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Testimony of the New York Civil Liberties Union

before

**THE NEW YORK STATE SENATE STANDING COMMITTEES ON LABOR,
BANKS, & INVESTIGATIONS AND GOVERNMENT OPERATIONS**

and

**THE NEW YORK STATE ASSEMBLY STANDING COMMITTEES ON LABOR,
BANKS, & OVERSIGHT, ANALYSIS AND INVESTIGATION**

regarding

Impact of COVID-19 on the Workforce

August 13, 2020

The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony regarding the impact of COVID-19 on New York’s workforce, and solutions to mitigate that impact.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices throughout the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the right of every New Yorker to enjoy life, liberty, and equal protection under law. This includes our work in pursuit of economic justice and access to work that is free from exploitation and harm. It is our position that, in the absence of economic justice, the civil rights and civil liberties mission of the NYCLU can never be fully realized.

As COVID-19 outbreaks continue to grow across the country, and an increasing number of New Yorkers are headed back to work, there remains an acute need for stronger protections in the workplace to prevent the spread of COVID. Despite thousands of complaints from essential workers, the federal Occupational Health and

Safety Administration (OSHA),¹ has largely abdicated its responsibility to ensure safe and health workplaces.² Instead of enacting enforceable regulations to prevent the spread of COVID in the workplace, OSHA has issued “Guidance on Preparing Workplaces for COVID-19”³ – health and safety recommendations that rely only on voluntary compliance by employers and create no legal obligations.

Unfortunately, as has been the case throughout the pandemic, the federal government’s failure to act now makes it incumbent upon this body to step up and fill the void. Below, we offer recommendations related to two important problem areas that state officials must address: the needs of the agricultural workforce,⁴ and expansion and clarification of the Emergency Paid Sick Leave Law enacted in March.⁵

The Needs of the Agricultural Workforce Must Be Addressed

Farmworkers are the backbone of New York’s massive agricultural industry. An estimated 80,000 to 100,000⁶ people labor on New York farms to produce over five billion dollars in revenue for our state.⁷ And yet, for those who do the work of harvesting vegetables, picking apples and grapes, and feeding, cleaning, and milking herds of dairy cows, the pay is low, and the work is grueling, dangerous, and at times life-threatening. Add to this: overcrowded, company-owned housing facilities without proper sanitation or social distancing, side-by-side work and transport conditions, lack of access to testing, and thousands of H-2A workers currently arriving from all over the world, and you’ve created a perfect environment for the spread of COVID.

Indeed, the first reported infections among New York farmworkers began in April. The worst outbreak occurred in May, when 171 workers at Green Empire Farms in Oneida became infected with the virus.⁸ Since then, there have been more

¹ OSHA is the federal agency tasked with “ensur[ing] safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.” US Dept. of Labor Occupational Safety and Health Admin., *About OSHA*, <https://www.osha.gov/aboutosha#:~:text=OSHA's%20Mission,%2C%20outreach%2C%20education%20and%20assistance>.

² The New York Times, *Why Is OSHA AWOL?* (June 21, 2020),

<https://www.nytimes.com/2020/06/21/opinion/coronavirus-osha-work-safety.html>.

³ US Dept. of Labor Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19* (2020), <https://www.osha.gov/Publications/OSHA3990.pdf>

⁴ The NYCLU was plaintiffs’ counsel in the landmark case that resulted in a finding that the exclusion of farmworkers from the right to organize and bargain collectively violated the New York Constitution. *Hernandez v. State*, 173 A.D.3d 105, 99 N.Y.S.3d 795 (2019).

⁵ The NYCLU is a member of the New York State Paid Leave Coalition leadership team.

⁶ Worker Justice Ctr. of N.Y., *Workplace Safety*, <http://www.wjcny.org/program/flsnys-work-place-safety-project>.

⁷ U.S.D.A., *2017 State Agricultural Overview, State Summary Highlights*,

https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/New_York/st36_1_0002_0002.pdf.

