergency rulemaking.

3 5.44 In the absence of emergency rulemaking from L&I and DOH, FUJ and UFW turn
4 to this Court for relief. Without relief from this Court, essential farmworkers are at imminent risk
5 of contracting COVID-19.

6 5.45 Based on the record, the existence of the COVID-19 pandemic, and Governor
7 Inslee’s Proclamations, there is good cause for the immediate adoption of emergency rules for
8 the preservation of public health, safety, and general welfare such that observing the time
9 requirements of notice and opportunity to comment upon adoption of a permanent rule would be
10 contrary to the public interest. RCW 34.05.350(1).

11 5.46 As of the date of filing, 10,783 people living in Washington are known to have
12 contracted COVID-19 and 567 have died of the disease. Since the Governor’s April 4, 2020
13 Proclamation 20-25.1, the death toll has more than doubled, from 247 to 541.
14 <https://www.arcgis.com/apps/opsdashboard/index.html#/3614241b1c2b4e519ae1cf52e2c3d560>

15 5.47 If this Court does not order immediate equitable relief in the form of a permanent
16 injunction ordering L&I and DOH to engage in emergency rulemaking, members of FUJ and
17 UFW and other similarly situated farmworkers across the state will suffer irreparable harm.

18 **VI. EXHAUSTION, TIMELINESS OF PETITION, AND IRREPARABLE INJURY**

19 6.00 Exhaustion of administrative remedies is not required to the extent that the APA or
20 any other statute states that exhaustion is not required. RCW 34.05.534(2).
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1 DATED this 15th day of April, 2020

2 COLUMBIA LEGAL SERVICES

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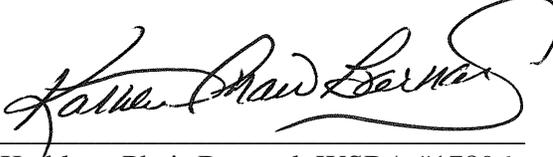
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EXHIBIT 1

DRAFT-feedback to KILP235@lni.wa.gov by Monday 4-6 Noon

(COVID-19) Prevention in Agriculture, Temporary Worker Housing and Related Operations

Employers and workers can help limit the spread of coronavirus and keep workers safe and healthy.

Prevent Worker Exposure to Coronavirus (COVID-19)

As of this date, COVID-19 is known to spread from person to person, primarily through respiratory droplets produced when an infected person coughs or sneezes. The Coronavirus virus also spreads by people touching surfaces or objects and then touching one's mouth, nose, and eyes.

The Department of Labor & Industries (L&I) requires employers to implement the Governor's Proclamation: <https://www.governor.wa.gov/news-media/inslee-announces-stay-home-stay-healthy%2%A0order> . Employers must ensure social distancing for employees and customers; frequent and adequate handwashing; and that sick employees stay home or in the case of employer owned housing, move to isolation away from other employees. Additionally, employers must provide basic workplace hazard education regarding Coronavirus (COVID-19) and how to prevent transmission. This basic workplace hazard education must be in the language best understood by employees.

Workplace Discrimination

It is against the law for any employer to take any adverse action such as firing or threatening a worker for exercising safety and health rights such as raising safety and health concerns to their employer, participating in union activities concerning safety and health matters, filing a safety and health complaint or participating in a DOSH investigation. Workers have 30 days from the date of any such discriminatory action by the employer to file their complaint with L&I DOSH and/or with Federal OSHA. <https://lni.wa.gov/workers-rights/workplace-complaints/discrimination-in-the-workplace>

Employers Must Create and Implement an Effective Social Distancing Plan

You must arrange work areas to facilitate social distancing with a minimum of 6 feet between staff and ensure your staff follow social distancing protocols.

Ideas for Social Distancing (at least 6 feet) in Agricultural Work:

- Stagger tasks and work shifts.
- Limit work to only necessary tasks, to maintain distance over six feet.
- In the field, assign and enforce tasks in which the workers can maintain a distance of at least six (6) feet apart.
- Reorganize work to break up tasks in a manner that facilitates social distancing or other protective measures.
- While maintaining social distancing, employers may need to schedule multiple smaller meetings for crews: safety meetings, trainings, and rest/lunch breaks with no more than 10 workers at any one time in one place.
- You must arrange lunch, common areas, and break rooms to ensure a minimum distance of 6 feet between occupants.

DRAFT-feedback to KILP235@lni.wa.gov by Monday 4-6 Noon

- For field workers, ensure adequate shade areas for breaks with minimum distance of 6 feet between occupants.
- Hold gatherings of no more than 10 employees and hold them outdoors.
- Establish a 'physical distance monitor' – similar to a safety monitor but whose job it is to reinforce the minimum six foot separation.
- Ensure supervisors lead by example.
- Evaluate both the size of vehicles used to transport employees and how many will be transported in order to maintain 6 foot distance between passengers.
- Commuting to/from worksite, limit occupancy during mass transit or carpooling in accordance with six-foot rule. For example, when a bus is used, put one worker per seat or row.
- Modify work so that pick up/drop off points are separated or increase the number to reduce number of employees going to one location.
- Inform workers about the steps being taken in the workplace to establish social distancing to prevent the spread of the coronavirus.
- Discourage nonessential visitation to facilities, and it is advised to maintain a record of all visitors

Employers Must Ensure Frequent and Adequate Handwashing

Ideas for an Effective Handwashing Plan:

- Ensure all workers know why and how to effectively wash hands with soap and water for at least twenty seconds.
- Employers must provide enough hand washing facilities/stations to promote frequent hand washing. There must be enough fixed or portable stations so all employees can wash their hands with soap and hot and cold running water at all worksites and in the Temporary Worker Housing area.
- Require workers to wash hands frequently with soap and water for at least twenty seconds such as when they arrive at work, leave their workstations for breaks, use the bathroom, or after touching any surfaces suspected of being contaminated.
- Require handwashing before and after consumption of food, drink or using tobacco products.
- Make sure handwashing stations have an adequate supply of soap, water and towels whenever they are or could be used by employees.
- Set up a schedule to ensure frequent re-supply of soap and running water on all jobsites and emptying of trash.
- To facilitate more frequent cleaning, secondary handwashing or sanitizing stations can be provided with either hand sanitizer, soap and tepid water, or wipes/towelettes.
- Gloves may be provided, but also must be washed regularly to prevent the spread of the virus. This may help for workers whose hands are bothered by frequent washing.
- Portable hand washing stations are required in fields.

Employers Must Ensure that Sick Employees Stay Home or in the Case of Employer- Owned Housing, Isolation Protocols from ALL Other Employees.

Ideas for Ensuring that Sick Employees are not at Work:

- Ensure employees know the signs and symptoms of COVID-19 caused by coronavirus exposure.

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- Require sick workers to stay home or go home if they feel or look ill.
- Have a process for identifying and isolating people workers who shows signs of COVID-19 or potential or confirmed COVID-19 cases.
- Encourage workers to report concerns and use paid sick leave.
- Conduct daily COVID-19 symptoms checks of employees, contractors, suppliers, customers and visitors entering the worksite – many employers are using short questionnaires.
- Develop a procedure if a worker becomes ill while at work or if a worker notifies the employer they have become ill while not at work.
- Maintain a process to check-in on sick workers to determine if emergency transport is required.

Establish Increased Frequency for Cleaning and Disinfecting the Worksite and TWH Facilities **Make sure you pay close attention to disinfecting common areas and touch points including:**

- Establish increased frequency and maintain regular disinfection at the site, particularly clean objects handled extensively by more than one worker when the items are transferred and in common areas and touch points including:
 - Taps and washing facilities
 - Toilet flush and seats
 - Door handles and push plates
 - Hand rails on staircases and corridors
 - Lift and hoist controls
 - Vehicles
 - Machinery and equipment controls
 - Food preparation and eating surfaces
 - Telephone equipment
 - Food prep areas
 - Common or community dining areas
 - Toilets, bathrooms, sinks, tubs and showers
 - Door handles and push plates
 - Hand rails on staircases and corridors
 - Shared or common telephone equipment
 - Keyboards, photocopiers and other office equipment.
- The first step in cleaning is to remove buildups of dirt and other materials on surfaces. Water and soap or other cleaning fluids are used with cloths, brushes or other physical means of removing these materials so that there is no visible build-up, smears, or streaks on the surface.
- Disinfecting is the second step and is primarily needed for high touch surfaces including vehicles. An EPA approved disinfectant must be used to make sure this is effective:
<https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.
- Surfaces that are commonly touched with the hands but difficult to clean (fabric, rough surfaces, and so forth) may need to be covered to make sure the environment is hygienic.
- Cleaning supplies need to be available to workers to do spot cleaning when necessary.
- Surfaces that are regularly touched by workers must be cleaned regularly to maintain a visibly clean state (no obvious soiling, smearing, or streaks).
- Follow CDC guidelines for cleaning and disinfection

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<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

- Update Safety Data Sheets (SDS) of all disinfectants on site

Employers Must Provide Basic Workplace Hazard Education Regarding Coronavirus (COVID-19) and How to Prevent Transmission in the Language Best Understood by Employees

Ideas for Providing Basic Workplace Hazard Education About Preventing Coronavirus Transmission:

- Instruct all workers on social distancing, handwashing, and other safety procedures related to coronavirus.
- Educate workers with up-to-date guidelines on COVID-19 risk factors, protective behaviors (e.g., cough etiquette and care of PPE), and how to prevent the spread.
- Advise workers about not touching eyes, noses, and mouths with unwashed hands or gloves.
- Post information from the local health department, state department of health, Center for Disease Control and Prevention, and other authorities.
- Teach workers the importance of hand washing before eating, drinking, or using tobacco.
- Communicate important safety messages/updates daily etc.
- Post large signs throughout the worksite with social distancing guidance; frequent hand washing; required PPE; symptoms reporting.
- Make sure written Accident Prevention Programs, Safety and Health Plans and policies, including plans to protect workers from biological hazards, are communicated to employees in a language they understand, and that they are easily accessible.
- Inform workers about the steps being taken in the workplace to establish social distancing and prevent the spread of the virus.

