



# FARMWORKER LEGAL SERVICES

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## State of Michigan Decides that Farmworkers on Small Farms are Not Covered by the State Minimum Wage Law

UPDATE RE: Agency Decides that Michigan's Minimum Wage Law Exempts Piece-Rate Hand Harvesters

In 2015, a family of 5 migrant farmworkers from Texas worked in Oceana County picking asparagus. They were paid on a piece-rate basis of 13-15 cents per pound and each ended up being paid less than \$4.00 per hour, which was less than the federal and state minimum wage (\$7.25 and \$8.15 per hour in 2015, respectively). The family filed a wage complaint with the Wage & Hour division of the Michigan Department of Licensing and Regulatory Affairs (LARA). LARA investigated the complaint and issued a decision in February 2016 declining to enforce the state minimum wage law<sup>1</sup> in their case. The two reasons given to the family were that: (1) piece-rate farmworkers were not covered by Michigan's minimum wage law, and (2) farmworkers on "small farms" that are already excluded from the federal minimum wage were also excluded from Michigan's minimum wage.

### Piece-rate farmworkers are covered by Michigan's minimum wage law again.

Farmworker Legal Services, on behalf of the workers, publicized LARA's decision to deny piece-rate farmworkers the Michigan minimum wage through an Issue Brief<sup>2</sup> and through media contacts.<sup>3</sup> In June 2016, Governor Snyder issued an Executive Order clarifying that LARA has authority to regulate provisions of the state's minimum wage law.<sup>4</sup> In August 2016, LARA issued a rule - effective on September 13, 2016 - clarifying that farmworkers who are paid by piece-rate must be paid a wage "at least equivalent to the minimum hourly wage rate."<sup>5</sup> According to LARA, the new rule should cover Michigan farmworkers who work after September 13, 2016. LARA has told FLS, however, that the rule will not be applied retroactively to cover farmworkers like the family from Oceana County who worked prior to September 13, 2016.

### State of Michigan takes away minimum wage from farmworkers on small farms.

In late August, LARA also told FLS that the department does not intend to change its February 2016 interpretation of the law that farmworkers who are excluded from the federal minimum wage due to working on "small farms" (as defined by federal law<sup>6</sup>) are also excluded from the

<sup>1</sup> Workforce Opportunity Wage Act, P.A. 138 of 2014, <http://www.legislature.mi.gov/documents/mcl/pdf/mcl-act-138-of-2014.pdf>

<sup>2</sup> Farmworker Legal Services, *Agency Decides that Michigan's Minimum Wage Law Exempts Piece-Rate Hand Harvesters* (April 1, 2016), <http://www.farmworkerlaw.org/minwage2016>.

<sup>3</sup> See e.g. Michigan Radio, *Advocates say state failing to protect farmworkers under minimum wage law* (April 15, 2016), <https://goo.gl/p6MlWv>. See also, WMUK, *Advocates say new law could mean no minimum wage for some farmworkers* (April 26, 2016), <https://goo.gl/76rUdH>.

<sup>4</sup> Executive Order 2016-13, [http://www.michigan.gov/documents/snyder/EO\\_2016-13\\_526322\\_7.pdf](http://www.michigan.gov/documents/snyder/EO_2016-13_526322_7.pdf)

<sup>5</sup> See Rule 408.711 at [http://w3.lara.state.mi.us/orr/Files/AdminCode/1656\\_2016-047LR\\_AdminCode.pdf](http://w3.lara.state.mi.us/orr/Files/AdminCode/1656_2016-047LR_AdminCode.pdf)

<sup>6</sup> "Any employer in agriculture who did not utilize more than 500 "man days" of agricultural labor in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA

state's minimum wage protections. This decision is contrary to decades of the state holding that the state minimum wage is a safety net for farmworkers who are excluded from the protection of the federal minimum wage. While Michigan's current minimum wage law was passed in 2014, the relevant sections are exactly the same as the version of the law that was in effect prior to 2014.

Prior to 2015, the state had consistently held that the state minimum wage should be enforced for these farmworkers who work on small farms. The clearest example is its own Policy Manual, which actually uses an example of how farmworkers on a farm that meets the "small farm" definition would be covered by the state minimum wage law.<sup>7</sup>

However, as of February 2016, LARA appears to no longer be following its own Policy Manual. LARA's decision letter in the complaint filed by the 5 migrant farmworkers cites the following provision in Section 10(1)(b) of the state's minimum wage law: "*This act does not apply to an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938.*" LARA's new interpretation of the law relies on misreading Section 10 in two ways.

First, Section 10(1) says that the above exception should only be applied to employers **covered by the federal minimum wage law** who are covered by the state law due to the state wage being higher. As "small farms" are exempt from federal coverage, the state exception should not apply to exclude those farms from the state minimum wage.

Second, even in situations where the state exception applies, the state law also says in Section 10(5) that the exception "*[does] not deprive an employee or any class of employees of any right that existed on September 30, 2006 to receive overtime compensation or to be paid the minimum wage.*" As the language in Section 10(1)(b) was added on October 1, 2006 – and therefore did not exist on September 30, 2006 – LARA should not be using Section 10(1)(b) to deprive farmworkers on small farms of their right to receive the minimum wage.

LARA's new policy will discourage workers from using the administrative complaint system – in which LARA's Wage and Hour Division will investigate complaints of minimum wage violations – in favor of more workers needing to file lawsuits in courts in order to get the wages that the minimum wage law requires.

FLS will continue to seek additional written confirmation of LARA's policy with respect to Michigan farmworkers on small farms. Eight months have passed since LARA indicated what its new interpretation is through its February decision to our clients. However, FLS believes that Michigan farmworkers deserve to receive a public pronouncement about whether LARA stands behind this decision to roll back years of protections and to deny some farmworkers the right to receive a basic minimum wage. Farmworkers considering working in Michigan should know whether getting paid less than \$4.00 per hour is acceptable in this state.

October 13, 2016

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for the current calendar year. A "man day" is defined as any day during which an employee performs agricultural work for at least one hour." <https://www.dol.gov/whd/regs/compliance/whdfs12.htm>

<sup>7</sup> See Example b at <http://www.farmworkerlaw.org/larapolicy>