

**Order of the Wisconsin
Department of Workforce Development**

The Wisconsin Department of Workforce Development adopts the following rule to create DWD 301.015, 301.06 (8m), 301.07 (5) (bg), (br) and (e), (11) (k), (k) and (L), (15) (n), (16) (r) and (s), (17) (d) 3., (e) and (f), (20) (h), (i) and (j), (21) (n) and (25), 301.09 (2) (d) and (e) and 301.10, relating to COVID-19 protections for migrant workers.

The statement of scope for this rule, SS 032-20, was approved by the Governor on May 1, 2020, published in register No. 773A3, on May 4, 2020, and approved by the Department on May 22, 2020. This emergency rule was approved by the Governor on March 11, 2021.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

The Department seeks to promulgate a new emergency rule to revise ch. DWD 301 protections for migrant workers from the SARS-CoV-2 virus which causes the coronavirus disease. (In this order, the virus and disease will be referred to as "COVID-19.") Chapter DWD 301 regulates migrant labor work agreements and housing conditions in migrant labor camps, imposes field sanitation standards, and provides for notice of migrant labor rights.

On April 14, 2020, at the direction of the Governor, the Secretary-designee of the Wisconsin Department of Health Services (DHS) issued Emergency Order #25 to impose safety measures related to COVID-19 for migrant labor camps for the specific purposes of preventing exposure to COVID-19, assisting individuals with COVID-19, and preventing the spread of COVID-19. Because the risks associated with COVID-19 for migrant workers were ongoing when Emergency Order # 25 expired on June 13, 2020, the Department promulgated emergency rule EmR2014 on June 12, 2020.

Emergency rule EmR2014 revised ch. DWD 301 to temporarily impose various protections for migrant workers in the camps, the fields, and in employer-provided transportation. The protections were based on the public health information available a year ago from DHS and the U.S. Centers for Disease Control and Prevention (CDC). The Joint Committee for Review of Administrative Rules (JCRAR) extended EmR2014 for the maximum period allowed under s. 227.24 (2) (a), Stats. As a result, EmR2014 expires on March 8, 2021.

When the emergency rule was issued, the Department did not contemplate a need for emergency rules to extend into the 2021 migrant labor season. Therefore, the Department did not seek to promulgate the revisions to ch. DWD 301 as a permanent rule. However, the COVID-19 pandemic continues to threaten public peace, health, safety, and welfare, as evidenced by Executive Order # 105 (dated February 4, 2021).

In consultation with DHS and interested stakeholders, the Department is promulgating a new emergency rule that will allow the Department to respond to the spread of COVID-19 in migrant labor camps by revising the safety protections under emergency rule EmR2014. The new rule does not duplicate EmR2014, but is based on more recent public health guidance related to the benefits of wearing face coverings, distancing, and otherwise preventing the transmission of COVID-19. The Department estimates over 4,400 migrant workers will live in employer provided housing in Wisconsin in 2021. The majority of migrant workers begin arriving in March and stay through the fall. The health and safety of migrant workers in employer provided housing affects the health of the other employees and the whole community.

Statutes Interpreted

Section 103.905, Stats.

Statutory Authority

Section 103.905, Stats.

Explanation of Statutory Authority

The Department has specific and general authority to establish rules to enforce and implement the Wisconsin Migrant Labor Law, ss. 103.90 to 103.97, Stats. This authority includes ensuring migrant labor camps, transportation, and field work are safe for workers.

Related Statutes or Rules

Sections 103.90 to 103.97, Stats., and ch. DWD 301.

Plain Language Analysis

The emergency rule requires migrant camp operators to make reasonable efforts to effectively isolate the following types of workers: 1) workers who test positive for COVID-19; 2) workers with COVID-19 symptoms who have not tested positive or have not received test results; and 3) workers who have been in close contact with persons diagnosed with COVID-19.

The emergency rule also requires migrant camp operators to disinfect high-touch areas within bathing, laundry, handwashing, cooking, eating, and sleeping facilities and toilet rooms, and to separate beds by at least six feet or place physical partitions or barriers between beds. The emergency rule allows camp operators to use bunk beds if camp operators request that occupants sleep head-to-toe. Additionally, the emergency rule requires camp operators to space kitchen and dining room tables at least six feet apart during shared meals or other events unless individual barriers are placed between workers. The emergency rule also requires camp operators to provide hand-washing stations and hand sanitizer to workers in all cooking and eating and sleeping facilities.