Personal Protective Equipment

Personal protective equipment may be helpful to prevent transmission of the disease or provide protection from cleaning and disinfecting materials.

- Face shields can prevent direct exposure to expelled droplets and provide protection from disinfectants.
- Respirators require care in use and management under a program covered by the Respirator Rule, Chapter 296-842 WAC. Respirators are not normally recommended for social distancing purposes, but may be appropriate where workers must have close proximity to others.
- Surgical face masks (loose fitting cloth covers over the mouth and nose) do not prevent respiration inhalation of fine aerosols and are not protective in close proximity. The primary purpose for these devices are to prevent exposures to others and may have a use when individuals enter the workplace with a cough or sneezing
- Non-medical face coverings, such as scarves or homemade face masks may be helpful in preventing the wearer from transmitting a non-symptomatic infection to others.
- Care should be used to prevent touching mouth, nose, or eyes when donning, doffing or adjusting the covering. When removing the covering the individual should prevent contaminating themselves, others, or nearby objects with the covering.

Employers Who Provide Worker Housing

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The employer's social distancing obligations includes Temporary Worker Housing. The Washington State Department of Health developed guidance to assist temporary worker housing facilities in response to the COVID-19 outbreak.

<https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/TemporaryWorkerHousingGuidance.pdf>

Employer-Provided Temporary Worker Housing is temporary housing provided by the employer in some circumstance such as agricultural guest workers.

- Social distancing must be supported for occupants during the time workers are housed, which may require additional resources. This includes accommodation of the six feet separation of social distancing during recreating time, cooking, and sleeping.
- Workers may have limited control over their environment in some worker housing situations and to the extent that the employer controls conditions the basic program elements should be maintained as feasible during non-working time.
- Transportation provided for workers must also allow for social distancing.
- Housing occupants **must be provided** cleaners and equipment to maintain a hygienic living space.

If a housing occupant becomes sick

- Provide sick employees with isolation plans that prevent further spread of the disease
 - Separate food and bathroom access is also strongly advised.
- Arrange for medical access.
 - Telemedicine resources should be utilized first to determine appropriate care.
 - Provide transportation, if necessary in a manner that does not expose others.
- The employer needs to consult with a physician or public health authority to monitor the situation and provide guidance on treatment and continued housing of workers.
- Establish a process for deep cleaning after any worker leaves the workplace reporting a suspected or confirmed case of COVID-19.
 - Thoroughly clean areas where the worker worked or would have stayed more than 10 minutes.
 - Wipe all accessible surfaces
 - Clean up any visible soiling including any smears or streaks.
 - Sanitize common touch surfaces in the vicinity.
 - Do not allow other workers into these areas until the cleaning is complete

Employee responsibilities:

- Don't go to work if you are sick.
- Wash hands just before consumption or use of food, water, and tobacco.
- Cover your mouth and nose with tissues if you cough or sneeze, or cough/sneeze into your elbow.
- Do not shake hands or bump elbows with others.
- Avoid touching your eyes, nose, or mouth.
- Wash your hands often with soap and water for at least 20 seconds.
- Pay attention to official sources of information such as the CDC and the Washington State Department of Health.
- Do not share tools, phones, or PPE.
- Do not share food with others on the jobsite.

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- Wear appropriate PPE for jobsite hazards.

Other Protective Measures

- Provide ways for workers to express any concerns and ideas to improve safety.
- Update store Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.
- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Employers should reference the CDC's **Interim Guidance for Businesses and Employers** : <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

EXHIBIT 2

Coronavirus (COVID-19) Prevention in Agriculture

Prevent Worker Exposure to Coronavirus (COVID-19)

Coronavirus causes COVID-19 and spreads when an infected person coughs or sneezes. Coronavirus also spreads by touching surfaces or objects and then touching one's mouth, nose, or eyes. Coronavirus is recognized as a very serious workplace hazard.

The Department of Labor & Industries (L&I) requires employers to implement the Governor's proclamation . <https://www.governor.wa.gov/news-media/inslee-announces-stay-home-stay-healthy%C2%A0order> Employers must ensure social distancing for employees and customers; frequent and adequate employee handwashing; and that sick employees stay home/go home. Employers must also provide basic workplace hazard education about coronavirus and how to prevent transmission in the language best understood by the employee. [WAC 296-307-030]

Workplace Discrimination

It is against the law for any employer to take any adverse action such as firing, demotion, or otherwise retaliate against a worker they suspect of exercising safety and health rights such as raising safety and health concerns to their employer, participating in union activities concerning safety and health matters, filing a safety and health complaint or participating in a DOSH investigation. Workers have 30 days to file a complaint with L&I DOSH and/or with Federal OSHA.

<https://lni.wa.gov/workers-rights/workplace-complaints/discrimination-in-the-workplace>

Expectations: Employers Must Create and Implement an Effective Social Distancing Plan

Employers must assess the risk of exposure from the public, co-workers, individual workers' risk factors (such as age and underlying health conditions), and other factors throughout their worksites, considering all job tasks, and then develop a plan to address those risk factors. This plan must ensure that work areas and activities occur with at least six feet between staff, and that all staff follow social distancing protocols. [WAC 296-307-030]

Suggestions: Ideas to Achieve Social Distancing (at least 6 feet) in Agricultural Work:

- Stagger tasks and work shifts.
- Limit work to only necessary tasks.
- In the field, assign and enforce tasks to maintain a distance of at least six feet between people.
- Reorganize work, break up tasks to facilitate social distancing.
- Provide radios for workers to communicate without having to come together.
- Set up staging areas where tools or other materials can be dropped and picked up by workers.
- Find alternatives to group meetings for sharing information (e.g. telephone conference).
- Ensure adequate shade areas for breaks with minimum distance of six feet between people.
- Hold gatherings (of no more than 10) outdoors while maintaining required distancing.
- Establish physical distance monitors to reinforce the minimum six-foot separation.
- Stress the importance of social distancing off the job

Suggestions: Ideas for Alternate Protections When six foot Spacing Is Infeasible

- Use barriers between workers to block direct face-to-face pathways and create at least six foot indirect pathways.
- Use fans or take advantage of natural breezes. Air pushed towards the worker's breathing zone must be from a clean source. Avoid blowing air exhaled by one worker directly to another.
- Review jobs that use more than one person to see if one person do them.
 - Consider shifting workers and/or tools used.
 - Consider reducing the size of the material being worked (e.g.lifted or processed).

Expectations: Employers Must Ensure Frequent and Adequate Handwashing

- Ensure all workers know how to wash hands with soap and water for at least twenty seconds, drying hands with disposable paper towels with proper used towel disposal during work time.
- Portable hand washing stations are required in fields and must contain water, liquid soap, disposable paper towels and a trash can.

Suggestions: Ideas for an Effective Handwashing Plan:

- Set up a schedule to ensure frequent re-supply of soap, running water, and paper towels on all jobsites and emptying of trash.
- Provide secondary handwashing or sanitizing stations (hand sanitizer or wipes/towelettes).
- If gloves are used, they must also be washed regularly.[WAC Part H 296-307-10005]

Expectations: Employers Must Ensure that Sick Employees Stay Home

- Require sick workers to stay home or go home if they feel or look ill. The main symptoms of COVID-19 include fever (100 or higher), cough and shortness of breath. Other symptoms may include body aches, fatigue, diarrhea, and loss of smell or taste.[WAC 296-307-030]

Suggestions: Ideas for Ensuring that Sick Employees are not at Work:

- Have a plan for identifying who exhibits symptoms of the disease (fever, sore throat, cough, difficulty breathing, etc.)
- Encourage workers to report concerns. Explain to workers that there are programs so workers can be paid if they are sick and can't work.
- Have flexible sick leave policies and tell workers about paid sick leave.
- Tell older workers (60 or older) and workers with underlying health conditions that if they stay home on furlough they will not suffer adverse employment consequences.
- Conduct daily COVID-19 symptoms checks of employees, contractors, suppliers, customers and visitors entering the worksite –consider a physical test or even a short questionnaire.
- Develop a process if a worker becomes ill while at work or outside of work.
- Notify co-workers who have come within six feet of COVID-19 sick worker, without identifying the sick worker.
- Notify the workers at the site that someone has fallen sick, and inform them of the measures you have taken to clean and sanitize the worksite.

Expectations: Employers Must Provide Basic Workplace Hazard Education Regarding Coronavirus (COVID-19) and How to Prevent Transmission in the Language Best Understood by Employees [WAC 296-307-030]

- Instruct all workers on COVID-19 preventive behaviors such as social distancing, handwashing, facial touching avoidance, cough etiquette, and PPE.

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- Emphasize cleaning and sanitizing items that are frequently touched, such as cell phones.
- Ensure written Accident Prevention Programs, Safety and Health Plans and policies, including plans to protect workers from biological hazards, are communicated to employees in a language they understand and are easily accessible. Include information about emergency services such as **911**, local hospital emergency room <https://www.wsha.org/our-members/member-listing> and community health centers. <https://www.wacommunityhealth.org/member-health-centers>

Suggestions: Ideas for Providing Basic Workplace Hazard Education About Preventing Coronavirus Transmission:

- Post information from the health authorities (CDC, OSHA, DOSH, WA DOH, etc.).
- Communicate important safety messages/updates daily etc.
- Post signs throughout the worksite about how to prevent coronavirus transmission.

