

**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 (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 003-22, was approved by the Governor on January 13, 2022, published in register No. 793A3, on January 18, 2022, and approved by the Department on January 28, 2022. This emergency rule was approved by the Governor on February 18, 2022.

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 disease caused by the SARS-CoV-2 virus. 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. EmR2014 revised ch. DWD 301 to temporarily impose various protections for migrant workers in camps, fields, and employer-provided transportation. The protections were based on the public health information that was then available from DHS and the U.S. Centers for Disease Control and Prevention (CDC). After extensions by the Joint Committee for Review of Administrative Rules (JCRAR), EmR2014 expired on March 8, 2021.

Because the COVID-19 pandemic continued to threaten public peace, health, safety, and welfare, the Department consulted with DHS and interested stakeholders and promulgated another emergency rule, EmR2109, on March 19, 2021. EmR2109 did not duplicate EmR2014 but was based on more recent public health guidance related to the benefits of wearing face coverings, distancing, and otherwise preventing the transmission of COVID-19. After extensions by JCRAR, EmR2109 expired on December 13, 2021.

The Department has published Statement of Scope SS 004-22 for a permanent rule with objectives that include exploring requirements for ensuring that employers follow best practices in protecting the health and safety of migrant workers in camps, fields, and employer-provided transportation. However, the Department estimates that over 4,400 migrant workers will reside in employer-provided housing in Wisconsin during 2022. A majority of those migrant workers will arrive in early spring and stay through the fall and the Department will not be able to promulgate a permanent rule in time to protect those migrant workers. Moreover, as the virus mutates, new variants of concern, such as Delta and Omicron, continue to be detected in Wisconsin. Therefore, a new emergency rule that is focused on COVID-19 is necessary for the immediate preservation of public health, safety, and welfare.

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 separate exposed workers from other camp occupants. The rule defines "exposed worker" as a migrant worker who has been in close contact with either an individual who has tested positive for COVID-19 or an individual exhibiting COVID-19 symptoms who has not tested negative for COVID-19. The emergency rule refers to the separation of exposed workers from other camp occupants as quarantine. The emergency rule also requires a second type of separation, as migrant camp operators must effectively separate from all other camp occupants the following: 1) workers who have tested positive for COVID-19 and 2) workers exhibiting COVID-19 symptoms who have not yet tested negative for COVID-19. The emergency rule refers to this second type of separation as isolation. The emergency rule requires both types of separation to be in accordance with DHS guidance. The emergency rule imposes other requirements related to quarantining and isolating migrant workers and allows migrant workers residing in certain family housing or living units to opt to remain in those units.

The emergency rule also requires migrant camp operators to clean and then disinfect high-touch areas within bathing, laundry, handwashing, cooking, eating, and sleeping facilities and toilet rooms, and, wherever possible, to separate beds by at least six feet. The emergency rule allows camp operators to use bunk beds if camp operators request that occupants sleep head-to-toe. Additionally, in central mess facilities, the emergency rule requires camp operators, wherever possible, to space kitchen and dining room tables at least six feet apart during shared meals or other events. 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. In addition, the emergency rule imposes ventilation requirements for camp buildings and housing units.

Further, the emergency rule requires camp operators and employers to make available for workers face masks 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 cleaned and then disinfected daily. However, a transport vehicle must be cleaned and then disinfected before the next trip if the vehicle is used to transport either a worker who has tested positive for COVID-19 or a worker exhibiting COVID-19 symptoms who

has not tested negative for COVID-19. The emergency rule also requires employers to provide separate transportation for workers exhibiting COVID-19 symptoms who have not tested negative for COVID-19.

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 quarantine and 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 and recommended booster shots. 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, quarantine, or isolation. The emergency rule also allows employers to make certain housing changes necessary to quarantine or 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 hearing on the Statement of Scope for the emergency rule, SS 003-22, was held on January 26, 2022. Legal Action of Wisconsin's Farmworker Project Program Manager and Legal Director submitted a written comment stating that a new emergency rule focused on COVID-19 "is critically necessary for the immediate preservation of public health, safety, and welfare of Wisconsin's migrant and seasonal farmworkers." The president of the Midwest Food Products Association (MWFPA) appeared at the preliminary hearing and submitted the following written comments on the emergency rule. The MWFPA president stated that "it is crucial that the interconnected nature of the employer-provided housing, workplace, and employer-provided transportation elements of the proposed rule work in concert with one another" and cited MWFPA members' experience in dealing with several COVID-19 strains and providing improved safety and protection for workers in employer-provided housing, the workplace, and employer-provided transportation. The MWFPA president also stated that "adopting too exacting of standards to compel the need for additional housing in rural areas may result in workers being forced to live even further from their place of work," which "would place even greater reliance on employer-provide transportation and put further pressure on the workers themselves, as each day will require additional time to travel to and from work." In addition, the MWFPA president stated that "limits on the capacity of employer-provided transportation would have an adverse impact on the ability of employers to transport workers to and from work as well as the errands that workers seek."