⁸ Utica Observer-Dispatch, *Living to work: Massive NY greenhouse coronavirus outbreak exposes migrant workers’ vulnerability* (June 17, 2020), <https://www.uticaod.com/news/20200617/living-to-work-massive-ny-greenhouse-coronavirus-outbreak-exposes-migrant-workers-vulnerability>.

outbreaks across the state – in late June, another outbreak at an Oswego County apple processor infected 82 of 179 workers.⁹ This is just the tip of the iceberg. With patchwork inspection and testing, and an isolated community of workers with insufficient access to medical care and afraid to speak out for fear of losing their jobs, outbreaks are sure to continue.

In May of this year, Governor Cuomo, issued guidance documents for the prevention and response of COVID-19 at farms.¹⁰ The guidance, while helpful for farm owners, creates no legal obligations, lacks sufficient enforcement mechanisms, and is devoid of important regulations related to housing, quarantine and isolation. We must do better for these essential workers and to protect the public health, and the NYCLU offers three recommendations here to that end.

1. Enact Enforceable Workplace Regulations

Like other essential workers, farmworkers must be protected from the spread of COVID in their workplace. Guidance for the workplace exists, but it must be enacted as legislation, **which would make mandatory**:

- Provision, free of charge, all necessary personal protective equipment (PPE) to protect workers from exposure to the virus;
- Proper ventilation of all work areas;
- Proper social distancing at work and during transportation to and from work and to and from work areas;
- Readily accessible hand-washing facilities with soap and clean water or hand sanitizer;
- Regular disinfection of surfaces in both work areas and shared living spaces;
- Accessible free testing and treatment for COVID-19 for all farmworkers as medically appropriate, regardless of immigration status, including special attention to foreign guestworkers now entering the country with H-2A visas;
- Special protections for workers over sixty and/or those with underlying health conditions;

In addition to mandatory health and safety regulations specific to agricultural workers, the legislature must ensure enforcement of such regulations by:

- Enacting robust anti-retaliation and whistleblower laws;

⁹ Syracuse Post-Standard, *82 of 179 workers at Oswego apple processing plant have the coronavirus* (June 26, 2020), <https://www.syracuse.com/coronavirus/2020/06/82-of-179-workers-at-oswego-apple-processing-plant-have-the-coronavirus.html>.

¹⁰ NY Dept. of Health, Dept. of Ag. and Markets, *Interim Guidance for Prevention and Response of COVID-19 at Farms* (Revised May 27, 2020),

https://agriculture.ny.gov/system/files/documents/2020/05/agm-doh_covid19_cleaningfarm.pdf;

NY Dept. of Health, Dept. of Ag. and Markets, *Novel Coronavirus (COVID-19) Operator Checklist for Farms* (Revised May 27, 2020); NY Dept. of Health, Dept. of Ag. and Markets, *Coronavirus (COVID-19) Tips* (Revised May 27, 2020).

- Permitting workers to form health and safety committees, which shall be empowered to raise health and safety complaints and violations to the employer and obtain a response from the employer within 24 hours. If the employer does not respond within 24 hours, the health and safety committee may report complaints and violations to the Commissioner;
- Establishing sufficient penalties to be assessed against employers for failure to comply with the COVID-19 prevention regulations;
- Establishing a private right of action; and
- Enacting a comprehensive plan for public outreach and education, a critical piece for this often-isolated community

2. Enact Enforceable Regulations for All Employer Operated Housing

Too many farmworkers live in cramped, unsanitary housing without little or no availability to social distance. In fact, officials trace the outbreak at Green Empire Farms, not to workplace conditions, but to the way in which workers live, sleeping up to four to a room and sharing restrictive common space.¹¹ The farm guidance documents referred to above address worker housing and recommend that farm operators work closely with local health departments (LDH) to address the housing needs of their workers, including housing workers in the smallest groups possible, distancing beds at least 6 feet apart; increasing ventilation in all housing areas, including living and sleeping, cooking and eating, and bathroom and shower areas; and implementing social distancing measures for common areas, such as scheduling staggered use of these areas.