Personal Protective Equipment - Personal protective equipment may prevent coronavirus transmission.

- Face masks/shields or cloth face coverings can prevent direct exposure to coronavirus droplets.
- Respirators require care in use and management under a program covered by the Respirator Rule. [Agriculture employers must comply with Part Y-5 Respirators under WAC 307-594 through 622](#). Respirators are not normally recommended for social distancing purposes, but may be appropriate where workers must be near to others.
- Avoid touching mouth, nose, or eyes when donning, doffing or adjusting the face covering.

Other Protective Measures

- Provide ways for workers to express any concerns and ideas to improve safety.
- Update your Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.
- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.
- Regular cleaning of all items frequently touched

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

From WA DOSH: <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus> includes resources from CDC, OSHA, and WA DOH

[Yakima Health District : https://www.yakimacounty.us/2323/COVID-19](https://www.yakimacounty.us/2323/COVID-19)

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Temporary Worker Housing Supplemental Fact Sheet for Coronavirus (COVID-19) Prevention in Agriculture

This supplemental fact sheet should be read in conjunction with the “Coronavirus (COVID-19) Prevention in Agriculture” publication.

This supplemental fact sheet is directed to agriculture operations that have temporary worker housing.

Expectations for Employers Who Provide Temporary Worker Housing

An employer’s social distancing obligations include temporary worker housing. The Washington State Department of Health developed guidance to assist temporary worker housing facilities during the COVID-19 outbreak. (WAC 296-307-030)

<https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/TemporaryWorkerHousingGuidance.pdf>

- Update store Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses. (WAC's 296-307-030 APP or WAC 296-307-16127 TWH management plan)

Employer-provided temporary worker housing is temporary housing provided by the employer in some circumstances, such as for agricultural guest workers.

- Social distancing must be supported for occupants during the time workers are housed, which may require additional resources. This includes maintaining six-foot separation for recreation, cooking, and sleeping.
- The employer shall continuously exercise reasonable efforts to ensure that the coronavirus prevention protocols, including social distancing elements, are maintained within the temporary worker housing environment.
- Transportation provided for workers must also allow for social distancing. This includes retrofitting buses with screens and keeping workers from sitting next to each other.
- Employers must provide cleaners and equipment to maintain a hygienic living space.

Suggestions to Meet 6’ Social Distancing Expectations

- Physical solutions, such as plastic flexible screens, should be added between sinks and other areas where workers are in close contact.
- Housing should be evaluated, and its initial set up modified to encourage social distancing, including the removal and/or spacing of chairs and furniture.
- Air conditioner units should be cleaned, always on at least fan, and filters changed weekly.
- Units without air conditioners should be provided with air filters.
- Transportation to and from housing should be cleaned on a daily basis.

Expectations - If a housing occupant becomes sick

- Provide sick employees with isolation plans that prevent further spread of the disease.
 - Separate food and bathroom access is also strongly advised.

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- Arrange for medical access.
 - Telemedicine resources should be utilized first to determine appropriate care.
 - Provide transportation, if necessary, in a manner that does not expose others.
- The employer must consult with a physician or public health authority to monitor the situation and provide guidance on treatment and continued housing of workers.
- Establish a process for deep cleaning temporary worker housing following a report and isolation of a worker with a suspected or confirmed case of COVID-19. (WAC 296-307-16145-8)
 - Thoroughly clean areas where a worker was for more than 10 minutes.
 - Wipe all accessible surfaces.
 - Clean up any visible soiling including any smears or streaks.
 - Sanitize common touch surfaces in the area.
 - Do not allow other workers into these areas until cleaning is complete.

Expectations - Establish Increased Frequency for Cleaning and Disinfecting TWH Facilities

- Make cleaning supplies available to workers to do spot cleaning when necessary.
- Follow CDC guidelines for cleaning and disinfection
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
- Update Safety Data Sheets (SDS) of all disinfectants on site.

Suggestions to Meet Cleaning/Disinfection Expectations:

- Increase frequency of regular disinfection at the site, particularly clean objects handled extensively by workers in common areas and touch points.
- Clean using soap water/other cleaning fluids and cloths and brushes to remove dirt buildups.
- Disinfect high touch surfaces including vehicles using an EPA approved disinfectant:
<https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.
- Consider covering surfaces difficult to clean or disinfect (fabric, rough surfaces, etc.).

Employee responsibilities:

- **Don't go to work if you are sick and tell the employer representative** you are not well.
- Wash hands just before consumption or use of food, water, and tobacco.
- Cover mouth and nose with tissues if you cough or sneeze, or cough/sneeze into your elbow.
- Do not shake hands or bump elbows with others.
- Avoid touching your eyes, nose, or mouth.
- Wash your hands often with soap and water for at least 20 seconds.
- Pay attention to official sources of information such as the CDC and the Washington State Department of Health.
- Do not share unsanitized cooking utensils, work tools, phones, or PPE.
- Do not share food with others on the jobsite.
- Wear appropriate PPE for jobsite hazards and sanitize and store it properly after each use.

Other Protective Suggestions

- Provide and encourage ways for workers to express any concerns and ideas to improve safety. (WAC 296-307-030).

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- Businesses are strongly encouraged to coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Employers should reference the CDC's [Interim Guidance for Businesses and Employers](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) :

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHAHS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

From WA DOSH: <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus>

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Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Employers should reference the CDC's [Interim Guidance for Businesses and Employers](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) :
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
Employers should check CDC recommendations frequently and update JHAs and safety plans.

Additional links from our federal and state government partners:

From OSHA: <https://www.osha.gov/SLTC/covid-19/> ; <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>; <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

From NIOSH: https://www.cdc.gov/niosh/emres/2019_ncov.html

From WA DOH: <https://www.doh.wa.gov/Portals/1/Documents/Pubs/130-012.pdf>

From WA DOSH: <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus>

Food Processing/Warehouse Workers Supplemental Fact Sheet

For Corononavirus (COVID-19) Prevention in Agriculture

This supplemental fact sheet addresses agriculture food processing warehouse operations and should be read in conjunction with the “Coronavirus (COVID-19) Prevention in Agriculture” publication.

Suggestions to Achieve Social Distancing Plan for 6 feet of physical separation [WAC 296-307-030]

- Facilitate physical (social) distancing at warehouse entrances, processing floors, maintenance shops, cold storages, breakrooms, and all other potential exposure areas.
- Limit the number of visitors and time spent by them in warehouse.
- Arrange work areas to facilitate social distancing with a minimum of six feet between staff where feasible, and ensure your staff follow social distancing protocols.
- Arrange lunch and employee break rooms to ensure a minimum distance of six feet or more.
- Temporarily mark 6-foot increments (using adhesive colored tape, chalk, etc.) on the ground or processing floor to ensure social distancing.
- Post signs readable from a far distance (or use portable, electronic reader boards) that inform visitors and workers of social distancing practices.
- Designate workers to monitor and facilitate distancing on process floor lines.

Suggestions for physical controls where social distancing is not feasible

- Use barriers between employees to create an effective 6-foot air path between workers. Barriers should be able to stop airflow, so curtains or plastic sheeting may be effective, or more solid materials can be used.
- Set up fans to blow clean air at the workers' breathing zone. Ensure air is not blown from one worker directly to another.
- Extend production lines so workers can be farther apart.
- Reduce production speed to reduce the number of workers needed on the line. Running multiple shifts may allow for additional production.

Suggestions for interacting with Visitors

- Ensure visitor logs are accurate and maintained.
- Train visitors on your company's site-specific COVID-19 safety procedures. [WAC 296-307-030]
- Limit visitor's time and scope of visit to essential business only.
- Stagger shipping and receiving orders to reduce potential COVID-19 exposure of transport personnel.
- Train clerical personnel on how to protect themselves when interacting with visitors.

Suggestions for an Effective Handwashing Plan:

- Install hand washing stations or hand-sanitizing dispensers at warehouse entrances and at key locations inside for visitors and workers. Hand sanitizer is not a substitute for hand washing. [WAC 296-307-24021; WAC 296-307-24024]
- Appoint a designated worker to replenish water in portable wash stations, single-use towels, and soap, along with emptying the trash.

Suggestions to Ensure Sick Workers Are Not at Work:

- Monitor employees for signs of illness and require sick workers to stay home.
- Ensure employees know the signs and symptoms of COVID-19 caused by coronavirus exposure. [WAC 296-307-030]
- If an employee is sent home, strongly recommend that employee follow Washington State Department of Health Guidelines for COVID-19 (Link: doh.wa.gov). [WAC 296-307-030]

Suggestions for Basic Workplace Hazard Education to Prevent Coronavirus Transmission:

- Instruct all workers on social distancing, handwashing, and other employee and food safety procedures related to coronavirus.
- Advise on respiratory etiquette, including covering coughs and sneezes and not touching eyes, noses, and mouths with unwashed hands or gloves.
- Limit the sharing of utensils, phones, work tools, and other workplace items.
- Communicate important safety messages/updates daily with methods such as posters, meetings, reader boards, etc. that will reach all workers.
- Educate workers on the importance of hand washing before eating, drinking, using tobacco.
- Educate workers on how to report potential COVID-19 exposures, symptoms and signs.
- Educate workers on how to report unsatisfactory sanitation of work areas.

