

WISHA REGIONAL DIRECTIVE

WISHA Services

Department of Labor and Industries

33.72 SHEEPHERDER HOUSING

Date: November 26, 2001

I. Background

Labor and Industries (L&I) enforces WAC 296-307-161 (found in Part L of Chapter 296-307 WAC), which includes requirements related to temporary worker housing in agriculture. They are similar to (but not identical to) the temporary labor camp requirements applicable to general industry, found in WAC 296-24-125. Both state standards differ in several respects from the temporary labor camp standard adopted by federal OSHA and in force in states without an approved state plan.

Although adopted under RCW 49.17, the Washington Industrial Safety and Health Act (WISHA), the agriculture temporary worker housing rules have been adopted jointly with the rules adopted by the state Department of Health (DOH), which also regulates – and licenses – most temporary worker housing in the agriculture industry. This joint rulemaking was required by the Legislature in 1999.

Within Washington, there is a small but significant shepherding industry, involving foreign nationals brought in under the federal H2A program (administered by the Employment Training Administration (ETA) of the United States Department of Labor (USDOL)). Typically, shepherding involves housing provided for fewer than 10 occupants; in such cases, DOH has no jurisdiction over the activity. However, the housing is provided as a condition of employment and is therefore subject to WISHA.

H2A within the state is administered by the Employment Security Department (ESD). Before Washington employers can contract through the program, ESD (or another state agency) must certify to ETA that, among other things, applicable health and safety standards have been met. Historically, DOH assisted ESD with these certifications. A Memorandum of Understanding (MOU) signed in 1990 and renewed in 1994 documented that relationship, but is no longer in effect; the same MOU did not mention WISHA jurisdiction over these activities. WISHA jurisdiction does not appear to have been discussed with the employers before December 2000.

These previous activities relied upon an agreement between ETA and the Western Range Shepherding Association as the governing policy in applying the federal Temporary Labor Camp standard. In other states, this agreement applies to shepherding by members of the association (although not by non-members, effectively creating two sets of standards for temporary worker housing of shepherders in states following the agreement). However, ETA guidelines state that any applicable state or local regulations must also be met.

As part of the certification visits beginning in December of 2000, L&I was consulted on the appropriate interpretation and application of the state standards. This led to further discussions about jurisdiction and about the appropriate application of the WISHA standards to the unique conditions involved in sheepherding. This WRD is a result of those discussions.

II. Scope and application

This WISHA Regional Directive (WRD) provides guidance to WISHA enforcement and consultation staff whenever they must assess temporary worker housing provided to sheepherders as a condition of employment. It supersedes any previous guidance, whether formal or informal.

III. Interpretive Guidance

A. Does WISHA have jurisdiction over housing provided to sheepherders as a condition of employment?

Yes. The sheepherders are clearly employees. The housing is provided as a condition of employment, and it benefits the employer (it does not appear that the work would be possible without housing provided by the employer; in any case, H2A certification would not be available if housing were not provided).

B. Which WISHA standards apply to shepherd housing?

The work in question clearly falls under the phrase “agricultural operation” (see WAC 296-307-006(1)(d)) and is therefore not subject to the requirements of Chapter 296-24 WAC. However, the housing in question is “temporary worker housing” as defined by WAC 296-307-16103 – “a place, area, or piece of land where sleeping places or housing sites are provided by an agricultural employer for agricultural employees...for temporary, seasonal occupancy.” Although these employees (who are themselves “temporary” by federal definition) may stay in the same trailer for the duration of their employment, the trailer itself is clearly moved from one “place, area, or piece of land” to another (often as frequently as every other day during certain months). Therefore, the requirements of WAC 296-307-161 apply.

C. How should feasibility and de minimis arguments be evaluated in relation to shepherd housing?

Some of the requirements of WAC 296-307-161 may raise feasibility concerns – however, in most cases, infeasibility will not be a valid defense against citation. However, the unique circumstances of shepherd housing (low population, remoteness, mobile sites) can appropriately be considered.

The standards can appropriately be applied in accordance with the following guidance:

1. WAC 296-307-16105 (*operating license*) and 16110 (*self-survey program*) do not apply, because these operations fall below the DOH threshold of five or more units or 10 or more occupants. On sites of 5 (five) or more units or 10 (ten) or more occupants, the operator must comply with the licensing and self-survey requirements, enforced by DOH.