Further, the emergency rule requires camp operators and employers to make available for workers face coverings in living and common areas, in the fields, and in employer-provided transportation. The emergency rule provides that employers and camp operators supervising field workers should allow workers sufficient space to maintain six feet of social distancing, including during lunch and breaks. In addition, employers must ensure, whenever possible, that workers engage in social distancing, provide ventilation and hand sanitizer during transportation, and ensure that vehicles are disinfected.

The emergency rule requires a camp operator to submit for the Department's approval a COVID-19 safety plan that does all of the following: 1) details how the camp operator will provide housing that complies with the emergency rule's isolation requirements; 2) identifies the entity with whom the camp operator will work to provide COVID-19 testing and health services to camp occupants; 3) describes how the camp operator will implement recommendations of DHS for COVID-19 screening and testing; and 4) describes how the camp operator will assist camp occupants in obtaining COVID-19 vaccinations. The emergency rule also requires camp operators to post a copy of the emergency rule that is made available by the Department.

Finally, the emergency rule requires employers to specify in work agreements and written recruiting disclosure statements whether early arrival or late departure from migrant camps is required for COVID-19

testing. The emergency rule also allows employers to make certain housing changes necessary to isolate workers without having to revise work agreements.

Summary of, and comparison with, existing or proposed federal regulations

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 USC 1801, et seq., sets standards for migrant and seasonal agricultural workers regarding housing and transportation.

Summary of comments on the statement of scope and description of how the comments were taken into account in drafting the rule

A preliminary public hearing on the statement of scope was held on May 21, 2020; comments were received at the hearing and by email. In sum, commenters generally supported promulgating rules to supplant Emergency Order # 25. Commenters expressed the need for clear rules, as well as for educating workers, in their preferred language, about the protections under the rules, including social distancing, using personal protection equipment (PPE) properly, and reporting symptoms. In addition, commenters expressed the need to include facemask requirements in transportation and the workplace and to address the usage of bunk beds and ventilation in dormitory and barrack-style housing. Commenters suggested including reporting and retaliation protection for workers. One commenter generally supported incorporating the requirements of Emergency Order # 25 into the rule, but expressed concern that camp operators are unable to meet the social distancing in transportation in employer-provided vehicles and suggested an alternative means of protecting worker safety, such as PPE and using every other seat in the transportation vans.

Agency Response: The Department considered all relevant comments received in drafting EmR2014. Those comments were also considered in drafting this new emergency rule. For the new emergency rule, the Department agreed that the requirements should be clear and enforceable and tailored the rule to achieve those goals. The Department also amended the social distancing in transportation requirement to provide an alternative that would protect workers. Moreover, the Department discussed the need for a new emergency rule during the Governor's Council on Migrant Labor meeting on January 27, 2021. Council members provided input about the need for a new rule that provided worker protections and certainty for employers. The Department also informally collected comments that were generally supportive of a new rule. Some commenters wanted stronger protections for workers that were mandatory and one commenter was opposed to bunk bed prohibitions. Those comments have been considered and incorporated into this new emergency rule. Further, the Department accepted written comments about the draft emergency rule on its website. The comments were generally supportive, except that one commenter expressed the need to minimize or reduce the use of bunk beds and impose more requirements to improve ventilation in housing. That commenter also stated that one provision of this new emergency rule is confusing. The Department considered the comments and made one revision to clarify the rule.

Comparison with rules in adjacent states

Except in Michigan, no agency in an adjacent state has promulgated rules that specifically address protecting migrant workers from exposure to COVID-19. Except in Michigan, agencies in adjacent states are issuing guidance and recommendations from their health departments and sharing CDC and Occupational Safety and Health Administration recommendations to employers. On March 2, 2021, the Michigan Department of Agriculture and Rural Development promulgated emergency rules requiring owners and operators of agricultural labor housing camps to develop and implement COVID-19 preparedness and response plans, which must include a training component for providing adult camp residents with information about social distancing, personal protective equipment, and enhanced sanitation and prevention measures. The emergency rules also require camp operators to report to local health departments information about camp residents who exhibit COVID-19 symptoms or who test positive for COVID-19. The emergency rules include other requirements, including requiring camp operators to

arrange for those camp residents to be evaluated by healthcare providers and requiring camp operators to provide isolation and quarantine housing to those camp residents.