Warehouse Sanitation [WAC 296-307-24001]

- Appoint a designated sanitation worker(s) to continuously clean and disinfect surfaces on a significantly increased schedule. Use the environmental cleaning guidelines set by the CDC. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
- Move deep cleaning activities during closing hours. If running a 24-hour operation, deep clean during the slowest period of the night with the least amount of workers on duty.
- When disinfecting for coronavirus, the EPA recommends using the longest recommended contact time and/or most concentrated solution per the label.
- Be sure to follow the label directions for FOOD CONTACT SURFACES when using the chemical near or on utensils and food contact surfaces.
- Be sure to wash and rinse visible dirt/debris from equipment before sanitizing.
- Ensure workers use appropriate personal protective equipment (PPE) for work tasks. [WAC 296-307-10005]

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- Use protective gloves and eye/face protection (e.g. face shields and/or goggles) when mixing, spraying, and wiping with liquid cleaning products, like diluted bleach; you must provide a functioning eyewash station. [WAC 296-307-10005] [WAC **296-307-03930**]

Other Protective Measures

- Alert warehouse managers or shift supervisors of strategies for handling visitors or workers who are not following physical distancing practices or who demonstrate signs of illness.
- Provide ways for workers to express any concerns and ideas to improve safety.
- Update warehouse Accident Prevention Program (APP) to include awareness and prevention measures for diseases and viruses.

Resources

Call a consultant near you or email DOSHConsultation@lni.wa.gov for help lni.wa.gov/doshconsultation

Posters, alerts, and more workplace safety information relating to COVID-19 are available on L&I DOSH's webpage <https://www.lni.wa.gov/safety-health/safety-topics/topics/coronavirus> includes resources from CDC, OSHA, and WA DOH

Yakima Health District : <https://www.yakimacounty.us/2323/COVID-19>

WA Department of Agriculture: <https://agr.wa.gov/about-wsda/news-and-media-relations/covid-19>

EXHIBIT 3

We, Anjum Hajat and Catherine Karr, declare the following under penalty of perjury under the laws of the State of Washington.

1. I, Anjum Hajat, received my PhD in Epidemiology from the University of North Carolina and my Master in Public Health (MPH) degree from the University of Michigan. I worked in public health practice, at a local health department and the Centers for Disease Control, for seven years prior to joining academia. I have been a public health professional for 14 years. My current research focuses on the health of low wage workers.
2. I, Catherine Karr, received my PHD in Epidemiology, my Masters of Science (MS) in Environmental Health, and my Medical Degree (MD) from the University of Washington. I have been on faculty at the University of Washington in the School of Medicine and School of Public Health since 2004. I am also a practicing general pediatrician at UW Medicine Pediatric Care Center. My current research includes a focus on the health of farm worker children.
3. The Corona virus (COVID-19) is transmitted mainly through respiratory droplets. This means that if an infected person talks, sneezes or coughs on another person in close proximity they may be spreading the virus through tiny droplets in the air. Maintaining good social distancing (about 6 feet) may reduce person-to-person transmission. In addition, it is possible that persons coming into contact with infected surfaces or objects may become infected. Hand washing and disinfecting surfaces is recommended for this reason. Evidence suggests that the virus can spread easily and quickly if appropriate prevention measures are not taken.¹
4. We give these opinions relying upon our education, experience and materials that are reasonably relied upon in our professions.
5. We base our analysis below on the following information:
 - a. Farm labor camp housing typically consists of dormitory-style housing with common bathroom and kitchen facilities.
 - b. The bedrooms are often a minimum of two bunkbeds per room but can often have more depending on the size of the room. Much farmworker housing has open-style large rooms, with no separate space available for isolation of sick or exposed workers.
 - c. Washington temporary worker housing regulations ([WAC 246-358-029](#)) set a minimum of only 50 square feet of floor space per occupant. That amounts to about a seven-foot square. A standard-size twin bed occupies close to half of that space. Temporary worker housing regulations also allow beds to be closer together than six feet and within three feet of cooking surfaces. ([WAC 246-358-135](#))
 - d. H-2A temporary agricultural visa holders do not have their own transportation and rely on their employer to be transported to work daily on busses or vans. They also rely on that same transportation to be taken to the store to do grocery shopping and banking in rural towns throughout the state.
 - e. Some H-2A workers who work for large agricultural employers can sometimes spend up to 3 hours per day in close proximity to others commuting round-trip from their labor camps to various orchards throughout eastern Washington.

¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

- f. Grocery shopping and banking trips usually happen on Friday evenings or weekends and can involve large groups of workers (50-100) being dropped off in parking lots of shopping areas and being given an hour or two to complete their shopping and banking needs.
 - g. Depending on the type of crop and type of work, farm workers are regularly asked to work in close proximity to (less than 6 feet away from) each other, both in packinghouse and harvest settings.
 - h. Farmworkers are often instructed to clean their own housing, buses, and workplaces. Industry representatives have stated in public meetings that cleaning supplies necessary for cleaning farmworker housing are backordered for long periods of time.
 - i. It is well documented that farmworkers, both domestic and H-2A workers, are fearful of making health and safety complaints due to a wide-spread fear of retaliation.
 - j. A recent Seattle Times article outlined worker complaints that handwashing supplies are not being provided in the fields. The same article included accounts of employers who did not provide information about prevention of COVID-19 or available paid sick leave to which workers are entitled.
 - k. The Department of Labor & Industries has released draft “fact sheets” about agriculture generally, packinghouses, and worker housing, dated April 8, 2020, which we have reviewed.
 - l. State agency staff has stated in public meetings that enforcement of the “fact sheets” will be complaint-driven, mostly due to limited enforcement staff. Farmworkers will have to complain before L&I attempts to determine whether their employer is complying.
6. Most farmworkers are living and working in rural areas, in which medical infrastructure can quickly be overwhelmed. Not only does infection of groups of farmworkers cause risk of overwhelming medical infrastructure, but visits from large groups of farmworkers to rural communities’ stores and other businesses poses a risk of transmission in those communities as a whole.
 7. Farmworkers may come to work sick with increased frequency due to fear of retaliation, economic hardship, and lack of knowledge about paid leave available to them.²
 8. Clear, specific, mandatory standards are needed to protect against the risk of COVID-19. Current draft guidance provided by the Department of Labor & Industries is unclear and in some cases contradictory. Rules should be specific and measurable. In the absence of clear, specific rules workers are unable to identify violations and thus will be unable to file complaints. (per 3l above).
 9. CDC now recommends the use of protective masks for anyone who is in close contact with others, where social distancing (at less than 6 feet distance) is difficult to maintain.³ For farmworkers this may occur in packinghouses and harvest settings as well as in living quarters. Therefore, employers should provide masks that cover workers nose and mouth and request that all workers wear masks when social distancing is difficult to maintain.

² <https://www.seattletimes.com/seattle-news/as-farm-work-carries-on-some-worry-about-becoming-the-states-new-coronavirus-epicenter/>

³ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>

10. Housing facilities that ensure one person or no more than two people per room of 150 - 200 square feet⁴ are necessary to meaningfully reduce the risk of transmission of COVID-19 in farmworker housing. People living in congregate housing such as the typical farmworker housing described above are at unique risk for the spread of COVID-19 because they are consistently in close contact with others and share bathroom and cooking facilities. Several research studies confirm that crowding increases the risk of transmission of influenza and similar illnesses.^{5 6}
 - a. If individual rooms are impractical, the number of farmworkers per room should be reduced and beds should be separated by 6 feet. Bunk beds that cannot meet this standard should be disallowed. Some have suggested using plastic sheeting on three sides of the bed and a curtain on the fourth side. This is likely to create poor ventilation which may result in abandoning the sheeting. Furthermore, studies have shown that poor ventilation increases the risk of respiratory infections.⁶
11. The number of people in vans and buses should be reduced so individuals can practice social distancing. Furthermore, employers should disinfect high-touch areas (handles, buttons, seat rests) with a bleach solution after every use to reduce the viability of the virus on surfaces. Since transportation on buses or vans puts people into close contact with one another, this may increase the likelihood of spread of COVID-19.
12. 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.
13. Employers should be responsible for providing housing units with bleach solutions, hand soap and additional needed cleaning supplies. Although an initial shortage of these supplies was reported, most local stores are selling these materials again.
14. Worker education about several aspects of COVID-19, i.e., how to prevent it and what to do if you think you are infected, should be provided in the language understood by the workers.
15. Employers must provide hand sanitizer/soap and water in the fields and ensure supplies are reliably replenished. A study in the military setting shows that hand-washing while working in field settings helps prevent acute respiratory infections.⁷
16. In the event a farmworker is diagnosed with COVID-19, the individual must immediately be isolated in their own housing unit with a bathroom. This will help reduce further spread of the virus.

⁴ Cedeno Laurent JG, Allen JG, McNeely E, Dominici F, Spengler JD. Influence of the residential environment on undergraduate students' health. *J Expo Sci Environ Epidemiol*. 2020 Mar;30(2):320-327.

⁵ Tsuang W M, Bailar JC, Englund JA. Influenza-like symptoms in the college dormitory environment: a survey taken during the 1999-2000 influenza season. *J Environ Health*. 2004 Apr;66(8):39-42, 44.

⁶ Sun Y, Wang Z, Zhang Y, Sundell J. In China, students in crowded dormitories with a low ventilation rate have more common colds: evidence for airborne transmission. *PLoS One*. 2011;6(11):e27140.

⁷ Kim HS, Ko RE, Ji M, Lee JH, Lee CS, Lee H. The usefulness of hand washing during field training to prevent acute respiratory illness in a military training facility. *Medicine (Baltimore)*. 2018 Jul;97(30):e11594.