2. WAC 296-307-16125 (*housing sites*) can be applied and enforced when applicable. However, (1)(d) must not be cited, because enforcing the separation from livestock is infeasible (given the nature of the work).
3. Because of feasibility issues involved in a remote, frequently moving operation, WAC 296-307-16130 (*water supply*) must be cited in relation to mobile shepherding activities only if the employer has not complied with WAC 296-307-16130(2) (an adequate supply of potable water available for drinking, cooking, bathing and laundry).
4. Issues related to WAC 296-307-16135 (*sewage disposal*) must not be cited in relation to mobile shepherding activities unless a local health jurisdiction violation can be documented.
5. In cases where electricity cannot feasibly be provided to mobile shepherding operations, WAC 296-307-16140 (*electricity and lighting*) must not be cited unless the employer fails to provide a safe means of lighting the habitable rooms (for example, battery or propane-powered lanterns).
6. The requirements of WAC 296-307-16145 (*building requirements and maintenance*) apply to constructed shelters. However, violations of (2) are clearly *de minimis* and therefore must not be cited since no identification of the units is necessary. In addition, the requirements of (14) do not apply to trailers constructed by the employer for the use of his or her employees.
7. The requirements of WAC 296-307-16150 (*laundry facilities*) apply to all shepherding operations. However, the requirements of (3) are considered *de minimis* due to the size of the operation and must not be cited in relation to mobile activities.
8. The requirements of WAC 296-307-16155 (*handwashing and bathing facilities*) must be met.
9. The requirements of WAC 296-307-16160 apply when feasible. Toilet facilities can be met in the high country by the availability of a camp toilet (waste material from the toilets must be disposed of in accordance with applicable health regulations, but the requirement for a licensed waste disposal company will not be enforced in the mobile operations due to feasibility issues). The distance requirements of (1)(b) with regard to chemical toilets will be considered *de minimis* and therefore not cited, provided that the toilets are segregated from the sleeping and food preparation areas. If pit privies are used, the requirements of (1)(d) must be met.
10. The requirements of WAC 296-307-16165 (*cooking and food-handling facilities*) must be met.
11. The requirements of WAC 296-307-16170 (*cots, bedding and personal storage*) must be met when applicable to the situation.

12. The requirements of WAC 296-307-16175 (*first aid and safety*) must be met when applicable to the situation. Because of feasibility issues, the requirements of (4) can be met in mobile operations by ensuring that shepherders are first-aid trained and that shepherders working alone are checked at regular intervals by some reliable and effective method. Cell-phones are a good option for communication between the shepherders and employer where coverage is available, but they are not required. First aid equipment must be readily accessible and provided to the shepherders.
13. The requirements of WAC 296-307-16180 (*refuse disposal*) must be met when applicable to the situation.
14. The requirements of WAC 296-307-16185 (*insect and rodent control*) must be met when applicable to the situation.
15. The requirements of WAC 296-307-16190 (*disease prevention and control*) must be met when applicable.

D. Can other state agencies provide certification to ETA for H2A purposes?

Yes. Although WISHA standards apply and will be enforced (subject to guidance in Section IV below), this does not prevent other agencies from advising employers and the ETA as to whether an employer has met them. H2A certifications can be provided by whatever method chosen by ESD (the state agency responsible for them).

IV. Special Enforcement Protocols

How are WISHA staff expected to cite violations of the temporary worker housing requirements in relation to shepherders?

Because of past confusion over the requirements on the part of employers and state agencies, WISHA is exercising enforcement discretion and will not cite violations of the temporary worker housing requirements that would not also have been violations of the agreement with the Western Range Shepherding Association until May 1, 2002. After that time, the Temporary Worker Housing standard will be enforced as described in Section III Above.

Approved: _____

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For further information about this or other WISHA Regional Directives, you may contact WISHA Policy & Technical Services at P.O. Box 44648, Olympia, WA 98504-4648 -- or by telephone at (360)902-5503. You also may review policy information on the WISHA Website (<http://www.wa.gov/lni/wisha>).