JOSH STEIN
ATTORNEY GENERAL

REPLY TO:
BLAKE THOMAS
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October 6, 2020

Via E-Mail and U.S. Mail

Lisa Granberry Corbett
General Counsel
Office of the Secretary, General Counsel's Office
N.C. Department of Health and Human Services
Adams Building, 101 Blair Drive
2001 Mail Service Center
Raleigh, NC 27699-2001

Re: Advisory Letter on the Ability of Healthcare Professionals and Staff to Enter an Employer's Premises to Provide Medical Care to Workers

Dear Ms. Corbett:

This advisory letter responds to your recent inquiry, which read:

> Secretary Cohen has been made aware that there is a concern that migrant farm workers who live in housing provided by the owner of the farm may not have access to health care onsite at the farm housing. This is very concerning, as timely access to health services is crucial during this COVID-19 pandemic.
>
> I would appreciate your review of the permissibility of healthcare professionals and public health staff to enter an employer's premises to provide medical advice and care to employees, particularly in light of the COVID-19 pandemic.

Short Answer

When healthcare professionals and public health staff enter a worker's residence on an employer's premises, they do not commit trespass so long as they have the worker's consent. An employer may not bar the entry of healthcare professionals and staff in these circumstances.

Analysis

On August 21, 1998, the Department of Justice issued an advisory letter in which the Department stated that it was seriously doubtful that the State could successfully prosecute a criminal trespass statute against an attorney whom migrant farmworkers invited into their housing on an employer's farm. *See* August 21, 1998 Letter from Andrew A. Vanore, Jr. to Keith Warner (Ex. A). The 1998 advisory letter based this opinion on two grounds. First, based on the facts, the farmworkers could be tenants of the farmer, and where there is a landlord-tenant

relationship, the tenant may invite a third party onto the property. Second, courts have found that migrant workers' First Amendment freedom of association restricts the landowner's right to forbid trespass and allows migrants to invite third parties onto the property. We reiterate that opinion today and add a third ground specific to the question that you have asked here.

For three separate reasons, it appears highly doubtful that health care professionals or public health staff would trespass if they enter onto a farm to provide assistance to a farmworker with that farmworker's consent, even if the farm owner does not consent. Any one of these three reasons would be sufficient, on its own, to conclude that access to the property must be provided.

1. Tenancy Rights

The 1998 advisory letter notes that "there is clear law in North Carolina that a migrant worker may invite a third party on the landowner's property if a landlord-tenant relationship has been established." Ex. A at 2 (citing *State v. Smith,* 100 N.C. 466 (1888) and *Tucker v. Yarn Mill Co.*, 194 N.C. 756 (1927)). Those precedents remain good law today. Indeed, in the 1990's, the Court of Appeals recognized and applied the tenancy rights of migrant farmworkers on employer property. *See Juarez-Martinez v. Deans*, 108 N.C. App. 486, 494-95, 424 S.E.2d 154, 159 (1993) (upholding jury instruction stating that a landlord-tenant relationship existed between a farmowner and a migrant farmworker residing in a house which the farmowner provided).

Accordingly, in all the circumstances where a farmowner and farmworker are landlord and tenant, a worker living in employer housing may invite healthcare professionals and staff to her home.

2. Workers' Rights

The 1998 advisory letter also reasoned that limits on guests could unconstitutionally impair workers' rights. The line of cases cited in the 1998 letter have held, depending on the facts, that employers/housing providers either cannot restrict workers' constitutional rights or, under the agreement between employer and worker, did not restrict constitutional rights. Recently, a U.S. District Court within North Carolina's circuit has adopted the reasoning in the line of cases cited in the 1998 advisory letter. *Rivero v. Montgomery Cty.,* 259 F. Supp. 3d 334, 345-46 and 352-56 (D. Md. 2017). The court in *Rivero* held that guests' access to migrant workers could not be barred if their housing camp either operated "as the functional equivalent of a company town" or there were "no alternative avenues" for communication with workers. 259 F. Supp. 3d at 356.[*]

[*] The 1998 advisory letter cited *Marsh v. Alabama*, 326 U.S. 501 (1946); *Mid-Hudson Legal Services, Inc. v. GNU, Inc.*, 437 F. Supp. 60, 62 (S.D.N.Y. 1977); *Folgueras v. Hassle*, 331 F. Supp. 615, 625 (W.D. Mich. 1971); and *New Jersey v. Shack*, 277 A.2d 369 (N.J. 1971). In the decades since *Marsh*, the U.S. Supreme Court has issued conflicting decisions about whether the *Marsh* doctrine should be expanded to shopping malls. *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *reversed by Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507, 520 (1976). *Marsh* remains good law, however, and continues to be applicable to migrant farmworkers who live in worker-provided housing that bears similarities to the conditions in *Marsh*. *See Rivero* and *Mid-Hudson Legal Services*, both of which were decided after *Hudgens*.