17. Farmworkers who demonstrate symptoms consistent with COVID-19, such as cough, fever, shortness of breath, fatigue, body ache, should be tested for COVID-19, put in isolation and prevented from further work until test results are known. The CDC recommendations for when to discontinue self-isolation can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>
18. For older workers (50 +) and those with preexisting conditions (e.g., hypertension, diabetes, asthma, tuberculosis) we recommend strictly following housing guidelines (1 person per room of 150 square feet) and providing work that allows for effective social distancing. These individuals should seek medical care immediately as potential for COVID-19 related complications is higher. In WA State the highest number of COVID-19 cases (35%) is among those 40 - 59 years old, indicating middle-aged individuals are at higher risk.⁸ One report suggests that about 34% of farmworkers are older than 45 years old.⁹ Some research indicates that farmworkers have a higher prevalence of TB¹⁰ and have higher exposure to agricultural dust which has been shown to result in a variety of respiratory conditions.¹¹ These conditions which may be more unique to farmworkers would put them at higher risk for complications of COVID-19.
19. Given the possibility of asymptomatic transmission, that is an infected person with no symptoms spreads the virus to others, it is possible that infections among farmworkers will spread undetected within the farmworker community for many days. Furthermore, asymptomatic persons who visit public places on weekends risk spreading the virus to the neighboring community.¹²
20. Because H-2A workers are dependent on their employers for transportation, these employers should be responsible for immediately transporting workers who show symptoms for testing. If testing facilities are unavailable or at capacity, employers should make every effort to facilitate contact between the worker and the health care provider. Employers should also provide workers who are subsequently isolated or quarantined with adequate food and water.
21. Farm workers have limited financial resources and loss of work can have devastating economic consequences. According to the most recent data from the National Agricultural Workers Survey, farmworkers' mean and median personal incomes the previous year were \$17,500 and \$19,999, respectively. Fourteen percent of workers said their total personal income was less than \$10,000, 29% said they had personal incomes of \$10,000 to \$19,999, another 29% had personal incomes of \$20,000 to \$29,999, and 14% reported that their total personal income was \$30,000 or more.⁹ As such, to the extent possible, symptomatic workers with COVID-19 diagnosis should be supported financially until their illness passes.

⁸ <https://www.doh.wa.gov/Emergencies/Coronavirus>

⁹ Hernandez T, Gabbard S. Findings from the national agricultural workers survey (NAWS) 2015-2016: a demographic and employment profile of United States farmworkers. JBS International, Research Report; 2019.

¹⁰ The National Center for Farmworker Health. Tuberculosis fact sheet. 2018

¹¹ Schenker MB, Pinkerton KE, Mitchell D, Vallyathan V, Elvine-Kreis B, Green FH. Pneumoconiosis from agricultural dust exposure among young California farmworkers. *Environmental health perspectives*. 2009 Jun;117(6):988-94.

¹² Mizumoto K, Kagaya K, Zarebski A, Chowell G. Estimating the asymptomatic proportion of coronavirus disease 2019 (COVID-19) cases on board the Diamond Princess cruise ship, Yokohama, Japan, 2020. *Eurosurveillance*. 2020 Mar 12;25(10):2000180.

Signed April 14, 2020 at Seattle, Washington.



Anjum Hajat, PhD, MPH



Catherine Karr, MD, PHD

EXHIBIT 4

https://www.cbc.ca/news/canada/british-columbia/temporary-foreign-workers-west-kelowna-1.5516914?_vfz=medium%3Dsharebar

Health authority investigates COVID-19 outbreak among temporary foreign workers in West Kelowna

Workers had minimal contact with outside community and risk of exposure to public is low, says Interior Health

CBC News · Posted: Mar 31, 2020 5:09 PM PT | Last Updated: March 31



The garden centre and farm associated with Bylands Nurseries Ltd. is now closed to customers, and the staff housing is off-limits. (Dana Kelly/CBC)

Interior Health says there's been a community outbreak of COVID-19 among a group of temporary foreign workers living and working at a West Kelowna farm.

Among the workers, 14 have tested positive for COVID-19, and 63 other migrant workers are now in isolation, with more test results pending. Twelve local workers are also in isolation.

A health order was placed on Bylands Nurseries Ltd. Friday saying the group of workers must remain in quarantine in their on-site housing until further direction.

Dr. Silvina Mema, the medical health officer with Interior Health, says the workers are not sharing one single accommodation and they have enough room to self-isolate.

"They are doing well," Mema said. "Fortunately, we haven't had any of them [be] quite sick."

The garden centre and farm is now closed to customers, and the staff housing is off-limits.

Dr. Mema says the risk of transmission to the general public is low.

"These workers work on the field. There is no customer service that they would have been engaged in," she said. "We don't have any concerns the public has any risk of exposure."

At her daily press conference Tuesday, Dr. Bonnie Henry said the business and the workers are cooperating fully.

"Everybody is able to be isolated in the housing — the very good housing — that is on site there," Henry said. "We want to thank both the workers themselves and the owners and operators of the nursery for being fully cooperative ... everybody is being cared for very well."

Dr. Mema says the workers came to Kelowna from Mexico between January and March 12.

"We believe the latest group that came at the beginning of March or mid-March, there may have been someone incubating the disease when they came in and that's how this has occurred," she said.

Earlier this month the federal government eased travel restrictions and border closures to allow around 8500 migrant agricultural workers into the province [in order to keep the food supply chains running](#). Under the rules, all workers are supposed to self-isolate for 14 days.

CBC has reached out to the nursery owners, but have not yet received a response.

EXHIBIT 5

<https://www.seattletimes.com/seattle-news/as-farm-work-carries-on-some-worry-about-becoming-the-states-new-coronavirus-epicenter/>

As farm work carries on, some worry about becoming Washington state's new coronavirus epicenter

April 12, 2020 at 6:00 am



More Photo Galleries

- of 5 | Ramón Torres, president of Familias Unidas Por La Justicia, a farmworker union, interviews a worker from a packing... (Courtesy of Familias Unidas por La Justicia) More

By
[Nina Shapiro](#)
and
[Hal Bernton](#)

For a woman who works the fields in the Yakima Valley, the spring routines remain largely unchanged.

Crews huddle in the morning to hear instructions, then prune trees, tie up branches and replant orchards, often in close proximity to one another. Those who want to wash their hands — vital workplace safety in the age of the novel coronavirus — need to bring soap from home, and until recently their own water, according to an April 1 complaint the state Department of Labor & Industries (L&I) is looking into. And judging by a video shared with The Seattle Times, at least one portable bathroom on this site is dirty, the faucet dry, the soap and towel dispensers empty.

A couple of others who work for the employer, Stadelman Fruit, already may have contracted the virus, prompting the company to send many workers home for a few days in early April, according to the woman, who asked not to be identified, worried about retribution.

The company did not respond to repeated requests for comment.

“We’re scared,” said the worker.

In the Yakima Valley, as in the Puget Sound region, this is a difficult spring shadowed by a pandemic. But in this rural part of the state, much of the work cannot be done from home. It unfolds in the fields, orchards and packing houses essential to keeping grocery stores stocked with food.

With the growing season under way, employers, farmworker advocates and state officials are wrestling with redefining workplace safety, a task that eventually will spread to other parts of the economy when the governor’s stay-at-home order is relaxed.

The coronavirus creates special challenges for agriculture. By summer, some 80,000 workers find jobs in Washington agriculture, including more than 20,000 recruited from Mexico and other nations under temporary visas.

With safety guidelines rushed through earlier in the pandemic, the state has drafted new rules — expected to be finalized soon — requiring agricultural employers to “facilitate” social distancing that keeps workers 6 feet apart, ensure frequent hand washing and isolate sick workers. In recent days, farmers and farmworker advocates, often at odds over labor conditions, have scrutinized proposals in teleconferences as they grapple with a common threat.

Without such measures, Carlos Olivares, CEO of the Yakima Valley Farm Workers Clinic, said the region could become “the new epicenter of the disease” for the spread in Washington.

While coronavirus hospitalizations appear to have peaked in much of the state, he and other Yakima health officials say the county’s peak is yet to come.

Yakima County has more than 440 confirmed cases, and the April rate of increase has been higher than in the Puget Sound area.

In Grant County, Health District Administrator Theresa Adkinson said several farmworker cases have been investigated in Quincy and Mattawa.

Existing case numbers are likely an undercount due to limited testing.

“WE’RE THE ONLY ONES WORKING”

Many farmworkers are “very young and feel invincible,” Olivares said. They are still going to crowded flea markets and holding large family gatherings.

Luz Bazan Gutierrez, secretary of the Yakima Hispanic Chamber of Commerce, co-owns a grocery store and check-cashing business popular with farmworkers. She said she has a hard time getting customers to stop chatting close together.

“We’re the only ones working,” they tell her, happily. An estimated half of all farmworkers are undocumented and therefore ineligible for unemployment insurance.

Yet, Ramón Torres and Edgar Franks, the president and the political director of the farmworker union Familias Unidas Por La Justicia, said they heard a lot of anxious questions during a recent trip to the Wenatchee area. How do you get tested? What happens if you get sick? What happens if you die?

Some workers from other countries want to know if their bodies would be sent back to their home countries.

Officials have scrambled to find answers. The state enacted emergency rules to provide [health care coverage](#) for COVID-19 patients who are undocumented. And the federal government made two weeks of paid sick leave available to most workers through the federal [Families First Coronavirus Response Act](#). (The act does not stipulate legal status and is thought to include undocumented immigrants.)

But that information isn’t necessarily getting through to workers. One man who works in a Wenatchee warehouse told Torres and Franks he asked a supervisor what would happen if employees got sick. They could apply for vacation time, the supervisor said, but only if they had worked at the company for a year.

The worker said he fears getting the virus and infecting his family. The warehouse has put tables in a break room 6 feet apart. But that guideline isn’t applied during work time.

“You’re working on a line, people are really close together,” Franks explained. The company provides hand sanitizer for employees but not masks or gloves.

