



# FARMWORKER LEGAL SERVICES

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## Agency Decides that Michigan's Minimum Wage Law Exempts Piece-Rate Hand Harvesters

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### The Critical Importance of the Hourly Minimum Wage to Michigan's Farmworkers

Since 1964, Michigan law has helped protect the most vulnerable of Michigan's workers by ensuring that they receive a fair wage for each hour worked. Michigan's minimum wage law, known as the Workforce Opportunity Wage Act (WOWA), currently sets a minimum wage rate of \$8.50 per hour for most Michigan workers. The state law serves two important functions: First, it sets Michigan's minimum wage above the current federal minimum wage of \$7.25 per hour. Second, it covers employees who fall outside the protection of the federal minimum wage due to working for small, exempt employers. This state wage protection has been a critical tool for combatting "wage theft" against farmworkers who are among the lowest-paid and are frequently employed by farmers who are not covered by federal minimum wage law (FLSA).

After decades of enforcing farmworkers' rights to the minimum hourly wage, in February 2016, Michigan's Wage and Hour Program (WHP) ruled that a family of five migrant farmworkers were excluded from the protections of WOWA and declined to enforce the workers' minimum wage claims. The agency's determination in this case evidenced a radical, new interpretation of Michigan law which would potentially exclude most of Michigan's nearly 50,000 agricultural workers from the state minimum wage and further depress their already-low wages.

The workers who sought to enforce their right to minimum wage were paid less than \$4.00 per hour harvesting asparagus, well below both the federal and state minimum wage levels. They were paid this sub-minimum wage by virtue of a piece-rate payment scheme imposed by their employer in which they were paid based on the total pounds of asparagus they picked as a family group, which included a 14-year-old harvester. Payment of wages based on a piece-rate is a common practice of growers of fruits and vegetables in Michigan. Unfortunately, it also encourages the use of minor family members to help pick more just to make a decent wage.

Hourly minimum wage protections are critical for harvesters because calculating the number of hours worked is the only objective standard for measuring the output of individual harvesters. Under the piece-rate system, employers and their crewleaders have sole control of the weights, measures and other tools used to record the amount of produce picked. It is too easy for an unscrupulous crewleader to falsify weigh records in order to increase his/her profits from the harvest. When agencies assist workers in obtaining their earned wages, workers usually do not have their own records of how much they picked. They do, however, keep track of their hours worked and breaks taken. These records of hours worked often provide the only reliable basis for calculating the workers' proper compensation. By this new interpretation of the minimum

wage law, the state of Michigan leaves farmworkers vulnerable to deceptive payment practices, stripping piece-rate harvesters of the minimum wage law's protections against wage theft.

### **The Agency's Disastrous New Interpretation of the State Minimum Wage Law**

By refusing to enforce the minimum wage claims of hand harvest workers, the Michigan Wage and Hour Program has adopted an unprecedented interpretation of WOWA, in which it has determined that workers who hand harvest fruits and vegetables commonly paid by piece-rate are no longer covered by the state minimum hourly wage. The agency apparently reasons that piece-rate harvesters should only now be excluded from hourly wage protections due to the 1997 expiration of "piece-rate equivalency scales" previously set by a state board that was abolished in 1996. The Wage and Hour Program's arbitrary ruling means that thousands of the nearly 50,000 farmworkers, who annually harvest crops such as asparagus, peppers, tomatoes, cucumbers, apples, berries and cherries, will work without any state minimum wage protection (although those who work on "large farms" should maintain the protection of the lower \$7.25 federal minimum hourly wage). At a time when Michigan farmers often complain about "labor shortages" and have turned to using the temporary foreign worker visa program (H2A) to recruit farmworkers, the state's irrational and mean-spirited interpretation of the WOWA gives traditional hand harvesters little incentive to seek employment in Michigan.

Farmworker Legal Services insists that the Wage and Hour agency's new interpretation of WOWA is not only incorrect, but it is unlawfully discriminatory because the agency's new enforcement policy disproportionately impacts Hispanic workers. Over 99% of Michigan's agricultural workers identify as Hispanic/Latino. A recent study by the Julian Samora Research Institute at MSU noted that, "in 2009-2013, approximately 30 percent of the Latino population in Michigan was in poverty." Given the state of Michigan's notorious failures in protecting the water quality of the low-income, minority population of Flint, we do not comprehend why the state would not ensure that all Michigan workers are paid fairly and equally.

The Wage and Hour Program (WHP), housed within the state Department of Licensing and Regulatory Affairs (LARA), is charged with administering the state's minimum wage law and is mandated to interpret the law consistent with its legislative purpose to protect workers. Instead, WHP has relied on a strained, and arguably discriminatory, interpretation of WOWA to withhold minimum wage protections from one of the state's most vulnerable populations of workers. WHP may soon begin the formal process of revising its policies for implementing the state minimum wage law. Unfortunately, the agency's recent decision indicates that it may intend to exclude farmworkers who harvest our fruits and vegetables on a piece rate basis from the protections of the state minimum wage law.

For more information about the state's current policy on protecting farmworker wages, you may contact Farmworker Legal Services or your local representative.