



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 10, 2025

Representative Anna Scharf
900 Court Street NE H387
Salem OR 97301

Re: Agricultural labor housing rules

Dear Representative Scharf:

Your office requested an opinion about agricultural labor housing rules recently adopted by the Occupational Safety and Health Division (Oregon OSHA). Specifically, you asked whether Oregon OSHA has exceeded its authority in purporting to regulate “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals” by failing to exclude that category of housing from regulation under the new rules.

The short answer is yes—to the extent Oregon OSHA purports to regulate “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals,” it impermissibly exceeds the authority granted to it by statute. We note, however, that the recently adopted rules are subject to a rule review process if requested by any member of the Legislative Assembly. That process includes notifying the agency of any defects we discover in a rule and giving the agency an opportunity to cure those defects.

AGRICULTURAL LABOR HOUSING REGULATIONS

ORS chapter 658 contains provisions addressing the regulation and registration of “farmworker camps,” also called “agricultural labor housing.”¹ As relevant here, ORS 658.705 (7) defines “farmworker camp” and explicitly excludes from that definition certain categories of housing—namely, (1) a “single, isolated dwelling occupied solely by members of the same family, or by five or fewer unrelated individuals,” or (2) a “hotel or motel which provides housing with the same characteristics on a commercial basis to the general public on the same terms and conditions as housing is provided to such workers.”² Other provisions in ORS chapter 658 authorize the Department of Consumer and Business Services (DCBS) to adopt any rules necessary to implement the farmworker camp statutes³ and to require every farmworker camp to “[c]omply with ORS chapter 654 and the administrative rules of [DCBS] adopted pursuant to ORS chapter 654.”⁴

¹ See ORS 658.705 to 658.850; see also Department of Consumer and Business Services, *Revision and Agricultural Labor Housing Rules – Explanation of Rulemaking, Final Action*, at 4, 15 (using the term “agricultural labor housing” and explaining that “camp” is disfavored “in recognition of the historical injustices and harm associated with [that] term”), <https://osha.oregon.gov/OSHARules/comments/comments-and-decisions-AO1-2025-agricultural-labor-housing.pdf> (last visited February 5, 2025).

² ORS 658.705 (7).

³ ORS 658.750.

⁴ ORS 658.755 (1)(b).

ORS chapter 654 contains the Oregon Safe Employment Act (OSEA).⁵ The purpose of that act is to “ensure as far as possible safe and healthful working conditions for every working person in Oregon[.]”⁶ To accomplish that goal, the legislature authorized DCBS and its designees to “make, establish, promulgate and enforce all necessary and reasonable regulations [and] rules”⁷ The legislature also authorized DCBS to delegate that rulemaking and enforcement power to any other state entity.⁸ Accordingly, DCBS has delegated that rulemaking and enforcement power to one of its agency subdivisions—Oregon OSHA.⁹

Pursuant to that rulemaking and enforcement authority, Oregon OSHA recently adopted new rules for farmworker camps.¹⁰ Included in those rules is Oregon Administrative Rule (OAR) 437-004-1120, which, among other things, defines the scope of applicability of Oregon OSHA’s farmworker camp rules. Reflecting the exclusions in ORS 658.705 (7) noted above, OAR 437-004-1120 (2) provides that OSHA’s farmworker camp rules “do not apply to . . . hotels or motels that provide similar accommodations commercially on a regular basis to the public on the same terms as they do to workers.”¹¹ By contrast, however, that rule *does not* reflect the similar exclusion under ORS 658.705 (7) of “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals[.]” Consequently, because OAR 437-004-1120 fails to exclude it, that category of housing is subject to OSHA’s new farmworker camp rules.

LIMITS ON AGENCY RULEMAKING

Under Oregon law, an agency cannot adopt a rule that exceeds the scope of authority granted to it by statute.¹² That is because an agency “is a creature of statute,” and “the scope of its substantive power is set forth in and circumscribed by its enabling statute.”¹³ A court may declare an agency rule invalid if that rule “[e]xceeds the statutory authority of the agency.”¹⁴ A rule exceeds the statutory authority of the agency when the rule “departs from a legal standard expressed or implied in the particular law being administered”¹⁵ or “contravene[s] some other applicable statute.”¹⁶ In making that determination, courts examine the rule itself and the statutory provisions authorizing the rule, along with any relevant documents.¹⁷

The specific question here is whether adopting OAR 437-004-1120 exceeds Oregon OSHA’s authority by failing to exclude “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals” from the meaning of “farmworker camp,”

⁵ See ORS 654.001.

⁶ ORS 654.003.

⁷ ORS 654.025 (2).

⁸ ORS 654.025 (5).

⁹ OAR 437-001-0020 (1) (“The Administrator [of Oregon OSHA] is hereby granted authority to do whatever is reasonably necessary or incidental to accomplish the purposes of the [Oregon Safe Employment Act] and these rules.”).