Summary of factual data and analytical methodologies

Emergency Order # 25, ch. DWD 301, emergency rule EmR2014, and relevant statutes relating to the Wisconsin Migrant Labor Law were reviewed as part of the process for developing this proposed rule. The Department also considered information provided by DHS and the Department of Agriculture, Trade and Consumer Protection, recent CDC guidance, and comments from various stakeholders.

Analysis and supporting documents used to determine effect on small business or in preparation of an economic impact analysis

This rule is intended to prevent the spread of disease in the migrant labor camps and is intended to have no negative net impact on business. Therefore, no analysis was necessary.

Effect on small business

No negative net impact on small business.

Agency contact person

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Place where comments are to be submitted and deadline for submission

E-Mail: DWAdminRules@dwd.wisconsin.gov
Comments will be accepted until a date to be determined.

SECTION 1. DWD 301.015 is created to read:

DWD 301.015 Definition. In this chapter, "COVID-19" means the SARS-CoV-2 virus and any related disease.

SECTION 2. DWD 301.06 (8m) is created to read:

DWD 301.06 (8m) (a) The work agreement and written recruiting disclosure statement required under s. 103.915 (1) (a), Stats., shall specify whether for purposes of COVID-19 testing or isolation a migrant worker is required to arrive at a migrant labor camp before or depart a migrant labor camp after the

period covered by the minimum work guarantee under sub (8).

(b) If a work agreement requires for purposes of COVID-19 testing or isolation that a migrant worker arrive at a migrant labor camp before or depart a migrant labor camp after the period covered by the minimum work guarantee under sub. (8), the period of employment and the guarantee of minimum work shall begin on the date the worker is required to arrive at the migrant labor camp and shall continue until the migrant worker departs the migrant labor camp.

(c) If an employer enters into a work agreement that does not require for purposes of COVID-19 testing or isolation that a migrant worker arrive at a migrant labor camp before or depart a migrant labor camp after the period covered by the minimum work guarantee under sub. (8), and the employer subsequently imposes that requirement on a migrant worker, the employer shall as soon as practicable after imposing the requirement revise the work agreement to comply with par. (b).

(d) If an employer changes the type of housing that is specified in a work agreement to isolate a worker under s. DWD 301.07 (11) (j) 1., the employer is not required to revise the work agreement. For all other changes to the type of housing, the employer shall revise agreements as required under this section.

SECTION 3. DWD 301.07 (5) (bg) and (br) are created to read:

DWD 301.07 (5) (bg) "Exposed worker" means a migrant worker who has been in close contact with a person diagnosed with COVID-19.

Note: Guidance of the department of health services on close contact can be found at the following website: <https://www.dhs.wisconsin.gov/covid-19/close-contacts.htm>.

(br) "Family unit" means a one-family housing unit or a family living unit that is part of a multifamily unit.

SECTION 4. DWD 301.07 (5) (e) is created to read:

DWD 301.07 (5) (e) "Symptomatic worker" means a migrant worker exhibiting symptoms of COVID-19 who either has not been tested for COVID-19 or has not received the results of a COVID-19 test.

Note: Symptoms of COVID-19 can be found at the following website of the Centers for Disease

Control and Prevention: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

SECTION 5. DWD 301.07 (11) (j), (k) and (L) are created to read:

DWD 301.07 (11) (j) 1. Except as provided in subd. 2., a camp operator shall do all of the following:

a. Make reasonable efforts to effectively isolate exposed workers and symptomatic workers from all other camp occupants. For purposes of this subd. 1. a., "effectively isolate" includes providing each worker with a private bathroom, sleeping area, and cooking and eating facility. If a camp operator cannot effectively isolate exposed workers and symptomatic workers from all other camp occupants, the camp operator shall provide living spaces to exposed workers that are separate from living spaces for all other camp occupants and provide living spaces to symptomatic workers that are separate from living spaces for all other camp occupants.

b. Effectively isolate workers who test positive for COVID-19 from all other camp occupants who have not tested positive for COVID-19. For purposes of this subd. 1. b., "effectively isolate" means to provide a sleeping area, bathroom, and cooking and eating facility that is not shared by camp occupants who have not tested positive for COVID-19.