Notably, because owner operated housing presents such a huge risk for the spread of COVID, voluntary guidelines are particularly insufficient. The legislature urgently needs to enact the guidance as enforceable standards.¹²

3. Enact Stronger Quarantine and Isolation Requirements

Because farmworkers are essential workers, they are exempt from NYS COVID-19 prevention guidelines that require 14 days of quarantine or isolation for anyone who has 1) tested positive for COVID-19, regardless of whether or not they are displaying symptoms, 2) been exposed to an individual infected with the coronavirus, or 3) travelled to New York from a country or a state with a high coronavirus infection rate.¹³

¹¹ Utica Observer-Dispatch, *Living to work*, note 8 *supra*.

¹² Last year, this body enacted the historic Farm Laborers Fair Labor Practices Act (FLFLPA). The law expands DOH's authority regarding standards and licensing of farm labor camps. N.Y. Pub. Health Law § 225. There is some confusion regarding whether the new provision applies to all farm labor camps or only those that house migrant workers. The legislature needs to clarify that DOH has authority over all labor camps, including those that house permanent workers.

¹³ NYS Dept. of Health, *Protocols for Essential Personnel to Return to Work Following COVID-19 Exposure or Infection*, (March 31, 2020),

Currently, there are over eight thousand H-2A agricultural visa holders arriving on New York farms to work during the harvest season.¹⁴ Surprisingly, the Governor’s Interim Guidance for Prevention and Response of COVID-19 at Farms¹⁵ contains no specific reference to this important group of workers, even though every country that sends H-2A workers has a high level of coronavirus infection.¹⁶

While the guidance acknowledges that workers who have travelled within the past fourteen days should be precautionary quarantined, because farmworkers are essential workers, they are permitted to work and required only to remain in quarantine when not at work. As set forth above, however, many farmworkers live in crowded owner-operated housing where social distancing and private rooms are nonexistent.

As evidenced by the spread of COVID-19 at Green Empire Farms, greater protection is needed to address this problem if the state is serious about controlling the spread of coronavirus. The Legislature must require:

- More stringent quarantine and isolation requirements for farmworkers arriving from other countries or states with high infection rates; and
- A comprehensive outreach and education plan regarding effective quarantine and isolation protocol for newly arrived workers.

Finally, these are the remarks of Erika, apple packing worker, Oswego County:

“We worked through the virus, we wore masks but we still started to get sick. We continued to work with what started as a headache, and other symptoms of COVID-19. Three weeks later, with pain and fever, the employer of the company said that all workers had to take tests for the coronavirus. The results came out positive. Then the boss said we couldn't work, and he sent three of us home to be quarantined. We were afraid to seek more medical support, we had to use home remedies to combat pain and cure ourselves. We were alone, only people who sent food came to drop off the food and left. It is unfair—we have to have better protection because we could have avoided this situation. We are still human beings and we deserve to be protected!”¹⁷

https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_essentialpersonnelreturntowork_rev2_033120.pdf.

¹⁴ See Congressional Research Service, H-2A and H-2B Temporary Work Visas: Policy and Related Issues (June 9, 2020), <https://fas.org/sgp/crs/homesec/R44849.pdf>

¹⁵ *Interim Guidance*, note 10 *supra*.

¹⁶ NYS Dept. of Health, *Health Advisory: COVID-19 Update for Local Health Department Response Activities* (April 7, 2020),

https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_lhdupdate_040720.pdf

¹⁷ Link to press conference.

Expand Paid Sick and Family Leave for All Workers

We cannot prevail in the fight to control and limit COVID-19 infections and prevent deaths without ensuring that paid sick and family leave is widely available for all who are subject to a mandatory or precautionary order of quarantine or isolation, or who must take care of a family member similarly situated. Paid sick leave is a policy designed to protect not only individuals, but all of us – by ensuring that those who are sick are not forced to choose between a paycheck and staying home. It's not a perk; it's an added protection for public health and the public good. Numerous studies have shown that paid sick leave is critical in preventing the spread of infectious disease, including COVID-19.¹⁸

Never has paid sick leave been more crucial than it is now, amid a pandemic. On March 18, 2020, Governor Cuomo signed into law emergency legislation guaranteeing job protection and pay for New Yorkers who are required to quarantine or isolate because of COVID-19.¹⁹ The law requires all employers to provide sick leave for employees who are subject to a "mandatory or precautionary order of quarantine or isolation issued by the State of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19."