¹⁰ See Oregon OSHA Administrative Order 1-2025 (adopted January 8, 2025, and effective March 31, 2025), <https://osha.oregon.gov/OSHARules/adopted/2025/ao1-2025-notice-alh-comprehensive.pdf> (last visited February 5, 2025).

¹¹ *Id.*

¹² *SAIF Corp. v. Shipley*, 326 Or. 557, 561 (1998) (“[A]n agency has only those powers that the legislature grants and cannot exercise authority that it does not have.”).

¹³ *PNW Metal Recycling, Inc. v. Dep’t of Env’t Quality*, 371 Or. 673, 676 (2023), *adh’d to as modified on recons.*, 372 Or. 158 (2024).

¹⁴ ORS 183.400 (4)(b).

¹⁵ *Pulito v. Oregon State Bd. of Nursing*, 366 Or. 612, 618 (2020) (internal citations omitted).

¹⁶ *Smith v. Dept. of Corrections*, 276 Or. App. 862, 865 (2016) (internal citations omitted).

¹⁷ ORS 183.400 (3).

as that term is defined in ORS 658.705 (7). To interpret that statutory term, we “apply the familiar principles of statutory construction set out in *State v. Gaines*,” which involves examining the text, context and relevant legislative history of the statute.¹⁸ Where, as here, the answer is clear from examining the text and context alone, no further analysis is required.¹⁹

As noted above, ORS chapter 658 contains farmworker camp regulations enacted by the legislature, and ORS 658.705 (7) defines “farmworker camp” for purposes of those regulations. In formulating that definition, the legislature chose to exclude certain categories of housing—namely, “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals” As also noted above, Oregon OSHA’s newly adopted rules in OAR chapter 437, division 4, do not include that same exception. Consequently, those new rules are applicable to a category of housing that the legislature explicitly excluded from regulation when it enacted the provisions in ORS 658.705 (7). Accordingly, to the extent Oregon OSHA’s new rules purport to regulate that category of housing (i.e., “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals”), doing so impermissibly exceeds the statutory authority granted to Oregon OSHA.²⁰

AGENCY RULE REVIEW

We briefly note that, even if Oregon OSHA’s newly adopted agricultural labor housing rules exceed the agency’s statutory authority, those rules are subject to review. The Secretary of State is required to submit to our office any newly adopted agency rules, and our office periodically reviews those rules.²¹ Additionally, any member of the Legislative Assembly may request in writing that Legislative Counsel review a proposed or adopted agency rule.²² In conducting our review, we determine whether the rule is within the intent and scope of the enabling legislation²³ and whether the rule raises any constitutional issues.²⁴ If we determine a rule is not within the intent and scope of enabling legislation, that does not invalidate the rule. Instead, we send a copy of our determination to the agency.²⁵ The agency is then required to respond as to whether the agency “intends to repeal, amend or take other action with respect to the rule.”²⁶ Customarily, we first contact agencies informally to apprise them of our determination and to give them an opportunity to cure the defect. Depending on the agency’s response, the Legislative Assembly may take additional actions, including requiring appearances at legislative committees and posting a negative determination on the Legislative Counsel website.²⁷

¹⁸ *Pulito*, 366 Or. at 619 (citing *State v. Gaines*, 346 Or. 160, 171-173 (2009)).

¹⁹ *Shipley*, 326 Or. at 562.

²⁰ Having reached that conclusion, we briefly note that Oregon OSHA’s failure to exclude that category of housing might simply be an oversight rather than a purposeful overreach. In its new rules, OAR 437-004-1120 (5) requires operators of farmworker camps to register farmworker housing with Oregon OSHA. But OAR 437-004-1120 (5)(a)(A) and (B) explicitly excludes from that registration requirement the same categories of housing listed in the exclusion under ORS 658.705 (7) (i.e., a “single, isolated dwelling[s] occupied solely by members of the same family, or by five or fewer unrelated individuals,” and a “hotel or motel which provides housing with the same characteristics on a commercial basis to the general public on the same terms and conditions as housing is provided to such workers.”). That suggests the misalignment between OAR 437-004-1120 and ORS 658.705 (7) might simply be an unintended oversight.

²¹ ORS 183.715; ORS 183.720 (1).

²² ORS 183.720 (2).

²³ ORS 183.720 (3)(a).

²⁴ ORS 183.720 (3)(b).

²⁵ ORS 183.720 (6).

²⁶ ORS 183.722 (1)(a).

²⁷ ORS 183.722.

We also note that any person may petition the Court of Appeals to review the validity of an agency rule.²⁸ The court may declare a rule invalid if the court finds that the rule exceeded the statutory authority of the agency²⁹ by having “the effect of undermining the legislative intent.”³⁰

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel’s office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel’s office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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Legislative Counsel



By
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²⁸ ORS 183.400.

²⁹ ORS 183.400 (4)(b).

³⁰ See *Garrison v. Department of Revenue*, 345 Or. 544, 548-549 (2008).