



## **6th Circ. Preserves Virus Testing Rule For Migrant Workers**

Suzanne Monyak

September 3, 2020

The Sixth Circuit has preserved Michigan's requirement that farms test migrant workers for COVID-19 before they start work, finding that the agricultural employers who claimed the rule discriminated against Latinos were unlikely to win their case.

In a Wednesday decision, the federal appeals court refused a request by two Michigan orchards to halt the state's emergency order mandating COVID-19 testing for migrant farmworkers, first when they arrive at the site and again two weeks later, after the farms and a group of employees accused the state of unconstitutionally targeting Latinos.

The fact that most seasonal farmworkers are from Latin America and the novel coronavirus has disproportionately attacked Latino communities "is evidence of disparate impact but does not indicate discriminatory intent," the panel of judges wrote.

"Statements of fact about the high incidence of COVID-19 among the Latino community and throughout the agricultural industry may indicate that the order will have a significant impact on Latinos, but they do not compel a finding that the impact motivated the order," the decision says.

Diana Marin, supervising attorney for the Michigan Immigrant Rights Center, which supported the state rules at the appeals court, said in a statement that the Wednesday ruling "made it clear that the state of Michigan can act to protect farmworker health."

"If plaintiffs in the case truly care about the rights and health of Michigan's agricultural workers, they should help implement the state's public health order and not undermine it," she continued.

The farms, True Blue Berry Management LLC and Smeltzer Orchards Co. LLC, and a group of six farmworkers sued the state in August, after the director of Michigan's health department issued an emergency order requiring farms and food processing plants with more than 20 workers to provide free COVID-19 testing for their seasonal workers who are required to spend the night away from their permanent residences, including foreign workers on H-2A seasonal visas.

The emergency order follows an executive order issued earlier this year by Michigan Gov. Gretchen Whitmer calling for heightened protections for migrant workers, who often live in crowded housing camps where disease could spread quickly.

According to the Cato Institute, Mexican citizens comprised 91% of H-2A visas under the guest worker program last year. The Trump administration has maintained visa processing and eased requirements for H-2A workers during the pandemic, even as other visa services have been slowed or halted altogether, to preserve the U.S. food supply.

Noting that the department's order did not require COVID-19 testing of individuals in other congregate settings, including summer camps and college dorms, the farms argued in their August lawsuit that the order represented an "unapologetic targeting of Latinos."

They also argued that the testing requirement could "completely uproot the lives of many Latino agricultural workers and destroy the agricultural and food processing industry," citing testimonials from the employees in the suit who feared the results of their test may bar them from working or that they could be exposed to the virus while getting tested.

As a result, these employees "will seriously consider leaving their employment" if they are required to take a coronavirus test, which could hurt the orchards' business, the suit says. According to the lawsuit, True Blue believes that 75% of its workforce will resign if they are required to be tested.

But U.S. District Judge Paul L. Maloney wasn't convinced, holding that the emergency order is "facially neutral" and did not intentionally target Latinos, a finding the farms have appealed.

While declining to block the requirement on Wednesday, the appeals court did grant the farms' request for expedited briefing in the appeal.

The case drew the attention of migrant worker advocacy groups, labor unions and public health professionals, who filed an amicus brief together at the appeals court supporting the testing requirement as key to protecting Latinos "against an urgent threat to their life and health."

They also argued that "agricultural business interests," not the "civil rights of Latino farmworkers," were at the heart of the farms' lawsuit.

"By requiring agricultural employers and operators of migrant housing to test workers and residents free of charge and without retaliation, the emergency order creates meaningful access to COVID-19 testing for the first time," they said. "Even if the order creates a burden for some workers who do not want to be tested, it most importantly provides a shield for the many workers who do want to be tested."

A spokesperson for the Michigan attorney general's office declined to comment. Counsel for the orchards and their employees didn't respond to a request for comment Thursday.

U.S. Circuit Judges Jane Branstetter Stranch, Amul Thapar and Chad Readler sat on the panel for the Sixth Circuit.

The farms are represented by Ronald G. DeWaard and Aaron M. Phelps of Varnum LLP.

Michigan is represented by Mark G. Sands, Katherine J. Bennett and Danielle Allison-Yokom of the Michigan attorney general's office.

The case is Susana Castillo, et al. v. Gretchen Whitmer, et al., case number 20-1815, in the U.S. Court of Appeals for the Sixth Circuit.