Agency response: The Department acknowledges the concerns of the MWFPA president and appreciates the efforts undertaken by MWFPA members to provide improved safety and protection for workers in the workplace and employer-provided housing and transportation. To avoid affecting the availability of housing in rural areas, the emergency rule does not require all tables in central mess facilities and beds in non-family units to be separated by six feet. Instead, the emergency rule requires six-foot separation "whenever possible," which the Department believes will give camp operators in rural communities more flexibility regarding their housing. Likewise, the Department believes that the emergency rule will not adversely affect employer-provided transportation because workers are required to sit six feet "wherever possible" and the emergency rule does not otherwise limit the number of workers transported in a vehicle.

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. The emergency rules were originally in effect for 6 months, but on August 27, 2021, the Michigan governor extended the rules to remain in effect until December 31, 2021.

Summary of factual data and analytical methodologies

Emergency Order # 25, ch. DWD 301, emergency rules EmR2014 and EmR2109, 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.

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Place where comments are to be submitted and deadline for submission

E-Mail: DWDAdminRules@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 Definitions. In this chapter:

(1) "COVID-19" means the disease caused by the SARS-CoV-2 virus.

(2) "Exposed worker" means a migrant worker who has been in close contact with an individual who tested positive for COVID-19 or with a symptomatic individual who has not tested negative for 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>.

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

(4) "Isolate" means to separate individuals who have tested positive for COVID-19 and symptomatic individuals who have not tested negative for COVID-19 from other individuals.

(5) "Quarantine" means to separate an exposed workers from other individuals.

(6) "Symptomatic individual" means an individual exhibiting symptoms of COVID-19.

Note: Symptoms of COVID-19 can be found at the following website of the department of health services: <https://www.dhs.wisconsin.gov/covid-19/symptoms.htm>.

(7) "Symptomatic worker" means a symptomatic individual who is a migrant worker.

(8) "Tested negative for COVID-19" means that a viral test has determined that an individual was not infected with the SARS-CoV-2 virus at the time of the test.

(9) "Tested positive for COVID-19" means that a viral test has determined that an individual was infected with the SARS-CoV-2 virus at the time of the test.

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, quarantine, 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, quarantine, 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, quarantine, 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 quarantine or 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 (11) (j), (k) and (L) are created to read:

DWD 301.07 (11) (j) 1. Except as provided in subd. 2., in accordance with current guidance of the department of health services, a camp operator shall do all of the following:

Note: Guidance of the department of health services on quarantine and isolation can be found at the following website: <https://www.dhs.wisconsin.gov/library/p-02836.htm>.

a. Make reasonable efforts to effectively quarantine exposed workers from all other camp occupants. For purposes of this subd. 1. a., "effectively quarantine" includes providing each worker with a private bathroom, sleeping area, and cooking and eating facility. If a camp operator cannot effectively quarantine exposed 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 .

b. Effectively isolate workers who have tested positive for COVID-19 and symptomatic workers

who have not tested negative for COVID-19 from all other camp occupants . 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.

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 isolated and quarantined workers who are 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 quarantine 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 and recommended booster shots.

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 central ventilation systems shall use portable high-efficiency particulate air (HEPA) filtration systems if windows cannot be left open.

Note: Additional guidelines for ventilation can be found at the following website of the department of health services: <https://www.dhs.wisconsin.gov/library/f-02771.htm>.

SECTION 4. 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 cleaned and then disinfected daily.

SECTION 5. 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 cleaned and then 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 6. DWD 301.07 (17) (d) 3m. is created to read:

DWD 301.07 (17) (d) 3m. During shared meals or other events, kitchen and dining room tables shall be at least six feet apart wherever possible.

SECTION 7. 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% ethanol 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 cleaned and then disinfected daily.

SECTION 8. 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, wherever possible, all beds shall be separated by at least six feet. 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% ethanol 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 cleaned and then disinfected daily.

SECTION 9. 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 masks for workers that comply with current guidance of the department of health services.

Note: Guidance of the department of health services on masks can be found at:

<https://www.dhs.wisconsin.gov/covid-19/mask.htm>.

SECTION 10. 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 11. 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% ethanol and no methanol.

(e) If the department has authorized the substitution of prepackaged towelettes for handwashing facilities through a variance, the prepacked towelettes must contain at least 60% ethanol.

SECTION 12. 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 masks that comply with current guidance of the department of health services.

Note: Guidance of the department of health services on masks can be found at:

<https://www.dhs.wisconsin.gov/covid-19/mask.htm>.

(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 masks that comply with current guidance of the department of health services and require all vehicle occupants to wear the face masks during transport, except for vehicle occupants with medical or other conditions that prevent them from wearing a face mask. Hand sanitizer with at

least 60% ethanol 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 then disinfected daily, except that if a transport vehicle is used to transport a worker who tested positive for COVID-19 or a symptomatic worker who has not yet tested negative for COVID-19, the high-contact surfaces shall be cleaned and then disinfected before the next trip. All high contact surfaces used by drivers, including steering wheels, vehicle controls, door handles, seatbelt buckles, and armrests, shall be cleaned and then 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: Guidance of the department of health services on masks can be found at:

<https://www.dhs.wisconsin.gov/covid-19/mask.htm>.

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 who have not tested negative for COVID-19 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 13. This rule takes effect on March 1, 2022, or upon publication in the state newspaper, whichever is later, 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.