Worker advocates say they’re hearing a lot of similar stories. “Many are doing little to nothing” in the way of precautions, said Erik Nicholson, a national vice president of the United Farm Workers who is based in the Tri-Cities.

“We’re doing the best we can,” said Bob Grandy, food safety director of Brewster-based Gebbers Farms, which has multiple fruit orchards and warehouses. “We’ve never been here before. It’s a real challenge.”

It’s a simple matter to spread workers out in the fields, he said. Warehouses are different. “Work stations on a packing line are not set up 6 feet apart,” he said.

Grandy said the company has looked for ways to lessen risk. It has given workers bandannas to use as masks, and gloves. And it is putting up cardboard dividers between work stations.

Asked if the company has thought about putting employees at every other work station to keep them farther apart, Grandy said, “We’ve thought about everything.” He declined to elaborate on why the company has chosen not to.

FARMWORKERS ESSENTIAL

The pace of agricultural work quickens as orchards ripen with fruit.

Roughly a third of the farmworkers recruited from Mexico and elsewhere under the H-2A visa program already are in Washington. Another big surge will arrive later this spring to help in the cherry harvest, and another wave later in the summer for the apple season as the Trump administration has allowed most visa processing to continue and designated those border crossings part of “essential travel” allowed to clear U.S. entry points even as some other travel is restricted.

“My concern is they will be brought up in buses, crowded together, from the border,” said Michele Besso, head of Northwest Justice Project’s farmworker unit. Then, they are often placed in [housing furnished with bunk beds](#), sometimes four or more people to a room, with shared kitchens and bathrooms. On grocery trips enabled by company buses, “often 50 guys on a bus will pull up at a store,” Besso said.

Dan Fazio, of WAFLA, an Olympia-based organization that brings in H-2A workers, said his organization is taking precautions. When it charters buses, it leaves seats empty. It is also flying some people north on commercial airlines to minimize travel time. On grocery outings, it is using vans rather than buses.

The Washington Growers League is only partially filling its [housing](#) camps for seasonal workers, allowing more space between people, according to executive director Mike Gempler. That, he added, will not be possible when more workers arrive.

Gempler said the organization is also stepping up cleaning efforts. Because of shortages, it has made its own sanitizing supplies and is using lots of rags.

What will the state allow?

When the governor [issued his stay-at-home order](#) March 23, he required essential businesses to implement social distancing and sanitation measures outlined by the U.S. Department of Labor and the state Department of Health.

But those guidelines lack specificity. “Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment and other elements of the work environment,” reads the [Labor Department guidelines](#). “Does that mean every day?” the Northwest Justice Project’s Besso asked. “Does that mean once a month? Who’s going to do it?”

State [health department guidelines](#) — a “first iteration” created “to get something out there,” according to Todd Phillips, the department’s environmental health and safety director — allow sick and healthy workers to sleep in the same room, on opposite sides.

“I can’t possibly go tell workers this is acceptable,” said Rosalinda Guillen, executive director of the advocacy group Community to Community. She and Phillips were speaking at a teleconference of a state [committee](#) on agricultural work, subsumed with discussing the COVID-19 crisis.

Farmers agree separate housing is needed for the sick, and the state is coordinating with counties to set up isolation quarters. WAFLA has turned over a housing camp in Okanogan County for this purpose.

Proposed new rules, shared in early April with the committee, come from L&I. Members on all sides criticized it as a confusing mix of mandates and suggestions. For instance, the document says employers “must” keep workers 6 feet apart, but then gives “ideas” of spacing people out and holding smaller meetings.

“At best, the guidance mandates general end goals without requiring specific actions; at worst, it is merely aspirational,” says a letter from worker advocates.

They also question whether the rules will be enforced. It’s a complaint-driven process, and L&I concedes it has limited staff to investigate.

Grower groups say if some of the items in the document are truly mandates, they may not be practical.

Hot water for hand washing at all work sites would be “impossible to achieve in field locations,” reads their letter. It suggests, instead of a 6-foot rule on buses, passengers sitting in every other seat, and continuing to use bunk beds by creating barriers around the sides.

Rosella Mosby, co-owner of Mosby Farms in Auburn, and a committee member, said all this was happening on top of preexisting economic forces hurting growers. Labor and other costs have gone up. Prices for goods haven’t. “We’re already going into this on the edge,” she said, and now the coronavirus is shrinking markets.

“We want everyone to stay healthy,” she stressed. The family farm, which grows vegetables and employs 20 people year-round and more during harvest time, has locked the warehouse to keep out visitors, put hand sanitizer by all the doors and kept a distance among workers as much as possible, she said.

She’s counting on workers to take precautions on their own time as well. A diabetic, she and her family are at risk, too. “At the end of the day, we all need each other.”

Still, she worries some proposed mandates, such as major changes to housing or packing lines, could bring business-ending costs. What about using personal protective equipment instead to mitigate risk, she asked. It’s good enough for health care workers, so why not agricultural?

Alejandro Sanchez, a special assistant to Gov. Jay Inslee, said the state is trying “to get to a place where advocates are satisfied on both sides.” But urgency limits time for debate. “It’s all happening extremely quickly,” he said.

Exhibit
10

NEW SECTION

WAC DRAFT EMERGENCY COVID 19 RULES FOR TEMPORARY AGRICULTURAL WORKER HOUSING

This section is intended to protect occupants from COVID-19 hazards.

WAC 296-307-16102/WAC 246-358-002

(1) The operator of temporary worker housing under this chapter/part must implement the following steps to protect from COVID-19 hazards:

- (a) Educate occupants about COVID-19, how to prevent virus spread, and what to do if they develop symptoms.
- (b) 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.
 - (i) Sleeping Quarters:
 - (A) Beds and cots must be spaced at least six (6) feet apart between frames in all directions and arranged so that occupants sleep head to toe. For bunk beds, only the lower bunk on each bed may be occupied except for sleeping rooms occupied by single families; **OR**
 - (B) Beds and cots must be separated by a bed length, floor to near ceiling temporary non-permeable barrier (e.g., plexiglass, plastic sheeting, etc.) placed perpendicular to wall such that a 36-inch minimum aisle exists between the bed and the temporary barrier and occupants sleep head toward wall. Only the lower bunk on each bed may be occupied; **OR**
 - (C) An operator may implement other effective engineering and/or administrative controls to modify this requirement by incorporating it in the plan required and having it pre-approved by the Department of Health and/or the Department of Labor and industries.
 - (ii) Physical barriers such as plastic shields can be used for fixtures such as sinks where occupants may come in close contact for short periods of time.
 - (iii) Discourage people from visiting buildings or sleeping quarters that are not their assigned living spaces, to minimize cross-contamination in the case of illness.
 - (iv) Complying with subsections (1)(b)(i)(B) and (C) of this section you must ensure that:
 - Egress is not impeded;
 - Ventilation/air flow is not compromised;

- Barriers being used are to be disinfected at least daily.
- (v) The use of tents meeting the requirements of WAC 296-307-16147/WAC 246-358-077 for use at housing sites other than cherry harvest camps or other proposed temporary housing proposals may be approved after review by the Department of Health for the initial review and approval. Review of these temporary requests will be expedited.
- (c) Clean and disinfect surfaces.
- (i) Clean and disinfect common areas on a regular schedule, at least as frequent as required by this part/chapter;
 - (ii) Wipe down and disinfect surfaces that are touched by multiple individuals at least daily using EPA approved disinfectant or diluted bleach solutions;
 - (iii) Provide adequate supplies and instruction to occupants for cleaning and disinfecting of living spaces of dwelling units and family shelters. Occupants must be able to clean and disinfect frequent touched surfaces, bathroom, and cooking areas as needed;
 - (iv) Ensure adequate supplies of soap and paper towels at all sinks to allow for frequent hand washing. Portable handwashing stations or hand sanitizer can be provided in addition to required facilities.
- (d) Implement policies and procedures to identify and isolate sick occupants.
- (i) Suspect COVID-19 cases must be isolated with sleeping, eating, and bathroom accommodations that are separate from others unless the suspect occupant resides in a room with family members.
 - (iii) Confirmed COVID-19 cases must be isolated and only housed with other confirmed cases and must have separate bathroom, cooking and eating facilities from people who have not been diagnosed with COVID-19 unless the suspect occupant resides in a room with family members
 - (iv) The operator must provide food and water and monitor for safety occupants in isolation at the operator's facility or ensure that these services are provided if isolated at another facility such as a local health department quarantine facilities.
 - (v) Upon identification of suspect COVID-19 cases, the operator must contact the local health officer as required under WAC 296-307-16190 and provide transportation for any medical evaluation or treatment. Ensure individuals providing transportation have appropriate PPE.

(e) Areas where occupants with suspect COVID-19 exposure have been must be cleaned and sanitized according to CDC guidelines.

(2) 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.

(3) Where the requirements in this section conflict with other requirements in this part/chapter, this section applies.

DRAFT

Exhibit
11

April 27, 2020

housing@doh.wa.gov
cynthia.ireland@lni.wa.gov

RE: Request from WA DOH and WA LNI for comments on draft emergency rules for Temporary Worker Housing

Thank you for the opportunity to comment on the Department of Health (DOH) and the Department of Labor & Industries (L&I) draft emergency rules for Temporary Worker Housing in response to the current COVID-19 pandemic. We are writing as academic public health professionals.

Anjum Hajat received her PhD in Epidemiology from the University of North Carolina and her Master 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.

Catherine 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

We applaud the decision to develop emergency rules to ensure the health and safety of farm workers living in temporary housing given concern for vulnerability of this subpopulation to exposure to SARS-CoV-2. We find many aspects of the draft rule helpful in ensuring their protection. We would like to highlight a few areas that we feel may be insufficient and merit additional consideration prior to finalizing.