The leave required to be provided by employers depends on the size of the business, with the largest employers – one hundred or more employees – required to provide at least fourteen days of paid sick leave, and the smallest employers -- ten or fewer employees and net income less than one million dollars or less -- required to provide *unpaid* sick leave only. Mid-size employers – eleven to ninety-nine employees and small employers with net incomes of greater than one million -- are required to provide at least five days of paid sick leave.

For most workers, however, gaps in NYS paid leave coverage can be filled by a combination of federal paid sick leave through the Families First Coronavirus Response Act (FFCRA) Act and/or NYS paid family leave and disability benefits. While the emergency paid sick leave law provided much needed relief to thousands of New Yorkers, and was likely a major factor in reducing the spread of COVID,²⁰ more must be done going forward if we are to meet the twin goals of keeping New Yorkers healthy and safe and gradually opening up the economy in the midst of a pandemic that appears likely to be with us for many months to come.

¹⁸ Healio, *Study: Paid sick leave is essential during COVID-19 pandemic* (May 22, 2020), <https://www.healio.com/news/primary-care/20200522/study-paid-sick-leave-is-essential-during-covid19-pandemic>. See also Medical Press, *U.S. workers need paid sick leave to stop the spread of coronavirus* (March 5, 2020), <https://medicalxpress.com/news/2020-03-workers-paid-sick-coronavirus.html>.

¹⁹ <https://www.nysenate.gov/legislation/bills/2019/s8091>

²⁰ See fn 20, *supra*.

To strengthen and expand this important policy, we recommend that the legislature ensure that:

- Workers are eligible for emergency paid sick leave pursuant to documentation from a licensed medical provider;
- Workers are entitled to more than one paid sick leave period if, subsequent to returning to work following a period of mandatory quarantine or isolation, they receive a positive diagnostic test result for COVID-19;
- Emergency paid sick leave is available on top of any sick days available under the new permanent paid sick leave law that was passed as part of the budget this year and goes into effect September 30, 2020. N.Y. Lab. Law § 196-b;
- All enforcement mechanisms available under New York Labor Law that are available to enforce minimum wage violations are expressly available to enforce sick leave violations as well, including all administrative remedies, fines and penalties – and in particular, civil actions arising under N.Y. Labor Law § 663; and
- A robust public education and outreach program is created.²¹

The impact of COVID-19 on New York’s workforce has been devastating in terms of continuing illness, lives lost, and economic security taken away from far too many. These recommendations will not only help to protect the health and lives of workers, but also safeguard the public health. For every worker who toils in an environment where risk of COVID infection is high, there are family members, friends and a separate community who also risk infection. No one wants to return to the dark days in spring of 2020 where New Yorkers were experiencing almost 10,000 new cases and over 1000 death per day.²² The risk is real, however, if we fail to enact enforceable regulations to prevent the spread of COVID in every workplace, and strengthen existing laws that protect workers and their families.

Thank you for your consideration of our testimony – we urge immediate and decisive action.

²¹ A recent report by the Community Service Society found that nearly two-thirds of low-income workers were unaware of their right to paid sick leave under the NYC law, which has been in effect since 2014. Rankin, Nancy, *Testimony: Coronavirus and Paid Sick Days Awareness* (March 5, 2020), <https://www.cssny.org/news/entry/testimony-coronavirus-and-paid-sick-days-awareness>

²² Johns Hopkins University Coronavirus Resource Center, *Impact of Opening and Closing Decisions by State*, (updated August 11, 2020), <https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/new-york/0>; Johns Hopkins University Coronavirus Resource Center, *Impact of Opening and Closing Decisions by State*, (updated August 11, 2020), <https://coronavirus.jhu.edu/data/state-timeline/new-deaths/new-york/0>