The *Rivero* case, along with its predecessors cited in the 1998 advisory letter, demonstrates that farmowners are limited in the degree to which they can restrict workers' First Amendment rights. Restricting migrant farmworkers' access to health care would be a particularly material limitation on constitutional rights, likely to be struck down by any court.

3. Necessity of Health Care Professionals and Public Health Staff to Access Property to Assist People with Their Consent

Finally, your inquiry raises an additional point not within the scope of the 1998 advisory letter: the ability of medical professionals to access private property to protect public health.

In the current COVID-19 emergency, it is particularly important that health care professionals have the ability to access patients and screen or treat them for COVID-19. Along with the reasons stated in the 1998 advisory letter, the necessity defense makes it especially doubtful that a health care professional or public health staff would commit trespass by entering a farm to provide necessary medical assistance to a farmworker who requested it. *See State v. Hudgins*, 167 N.C. App. 705, 606 S.E.2d 443 (2005) (establishing the elements of the common-law defense of necessity). No North Carolina case appears to have specifically considered how the defense of necessity applies to persons providing health care, but the necessity defense for emergency responders is well-established in tort law. *See Restatement (2nd) of Torts* § 197 (1965, 2020 Supp.), § 1(b) and Comment § (e) (discussing the defense to the tort of trespass for an actor who enters a property to protect a person on that property, so long as the person receiving the assistance is willing to receive help from the actor). *Cf. also* N.C. Gen. Stat. §§ 130A-17 (providing a right of entry for public-health staff in the case of an imminent public health hazard) and 166A-19.60 (establishing immunity from liability for emergency management services).

Therefore, it appears that any health care providers or public health staff who enter a farm to provide assistance would not commit trespass, so long as they have the consent of workers.

Conclusion

If a worker who is living in employer-provided housing consents to the entry of healthcare professionals and staff into her living quarters, it is extremely doubtful that the healthcare professionals and staff commit trespass. An employer may not bar the entry of such professionals and staff.

I hope that letter this adequately responds to your inquiry. Please do not hesitate to contact me if I can provide any additional assistance.

Please be aware that this is an advisory letter. It has not been reviewed and approved in accordance with the procedures for issuing a formal Attorney General's Opinion.

Sincerely,

Blake Thomas
Deputy General Counsel

cc: Swain Wood, General Counsel, N.C. Department of Justice
Sripriya Narasimhan, Deputy General Counsel, N.C. Department of Justice
William C. McKinney, General Counsel, Office of the Governor

Exhibit A:
1998 Attorney General Opinion

MICHAEL F. EASLEY
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

Reply to:
Andrew A. Vanore, Jr.
Administration
(919) 716-6400

August 21, 1998

Mr. Keith Werner
Assistant District Attorney
Nash County Courthouse
P. O. Box 750
Nashville, NC 27856

Dear Mr. Werner:

I reply to your letter requesting advice concerning a situation which has arisen in your prosecutorial district between a local farmer and attorneys with Farmworkers Legal Services of North Carolina.

The question you ask is: "Whether migrant farm workers, under H2-A status, are afforded the protection of the landlord-tenant relationship which is contrary to the contract that is provided by the federal government." Put another way, you ask whether and to what extent a landowner may enforce a criminal trespass statute against a Farmworkers Legal Services attorney who, upon the invitation of a migrant worker, seeks access to the landowners property to communicate with the migrant worker living thereon.

For reasons which follow, if the attorney accesses the landowners property at the invitation of a migrant worker, I most seriously doubt that you could successfully prosecute the attorney for criminal trespass.

Before proceeding, I note a couple of things. First, the H2-A status of the migrant worker makes no legal difference. All importers who desire to import non-immigrant farm workers (H2-A workers) must first obtain proper approval from the U. S. Department of Labor. For your information, the federal statute dealing with this type migrant worker is 8 U.S.C. 1188 (1997). Regulations have been adopted by the U.S. Department of Labor with respect to H2-A workers. Those regulations are set out in Subpart B of 20 CFR Chapter V, Section 655.90, et. seq. Finally, as we discussed in our telephone conversations, you are not certain as to the facts giving rise to your question. However, I may assume for this discussion that a migrant worker requested the attorney to visit at the worker's housing facility provided by the landowner.

