

**ACCESS TO JUSTICE ISSUES AFFECTING
OREGON'S FARMWORKERS**

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- The Oregon Health Authority estimates that 174,000 migrant and seasonal farmworkers, and related family members, support Oregon's multi-billion dollar agricultural industry.
- More than one-third of Oregon's farmworkers are undocumented.¹
- Studies estimate that up to 40% of Oregon's farmworkers and families are indigenous.²

¹ Occupations with highest shares of unauthorized immigrant workers by state, 2014, continued. (2016, November 02). Retrieved September 17, 2020, from https://www.pewresearch.org/hispanic/2016/11/03/appendix-d-detailed-tables/ph_11-03-16_unauthorized-app-d-04/

² Promoting the Occupational Health of Indigenous Farmworkers, Farquar, et. al, 2008. Journal of Agricultural Safety and Health 15(1): 89-102, http://www.adph.org/ALPHTN/assets/042309_promote.pdf

UNDERSTANDING COMMON BARRIERS FACED BY FARMWORKER

- Entrenched poverty
- Environmental racism
- Lack of opportunity
- Lack of Health Care
- A broken-down immigration system
- Excluded from basic worker protections
- Lack of housing for farmworkers
- Language

FARMWORKERS AND THE COURTS

- Lack of Confidence in the Legal System
- Lack of Access to Legal Representation
- ICE at the courthouses
- Differences between U.S. Legal System and home countries
- “Notario” Fraud
- Criminal Justice System

HOW CAN WE IMPROVE FARMWORKERS' ACCESS TO JUSTICE?

KEEPING ICE OUT OF OREGON'S COURTHOUSES

- UTCR 3.190 prohibits civil arrests of persons in a courthouse or within the environs of the courthouse, including entryways, driveways, sidewalks, and parking areas intended to serve a courthouse.
- Having a rule is not enough, as the Court and attorneys, we must:
 - Continue to educate immigrant clients;
 - Have postings in or around the courthouses, to the extent that it's possible;
 - Train court staff and attorneys on how to report any ICE activity;
 - Make it clear to ICE that they are not wanted in our courthouses; and
 - Enforce this rule broadly to ensure that the immigrant community continues to report crimes and participate in court proceedings.

PROTECTIONS FROM EXTORTION

- ORS 164.075(1)(e): A person commits the crime of extortion when the person compels or induces another person to . . . refrain from reporting unlawful conduct to a law enforcement agency, by instilling in the other person a fear that . . . if the unlawful conduct is reported, . . . the person will in the future . . . report the immigration status, or suspected immigration status, of the other person, or some other person known to the other person, to a law enforcement agency.
- In 2016, this statute was amended to address the “notario” problem by:
 - Making it clear that preventing another person from reporting unlawful conduct is criminalized, and
 - Prohibiting threats of reporting a person’s immigration status as a way to prevent them from reporting unlawful conduct.

LITIGATION ISSUES

- **Issue:** Litigants or witnesses that no longer reside in the United States.
 - E.g., Migrant plaintiffs who return to their home countries while litigation is pending may need to return to the U.S. to participate in their case.
- Potential visitor visas or humanitarian parole for foreign litigants or witnesses
- Attorneys with clients or witnesses living outside of the United States need to discuss these issues with opposing counsel early on in the case.
- As opposing counsel, it is essential to be flexible, including by agreeing to virtual depositions or depositions before trial.
- As the Court, accommodate telephonic appearances of witnesses at trial or encourage the parties to engage in virtual depositions.

MIGRANT WORKERS AND USMCA

- U.S.-Mexico-Canada Agreement (USMCA)
 - Article 23.8: Migrant Workers – “The Parties recognize the vulnerability of migrant workers with respect to labor protections. Accordingly, in implementing Article 23.3 (Labor Rights), each Party shall ensure that migrant workers are protected under its labor laws[.]”
 - Article 23.10:
 - Each country commits to ensuring “that a person with a recognized interest under its law in a particular matter has appropriate access to tribunals for the enforcement of its labor laws. These tribunals may include administrative tribunals, quasi-judicial tribunals, judicial
 - Each country commits to “provide procedures to effectively enforce the final decision its tribunals in these proceedings.”

LITIGATION ISSUES CONT'D: FICTITIOUS NAMES

- In some circumstances, attorneys may be able to protect the identity of undocumented plaintiffs by filing suit under pseudonyms or fictitious names.
- Multnomah and Clackamas County have adopted almost identical Supplemental Local Court Rules permitting this practice if approved by a judge. See SLR 2.035 and SLR 2.016
 - Multnomah “SLR 2.035 DESIGNATION OF KNOWN PARTIES BY FICTITIOUS NAME
In civil actions, the designation of a known party by a name other than the party’s true name shall be allowed only upon an order of the court. If ordered, the designation of such party shall be by use of such party’s initials or a fictitious name other than “Jane Doe” or “John Doe”. The name “Jane Doe” or “John Doe” is reserved to be used for a party whose identity is unknown and the party is being designated as provided in ORCP 20 H.”

DOES I THRU XXIII V. ADVANCED TEXTILE CORP., 214 F.3D 1058 (9TH CIR. 2000)

- Plaintiffs were foreign garment workers on the island of Saipan who used fictitious names in their complaint. They feared that disclosing their identities to the defendants/other nonparties would lead to termination from their jobs, deportation from Saipan, and arrest/imprisonment by the People's Republic of China. The district court dismissed the action with leave to amend the complaint to state plaintiffs' true names.
- The Ninth Circuit reversed and explained that "a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity."
- The Ninth Circuit also stated that the district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation.

FICTITIOUS NAME CASES

- *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993): Discussing factors relevant to decision to allow plaintiff to proceed anonymously, including “whether identification poses a risk of retaliatory physical or mental harm to the requesting party or . . . innocent non-parties.”
- *Coe v. U.S. Dist. Court for the Dist. Of Colorado*, 676 F.2d 411 (10th Cir. 1981): Noting that plaintiffs have been permitted to proceed anonymously or under a fictitious name where they would have had to divulge “personal information of the utmost intimacy,” or that they “had violated state laws or government regulations or wished to engage in prohibited conduct.”
- *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981): Identifying factors relevant in determining whether plaintiffs should be permitted to proceed under fictitious names, including whether they would be compelled to “disclose information of the utmost intimacy . . .”

LANGUAGE

- Oregon has established a system for certification of qualified interpreters, ORS 45.291, and in a civil proceeding, the court will appoint a qualified interpreter to assist parties or witnesses who require assistance at no cost to the non-English speaker. ORS 45.275.
- Note that the interpreter need not necessarily be certified to be “qualified.” Although a certified interpreter ordinarily will be deemed to be qualified, “qualified interpreter” is defined by statute:
- “Qualified interpreter” means a person who is readily able to communicate with the non-English-speaking person and who can orally transfer the meaning of statements to and from English and the language spoken by the non-English-speaking person. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style and register of the original statement, without additions or omissions. “Qualified interpreter” does not include any person who is unable to interpret the dialect, slang or specialized vocabulary used by the party, victim or witness. ORS 45.275(8)(c).