2. A migrant worker who resides in a family unit that is occupied exclusively by members of his or her family may opt to remain in that family unit.

3. A camp operator shall provide food and water to workers isolated or provided separate living spaces under subd. 1. in order to minimize the spread of COVID-19.

4. If a camp operator is not able to isolate or provide a separate living space to a worker under subd. 1. in the worker's current living space, the camp operator shall provide alternative housing to the worker.

5. If alternative housing required under subd. 4. is not within a migrant labor camp certified under sub. (1), the camp operator shall seek a variance under sub. (7) (a) in accordance with the following requirements:

a. When possible, a variance request shall be submitted in advance of the need for alternative housing. If a variance has not been requested in advance, the camp operator shall submit a request as soon as the camp

operator becomes aware of the need for alternative housing. All variance requests must be submitted on the department's variance form to MSFW@dwd.wisconsin.gov.

Note: The department's variance form is available on the department's website at <https://dwd.wi.gov/jobservice/MSFW/migrant-intro.htm>.

b. The department shall approve or deny the request for a variance within two business days of receipt of the request.

c. The variance may be subject to inspection and be in effect pending inspection. The department shall conduct inspections as soon as practicable and inspections may be performed remotely in conjunction with camp operators.

(k) 1. A camp operator shall submit for the department's review and approval a COVID-19 safety plan for each migrant labor camp that the camp operator maintains. Except as provided in subd. 2., a camp operator shall submit the plan with the camp operator's application under sub. (1) for a certificate to operate a migrant labor camp. The COVID-19 safety plan shall do all of the following:

Note: The department's recommended template for the COVID-19 safety plan is available on the department's website at <https://dwd.wi.gov/jobservice/MSFW/migrant-intro.htm>.

- a. Detail how the camp operator will provide housing that complies with par. (j) 1.
- b. Identify the entity with whom the camp operator will work to provide COVID-19 testing and health care services to camp occupants.
- c. Describe how the camp operator will implement recommendations of the department of health services for screening and testing camp occupants for COVID-19 and how the camp operator will assist camp occupants in obtaining COVID-19 vaccinations.

Note: DPH Numbered Memo BCD 2020-29 describes the recommendations of the department of health services for reducing the risk of COVID-19 among migrant and seasonal workers. The memo can be found at the following website: <https://www.dhs.wisconsin.gov/dph/memos/communicable-diseases/2020-29.pdf>.

2. If a camp operator applied for a certificate for a migrant labor camp under sub. (1) before the

effective date of this subdivision, the camp operator shall submit the COVID-19 safety plan required under subd. 1. to the department at the time that the department inspects the migrant labor camp.

3. If a camp operator is aware of the need for alternative housing described in par. (j) 5. at the time the camp operator submits a COVID-19 safety plan under subd. 1. or 2., the camp operator shall submit with the plan any variance requests required under par. (j) 5.

(L) A camp operator shall maximize the quantity and supply of outdoor air and increase filtration efficiency to the highest level compatible with the existing ventilation systems of the camp's buildings and housing units. Wherever possible, dormitory or barracks style housing without ventilation systems shall use air filtration systems if windows cannot be left open.

Note: Additional guidelines for ventilation can be found at the following website of the Centers for Disease Control and Prevention: <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html>.

SECTION 6 DWD 301.07 (15) (n) is created to read:

DWD 301.07 (15) (n) High-touch areas within all toilet rooms, except in individual family units occupied exclusively by members of the same family, shall be disinfected daily.

SECTION 7. DWD 301.07 (16) (r) and (s) are created to read:

DWD 301.07 (16) (r) High-touch areas within all bathing, laundry, and handwashing facilities, except in family units occupied exclusively by members of the same family, shall be disinfected daily.

(s) Wherever possible, camp operators shall provide lockers or other storage devices for soiled laundry to keep individual worker's clothing separate.

SECTION 8. **DWD 301.07** (17) (d) 3m. is created to read:

DWD 301.07 (17) (d) 3m. Kitchen and dining room tables shall be at least six feet apart during shared meals or other events unless individual barriers are placed between workers.

SECTION 9. **DWD 301.07** (17) (e) and (f) are created to read:

DWD 301.07 (17) (e) Hand-washing stations and hand sanitizer with at least 60% alcohol and no methanol shall be provided to workers in all cooking and eating facilities.