Ensuring space requirements match need for distancing including for most high risk groups

- The draft rule asks for the development and implementation of a social distance plan. It then offers three ways of complying with bed spacing, including the use of plastic barriers when beds are not six feet apart.
 - We are concerned that these options may not align with the existing square footage requirements, which allows housing with only 50 square feet of floor space per occupant. ([WAC 246-358-029](#)).
 - Recent evidence regarding density and transmission of upper respiratory infections (URI) indicates that an increase in space by 100 square feet reduced URI by almost 13%. Thus from this paper and other evidence, allowing no more than two people per room of 150-200 square feet is needed to meaningfully reduce the risk of transmission of COVID-19.¹
 - More stringent protections are needed for farm workers at highest risk of severe disease. The CDC recognizes individuals over age 65 years of age are higher risk of severe health consequences. In addition, workers of any age with preexisting conditions including chronic lung disease, moderate to severe asthma, serious heart conditions, immunocompromised states, severe obesity, diabetes, chronic kidney disease or liver disease are at highest risk of severe health consequences. Research indicates that farmworkers have a higher prevalence of TB ² and

¹ Cedeno Laurent JG, Allen JG, McNeely E, Dominici F, Spengler JD. Influence of the residential environment on undergraduate students' health. J Expo Sci Environ Epidemiol. 2020 Mar;30(2):320-327.

² The National Center for Farmworker Health. Tuberculosis fact sheet. 2018

have higher exposure to agricultural dust which has been shown to result in a variety of respiratory conditions.³ These conditions which may be more unique to farmworkers would put them at higher risk for complications of COVID-19. We recommend that such high risk individuals not be housed with more than 1 person per room of 150 square feet.

Cleaning and Plastic Barriers

- **Cleaning:** Additional language to specify who will conduct the cleaning and ensure that these individuals have adequate training, protective equipment and supervision is needed. If it is workers who are intended to do the training, adequate time and cleaning materials to conduct this activity need to be ensured.
- **Plastic barriers:** The extent to which these barriers will impede ventilation and air flow is unknown. However, this must be monitored closely and if found that these barriers do impede ventilation/air flow a new solution must be found.

Insufficient washing facilities

- It is critical to ensure that the plastic barriers to be used for sinks are robust and durable rather than thin plastic sheeting. The latter is vulnerable to movement and will be more challenging to clean. The risk is that these plastic barriers themselves will become a vector of transmission.
- It is our understanding that the current rule states 1 sink per six people and 1 shower per ten people; (<https://app.leg.wa.gov/WAC/default.aspx?cite=246-358-029>). Increasing the numbers of sinks and showers can also help in reducing transmission and is recommended.

Lack of inspection

- This rule does not appear to contemplate inspection of housing. Providing a provision for inspection, including by video as a means of protecting inspectors, would increase assurance that barriers used and other unidentified “engineering controls,” achieve the intent of this rule to reduce transmission.

Lack of Isolation Option for Families

- We are pleased to see the rule gives exceptions for family housing to isolation requirements for suspected or diagnosed SARS-CoV-2-positive people. These are challenging decisions for families. We recommend families residing together be provided with the option of housing to isolate suspected or confirmed positive family members, if they so desire.

Education

- The rule provides that the operator of temporary worker housing provides occupants with education about COVID-19, how to prevent virus spread, and what to do if they develop symptoms. It is important to include a statement that such training is available in the language best understood by individual workers and that the content of the information is derived from a reliable source such as the CDC or Washington State Department of Health.

³ Schenker MB, Pinkerton KE, Mitchell D, Vallyathan V, Elvine-Kreis B, Green FH. Pneumoconiosis from agricultural dust exposure among young California farmworkers. Environmental health perspectives. 2009 Jun;117(6):988-94.

Again, thank you for your attention to this important concern and the alignment of the Departments of Health and Labor & Industries.

Sincerely,



Catherine Karr MD PHD
Professor, Pediatrics and Environmental & Occupational Health Sciences
Adjunct Professor, Epidemiology
University of Washington



Anjum Hajat MPH PHD
Assistant Professor, Epidemiology
University of Washington



Exhibit
12

From: [Hartfield, Douglas E \(DOH\)](#)
To: [Gierach, Kimberly \(DOH\)](#)
Subject: RE: Bunk bead idea
Date: Tuesday, April 7, 2020 2:15:53 PM
Attachments: [image007.png](#)
[image001.png](#)
[image003.png](#)

It's a nice idea, but the person on the bottom bunk will be in a hotbox...

My concerns would be:

- 1- The lack of ventilation for the bottom bunk- the occupant will be uncomfortable, and will end up with a higher likelihood of mold or other growth on the mattress (or the entire enclosure, really).
- 2- The curtain would provide a hindrance to emergency egress. Not a huge one, but an issue nonetheless.
- 3- It does nothing for the ladder as a contact point.
- 4- The curtain and the space around the top mattress aren't a filtration system- this **still has people less than 6 feet apart**, and will not somehow stop or slow the virus transmission. Cloth masks allow for a 97% transmission rate (which is why they're not worth it), and a curtain isn't going to do any better when it's not form-fitting.

Doug Hartfield MPH, REHS

Public Health Advisor 3
Transient Accommodations Program
Environmental Public Health Division
Washington State Department of Health
Douglas.Hartfield@doh.wa.gov
360-480-1062 | www.doh.wa.gov



From: Gierach, Kimberly (DOH)
Sent: Tuesday, April 7, 2020 1:25 PM
To: Hartfield, Douglas E (DOH) <douglas.hartfield@doh.wa.gov>
Subject: FW: Bunk bead idea

I would appreciate your input on this.

Thank you
Kimberly

Kimberly Gierach

Lodging Programs Supervisor – TA & TWH
Division of Environmental Public Health
Washington State Department of Health
kimberly.gierach@doh.wa.gov
360-236-3366 | www.doh.wa.gov



From: Gifford, David (DOH)
Sent: Tuesday, April 7, 2020 12:42 PM
To: Cardenas, Maira (DOH) <Maira.Cardenas@doh.wa.gov>; Gierach, Kimberly (DOH) <kimberly.gierach@doh.wa.gov>
Subject: FW: Bunk bead idea

Thoughts?

David Gifford, RS
Local Health Support Section Manager
Environmental Public Health Division
Washington State Department of Health
dave.gifford@doh.wa.gov
360-236-3074 | www.doh.wa.gov



From: Mike Gempler [<mailto:mgempler@growersleague.org>]
Sent: Tuesday, April 7, 2020 12:36 PM
To: Gifford, David (DOH) <Dave.Gifford@DOH.WA.GOV>; Soiza, Anne M (LNI) <soiz235@LNI.WA.GOV>; Jeff Gomes <jeff.gomes@cityofcashmere.org>; Killip, Jeffrey (LNI) <kilp235@LNI.WA.GOV>
Cc: DeVaney, Jon (ESD Partner) <jon@wstfa.org>
Subject: Bunk bead idea

David

Here is a rendering of what I have in mind for a bunk bed that has adequate physical barriers to prevent transmission of Covid-19 virus. There is 3 to 3.5 feet between the top and bottom bunk depending on the model of bunkbed. We would also have people sleep with heads on opposite ends,

Please let me know if this design would be acceptable.

Regards,

Mike Gempler



**WGL TEMPORARY WORKER HOUSING BUNKBEDS
PROPOSED MITIGATION FOR COVID-19 RESPONSE:**

- INSTALL REMOVABLE / CLEANABLE SHEET PRODUCT OR SOLID PANELS TO ENCLOSE 2 ENDS AND WALL SIDE OF LOWER BUNK
- INSTALL WASHABLE CURTAINS ON ACCESS SIDE OF BEDS
- MAINTAIN SOCIAL DISTANCING WITH BED SPACING IN ROOMS
- SLEEPING ROOMS HAVE DEDICATED HVAC UNITS