The Work Agreement (hereinafter "Agreement") is a 12-page, single spaced printed document. Paragraph 6 of the Agreement, titled "Housing and Meals" provides in pertinent part the following:

> Housing is provided at no cost to workers who are not reasonably able to return to their place of residence the same day . . . . No tenancy in such housing is created; employer retains possession and control of the housing premises at all times and worker, if provided housing under the terms of this work agreement, shall vacate the housing promptly upon termination of employment with the assigned employer who provides such housing. Workers who reside in such housing agree to be responsible for maintaining the housing in a neat and clean manner. Reasonable repair costs of damage or loss of property, other than that caused by normal wear and tear, will be deducted from the earnings of the worker if he is found to be responsible for damage or loss to housing or furnishings. (Emphasis added).

My review of the pertinent language in Paragraph 6 suggests that the intent was to protect the landowner from having to give notice to the migrant-employee to end his right to remain on the landowner's property after the employment period ended, rather than to remove all tenancy rights from the worker. Absent other evidence, I seriously doubt any court would conclude that the language of Paragraph 6 denies the worker the right to invite an attorney to visit.

State and federal courts are in general agreement that the question of access to migrant labor camps involves an analysis of at least two major legal issues: (1) the rights of migrants as tenants; and (2) the First Amendment rights of both migrants and third parties.

RIGHTS OF MIGRANTS AS TENANTS

Whether or not the landlord-tenant relationship can be established in this case is questionable, and depends on the facts which are brought out if there is a trial. Arguably, the landowner could assert that the migrants were licensees because the housing was given free of charge and not in return for compensation for labor; and, the migrant signed a contract which provided that "no tenancy in such housing is created; employer retains possession and control of the housing premises at all times . . . ."[1] If a court concludes that the worker has tenancy rights, there is clear law in North Carolina that a migrant worker may invite a third party on the landowner's property if a landlord-tenant relationship is established. See, State v. Smith, 100 N.C. 466 (1888), and Tucker v. Yarn Mill Company, 194 N.C. 756 (1927).

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[1]I should point out that if the contract were interpreted to exclude all rights of tenancy, arguably the contract may be unenforceable if it can be shown that the contract was unconscionable because of a lack of bargaining power of the migrants with the landowners. See, Brenner v. SchoolHouse, Ltd., 302 N.C. 207, 213 (1981).

Other state jurisdictions have also concluded that a landlord-tenant relationship exists between an agricultural employer and a migrant farm worker. In State v. Fox, 82 Wash.2d 288, 510 P.2d 230 (1973), the Washington Supreme Court overruled a criminal trespass charge against an employee of Legal Services. The court held that the employer did not have a right to bring a trespass charge against the employee of Legal Services since the migrant farm workers were tenants of the labor camp and they had possession of the premises. The California Supreme Court reversed a similar trespass conviction in People v. Medrano, 78 Cal. App.3rd 198 (1978), on the grounds that the migrant farm workers were tenants and had possession of the premises.

FIRST AMENDMENT CONSTITUTIONAL RIGHTS OF MIGRANTS

As you know, the First Amendment to the U.S. Constitution protects, among others, the freedom of speech and association. The question here is whether the enforcement of a criminal trespass statute against an invited visitor to a migrant labor camp constitutes unconstitutional state action. As we discussed in one of our telephone conversations, assuming there is clear evidence that one of the migrant workers invited the attorney to visit, I do not see how the State could successfully maintain a criminal trespass action. The controlling case in this area is Marsh v. Alabama, 326 U.S. 501 (1946), where the Supreme Court found the constitutional guarantees of freedom of speech and religion precluded enforcement of a state trespass statute against persons who distributed religious literature on the street of a company-owned town. Because the company had "open[ed] up its property for use by the public in general," the company's right as a landowner to forbid trespassing was "circumscribed" by the First Amendment rights of free speech and association. Id., at 506. Federal courts have particularly applied the "company town rationale" in permitting migrants to invite third parties onto the landowners property. See, Folgueras v. Hassle, 331 F.Supp. 615, 625 (W.D. Mich. 1971) and Mid-Hudson Legal Services, Inc. v. GNU, Inc., 437 F.Supp. 60, 62 (S.D.N.Y. 1977). See also, New Jersey v. Shack, 58 N.J. 297, 277A.2d 369 (1971).

Based on the facts as I understand them, and assuming that the Farmworkers Legal Services attorney is on the landowner's property at the invitation of a migrant worker living thereon, I seriously doubt that the State may successfully prosecute a criminal trespass statute against the invited attorney.

Very truly yours,

Andrew A. Vanore, Jr.
General Counsel

AAVjr/jt