(f) High-touch areas within all cooking and eating facilities, except in family units occupied

exclusively by members of the same family, shall be disinfected daily.

SECTION 10. DWD 301.07 (20) (h), (i) and (j) are created to read:

DWD 301.07 (20) (h) Except for beds in family units occupied exclusively by members of the same family, all beds shall be separated by at least six feet or physical barriers or partitions shall be placed between the beds. Bunk beds may be occupied if camp operators request camp occupants to sleep head-to-toe.

(i) Hand-washing stations and hand sanitizer with at least 60% alcohol and no methanol shall be made available to workers within sleeping facilities.

(j) Except in family units occupied exclusively by members of the same family, high-touch areas within sleeping facilities shall be disinfected daily.

SECTION 11. DWD 301.07 (21) (n) is created to read:

DWD 301.07 (21) (n) Camp operators shall make available in all living and common areas of the camp face coverings for workers that comply with current guidance of the Centers for Disease Control and Prevention.

Note: Guidance of the Centers for Disease Control and Prevention can be found at:

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

SECTION 12. DWD 301.07 (25) is created to read:

DWD 301.07 (25) POSTING OF EMERGENCY RULE. (a) In this subsection, "emergency rule" means the requirements under all sections of this rule.

(b) The department shall make this emergency rule available for posting in English and in the language of the camp occupants if other than English. Camp operators shall post this emergency rule in English and in the language of the camp occupants if other than English.

SECTION 13. DWD 301.09 (2) (d) and (e) are created to read:

DWD 301.09 (2) (d) Handwashing facilities shall provide soap and water or hand sanitizer with at least 60% alcohol and no methanol.

(e) If the department has authorized the substitution of prepackaged towelettes for handwashing

facilities through a variance, that variance is revoked. All handwashing facilities must comply with par. (d).

SECTION 14. DWD 301.10 is created to read:

DWD 301.10 Social distancing. (1) FIELD WORK. Employers and camp operators should provide workers engaged in hand labor in fields with sufficient space to maintain six feet of social distancing from other persons, including during lunch and breaks. Employers shall provide the workers with face coverings that comply with current guidance of the Centers for Disease Control and Prevention.

(2) TRANSPORTATION. (a) Whenever possible, employers shall ensure that workers engage in social distancing during the transportation of workers between work and their residences and other transportation provided by the employer to allow workers to obtain necessary supplies and services and sit at least six feet apart. Employers shall provide face coverings that comply with current guidance of the Centers for Disease Control and Prevention and require all vehicle occupants to wear the face coverings during transport. Hand sanitizer with at least 60% alcohol and no methanol shall be available in all transport vehicles. All high contact surfaces, including door handles, seatbelt buckles, and armrests, used by passengers shall be cleaned and disinfected before each trip. All high contact surfaces used by drivers, including steering wheels, vehicle controls, door handles, seatbelt buckles, and armrests, shall be cleaned and disinfected between different drivers. Disinfectants shall meet the U.S. Environmental Protection Agency criteria for use against SARS-CoV-2, the virus that causes COVID-19.

Note: U.S. Environmental Protection Agency-approved disinfectant for use against SARS-CoV-2 can be found here: <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.

(b) Employers shall ensure that symptomatic workers, as defined in s. DWD 301.07 (5) (e), are transported separately to their residences and to other locations in transportation provided by the employer from workers not exhibiting symptoms.

(c) Wherever possible, employers shall prioritize shared transportation assignments in the following order:

1. Employees residing in the same housing unit shall be transported in the same vehicle.
2. Employees working in the same crew or worksite shall be transported in the same vehicle.

3. Employees who do not share the same household, work crew, or worksite shall be transported in the same vehicle only when no other transportation alternatives are possible.

(d) Employers shall ensure that the vehicle ventilation system is set to maximize outdoor air and not recirculate air and, unless the vehicle has a cabin air filter in use and the U.S. Environmental Protection Agency Air Quality Index for any pollutant is greater than 100, encourage windows to be kept open at all times except when protection is needed from weather conditions, such as rain, snow, or extreme temperatures.

SECTION 15. This rule takes effect upon publication in the state newspaper and shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats., subject to extensions under s. 227.24 (2), Stats.

Dated this 11th day of March, 2021.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: _____
Amy Pechacek, Secretary-Designee