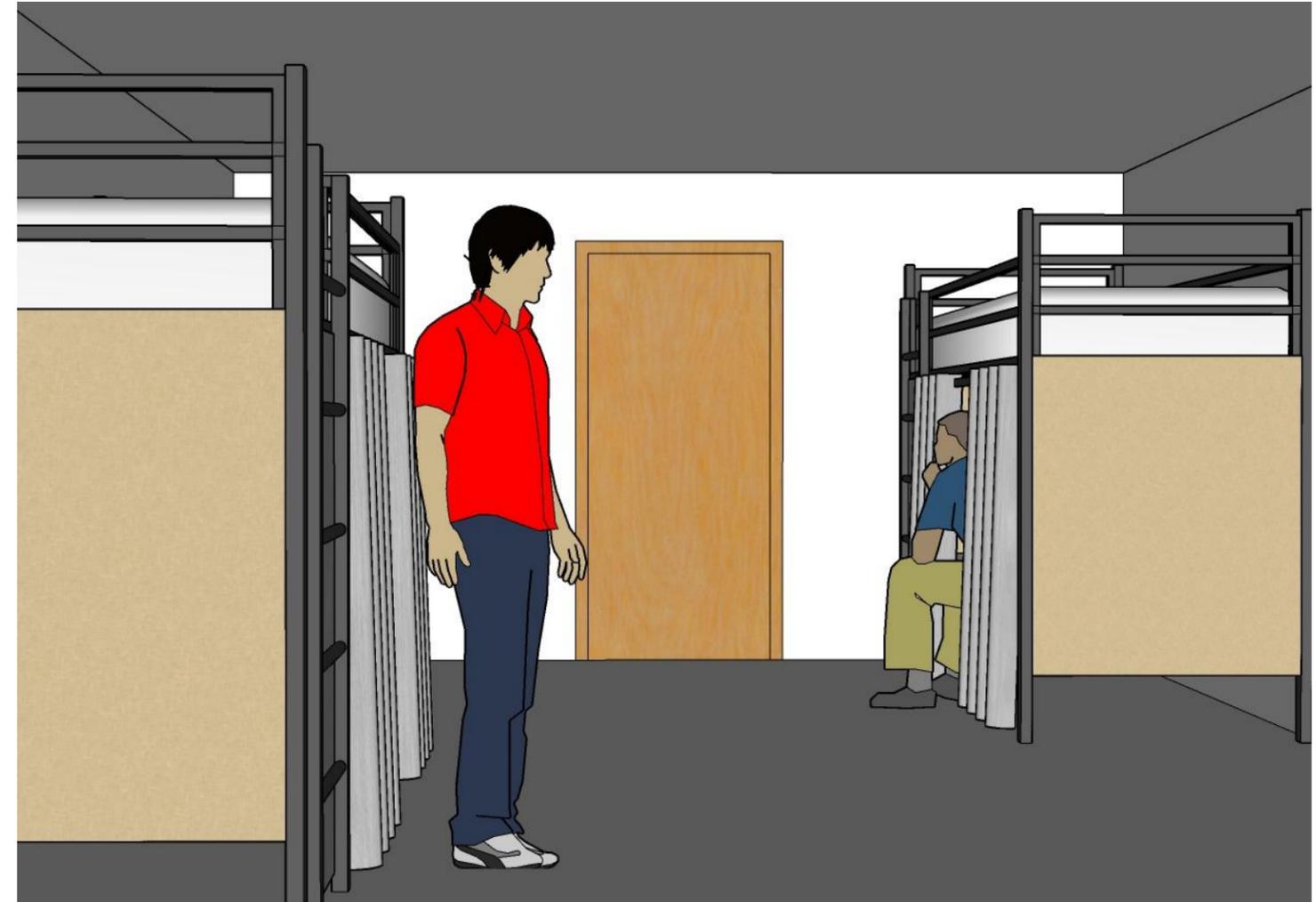


Exhibit
13

NEW SECTION- WAC 246-358-002

Revised Camp Management Plan Required for Temporary Worker Housing

Additional requirements have been adopted to protect occupants in Temporary Worker Housing (TWH) from 2019 novel coronavirus (COVID-19) exposure.

- Effective Date: **May 18, 2020**
- Revised Camp Mgmt. Plans Due to DOH: **May 28, 2020**
- Current Rule Expiration Date: **September 10, 2020**

The operator must revise/amend the facility's written TWH camp management plan to include implementation of the requirements in WAC 246-358-002, as applicable. The revised/amended plan is to assure the operator/facility is taking the required steps to protect occupants from COVID-19 hazards.

- The plan must identify a single point of contact at the TWH for COVID-19 related issues.
- The operator must share the plan with all occupants on the first day the plan is operational or the first day the occupant arrives at the TWH.
- The operator must designate a person that will ensure all occupants are aware of all aspects of the plan and be available to answer questions.
- The operator must submit the revised TWH camp management plan to the state Department of Health by **May 28, 2020** (within ten calendar days of the effective date of WAC 246-358-002).
 - Please submit your plan, either by:
 - email to: Housing@doh.wa.gov OR
 - mail to:
Washington State Department of Health
Housing Programs
PO Box 47824
Olympia, WA 98504
- Inspection staff will verify implementation of each facility's TWH Camp Management Plan during occupancy inspections.
- Failure to submit a revised plan or properly implement the requirement of the new rule section may result in administrative action, including license suspension or fines.

The following TWH camp management plan checklist may be used for submittal. If checklist is used as a guide to revise/amend the facilities current TWH camp management plan all sections of this chapter must be included to be considered for approval.

Temporary Variance. Consistent with WAC 296-307-16120(1)/WAC 246-358-040(1), an operator may request a temporary variance from the requirements of the emergency rule when another means of providing equal protection is provided.

**TWH Camp Management Plan
Revised (Amended) in accordance with
WAC 246-358-002**

FACILITY INFORMATION

Facility Name	
Owner Name	
Facility Street Address	
Facility City	
Facility ZIP	
Designated Point of Contact	
Role/Position	
Phone	Primary:
	Cell:
	Alternate:

EDUCATION

All occupants will be trained in a language or languages understood by the occupants on COVID-19

	YES	NO	N/A
How Covid-19 spreads.			
How to prevent the spread of Covid-19.			
Emphasis on Handwashing.			
Proper use of face mask (cloth face covering).			
Proper hygiene regarding sneezing and coughing.			
Prompt sanitizing of frequently touched items.			
Common symptoms: <i>as identified by the Center for Disease Control (CDC), including fever, cough, shortness of breath, difficulty breathing, chills, shaking with chills, muscle pain, headaches, and loss of taste or smell.</i>			
How occupants secure medical treatment.			
Entry of community health workers and community-based outreach workers to provide additional information must be allowed.			

PHYSICAL DISTANCING

Develop and implement a physical distancing plan for maintaining six (6) feet of separation between occupants when at housing sites to include:

	YES	NO	N/A
Cooking Area(s).			
Eating Area(s).			
Bathing/Shower Area(s).			
Hand Washing Area(s).			
On-site Laundry Area(s).			
Recreational Facilities.			
Sleeping Facilities.			

PHYSICAL DISTANCING

Develop and implement a physical distancing plan for maintaining six (6) feet of separation between occupants when at housing sites to include:

	YES	NO	N/A
Camp rules established regarding social distancing and visiting other buildings, sleeping quarters that are not assigned living quarters to minimize potential cross-contamination.			
Physical barriers for fixtures (e.g., sinks) placed less than 6 ft. apart.			
If needed, additional facilities and services must be provided in accordance with this chapter to ensure social distancing in common areas, (e.g., sinks, refrigerators).			
Beds are spaced at least six (6) feet apart between frames in all directions and arranged so that occupants sleep head to toe, (or)			
Beds are separated by a bed length; floor to near-ceiling temporary non-permeable barrier (e.g. plastic sheeting, etc.) placed perpendicular to wall with thirty-six inch <u>minimum</u> aisle exists between the bed, temporary barrier, and occupants. Materials must be fire resistant or fire retardant treated.			
<p style="text-align: center;">The operator must ensure that temporary barriers:</p> <ol style="list-style-type: none"> 1. Do not impede required egress; 2. Do not compromise ventilation/air flow; and 3. Are cleaned at least daily. 			

CLEANING AND DISINFECTING SURFACES

Provide training in a language or languages understood by occupants and contracted workers regarding COVID-19 cleaning, disinfecting, and sanitizing protocols prior to cleaning temporary worker housing. In addition to any personal protective equipment required under Department of Labor and Industries rules to perform the cleaning activities, provide and require that occupants and contracted workers use disposable gloves and wear masks covering nose and mouth while working at the site.

	YES	NO	N/A
Cleaning schedule or contract for cleaning services available for review.			
EPA approved disinfectant or diluted bleach solution available.			
Adequate supply of single use soap at all sinks.			
Adequate supply of single use paper towels at all sinks.			
Portable handwashing sinks available (if applicable).			
Hand sanitizer available.			

GROUP SHELTER (IF APPLICABLE)

“Group Shelter” means a dwelling unit or cluster of dwelling units with sleeping facilities for up to fifteen occupants that includes toilet facilities, bathing facilities and, if applicable, food preparation and cooking facilities. All facilities and services within the group shelter are for the sole use of the occupants of the group shelter and must be marked as such

In group shelters, must:

	YES	NO	N/A
Arrange beds as far apart as possible – at least six feet apart.			
Bunk bed occupants must sleep head to toe.			
Ventilation is not impeded and is improved wherever possible.			
Maintain all egress requirements.			
Provide all occupants suitable storage space to include; personal storage space for clothing and personal articles.			
Ensure all or a portion of the storage space is enclosed and lockable.			
Directions provided to occupants on maintaining physical distancing and wearing face coverings whenever possible.			
Operator must keep each group together even during transportation to work sites			

GROUP SHELTER (IF APPLICABLE)

“Group Shelter” means a dwelling unit or cluster of dwelling units with sleeping facilities for up to fifteen occupants that includes toilet facilities, bathing facilities and, if applicable, food preparation and cooking facilities. All facilities and services within the group shelter are for the sole use of the occupants of the group shelter and must be marked as such

In group shelters, must:

	YES	NO	N/A
- If employer is different from housing operator, ensure employer follows rules during transportation of groups.			
Operator has designated one to two persons per group shelter for procuring groceries or other items not supplied by housing operator.			
Operator has the ability to quarantine and or test all members of a group shelter if a member develops COVID-19 symptoms per Local Health Jurisdiction directions.			

IDENTIFICATION AND ISOLATION OF SICK OCCUPANTS

A process to screen occupants for symptoms of COVID-19 as identified by the Center for Disease Control, including fever, cough, shortness of breath, difficulty breathing, chills, shaking with chills, muscle pain, headaches, and loss of taste or smell.

	YES	NO	N/A
Thermometer provided for each occupant, OR			
Trained designee to perform daily temperature checks of all occupants with a ‘no touch’ or ‘no contact’ thermometer.			
Local health officer contact information available for immediate contact as required under WAC 296-307-16190 for any suspected COVID-19 cases.			
Transportation available for any medical evaluation of an occupant.			
Isolation site available for any suspected COVID-19 cases of occupants.			
Isolation site available for confirmed COVID-19 cases that do not reside with family.			
Cleaning and disinfectant supplies available for all isolation sites.			
Food and water provided for all isolation sites.			

Provide additional details such as schedules, drawings, plans to describe/show how you are both rearranging bedrooms and planning for distancing, etc.

Operator Name (PRINTED)

Date